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2019 IL App (3d) 170818-U

Order filed July 19, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

PATRICIA M. NIEUKIRK, as Executor)	Appeal from the Circuit Court
of the Estate of HENRY W. NIEUKIRK,)	of the 10th Judicial Circuit,
Deceased,)	Peoria County, Illinois.
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
OSF HEALTHCARE SYSTEMS, d/b/a)	
SAINT FRANCIS MEDICAL CENTER,)	Appeal No. 3-17-0818
an Illinois Corporation; PEORIA)	Circuit No. 13-L-45
SURGICAL GROUP, LTD., an Illinois)	
Corporation; and JULIUS BONELLO,)	
M.D., individually and as agent of OSF)	
Healthcare Systems, d/b/a Saint Francis)	
Medical Center, an Illinois Corporation,)	
and Peoria Surgical Group, Ltd., an)	
Illinois Corporation,)	The Honorable
)	Michael P. McCuskey,
Defendants-Appellees.)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* In an appeal in a medical negligence case, the appellate court found that the trial court erred when it concluded that the plaintiff's third amended complaint did not

relate back to plaintiff's first amended complaint and granted defendants' motions to dismiss plaintiff's third amended complaint on that basis. The appellate court, therefore, reversed the trial court's judgment and remanded the case for further proceedings on plaintiff's third amended complaint.

¶ 2 Plaintiff, Patricia Nieukirk, as the executor of her deceased husband's estate, brought a medical negligence action against three defendants—a hospital, a surgical group, and a doctor—relating to a medical procedure that plaintiff's late husband had undergone in February 2011. In her third amended complaint, plaintiff alleged claims for wrongful death, survivorship, and family expense against all three defendants. Defendants moved to dismiss the third amended complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)), alleging that the claims were time-barred by the applicable statute of limitations and/or statute of repose. Plaintiff opposed the motions to dismiss, alleging that the claims related back to her timely-filed first amended complaint. After a hearing, the trial court granted defendants' motions, dismissed plaintiff's third amended complaint with prejudice, and ordered that the case would proceed on plaintiff's first amended complaint. Plaintiff filed a motion to reconsider, which the trial court denied. Plaintiff appeals. We reverse the trial court's judgment and remand for further proceedings on plaintiff's third amended complaint.

¶ 3 **FACTS**

¶ 4 In February 2011, plaintiff's 54-year-old husband, Henry Nieukirk, underwent colon resection surgery at OSF Saint Francis Medical Center (hospital or OSF) in Peoria, Illinois. The operation was performed by Dr. Julius Bonello of the Peoria Surgical Group (PSG). As a result of the surgery, Henry spent five days in the hospital, four of which were after the operation occurred. On the fourth day following surgery, Henry was discharged and went back home. Two days later, Henry became violently ill, was rushed back to the hospital, and passed away. He died from bacterial peritonitis and complications of bowel surgery.

¶ 5 Nearly two years after Henry’s death, in February 2013, Henry’s wife, Patricia Nieu Kirk, as the executor of Henry’s estate, filed the instant lawsuit against defendants. Plaintiff’s original complaint contained eight counts—four counts against OSF and four counts jointly against Bonello and PSG. Plaintiff alleged claims for wrongful death, survivorship, family expense, and *res ipsa loquitur* against each defendant. The substance of the original complaint was that Bonello had botched Henry’s surgery, that Bonello and the other medical personnel involved had failed to appreciate the post-operative signs that something had gone wrong with the surgery, and that Bonello and the other medical personnel involved had discharged Henry from the hospital when Henry should not have been discharged. Plaintiff referred in the original complaint to the other medical personnel involved as the “employees and/or agents and/or apparent agents” of OSF or PSG and further described those individuals by titles, such as “attending physicians and surgeons, residents, and nurses, all of whom provided care and treatment to [Henry].” Bonello, however, was specifically mentioned by name. Plaintiff listed Henry’s post-operative symptoms in two brief one-sentence paragraphs that referred collectively to the five days that Henry spent in the hospital. The acts or omissions of negligence were listed in a single paragraph with six specific acts or omissions noted.

¶ 6 In May 2013, plaintiff filed a first amended complaint. The first amended complaint contained six counts and alleged claims for wrongful death, survivorship, and family expense against each defendant. The *res ipsa loquitur* claims were not carried forward into the first amended complaint. Plaintiff described in the first amended complaint the other medical personnel involved in the same general terms that had been used in the original complaint. Henry’s post-operative symptoms were listed in more detail in the first amended complaint in seven one-sentence paragraphs with references to the specific dates and times of when the

symptoms were observed and to the information obtained from Henry's medical chart relative to those symptoms. The specific acts or omissions of negligence were expanded to 12 or 13 in the first amended complaint (from 6 in the original complaint), which included three that pertained to OSF's failure to implement and enforce certain hospital policies. Other than those three allegations, the substance of the first amended complaint was similar to that of the original complaint—that Bonello and the other medical personnel involved had failed to appreciate the post-operative signs that something had gone wrong with the surgery and had discharged Henry from the hospital when Henry should not have been discharged. The allegation that Bonello had botched the surgery, however, was not carried forward into the first amended complaint.

¶ 7 In April 2017, plaintiff filed a second amended complaint. The second amended complaint contained the same six counts as the first amended complaint and raised claims for wrongful death, survivorship, and family expense against each defendant (three counts against OSF and three counts against Bonello and PSG jointly). In the second amended complaint, plaintiff listed the specific names and titles of the other medical personnel involved in Henry's treatment, including Dr. David Crawford and Dr. Norman Estes (surgeons and attending physicians), Dr. Steven Henriques (second-year resident), and Melody Marin and Kerri Waldorf (registered nurses). The description of Henry's post-operative symptoms remained the same as in the first amended complaint, for the most part, although one of the paragraphs was made slightly more specific. The specific acts or omissions of negligence were expanded from 12 or 13 in the first amended complaint to 19 in the second amended complaint as the specific names of the other medical personnel involved were incorporated into the description of each specific act or omission and more specific acts or omissions relating to the post-operative care of Henry were listed. In addition, the specific acts or omissions of negligence of the three main doctors

involved—Bonello, Crawford, and Estes—were placed into a separate paragraph (the doctor paragraph). In the doctor paragraph, 23 specific acts or omissions of negligence were listed. Although the substance of the allegations in the doctor paragraph was the same as in the first amended complaint (that Bonello and other medical personnel involved had failed to appreciate the post-operative signs that something had gone wrong with the surgery and had discharged Henry when Henry should not have been discharged), the second amended complaint also carried forward the three specific acts or omissions that were alleged in the first amended complaint regarding OSF’s failure to implement and enforce certain hospital policies. In addition, the second amended complaint added as specific acts or omissions of negligence in the doctors paragraph that Bonello had authored a false discharge summary and that he had failed to appreciate Henry’s post-operative symptoms, even though Bonello had experienced similar problems with another one of his surgical patients approximately six to eight months before Henry’s surgery. Plaintiff later withdrew the second amended complaint after defendants filed motions to dismiss, claiming that the second amended complaint was time-barred by the statute of limitations and/or statute of repose.

¶ 8 In June 2017, more than six years after Henry’s death and more than four years after the lawsuit was originally filed, plaintiff filed a third amended complaint. The third amended complaint contained nine counts and alleged claims for wrongful death, survivorship, and family expense against each defendant. The three additional counts were the result of plaintiff separating the counts that had previously been alleged against Bonello and PSG jointly. As with the second amended complaint, in the third amended complaint, plaintiff listed the specific names of the other medical personnel involved in Henry’s treatment and split the specific acts or omissions of negligence into two separate paragraphs—one that pertained to the other medical

personnel involved and one that pertained to the three main doctors. The recitation of Henry's post-operative symptoms remained relatively the same between the second and third amended complaints. The specific acts or omissions of negligence of the other medical personnel involved were reduced in the third amended complaint to 16 (down from 19 in the second amended complaint) as the three allegations regarding OSF's failure to implement and enforce certain hospital policies were not carried forward into the third amended complaint. Regarding the three main doctors, the specific acts or omissions of negligence listed in the doctor paragraph of the third amended complaint were the same as those listed in the doctor paragraph of the second amended complaint.

¶ 9 Defendants moved to dismiss the third amended complaint pursuant to section 2-619(a)(5) of the Code, alleging that the third amended complaint was time-barred by the statute of limitations and/or the statute of repose. Plaintiff filed a response and opposed the motions to dismiss. In the response, plaintiff alleged that the third amended complaint was not time-barred because it related back to the timely-filed first amended complaint.

¶ 10 In July 2017, the trial court held a hearing on defendants' motions to dismiss. After listening to the arguments of the attorneys, the trial court granted the motions, dismissed the third amended complaint with prejudice, ordered that the case would proceed on plaintiff's first amended complaint, and made an Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) finding as to its ruling. Plaintiff filed a motion to reconsider, which the trial court denied. This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff argues that the trial court erred in granting defendants' section 2-619(a)(5) motions to dismiss plaintiff's third amended complaint. Plaintiff asserts that the

motions to dismiss should not have been granted because the claims raised in the third amended complaint related back to plaintiff's timely-filed first amended complaint and were not, therefore, time-barred by the statute of limitations and/or statute of repose. In making that assertion, plaintiff contends that relation back applies in this case because: (1) there was a timely filed prior complaint, the first amended complaint; (2) the same transaction or occurrence test has been satisfied; and (3) defendants were not prejudiced or surprised by the claims raised in the third amended complaint, since plaintiff was merely making her prior allegations more specific and adding the specific names of defendants' employees or agents who had previously been implicated by job title in the first amended complaint. For all of the reasons stated, plaintiff asks that we reverse the trial court's ruling and, presumably, that we remand this case for further proceedings.

¶ 13 Defendants argue that the trial court's ruling was proper and should be upheld. In support of that argument, defendants assert that plaintiff's third amended complaint served no purpose other than to prejudice defendants. According to defendants, the timing of the third amended complaint in and of itself was prejudicial in that the third amended complaint was not filed until over four years after the litigation had started and six years after the alleged negligence had occurred. At that point in the litigation, defendants maintain, fact discovery had already been closed, plaintiff was on the eve of disclosing her controlled expert witness, and the depositions of the doctors involved had been completed for years. In addition, defendants disagree with plaintiff's contention that the third amended complaint merely added more specific information to the timely-filed first amended complaint and assert instead that the 2017 pleadings (the second and third amended complaints) were vastly different from the timely-filed 2013 pleadings (the original and first amended complaint). According to defendants, the 2017

pleadings added new allegations of fact and new causes of action and raised, for the first time, criticisms of other medical personnel. Defendants suggest that prior to the filing of the 2017 pleadings, they had no indication that they would be called upon to defend allegations of institutional negligence or negligent/fraudulent record keeping and that they were blindsided by the new unrelated allegations of fact and causes of action. For those reasons, defendants ask that we affirm the trial court's grant of defendants' section 2-619(a)(5) motion to dismiss.

¶ 14 Section 2-619 of the Code allows a litigant to obtain an involuntary dismissal of an action or claim based upon certain defects or defenses. See 735 ILCS 5/2-619 (West 2016); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). The statute's purpose is to provide litigants with a method for disposing of issues of law and easily proven issues of fact early in a case, often before discovery has been conducted. See *Van Meter*, 207 Ill. 2d at 367; *Advocate Health & Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (2004). In a section 2-619 proceeding, the moving party admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter to defeat the nonmoving party's claim. *Van Meter*, 207 Ill. 2d at 367. Section 2-619 lists several different grounds for which an involuntary dismissal may be granted. See 735 ILCS 5/2-619(a)(1) to (a)(9) (West 2016). Under subsection (a)(5), the subsection that applies in this case, a defendant may obtain an involuntary dismissal of an action if the action was not commenced within the time limits provided by law. 735 ILCS 5/2-619(a)(5) (West 2016). In ruling upon a section 2-619 motion to dismiss, the court must construe all of the pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68. On appeal, a dismissal pursuant to section 2-619 is reviewed *de novo*. *Id.* at 368; *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008) (applying a *de novo* standard of review to a section 2-619(a)(5) dismissal). When *de*

novo review applies, the appellate court performs the same analysis that the trial court would perform. *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43. A trial court's grant of a section 2-619 motion to dismiss a complaint may be affirmed on any basis supported by the record. *Board of Trustees of Community College, District No. 508, County of Cook v. Coopers & Lybrand LLP*, 296 Ill. App. 3d 538, 543 (1998).

¶ 15 The instant case involves a medical negligence claim. The statutory time limits for such a claim are set forth in section 13-212(a) of the Code. Pursuant to section 13-212(a), an action seeking damages for injury or death resulting from patient care is subject to a two-year statute of limitations and a four-year statute of repose. 735 ILCS 5/13-212(a) (West 2010); *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 17. The statute of limitations starts to run on the date that the plaintiff discovers or reasonably should have discovered the injury or death; whereas, the statute of repose starts to run on the date that the act or omission that caused the injury or death occurred. See 735 ILCS 5/13-212(a) (West 2010); *Lawler*, 2017 IL 120745, ¶ 18. Because of the different starting dates, under some circumstances, the statute of repose may bar recovery for an injury caused by medical negligence even before the plaintiff discovers that the injury occurred. *Lawler*, 2017 IL 120745, ¶ 18. Although such a result may seem harsh or unfair, the legislature enacted the statute of repose to cut short the long length of possible medical malpractice claim exposure resulting from the application of the discovery rule by placing an outer time limit on when a medical malpractice claim must be filed. *Id.* Indeed, limitations and repose periods, such as those provided for in section 13-212(a), are designed to prevent prejudice to the defendant by allowing the defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are still accessible. See *Porter*, 227 Ill. 2d at 355.

¶ 16 Plaintiff in the present case does not dispute that her second and third amended complaints were filed after the statute of limitations and statute of repose periods had ended. Plaintiff contends, however, that her third amended complaint is not time-barred and that it relates back to her timely-filed first amended complaint as provided for in section 2-616(b) of the Code. Under section 2-616(b), an amended pleading relates back to the date that the original pleading was filed if the following two requirements are satisfied: (1) the original pleading was timely filed; and (2) the causes of action asserted in the amended pleading grew out of the same transaction or occurrence that was set up in the original pleading. 735 ILCS 5/2-616(b) (West 2010); *Porter*, 227 Ill. 2d at 353; *Lawler*, 2017 IL 120745, ¶ 21. The purpose of the section 2-616(b) relation-back doctrine is to prevent causes of action from being lost due to a technical default unrelated to the merits. *Porter*, 227 Ill. 2d at 355. In furtherance of that end, courts are to liberally construe the requirements of section 2-616(b) to allow cases to be resolved on the merits and to avoid elevating questions of form over substance. *Id.* In addition, it has been recognized that Illinois courts liberally allow pleadings to be amended after the statute of limitations has run. *Zeh v. Wheeler*, 111 Ill. 2d 266, 278 (1986). In a medical malpractice lawsuit in particular, plaintiffs are to be afforded every reasonable opportunity to establish a case, and to that end, amendments to pleadings are to be liberally allowed so that the action may be heard on the merits rather than terminated because of some procedural technicality. See *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2002).

¶ 17 There is no dispute in the present case that the first relation-back requirement was satisfied in that plaintiff's original and first amended complaints were both timely filed. Our focus, therefore, is on the second relation-back requirement—the same transaction or occurrence requirement. To determine whether the same transaction or occurrence requirement has been

satisfied, Illinois courts apply the sufficiently close relationship test whereby “a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations as compared with the timely filed allegations show that the events alleged were close in time and subject matter and led to the same injury.” *Porter*, 227 Ill. 2d at 360. Stated another way, an amended pleading will be considered to be distinct from the original pleading and will not relate back if any of the following circumstances are present: (1) the original and amended set of facts are separated by a significant lapse of time; (2) the two sets of facts are different in character; or (3) the two sets of facts lead to arguably different injuries. *Id.* at 359. The rationale for the same transaction or occurrence requirement is that a defendant is not prejudiced if his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him. *Id.* at 355. The requirement is founded upon the belief that a defendant who has been made aware of the occurrence or transaction upon which the claim is raised can prepare to meet plaintiff’s claim, whatever theory it may be based upon. *Zeh*, 111 Ill. 2d at 279. In determining whether the same transaction or occurrence requirement has been satisfied, a court should consider the entire record, including depositions and exhibits, to determine whether the defendant had the requisite notice. *Porter*, 227 Ill. 2d at 355.

¶ 18 After having reviewed the entire record in the present case, we find that plaintiff’s third amended complaint satisfied the same transaction or occurrence requirement. See *id.* at 355-60. Contrary to defendants’ assertion on appeal, the majority of changes that were made to the third amended complaint, as compared to the first amended complaint, served to make the existing factual allegations against defendants more detailed by adding the specific names of the medical staff members who had provided post-operative treatment to Henry at the hospital and by incorporating the names and the information from Henry’s medical chart into the allegations of

negligence. Nearly all of the factual allegations made in the third amended complaint were already contained in the first amended complaint but were referred to in a more general nature using titles instead of specific names or a more general description of symptoms. Defendants, therefore, cannot claim to be surprised or prejudiced by those particular allegations. See *id.* at 355. With regard to the few remaining changes that were made in the third amended complaint, as compared to first amended complaint, those changes provided a few additional factual allegations (that Bonello had a similar experience with a patient six to nine months before Henry’s surgery and that Bonello had falsified his discharge report) but did not change the substance or occurrence that was carried throughout all of plaintiff’s complaints in the instant case—that Bonello and the other medical personnel involved had failed to appreciate the post-operative signs that something had gone wrong with the surgery and discharged Henry from the hospital when Henry should not have been discharged. Because the third amended complaint satisfies the same transaction or occurrence requirement, it relates back to the filing date of the first amended complaint and is not time-barred by the statute of limitations or the statute of repose. See 735 ILCS 5/2-616(b) (West 2016); *Porter*, 227 Ill. 2d at 353-60; *Lawler*, 2017 IL 120745, ¶ 21. The trial court erred when it reached a conclusion to the contrary.

¶ 19

CONCLUSION

¶ 20

For the foregoing reasons, we reverse the judgment of the circuit court of Peoria County and remand for further proceedings on plaintiff’s third amended complaint.

¶ 21

Reversed and remanded.