SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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SUSAN KREMBS,

Plaintiff,

Index No.
805375/2012

DECISION and ORDER

against,

Mot. Seq. 004

NYU LANGONE MEDICAL CENTER; TISCH HOSPITAL; ANDREAS N. NEOPHYTIDES, ANDREAS N. NEOPHYTIDES, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ANDREAS N. NEOPHYTIDES PRACTICES MEDICINE; NEUROLOGICAL CONSULTANTS OF NEW YORK, P.C.; MICHAEL L. SMITH; MICHAEL L. SMITH, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH MICHAEL L. SMITH PRACTICES MEDICINE; ROBERT E. ELLIOTT; ROBERT E. ELLIOTT, M.D., P.C., A FICTITIOUS NAME INTED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ROBERT E. ELLIOTT PRACTICES MEDICINE; STEPHEN P. KALHORN; BAXTER INTERNATIONAL INC. AND BAXTER HEALTH CARE CORPORATION,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Susan Krembs ("Plaintiff"), moves for an Order (a) pursuant to CPLR § 3025(b) granting Plaintiff leave to amend the complaint to add the NYU

School of Medicine and New York University as party defendants; (b) amending the complaint to substitute the name "NYU Hospitals Center" in the place and instead of "NYU Langone Medical Center; Tisch Hospital" to reflect the true name of the hospital defendant in this action; (c) directing the Clerk of the Court to change the records to reflect the new caption in this action; and (d) directing that service of the amended complaint and supplemental summons upon counsel for parties who have already appeared in the case been deemed sufficient. Plaintiff initially sought to amend the complaint in order to add NYU Neurosurgery Associates as a party defendant in addition to NY School of Medicine and New York University, but has withdrawn that portion of its motion its reply.

Defendants NYU Hospitals Center s/h/a NYU Langone Medical Center, Tisch Hospital, Stephen Paul Kalhorn, M.D., s/h/a Stephen P. Kalhorn, Andreas N. Neophytides, M.D., s/h/a Andreas N. Neophytides, M.D., P.C. ("Dr. Neophytides"); Michael Louis Smith, M.D., s/h/a Michael L. Smith, and Michael L. Smith, M.D., P.C. ("Dr. Smith"), Neurology Consultants of New York, P.C., and Robert E. Elliott, M.D., s/h/a Robert E. Elliott, and Robert E. Elliott, M.D., P.C. ("Dr. Elliott"), (collectively, "Defendants") oppose. Defendants argue that Plaintiff seeks to add NYU School of Medicine, New York University and NYU Neurosurgery Associates in violation of the statute of limitations. Defendants also argue that Plaintiff has failed to assert an explanation for the need to add these entities as party defendants.

Plaintiff timely commenced this action against Defendants by the filing of a Summons and Complaint on or about December 20, 2012. The action involves medical malpractice and product liability claims. Plaintiff presented to NYU Langone Hospitals on June 23, 2010 with back pain. Plaintiff alleges that Defendants failed to take an adequate medical history and failed to observe and advise Plaintiff of pain management and other pain alleviating techniques prior to performing surgery. Plaintiff alleges that Dr. Smith negligently assessed her condition as necessitating surgery which resulted in nerve damage. Plaintiff states that the reason for the late addition of NYU University, NYU School of Medicine and NYU Neurosurgery Associates, as party defendants, is because Dr. Smith's employment status was only discovered at his March 10, 2017 deposition.

At his deposition on March 10, 2017. Dr. Smith testified that he was an employee of the NYU School of Medicine, acting within the scope of his employment at the time that he provided the alleged negligent surgical care and treatment to Plaintiff. Dr. Smith also testified that he was also an attending neurosurgeon of the NYU Neurosurgery Group Practice at the time of the alleged medical malpractice. More specifically, Dr. Smith testified at his deposition:

Q: What is your relationship with the NYU Neurosurgery Group Practice?

A: I am an attending neurosurgeon of that faculty practice.

Q: Are you an employee of that practice?

A: Technically I am an employee of the School of Medicine, that is what the paychecks say.

Q: So you're employed by the New York School of Medicine?

[Defense counsel: That is what he just said.]

Q: I understand, but you have an affiliation with the New York Neurological Practice, NYU Neurosurgical Practice?

A: I am a member of the faculty group practice for neurosurgery at NYU, the paychecks say NYU School of Medicine?

Q: Have you been an employee of the NYU School of Medicine continuously since then?

A: Yes.

(Transcript from deposition, pages 13-14).

"An action for medical malpractice must be commenced within two years and six months of the date of accrual. A claim accrues on the date the alleged malpractice takes place." (*Massie v. Crawford*, 78 N.Y.2d 516, 516 [1991]; CPLR §214[a]). The alleged malpractice here occurred in June 2010. Therefore, the statute of limitations for plaintiff's claims for medical malpractice expired as of December 2012, 2 ½ years after the negligence alleged occurred. Since the statute of limitations has run as to the proposed medical malpractice claims against the proposed additional defendants, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine. (*Garcia v. New York-Presbyterian Hosp.*, 114 A.D.3d 615, 615, 981 N.Y.S.2d 84, 86 [1st Dept 2014]). Once the plaintiff demonstrates the applicability of the relation-back doctrine, it may interpose a cause of action against a new defendant after the statute of limitations has expired.

CPLR § 203(b) allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are united in interest. The plaintiff must establish the following three conditions in order for claims against one defendant to relate back to claims asserted against another: (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well (*see Buran v. Coupal,* 87 N.Y.2d 173, 178). The "linchpin" of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period (*see Buran v. Coupal,* 87 N.Y.2d at 180).

Parties are united in interest where "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." (*Prudential Ins. Co. of Am. v. Stone*, 270 N.Y. 154, 159, 200 N.E. 679, 680 (1936). "[W]here one defendant 'may' have a defense which is not available to the other, they cannot be said to be united in interest." (*Connell v. Hayden*, 83 A.D.2d 30, 41–42 [2d Dept 1981]). "To determine unity of interest, therefore, one looks not to whether the two defendants will assert different defenses but rather whether they could assert such different defenses." (*Id.*). "[I]n an action to recover for the torts of negligence or malpractice the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other." (*Id.*). (*See also Mercer v. 203 E. 72nd St. Corp.*, 300 A.D.2d 105, 106, 751 N.Y.S.2d 457, 458 [1st Dept 2002]).

Plaintiff's motion to add NYU School of Medicine as a party defendant

Plaintiff seeks to add NYU School of Medicine as an additional defendant based on Dr. Smith's testimony that at the time of the alleged negligence, Dr. Smith was employed by NYU School of Medicine. Plaintiff has demonstrated that her claims against both NYU School of Medicine and Dr. Smith arise out of the same course of treatment that she received in June 2010. Turning to the second prong, employers and employees are united in interest for relation-back purposes. (*Brown v. Midtown Med. Care Ctr.*, 96 A.D.3d 641, 641, 947 N.Y.S.2d 109, 110 [1st Dept 2012]). Thus, Plaintiff has also demonstrated that NYU School of Medicine is

"united in interest" with Dr. Smith, due to the employer-employee relationship, and by that reason, can be charged with notice of the institution of the action and will not be prejudiced. Plaintiff has therefore satisfied the first prong and second prongs of the relation back doctrine.

Defendants concede that Plaintiff has satisfied the first and second prongs of the relation back doctrine with respect to NYU School of Medicine; however, they argue that Plaintiff has failed to establish that NYU School of Medicine knew or should have known that but for a mistake in originally failing to identify all the proper parties, the action would have been brought against them as well.

Plaintiff argues that the third prong is satisfied because the Complaint alleges on page 4 that Dr. Smith was an agent, servant, or employee of defendants NYU Langone Medical Center and of Tisch Hospital. Plaintiff alleges, "When Dr. Smith reported to his employer that he had been sued (which he would have done to have triggered the Medical School/NYU to notify its insurer and provide for his defense), the Medical School/NYU would have known from the page 4 language that Dr. Smith's employer was meant to be a defendant in this lawsuit and that, but for a mistake as to that entity's identity, the Medical School/NYU would have been named in the lawsuit." Defendants, in turn, argue that there is no evidence to substantiate Plaintiff's claim that Dr. Smith reported the litigation to his employer (i.e. NYU School of Medicine) or there was any requirement for him to do so. Defendants further argue even if the Court assumes that Dr. Smith would have notified his employer, the allegations in the Complaint that Dr. Smith was an employee of NYU Langone Medical Center and of Tisch Hospital are "vague" and "insufficient to establish that NYU School of Medicine was on notice that but for plaintiff's mistake, it would have been named." Defendants further argue that even if the NYU School of Medicine was aware of the pending action against the other defendants, that is insufficient to charge NYU School of Medicine with knowledge that Plaintiff intended to sue them too.

Here, NYU Medical School should have known from the allegations of the Verified Complaint that, but for Plaintiff's mistake in identifying NYU Langone Medical Center and Tisch Hospital as Dr. Smith's employer, it would have been timely named in this action. Furthermore, the record shows that the initial failure to add NYU Medical School was not intended but rather simply a mistake on Plaintiff's part.

Plaintiff's motion to add New York University as a party defendant

Plaintiff seeks to add New York University as an additional defendant based on the allegation that NYU School of Medicine "is itself an administrative unit of NYU." Plaintiff's attorney alleges, "The status of the Medical School as a branch of NYU is shown by Exhibit B, which is the Complaint in New York University et al. v. Turner Construction Company, Ind. No. 653535/2015, an action pending in this Court. Under 'The Parties' on page 3, NYU's attorneys describe the NYU School of Medicine as 'an administrative unit of [NYU].'" Plaintiff argues that based on this alleged relationship between NYU School of Medicine and NYU, NYU should also be considered Dr. Smith's employer for purposes of the relation back doctrine. However, while Plaintiff testified that he was employed by NYU School of Medicine, he did not testify that he was employed by New York University. Since Dr. Smith was not employed by NYU, Dr. Smith and New York University are not "united in interest" based upon any employment relationship. Plaintiff has also failed to establish that New York University should have known that but for a mistake by the plaintiff, New York University should have been named in this action.

Motion to Amend the Complaint to Substitute

Plaintiff also moves to amend the complaint to substitute the name NYU Hospitals Center in the place and instead of "NYU Langone Medical Center; Tisch Hospital" to reflect the proper name of the hospital defendant in this action. Plaintiff states that the hospital acknowledged the misnomer when it answered the Complaint in August 2013 as "NYU HOSPITALS CENTER s/h/a NYU LANGONE MEDICAL CENTER; TISCH HOSPITAL." Defendants do not object to the amendment of the Complaint to reflect the proper name of the Hospital. However, Defendants state that the the proper corporate name of the hospital is "NYU Langone Hospitals," and not "NYU Hospitals Center."

Wherefore, it is hereby

ORDERED that the portion of Plaintiff's motion which seeks leave to amend the Verified Complaint to add NYU School of Medicine as a party defendant is granted; and it is further

ORDERED that the amended complaint in the proposed form annexed to Plaintiff's moving papers shall be deemed served on the parties, upon service of a copy of this Order with notice of entry thereof, and served on NYU School of Medicine in accordance with the provisions of the CPLR; and it is further

ORDERED that the portion of Plaintiff's motion which seeks leave to amend the Verified Complaint to add New York University as a party defendant is denied; and it is further

ORDERED that the portion of Plaintiff's motion which seeks leave to amend the Verified Complaint to add NYU Neurosurgery Associates has been withdrawn by Plaintiff; and it is further

ORDERED that that the name NYU Langone Hospitals shall be substituted in the place and instead of "NYU Langone Medical Center; Tisch Hospital" to reflect the proper name of the hospital defendant in this action; and it is further

ORDERED that the amended caption shall appear as follows:

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SUSAN KREMBS,

Plaintiff,

-against-

NYU LANGONE HOSPITALS, ANDREAS N. NEOPHYTIDES, ANDREAS N. NEOPHYTIDES, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ANDREAS N. NEOPHYTIDES PRACTICES MEDICINE; NEUROLOGICAL CONSULTANTS OF NEW YORK, P.C.; MICHAEL L. SMITH; MICHAEL L. SMITH, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH MICHAEL L. SMITH PRACTICES MEDICINE; ROBERT E. ELLIOTT; ROBERT E. ELLIOTT, M.D., P.C., A FICTITIOUS NAME INTED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ROBERT E. ELLIOTT PRACTICES MEDICINE; STEPHEN P. KALHORN; BAXTER INTERNATIONAL INC. AND BAXTER HEALTH CARE CORPORATION,

NYU SCHOOL OF MEDICINE,

Defendants.

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and it is further

ORDERED that Plaintiff shall serve a copy of this decision upon the Clerk, who is directed to amend the caption accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 13, 2017

EILEEN A. RAKOWER, J.S.C.