

DOCKET NO.: CV-14-6025333S	:	COMPLEX DOCKET
STAMFORD HEALTH SYSTEM, INC.	:	
D/B/A STAMFORD HOSPITAL,	:	J.D. OF WATERBURY
	:	
V.	:	
	:	AT WATERBURY
ETHICON, INC., ETHICON, LLC,	:	
JOHNSON & JOHNSON, INC.,	:	
AMERICAN MEDICAL SYSTEMS, INC.,	:	
and AMERICAN MEDICAL SYSTEMS	:	
HOLDINGS INC.,	:	

**STAMFORD HOSPITAL’S OBJECTION TO
PLAINTIFF’S REQUEST FOR LEAVE TO AMEND THE COMPLAINT**

Pursuant to Connecticut Practice Book § 10-60, defendant, Stamford Health System, Inc. d/b/a Stamford Hospital (“Stamford Hospital”), hereby objects to plaintiffs’ Request for Leave to Amend dated September 23, 2016.

PRELIMINARY STATEMENT

Plaintiffs filed their Complaint on August 27, 2014, alleging a single count of product liability against the Hospital. The parties have proceeded for two and a half years preparing the case under that single theory of liability. Now, a little over three months before jury selection is scheduled to start, plaintiffs seek to add ten new counts against Stamford Hospital.

This Court should deny the motion to amend for two reasons. First, there is no good faith basis for the ten additional counts because they are all barred by applicable statutes of limitations and the exclusivity provision of the Connecticut Product Liability Act, Conn. Gen. Stat. § 52-572m et. seq. (the “CPLA”). Second, Stamford Hospital will be prejudiced if the amendment is permitted. All of the new claims require expert testimony. The time for summary judgment has passed and plaintiffs’ experts will be deposed in the next month. It is likely that plaintiffs will try to proceed to trial without expert testimony. Because plaintiff waited to late in the case,

Stamford Hospital was unable to include this lack of expert testimony in its summary judgment motion. For this reason as well, the request to amend should be denied.

ARGUMENT

I. The Counts In the Amended Complaint Lack A Good Faith Basis Because They Are Barred By Applicable Statutes of Limitations And The Exclusivity Provision Of The CPLA

The Plaintiff lacks a good faith basis to bring the new claims because they are barred by applicable statutes of limitations. Practice Book § 1-25 states that “no party or attorney shall bring or defend an action, or assert or oppose a claim or contention, unless there is a basis in law and fact for doing so that is not frivolous.” This section provides the Court with a basis to deny the request to amend because the claims are frivolous. As set forth in the proposed complaint, this is a 2006 surgery and a 2016 amendment. There is no statute of repose for any of these claims and plaintiff has not alleged any basis for equitable or statutory tolling. After all, there is a MDL with thousands of mesh cases and advertisements all over television for mesh lawsuits.

In the pending multidistrict litigation regarding pelvic mesh products, federal courts have begun to sanction counsel for bringing frivolous claims that are obviously barred by the statute of limitations. See In re Mentor Corp. Obtape Transobturator Sling Prods., MDL Docket No. 2004, 4:08-MD-2004 (CDL), 2016 U.S. Dist. LEXIS 121608, at *4 (M.D. Ga. Sep. 7, 2016) (“[I]f you did not file the action until eight years later after your client’s doctor excised the [pelvic mesh device] and informed your client that it was causing her problems, you may face a serious challenge showing cause as to why sanctions should not be imposed.”). The mesh in this case was excised in 2011. See DE 176, Pp. 9-10.

Stamford Hospital is not citing Mentor Corp. for the purpose of seeking sanctions, but merely for the proposition that the Plaintiff should not be allowed to amend her complaint to

bring claims for which the statute of limitations clearly expired several years ago. Under similar provisions in the Federal Rules of Civil Procedure, that conduct is so egregious that it is sanctionable.

A trial court has wide discretion in granting or denying amendments of pleadings and may deny leave to amend when there is no good faith basis for the amended counts. See S.M.S. Textile Mills v. Brown, Jacobson, Tillinghast, Lahan & King, P.C., 32 Conn. App. 786, 794 -95 (1993) (affirming denial of leave to amend where request was “a rather disingenuous attempt to avoid [a] summary judgment motion”). There is no good faith basis for the proposed amended counts and the Court should deny the Plaintiff’s motion to amend. See Dimmock v. Lawrence & Mem. Hosp., Inc., 286 Conn. 789, 795-96 (2008) (noting that trial court denied motion to amend on statute of limitations grounds).

The additional claims are barred by applicable statutes of limitation because they all arise out of harm plaintiffs suffered in 2006. As addressed in Stamford Hospital’s motion for summary judgment (#176.00), plaintiffs’ product liability claim is barred by the applicable statute of limitations in § 52-577a(a). See DE 176, Pp. 11-19. She suffered actionable harm when, as she admitted in her deposition, she realized in late 2006 and early 2007 that she was suffering injuries that she knew were caused by the pelvic mesh product. See, also, Smothers v. Boston Sci. Corp. (In re Boston Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig.), MDL No. 2326, 2:12-cv-4078, 2014 U.S. Dist. LEXIS 97371, at *672-73 (S.D. W. Va. July 11, 2014) (actionable harm began when plaintiff attributed her injuries to pelvic mesh product). All of the counts in the Amended Complaint arise out of the facts upon which the product liability claim is based. Thus, all the counts in the Amended Complaint are also barred by statutes of limitation as briefly outlined below.

The counts in the Amended Complaint of negligence, recklessness, and lack of informed consent claims are governed by § 52-584, which contains a two year discovery period and a three year statute of repose. The civil conspiracy¹ and three misrepresentation counts are all tort claims governed by the three-year statute of limitations in § 52-577. Actionable harm for all of these claims began, as referenced above, in late 2006 and early 2007. The statute of limitations for each claim expired, at the latest, in 2010.

The Plaintiff's CUTPA claim is also barred by the statute of limitations. CUTPA has a three year statute of limitations. General Statutes § 42-110g(f). The Plaintiff underwent surgery on April 12, 2006 and learned of actionable harm stemming from the products soon after in late 2006 or early 2007. Like the claims above, the statute of limitations on the Plaintiff's CUTPA claim expired over four years ago.

The Plaintiff also alleges claims of breach of express and implied warranties. These claims are governed by the four year statute of limitations in the Connecticut Uniform Commercial Code. General Statutes § 42a-2-725. Breach of warranty claims begin running at the time of sale of a product. While Stamford Hospital maintains that it is not a product seller of medical devices as a matter of law, assuming for sake of argument that it sold a product, the sale of goods took place on April 12, 2006. The statute of limitations for any alleged breach of warranty expired on April 12, 2010. All of the counts in the Amended Complaint are barred by statutes of limitations.

The Plaintiff also does not have a good faith basis for the counts in the Amended Complaint because they are barred by the exclusivity provision of the CPLA. It is well-established that a plaintiff cannot seek CPLA damages by filing a CPLA claim and then seek the

¹ Civil conspiracy is a derivative claim that must be joined with an allegation of a substantive tort. Harp v. King, 266 Conn. 747, 779 n.37 (2003). Civil conspiracy is governed by the three-year statute of limitations as provided in General Statutes § 52-577. Wedig v. Brinster, 1 Conn. App. 123, 136 (1983), cert. denied, 192 Conn. 803 (1984).

same damages in a non-CPLA claim.² Conn. Gen. Stat. § 52-572n(a) states: “[a] product liability claim as provided in sections 52-240a, 52-240b, 52-572m to 52-572q, inclusive, and 52-577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.” The Connecticut Supreme Court has held that all claims for personal injury, death, or property damage, if related to a defective product, are properly pled under CPLA, *and that the CPLA precludes any other claims for the same damage resulting from that defective product.* See Gerrity v. R.J. Reynolds Tobacco Co., Inc., 263 Conn. 120, 128 (2003).³

The Amended Complaint merely re-alleges the product liability claim in the ten proposed new counts. On its face the Amended Complaint seeks monetary damages for the same personal injuries that underlie her products liability claim. The plain language of the statute bars these claims and they have no merit. The Plaintiff lacks a good faith basis for these ten additional counts because they are barred by the exclusivity provision of the CPLA.

II. Plaintiff's Proposed Amendment Is Untimely Because Plaintiff Unreasonably Delayed Alleging The Ten New Causes Of Action

This Court should also deny the motion to amend because of the Plaintiff's unexplained delay in amending the operative complaint and the prejudice such last-minute amendment will cause to Stamford Hospital. All of the new claims require an expert. For example, Stamford Hospital cannot be negligent if it does not have a duty. Given the expert testimony by the same experts in Farrell case, it is unlikely that plaintiffs will have the required expert testimony. By the time plaintiffs' experts are deposed (later this month), it will be too late to file a dispositive

² Here, plaintiff has filed the following additional claims: negligence, breach of express warranty, breach of implied warranty, recklessness, civil conspiracy, lack of informed consent, innocent misrepresentation, negligent misrepresentation, intentional misrepresentation, and CUTPA.

³ See also Winslow v. Lewis-Shepard, Inc., 212 Conn. 462, 471 (1989) (“[t]he legislature clearly intended to make our products liability act an exclusive remedy for claims falling within its scope”); Daily v. New Britain Machine Co., 200 Conn. 562, 571 (1986) (“[t]he products liability statute provides an exclusive remedy and ... plaintiffs cannot bring a common law cause of action for a claim within the scope of the statute”).

motion. As a result, Stamford Hospital will be prejudiced as plaintiffs will go to trial without required experts.

Although Connecticut courts liberally grant motions to amend the pleadings, plaintiffs must show good cause for their delay when the amendment occurs close to trial because late amendments can materially prejudice defendants. See Farrell v. St. Vincent's Hospital, 203 Conn. 554, 561-62 (Conn. 1987). More specifically, “[a]mendments should be made seasonably.” Id.; see also Connecticut Nat'l Bank v. Voog, 233 Conn. 352, 364 (1995) (“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 Plaintiff commenced this case in 2014. More than two years later, a little more than three months before jury selection is set to begin, the Plaintiff seeks to amend the complaint. The Plaintiff provides no explanation for this delay nor can she.

During the prior two years, the Plaintiff has had sufficient information available to allege additional theories of liability. The original complaint demonstrates that the Plaintiff was aware of the facts and circumstances that allegedly gave rise to the new theories of liability. Plaintiff, however, for no clear reason, chose to wait until just before jury selection, to raise these claims. Plaintiff’s request is simply untimely and inappropriate. See Acri v. International Ass'n of Machinists & Aerospace Workers, 781 F.2d 1393, 1398 (9th Cir. 1986) (“[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action”).

In deciding a motion to amend, courts must consider any unfairness to the opposing party. See Farrell, 203 Conn. at 562; Beasley v. Yale Univ., 2005 Conn. Super. LEXIS 2665 (Conn. Super. Ct. Sept. 29, 2005) (concluding that permitting amendment would unfairly

prejudice the opposing party). Permitting the Plaintiff to add ten additional claims against the Hospital at this late stage would unfairly prejudice the Hospital.

The trial is set to begin on January 10, 2017, and this Court has indicated that it will not grant a continuance. Stamford Hospital has proceeded in preparing its defense based on the sole count of product liability. It would be unfairly prejudicial for the Plaintiff to be allowed to assert ten new counts alleging entirely different theories of liability from the sole count in the initial complaint. See Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225, 257-58 (2006) (affirming denial of motion to amend where plaintiff sought to inject new and complex legal issues four months prior to trial after proceeding under different theory for three years); see also Beckenstein v. Reid & Riege, P.C. 113 Conn. App. 428, 440 (2009) (upholding trial court's refusal to allow amendment to complaint based in part on prospect of undue delay in commencement of trial). Stamford Hospital, which is in the process of finalizing discovery on the product liability count, likely would have to conduct an additional round of discovery on the ten new counts. The potential for additional discovery is an appropriate factor for the Court to weigh in deciding this motion. See S.M.S. Textile v. Brown, Jacobson, Tillinghast, Lahan & King, 32 Conn. App. 786, 795 (Conn. App. Ct. 1993) (finding no abuse of discretion in trial court's denial of leave to amend where party sought leave to amend after discovery was completed); Close, Jensen, & Miller P.C. v. Lomangino, 1995 Conn. Super. LEXIS 3347 (Conn. Super. Ct. Nov. 29, 1995) (denying motion to amend where amendment "would entail a whole new round of discovery and depositions causing unreasonable delay").

All of plaintiffs' claims require expert testimony but it appears likely that they do not have any testimony to support the claims. By waiting until just before trial, plaintiffs have

shielded themselves from a dispositive motion. The delay therefore materially prejudiced Stamford Hospital.

Furthermore, plaintiff s have not explained why they did not seek to add these claims long ago; this factor weighs heavily for denying the instant motion. See Lomangino, 1995 Conn. Super. LEXIS 3347, at *1 (“plaintiff had more than ample time to utilize discovery, to take depositions, and to file any requested amendments in a much more timely fashion”). After two years of litigation on a product liability theory, plaintiffs cannot be allowed to wait until three months before trial to allege ten new counts with completely different theories of liability, all of which are also barred by the statute of limitations. Plaintiffs’ unreasonable delay in amending the Complaint will result in unfair prejudice to Stamford Hospital. Plaintiffs’ request should be denied.

CONCLUSION

For all the foregoing reasons, the Hospital requests that the Court deny plaintiffs’ request for leave to amend.

**DEFENDANT,
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D/B/A STAMFORD HOSPITAL**

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent via email to the following counsel
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