DOCKET NO. HHD CV-16-6073070 S	:	SUPERIOR COURT
DOROTA WISNIEWSKI, ET AL	:	J. D. OF HARTFORD
VS.	:	AT HARTFORD
HARTFORD HEALTHCARE CORPORATION, ET AL	:	SEPTEMBER 3, 2019

MEMORANDUM OF DECISION

In this medical malpractice action, the plaintiffs filed an objection (#135) to the defendants' July 30, 2019 request for leave to amend their answer (#134) to file a special defense based on the statute of limitations. The objection appeared as a take papers matter on the short calendar for August 26, 2019. This matter is scheduled to commence jury selection on November 5, 2019.

"While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court." *LaFrance* v. *Lodmell*, 322 Conn. 828, 846–47, 144 A.3d 373 (2016).

"In exercising its discretion with reference to a motion for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment, or to his adversary by granting the motion, with the resultant delay." *DuBose v.*

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Carabetta, 161 Conn. 254, 263, 287 A.2d 357 (1971).

"To justify a refusal to allow an amendment, it must appear that there [is] some sound reason for the trial court's exercise of its discretion in that manner." (Internal quotation marks omitted.) *Jacob* v. *Dometic Origo AB*, 100 Conn. App. 107, 111, 916 A.2d 872, cert. granted, 282 Conn. 922, 925 A.2d 1103 (2007), appeal withdrawn, August 7, 2007. "[U]nless there is a sound reason, refusal to allow an amendment is an abuse of discretion." Id. "The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) Id., 113. The absence of significant injustice or prejudice may outweigh any possible inconvenience to the nonmoving party or potential delay. See id., 114.

Here, the proposed amendment relates only to a single allegation of medical malpractice. In the complaint, one of the plaintiff's eleven allegations of negligence is that the defendants "failed to warn the Plaintiff that the use of methadone created the risk of damage to the Plaintiff's teeth[.]" See complaint, second and third counts, ¶ 5j. In the proposed special defense, the defendants allege that Dr. Taboada saw the plaintiff for an appointment on January 28, 2014, and noted that he "spent a large portion of [her] visit discussing oral hygiene secondary to the loss of teeth as a result of using methadone. There is no question in my mind that methadone is responsible for the decay in her teeth." (Internal quotation marks omitted.)

The defendants further allege that "[t]his claim is barred by the applicable statute of limitations, Conn. Gen. Stat. § 52-584 as it was brought more than two years from the date when the Plaintiff's injury was first sustained or discovered or in the exercise of reasonable care

should have been discovered."

The plaintiffs argue that defense counsel was well aware of Dr. Toboada's note when suit was brought in November 2016 and when the answer was filed in March 2017, and there is no valid excuse for failing to timely assert the special defense in the answer. They argue that it would be unfair to allow this defense now since trial is imminent, depositions of the parties have been conducted, experts have been disclosed, and the plaintiffs' expert has been deposed.

The plaintiffs note that plaintiff Dorota Wisniewski's deposition was conducted in June 2018, and, if the basis of the defense is information obtained then, as suggested in the defendants' reply, the defendants waited over one year to file the proposed defense. Also, they state that, after that deposition, other discovery was conducted, in particular the deposition of Dr. Toboada, and argue that since they were not on notice of the statute of limitations defense when other discovery was conducted, no inquiries were made regarding the factual basis of the defense, potentially prejudicing their ability to rebut the defense at trial. The plaintiffs also challenge the legal validity of the special defense, contending that the continuing course of treatment doctrine is applicable.

The defendants assert that they will be prejudiced if their defense is not allowed and the plaintiffs have not identified any prejudice to them that would result from permitting the amendment. They assert that the issue presented by the special defense was explored in discovery, during Ms. Wisniewski's deposition, and no further discovery would be necessary.

"[R]equests to amend cannot be denied based on the sufficiency of the proposed [pleading]. . . . [E]ven if a proposed pleading is alleged to be insufficient, a [party] should be

permitted to file [the amended pleading], so that the issues arising under it may be determined in proceedings properly adapted to that end." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 256–57, 905 A.2d 1165 (2006). Thus, the court may not consider the plaintiffs' challenge to the legal validity of the special defense.

As was the situation in *Jacob* v. *Dometic Origo AB*, supra, 100 Conn. App. 107, although the defendants' proposed amendment could have been presented earlier, this case was not scheduled for trial until three months after the amendment was offered. See id., 114. Also, the issue was apparently addressed in Ms. Wisniewski's deposition.

The plaintiffs have not shown that they would be unable to rebut the new defense at trial. In the exercise of its discretion, the court concludes that denial of the proposed amendment would work an injustice to the defendants, since it would deprive them of the opportunity to assert a defense to part of the plaintiffs' claims, which outweighs any inconvenience to the plaintiffs or any potential delay. To mitigate any prejudice that would result, the plaintiffs are authorized to re-depose Dr. Toboada, limited to the issue raised by the statute of limitations defense.

Accordingly, for the reasons stated above, the plaintiffs' objection to the defendants' request to amend is overruled.

BY THE COURT

Robert B. Shapiro

ROBERT B. SHAPIRO
JUDGE TRIAL REFEREE

CHECKLIST FOR CLERK

Docket Number CV 16-6073070-S

Case Name Dorota Wisniewski, Et al
v. Hartford Healthcare Corp, Et al

Memorandum of Decision dated 9-3-19

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