SHORT FORM ORDER

SCAN

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

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TRIAL/IAS PART 27

NICHOLAS CASTELLANO, an infant under the age of 14 years, by his mother and natural guardian NANNETTE LOWEREE a/k/a NANNETTE CASTELLANO,

Plaintiff,

- against -

PETER HACKETT, M.D., LONG BEACH MEDICAL CENTER, and POINT LOOKOUT-LIDO FIRE DEPARTMENT,

Defendants.

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Index # 25904/97

Sequence #: 3 & 4
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Motion by defendant, Peter Hackett, M.D., for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint based upon Public Health Law §3000-a(1) and the Good Samaritan Law (Education Law §6527[2]) or, in the alternative, for a protective order pursuant to CPLR 3103 vacating the Notice of Discovery and Inspection filed by plaintiff's counsel which seeks certain medical authorizations is determined as hereinafter provided.

Cross-motion by plaintiff for an order pursuant to CPLR 3025(b) granting it leave to amend its complaint to assert a claim for gross negligence is granted.

This is an action to recover damages based upon medical malpractice involving an infant-plaintiff. The pertinent facts of this action are as follows: On January 17, 1989, the infant plaintiff suffered a febrile seizure at his home located at 100 Inwood Avenue, Inwood, New York. Dr. Hackett and the personnel from the Point Lookout-Lido Beach Fire Department (hereinafter referred to as "PLLFD") responded to the call. It is undisputed that Dr. Hackett was the only physician who arrived at the infant's home and that he administered certain medical care to the infant. Thereafter, the infant was transported by ambulance to the Long Beach Memorial Hospital ("LBMH") and then transferred to South Nassau Communities Hospital and to North Shore University Hospital in Manhasset.

In its bill of particulars, plaintiff alleges, *inter alia*, that Dr. Hackett acted negligently in failing to: administer intravenous fluids, treat the infant's febrile seizure, document the emergency treatment he rendered, supervise the emergency personnel providing emergency treatment, communicate with LBMH, and hydrate the infant.

The pertinent procedural history of this action is as follows: The within action was commenced by the service of a verified complaint and certificate of merit on or about September 10, 1997. An answer was served on behalf of Dr. Hackett on November 26, 1997, and issue was joined thereby. This action was the subject of a stay due to the filing

of a bankruptcy petition by Dr. Hackett. The stay was lifted on or about December 21, 1999.

On or about May 24, 1999, a preliminary conference was held in which all parties appeared. On or about October 23, 2000, January 16, 2001, and March 27, 2001, conferences were held before the Court. On the last date, a discovery schedule including defendant deposition dates was entered into and agreed to by all parties. There was no indication at said time that Dr. Hackett would be moving for summary judgment and staying all discovery. As of this date, Dr. Hackett has not been deposed, and no witness has been designated yet from LBMH apparently because plaintiff has not seen the original or certified copy of the hospital record. In fact, the only individual to be produced for an examination before trial has been plaintiff's mother, and she appeared for two contentious deposition sessions.

Dr. Hackett now moves for summary judgment dismissing the complaint on the grounds that he was a volunteer member of the PLLFD at the time he rendered care to the infant plaintiff, and as such, he is immune from liability under Public Health Law §3000-a(1) and the Good Samaritan Law (Education Law §6527[2]).

In opposition to this motion, plaintiff contends that it has not had an adequate opportunity to conduct discovery into various relevant issues of fact, some of which are exclusively within Dr. Hackett's knowledge. In particular, plaintiff asserts that the extent of Dr. Hackett's involvement in the care and treatment of the infant is now unknown and his employment status with LBMH is exclusively within Dr. Hackett's knowledge.

Furthermore, plaintiff seeks leave to amend its complaint to assert a claim for gross negligence, and in the event such leave is granted, the issue of whether Dr. Hackett is absolved from unqualified immunity pursuant to the Good Samaritan Law (Education Law §6527[2]) becomes an issue of fact which precludes the granting of summary judgment dismissing the complaint.

Based upon the record submitted, this Court elects to address and grant plaintiff's motion to amend its complaint to assert a cause of action for gross negligence.

Absent a showing of surprise or prejudice from the delay, leave to amend a pleading shall be freely granted (CPLR 3025[b]; *McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corporation*, 59 N.Y.2d 755; *Monello v. Sottile Megna, M.D.*, P.C., 281 A.D.2d 463; *Fidelity Holdings, Inc. v Marom*, 276 A.D.2d 468). The decision of whether to grant leave is committed to the sound discretion of the trial court (*see, Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957, 959), and will not be lightly disturbed. (*See, Henderson v Gulati*, 270 A.D.2d 308; *Lane v. Beard*, 265 A.D.2d 382.) In exercising its discretion, the Court shall consider how long the party seeking the amendment was aware of the facts upon which the motion was based, whether a justifiable excuse for the delay was proffered, and whether prejudice resulted therefrom. (*See, Muro v. Bay Ready Mix & Supplies, Inc.*, 282 A.D.2d 584; *Sidor v. Zuhoski*, 257 A.D.2d 564.) Furthermore, delay alone or mere lateness will not be a barrier to an amendment. (*See generally, Lane v. Beard, supra; see also, Thompson v. Ludovico*, 246 A.D.2d 642.)

Contrary to defendants' contention, this Court finds that defendants have failed to demonstrate any significant prejudice or that the amendment is patently lacking in merit. (*See, Fidelity Holdings, Inc. v Marom, supra.*) In support of its motion, plaintiff has submitted a redacted affirmation from an expert physician which sets forth an opinion that Dr. Hackett was grossly negligent in his care and treatment of the infant plaintiff. Such an affidavit has been held to be sufficient to oppose a motion for summary judgment. (*See, e.g., Marano v Mercy Hosp.*, 241 A.D.2d 48.) Consequently, this Court shall allow the proposed amendment, and the proposed pleading shall be deemed served when a copy of this order is served upon defendants' attorneys.

Accordingly, Dr. Hackett's request to amend his answer to deny this allegation is granted, and he is directed to serve his amended answer within twenty days after a copy of this order is served upon his attorneys.

The branch of Dr. Hackett's motion which seeks summary judgment dismissing the complaint is denied. This Court agrees with plaintiff that summary judgment is inappropriate at this juncture. As noted above, no defendant depositions have been conducted.

Where, as here, knowledge is exclusively within the movant's possession, summary judgment will ordinarily be denied. (*See, Firesearch Corp. v. Micro Computer Controls Corp.*, 240 A.D.2d 365; *Di Micelli v. Olcott*, 119 A.D.2d 539.) Furthermore, since plaintiff sought leave to amend its complaint to assert a claim for gross negligence, Dr. Hackett has not established that he was immune from liability under the Good

Samaritan Law or that his treatment of the infant plaintiff did not amount to gross negligence. (*See, S'Doia v. Dhubhar*, 261 A.D.2d 968; *cf., O'Leary v. Greenpoint Fire Department*, 276 A.D.2d 539.)

Irrespective of the foregoing, this Court finds that Dr. Hackett is entitled to a protective order vacating the Notice of Discovery and Inspection filed by plaintiff's counsel which seeks authorizations for "medical care providers furnishing care and treatment to [Dr. Hackett] for substance abuse for the period one year prior to the incidents at issue and two years subsequent to said occurrence."

In *Grafi v. Solomon*, 274 A.D.2d 451, at p. 452, the Appellate Division stated, in pertinent part, that:

> "A litigant will be deemed to have waived the physician-patient privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue (*see, Dillenbeck v Hess*, 73 NY2d 278, 287; *Koump v Smith*, 25 NY2d 287, 294). Nevertheless, a defendant does not waive the privilege whenever forced to defend an action in which his or her mental or physical condition is in controversy unless, in so defending, he or she affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff (*see, Dillenbeck v Hess, supra*; *Koump v Smith, supra*; *Gandy v Larkins*, 165 AD2d 862.)"

Plaintiff's proof in this case is insufficient to satisfy its initial burden of demonstrating that Dr. Hackett's medical condition at the time of the alleged malpractice is in controversy (*see, Dillenback v. Hess*, 73 N.Y.2d 278, 286-287) or that Dr. Hackett waived the physician-patient privilege (*Id.*, at p. 288; *Scinta v. Van Coevering*, 249

A.D.2d 889). Hence, the branch of Dr. Hackett's motion which seeks a protective order is granted.

In accordance with the foregoing, the portion of Dr. Hackett's motion which seeks summary judgment dismissing the complaint is denied. Plaintiff's cross-motion to amend its complaint to assert a claim for gross negligence is granted.

Dated: 11/15/01

J.S.C.

ENTERED

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