SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

ELISA POLLACK and LAWRENCE POLLACK, as Executors of the Estate of ALBERT POLLACK, Deceased,

Plaintiffs,

-against-

ST. FRANCIS HOSPITAL, NEIL R. BERCOW, M.D., LAWRENCE H. DURBAN, M.D., and ALLA RUS, P.A.,

Defendants.

INDEX NO. 805286/2018
MOTION DATE
MOTION SEQ. NO. 4
MOTION CAL. NO.

Decision and Order

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Defendants St. Francis Hospital, Neil R. Bercow, M.D., Lawrence H. Durban ("Dr. Durban"), M.D., and Alla Rus P.A. (collectively, "Defendants") move for an Order pursuant to CPLR § 2221(e) and CPLR § 2221(d)(2), granting leave for Defendants to renew and reargue their prior motion practice, which resulted in this Court's Order dated January 11, 2021, and entered with the Clerk of the Court on January 12, 2021; and upon such renewal and re-argument, issuing an Order pursuant to CPLR §510(3), transferring the venue of the above-captioned action from the Supreme Court, New York County, to the Supreme Court, Nassau County, and directing the Clerk of the Supreme Court, New York County, to transfer the file pertaining to this matter to Supreme Court, Nassau County.

Plaintiffs Elisa Pollack and Lawrence Pollack, as Executors of the Estate of Albert Pollack, Deceased (collectively, "Plaintiffs") cross-move for an order pursuant to CPLR 3025(b), granting leave to amend their complaint to assert a demand for punitive damages against Dr. Durban.

Factual Background

This is an action for medical malpractice against Defendants for failure to advise Plaintiff of alternatives of the proposed eye surgery and surgical procedure, failure of diagnosis of the Plaintiff's eye condition, and failed retina surgery and surgical procedures on the Plaintiff's left eye, causing injuries to his left eye. Plaintiff filed the Summons and Verified Complaint on August 25, 2017. Issue was joined upon the service of Defendants' Answer, Demand for a Verified Bill of Particulars, Combined Discovery Demands, and Demand for Authorizations on February 9, 2018.

On July 29, 2020, Defendants filed Motion Sequence 2, an Order to Show Cause pursuant to CPLR § 510(3), transferring the venue of the above-captioned action from the Supreme Court, New York County, to the Supreme Court, Nassau County. On January 11, 2021, the Court heard oral argument via Teams and the motion was denied.

On August 20, 2020, Defendants Ankur Anand, M.D. ("Dr. Anand"), and Jason Wells, M.D. ("Dr. Wells"), filed Motion Sequence 3, pursuant to CPLR 3127 for a so ordered Stipulation of Discontinuance as to Drs. Anand and Wells, dismissing the complaint with prejudice, and severing their names from the caption. On January 12, 2021, the Court granted the motion without opposition.

Defendants' Motion to Reargue

Parties' Contentions

Defendants argue that when "the Court denied moving Defendants' Order to Show Cause seeking a transfer of venue on January 11, 2021, anesthesiologists, Jason Wells, M.D. and Ankur Anand, M.D., were named defendants and parties to this action." Defendants assert that on January 12, 2021, the Court granted Defendants' motion (Motion Sequence 3), So-Ordering the Stipulations of Discontinuance of Drs. Wells and Anand. Defendants argue that "[s]uch change in the status of Drs. Wells and Anand from parties to non-parties is significant to the moving Defendants' underlying Order to Show Cause seeking a change of venue, as they now constitute two additional non-party witnesses with material evidence in this case who will be inconvenienced by a trial in New York County, as opposed to Nassau County." Defendants argue that "[t]he nature of the anticipated testimony by

Drs. Wells and Anand are clear, as can be seen by a review of their deposition testimony given during the discovery phase of this case." Defendants assert that Drs. Wells and Anand were both present at decedent's surgery on August 23, 2016 at St. Francis Hospital. Defendants contend that the anticipated testimony from Drs. Wells and Anand "is clearly material to the issues raised, as both physicians served as eyewitnesses to the surgical procedure at issue." Defendants further contend that Drs. Wells and Anand have both "proffered testimony at their depositions and their respective counsel advised that their office would accept service of subpoenas for their testimony at the time of trial."

Moreover, Defendants argue that "the admissible evidence demonstrates that Drs. Wells and Anand would be inconvenienced by a trial in New York County, as opposed to Nassau County." Defendants contend that three depositions were conducted for Dr. Wells. Defendants assert that the last two depositions were conducted "in Nassau County, so as to avoid any further inconvenience to Dr. Wells given his residence and employment, which are both located in Nassau County." Defendants argue that "it cannot be disputed that Dr. Wells would be inconvenienced if he were to have to travel to New York County to testify as a non-party material witness in this action." Defendants further argue that "the admissible evidence demonstrates that Dr. Anand will also be inconvenienced as a material non-party witness if he were required to travel to New York County to proffer trial testimony in this action." Defendants assert that at Dr. Anand's deposition, he stated, "[m]y office is in Long Island where the doctor lives and the doctor practices."

Defendants assert "that this Court overlooked and misapprehended the facts and law in denying Defendants' Order to Show Cause seeking a transfer of venue from New York County to Nassau County." Defendants contend that "the sole nexus between this action and New York County is the residence of a single Executor, Elisa Pollack." Defendants argue that "[t]he First Department has held it improper for the Supreme Court to deny a change of venue where, in a wrongful death action, the defendant sought to move the case to the county where the cause of action arose, the greater number of witnesses lived and worked and the only person with connection to the county in which the action was brought was an Administratrix of decedent's estate." Defendants assert "that the Court overlooked the general rule as established by the Appellate Department First Department that a medical malpractice action should be brought in the county where the cause of action arose." Defendants argue "that the events giving rise to the instant action occurred at St. Francis Hospital, located in Nassau County." Defendants contend that "[a]ll of the named defendants were working at St. Francis Hospital in Nassau County at the time of the alleged malpractice, at the time this action was commenced, and at the present

time." Defendants further contend that "[t]he Amended Letters of Testamentary were issued by the Nassau County Surrogate's Court. Co-Executor Lawrence Pollack presently resides in Nassau County at 28 Oak Drive in Plainview, New York where he has resided for approximately twenty-two years." Defendants assert that "Albert Pollack and his wife Terri Pollack resided in Nassau County at 1983 Lilac Drive in Westbury, New York at the time of his August 23, 2016, presentation to St. Francis Hospital where they had resided for 45 years."

Furthermore, Defendants assert that "all of Albert Pollack's non-party treating medical providers are located in Nassau County." Defendants contend that "[a]n authorization for release of health information pursuant to HIPAA contained within Albert Pollack's St. Francis Hospital chart lists the following physicians as his treating providers: Internist, Albert Ferrara, M.D., Cardiologist, Stuart Schechter, M.D., and Cardiologist, Stephen Bernstein, M.D." Defendants argue that "[t]he testimony of these non-party witnesses will be material and necessary to this case, as Mr. Pollack's cardiovascular status and care and his significant underlying co-morbidities at the time of and predating his presentation to St. Francis Hospital on August 23, 2016, are significant in the defense of this matter as to issues of both causation and damages." Defendants assert that "Dr. Ferrara provided an Affirmation in support of the underlying Order to Show Cause setting forth that he is a physician licensed to practice medicine in the State of New York who maintains an office in East Meadow, New York, which is located in Nassau County." Defendants contend that "Dr. Ferrara treated Albert Pollack in Nassau County; resides in Suffolk County; regularly treats patients on a regular basis at his office in Nassau County; and would be inconvenienced if he were called as a witness to testify at trial in New York County for a patient that he treated exclusively in Nassau County. Defendants argue "that that this Court overlooked the Affirmation of Dr. Ferrara, which alone supports a transfer of venue from New York County to Nassau County. Defendants argue that "at the time of the treatment at issue, the decedent was a long-standing resident of Nassau County." Defendants assert that "any witnesses to the decedent's overall health and condition will also be located in Nassau County." Defendants argue that "[s]uch witnesses would clearly be inconvenienced by a trial in New York County." Additionally, Defendants argue that Defendants, "Dr. Durban and Dr. Bercow, are cardiac surgeons with a busy practice at St. Francis Hospital" and "[t]hey will undoubtedly suffer significant inconvenience should they need to attend their trial on a daily basis in New York County, as would their patients. The interests of justice alone would be served by a change of venue based upon same."

In opposition, Plaintiffs argue that "[t]he Court should deny Defendants' CPLR 2221(d) motion to Reargue because the Court did not overlook or

misapprehend any matters of fact or law in determining the prior motion." Plaintiffs assert that Defendants knew that "Drs. Wells and Anand were effectively non-parties to this action as of February 25, 2020… because plaintiffs expressly agreed to discontinue claims against them upon the completion of their depositions (which then had in fact been completed)." Plaintiffs assert that "[t]he only unknown regarding the inevitable non-party status of Drs. Wells and Anand was the exact timing." Plaintiffs argue that "[t]here is no reasonable justification for Defendants' failure to discuss Drs. Wells and Anand inevitable non-party status on the Prior Motion, because Defendants then knew that the status of Drs. Wells and Anand would change from 'parties' to 'non-parties' before trial."

Plaintiffs assert that "[e]ven if this Court were to deem the "non-party" status of Drs. Wells and Anand a 'new' fact, Defendant's renewal motion must still be denied because the non-party status of Drs. Wells and Anand would not change this Court's prior determination, a threshold requirement of CPLR 2221(e)(2)." Plaintiffs argue that both "purported 'non-party' witnesses are closely affiliated with defendant St. Francis Hospital, which in and of itself disqualifies them from being the basis for any CPLR 510(3) transfer of venue." Plaintiffs assert that "[i]t is well settled that party employees and affiliates and agents do not constitute CPLR 510(3) 'material witnesses' and, therefore, their 'convenience is not a factor for consideration on such motion.'" Plaintiffs argue that "Defendants have the burden of establishing that Drs. Wells and Anand are not 'within their control.'" Plaintiffs assert that "Defendants cannot sustain this burden given that both Drs. Wells and Anand are partners in the group that is based at, pays rent to, and provides exclusive anesthesia services to defendant St. Francis Hospital."

Plaintiffs argue that the First Department in *Cardona v. Aggressive Heating Inc.*, 180 A.D.2d 572 (1st Dept., 1992) reversed the trial court's granting of defendant's motion to change venue because the "movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change," and defendant failed to make the showing required to sustain its burden. Plaintiffs assert that the Court required a showing must include: "(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in a county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case." Plaintiffs argue that the Defendants have failed to satisfy the criteria set forth in *Cardona*. Plaintiffs further argue that"[n]either [Drs.] Wells nor Anand have submitted their own affirmation(s) regarding any of these criteria, and neither has under oath (i) ever claimed any actual

inconvenience from a trial in NY County (let alone the manner of such inconvenience), (ii) ever confirmed they are available and willing to testify for Defendants, or (iii) ever indicated the nature of their anticipated trial testimony."

In reply, Defendants argue that Drs. Anand and Wells status as non-parties constitutes new facts which warrant reargument of the prior motion. Defendants assert that "Drs. Wells and Anand were still named defendants in this action at the time the prior Order to Show Cause seeking a change of venue from New York County to Nassau County was filed on July 29, 2020." Defendants argue that "counsel for Drs. Wells and Anand did not file his motion seeking that the Court So-Order a Stipulation of Discontinuance as to his clients until August 20, 2020, nearly one month after Defendants filed their prior Order to Show Cause seeking a transfer of venue." Defendants argue that "Drs. Wells and Anand were not actually discontinued from the action until the Court granted their motion after Defendants' Order to Show Cause seeking a transfer of venue had already been decided by this Court." Defendants assert that Drs. Wells and Anand "are employed by a private group who maintains a contract to provide anesthesia services at St. Francis Hospital."

Legal Standards

"A motion for leave to reargue pursuant to CPLR 2221...may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.' " *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27, 588 N.Y.S.2d 8, 11 [App. Div. 1992] (quoting *Schneider v Solowey*, 141 AD2d 813 [App. Div. 1988]. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *Id*. (citing *Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971 [App. Div. 1984]; *Foley v Roche*, 68 AD2d 558 [App. Div. 1979]). "A motion to reargue may not include 'any matters of fact not offered on the prior motion.' " *Alta Apartments, LLC v. Wainwright*, 2004 NY Slip Op 50797(U), ¶ 3, 791 N.Y.S.2d 867, 867 [NY 2004] (quoting CPLR 2221 (d)(2)).

CPLR § 2221(e) provides that leave to renew must be identified as such, and may be granted by a court where there are "new facts not offered on the prior motion that would change the prior determination," provided that the movant provide "reasonable justification for the failure to present such facts on the prior motion."

CPLR § 510(3) permits a court, upon motion, to change the place of trial of an action where "the convenience of material witnesses and the ends of justice will be promoted by the change." "A motion to change venue for the convenience of non-party witnesses must be supported by an affirmation of the attorney or the witness that is not conclusory in nature, detailing the identity and availability of the proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue." *Silber v. Provident New York Bancorp Citibank, N.A.*, No. 156065/2013, 2014 WL 1101483, at *2 [N.Y. Sup Ct, New York County 2014] (citations omitted). "The affidavit must (1) contain the names, addresses and occupations of the prospective witnesses, (2) disclose the facts to which the proposed witnesses will testify at the trial, so the court may judge whether the proposed evidence of the witnesses is material and necessary, (3) show that the witnesses for whose convenience a change of venue is sought are in fact willing to testify and (4) show how the witnesses in question would in fact be inconvenienced in the event a change of venue were not granted." *Id.*

Discussion

Leave to reargue is denied. Defendants have failed to demonstrate that the Court "overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp.*, 182 A.D.2d at 27 (citation omitted). At the time of oral argument for Motion Sequence 2, on January 11, 2021, Defendants knew there was a pending motion (Motion Sequence 3) pursuant to CPLR 3127 for a so ordered Stipulation of Discontinuance as to Drs. Anand and Wells. Defendants failed to argue the non-party status of Drs. Wells and Anand at oral argument. These facts were not unknown to the parties in the prior motion and therefore do not constitute as "new facts." Thus, Defendants' motion to reargue is denied.

Even assuming that Defendants have established they are entitled to reargument, Defendants have not met their burden of demonstrating that the convenience of material and necessary witnesses and the ends of justice will be promoted by changing the venue to Nassau County. Defendants have failed to "disclose the facts to which the proposed witnesses will testify at the trial, so the court may judge whether the proposed evidence of the witnesses is material and necessary." *Silber v. Provident New York Bancorp Citibank, N.A.*, No. 156065/2013, 2014 WL 1101483, at *2. Furthermore, "the mere fact that witnesses must travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden." *Id.* Therefore, the proposed inconvenience to

witnesses does not outweigh Plaintiffs' CPLR § 503(a) right to choose a venue in which one of the parties resides.

Plaintiffs' Cross Motion

Parties' Contentions

Plaintiffs assert that the proposed "Amended Complaint adds a demand for punitive damages against defendant Durban, based on the allegation that he alterated (sic.) and/or modified medical records of Decedent to try to evade potential medical malpractice liability." Plaintiffs argue that "[i]n the instant cross-motion, the facts set forth above are sufficient for the reasonable inference that, contrary to defendant Durban's testimony that the Consent was properly signed at his office on August 12, 2016 by Decedent and himself, the Consent was in fact altered to try to make it appear as though this was the case." Plaintiffs assert that:

> Such an inference is supported by the fact that (i) all medical documents signed by Durban of which Plaintiffs are aware – other than the Consent – include only Durban's initials, not his full name (Exs 7 & 8), (ii) Decedent's SFH Records fail to include the Progress Notes that defendant Durban claims he dictated directly onto the hospital-wide EPIC computer system, (iii) many of Decedent's medical records purportedly made in Durban's office on August 12, 2016 – including the Consent – are not even included in Durban's own Office Records, (iv) the preparation of the August 19, 2016 consent form, signed by Decedent (Ex 9), would not have been needed if the Consent actually had been signed on August 12, 2016 – as Durban claims that it was – and included in the SFH Records as of such date, and (v) Beth Taylor made an electronic entry in the SFH Records on August 22, 2016, suggesting that – as of that date – the hospital still needed to prepare a consent for Decedent for the Procedure.

Plaintiffs further argue that "[t]he proposed Amended Complaint will not result in any prejudice to defendant Durban as the note of issue has not yet been filed.

In opposition to the cross motion, Defendants argue that:

> (1) the motion has been untimely made, resulting in substantial prejudicial to the defendants, as discovery has been completed in this matter, including the deposition of Dr. Durban which took place one year ago; and (2) the proposed amendment for punitive damages is completely meritless and based on nothing more than pure conjecture, mere speculation and baseless assertions by Plaintiffs' counsel that are not supported by any evidence whatsoever.

Defendants assert that "there is no evidence whatsoever that Dr. Durban 'willfully' caused injury to Mr. Pollack." Defendants argue that "Plaintiffs' cross-motion is based upon Dr. Durban's testimony at his deposition that he would generally sign his medical documents using his full name." Defendants contend that Dr. Durban's "full name is in fact contained on the documentation Plaintiffs argue is altered, to wit, the consent form pertaining to Mr. Pollack. Plaintiffs claim this document was altered based upon Dr. Durban's signature bearing his initials being contained on the St. Francis records as well as on a consent form of an unrelated patient, which, in violation of HIPAA, is attached to Plaintiffs' cross-motion." Defendants argue that "Plaintiffs clearly fail to show that the signature on the consent form was inconsistent with how Dr. Durban would generally sign his medical documents, as the documents containing only his initials are select 'cherry picked' documents conveniently relied upon by Plaintiffs' counsel in support of his baseless cross-motion." Defendants assert that "there is no claim in Plaintiff's motion that Mr. Pollack's signature on the consent is in any way fraudulent or forged." Defendants argue that "Dr. Durban was not even asked about such an alleged discrepancy in any of the documents introduced at his deposition, which spanned a full day." Defendants assert that "Plaintiffs' counsel can only speculate as to why Dr. Durban signed his full name on Mr. Pollack's informed consent form and opted to utilize his initials on other medical documents, including an informed consent form for a completely unrelated patient." Defendants argue that "many persons use their full names and initials interchangeably when signing documents."

Furthermore, Defendants argue that "Plaintiffs' counsel baselessly concludes that because the St. Francis chart references preparation of an informed consent form at the hospital, this must indicate that Dr. Durban failed to have the patient execute an informed consent document as his office consultation with the patient preceding the date of the surgery." Defendants assert that "[t]his reasoning also defies any logic." Defendants argue that "[i]t is common knowledge that physicians frequently

have a patient execute an informed consent form at an office consultation, at which time the risks, benefits and alternatives of the procedure are explained to the patient, and the patient agrees to proceed with same." Defendants further argue that "it is standard practice for a hospital such as St. Francis Hospital in this case to have the patient execute a separate informed consent form at the hospital shortly before undergoing the procedure irrespective of whether an informed consent was previously executed at the physician's office." Defendants assert that "it cannot be said or found that Dr. Durban's full name appearing on the informed consent form as to Mr. Pollack, rather than his initials, caused any injury to Mr. Pollack."

Defendants argue that the cross motion should be denied as untimely. Defendants assert "that Plaintiffs have not identified any excuse for their extensive delay in seeking to amend their Complaint." Defendants contend that "Dr. Durban's office records regarding the decedent were produced by this office on November 21, 2019. (See, Exhibit 4 annexed to Plaintiffs' cross-motion)." Defendants further contend that "the decedent's St. Francis Hospital records were certified on November 5, 2018. (See, Exhibit 3 annexed to Plaintiffs' cross motion)." Defendants argue that "Plaintiffs' counsel was, therefore, in possession of these records prior to commencing the instant action, as this action was commenced by the filing of the Summons and Complaint on October 30, 2018." Defendants assert that "the records were also provided to Plaintiff's counsel early on during this litigation and a certified copy was made available at each defendant deposition" Defendants contend that "Dr. Durban was deposed in this action on March 9, 2020, more than one year ago." Defendants assert that "Plaintiffs' counsel was in possession of the materials and records he claims are the basis for the punitive damages claim he seeks to assert as against Dr. Durban." Defendants argue that "Plaintiffs opted to wait one year from the date of Dr. Durban's deposition and only after the completion of all discovery, to move this Court and seek the relief sought within the Plaintiffs' cross-motion." Defendants assert that "Plaintiffs' counsel has failed to provide any excuse for waiting years from the receipt of the subject medical records he claims were altered or destroyed and one year since the completion of Dr. Durban's deposition to make the motion to amend the Complaint." Defendants argue that "[t]o permit Plaintiffs to amend the Complaint at this late stage in the litigation would result substantial prejudice and surprise to the Defendants."

In reply, Plaintiffs argue that Defendants ignore "virtually all of the evidence identified by Plaintiffs in their Supporting Affirmation, including the following:

> a. The consent form purportedly signed by both decedent Albert Pollack ("Decedent") and Durban during

Decedent's August 12, 2016 office consultation ("Consent") is the only medical document among decedent's approximately 800 pages of certified St. Francis Hospital medical records ("SFH Records") that Durban signed using his full name;

b. The hand-written times next to the signatures on the Consent are (i) contrary to Durban's claimed protocol of his signing consents "more or less at the same time as the patient," and (ii) contrary to good and accepted medical practice, as such times indicate that Durban signed the Consent well before Decedent signed, and before discussing the specific surgical procedure with Decedent (Supp. Aff., ¶¶10-11; Ex 5 to Supp. Aff., pgs 57- 60; Ex 6 to Supp. Aff.);

c. The consent form of an unrelated third-party patient (i) indicates the same 10am "signing times" by both Durban and his patient (consistent with Durban's claimed protocol, but inconsistent with the signing times reflected on the Consent), and (ii) indicates that Durban signed using his initials only, consistent with every other Durban signature contained in Decedent's SFH Records except for the Consent (Ex 8 to Supp. Aff.);

d. The Consent and many of Decedent's other medical records purportedly made in Durban's office on August 12, 2016 are missing from Durban's own office records ("Office Records") that were emailed to me by defendants' counsel separately from the SFH Records (Ex 4-5 to Supp Aff.);

e. Significant portions of the Office Records, including Decedent's progress notes that Durban testified he dictated directly into the hospital wide computer system following Decedent's August 12, 2016 office consult, are missing from the SFH Records (Supp. Aff., ¶ 9); and

f. The SFH Records include (i) an incomplete surgical consent form signed only by Decedent on August 19, 2016

> (three days after his Durban office meeting), and (ii) an August 22, 2016 St. Francis Hospital records entry for an order to "Prepare consent for Laser Extraction of AICD with reimplant" (which suggests that, as of August 22, 2016, there was no consent for Decedent's surgery in the SFH Records)."

Plaintiffs argue that to show prejudice Defendants must show "some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position," which they have not shown here.

Legal Standards

CPLR § 3025[b] permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances," absent prejudice or surprise resulting from the delay. CPLR § 3025[b]; *MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499, 500 [1st Dept 2010]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325 [1st Dept 1998]. Furthermore, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be 'discreet, circumspect, prudent and cautious.' " *Cseh v. New York City Transit Authority*, 240 A.D.2d 270 [1st Dept. 1997].

"[L]eave to amend will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 585 [1st Dept 2001]. "It is essential that a party seeking leave to amend a complaint demonstrate the merit of the proposed pleading." *Peretich v. City of New York*, 263 A.D.2d 410, 410 [1st Dept 1999]. The moving party "must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading." *Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 [1st Dept 1989]. "If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as a matter of law." *Daniels*, 151 A.D.2d at 371.

"Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from

indulging in the same conduct in the future." *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 489 [2007]. "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[] such wanton dishonesty as to imply a criminal indifference to civil obligations.' " *Id.* (citations omitted). "The misconduct must be exceptional, 'as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.' " *Id.*

"To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." *Don Buchwald & Associates, Inc. v. Rich*, 281 A.D.2d 329, 330 [1st Dept 2001]. In a medical malpractice action, punitive damages are not recoverable unless "the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." *Schiffer v. Speaker*, 36 A.D.3d 520, 521 [1st Dept 2007]. Where "[t]he complaint lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages," it is properly stricken. *Denenberg v. Rosen*, 71 A.D.3d 187, 196 [1st Dept 2010].

Discussion

The proposed amendment to assert punitive damages against Dr. Durban is devoid of merit and lacks sufficient facts to establish a claim for punitive damages. Here, the claim is that Dr. Durban altered and/or modified medical records of Decedent to try to evade potential medical malpractice liability. The record is devoid of any evidence that "the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." *Schiffer*, 36 A.D.3d at 521. Additionally, Petitioner has been in possession of Decedent's medical records from Dr. Durban and St. Francis Hospital since November 21, 2019. Dr. Durban's deposition was held March 9, 2020. Plaintiffs' counsel has failed to provide any excuse for waiting to bring a motion to add a claim that Dr. Durban altered and/or modified Decedent's medical records.

Wherefore it is hereby

ORDERED that Defendants' motion to reargue is denied; and it is further

ORDERED that Plaintiffs' cross motion to Amend the Complaint to add a punitive damages claim against Dr. Durban is denied; and it is further

ORDERED that the parties are reminded that a compliance conference is scheduled for May 25, 2021 at 2:30pm via Teams.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: May 19, 2021

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION