SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

GLEN-HAVEN RESIDENTIAL HEALTH CARE FACILITIES, INC. d/b/a PORT JEFFERSON HEALTH CARE FACILITY,

Plaintiff,

- against -

Index No.: 5080/09
Motion Seq. No.: 04
Motion Date: 03/14/12

RALPH MEROLA, JR., Individually, RALPH MEROLA, JR., as Attorney-in-Fact for Ilene Merola, and RALPH MEROLA, JR., as Administrator of the Estate of Ilene Merola,

Defendants.

RALPH MEROLA, JR.,

Third-Party Plaintiff,

- against -

GAIL AUDREY WEBER,

Third-Party Defendant.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 1003 and 1009, for an order granting it leave to add third-party defendant as a direct defendant; moves, pursuant to CPLR § 3025(b), for an order granting it leave to serve a Supplemental Summons and Amended Verified Complaint as to the new party; and moves for an order directing the Clerk of Court to amend the caption accordingly. Third-party defendant opposes the motion.

This action seeks damages arising from the room, board, care and skilled nursing services rendered to Ilene Merola, the mother of defendant/third-party plaintiff and third-party defendant, during the period of time from November 18, 2003, until her discharge on September 22, 2004, resulting in a balance due and owing to plaintiff in the sum of $72,171.78. Ilene Merola passed away on November 20, 2005. Plaintiff commenced the action by service of a Summons and Verified Complaint on defendant/third-party plaintiff on or about August 13, 2008. Plaintiff's claims against defendant/third-party plaintiff arise under the New York State Debtor and Creditor Law ("DCL") resulting from the alleged fraudulent transfer of real property owned by the now deceased Ilene Merola to defendant/third-party plaintiff, as well as the transfer, liquidation and/or receipt of other assets belonging to the decedent as testified by defendant/third-party plaintiff and third-party defendant during the course of their respective depositions. On December 2, 2009, a Decision and Order was rendered by Nassau County Acting Supreme Court Justice Daniel Martin which granted in part and denied in part defendant/third-party plaintiff's motion to dismiss so that plaintiff's Second and Third Causes of Action arising under the DCL survived. On or about February 18, 2010, defendant/third-party plaintiff interposed an Answer with respect to the remaining claims against him. In or about May 2010, defendant/third-party plaintiff commenced a third-party action against his sister, Audrey Weber. On or about June 15, 2010,

third-party defendant interposed an Answer to the third-party Verified Complaint. On or about September 1, 2010, plaintiff moved to add Ralph Merola, Jr. as Administrator of the Estate of Ilene Merola, as a party defendant. Said application was granted in the November 30, 2010 Decision and Order of this Court. Depositions of defendant/third-party plaintiff and third-party defendant were conducted on November 12, 2010. On or about January 31, 2011, an Answer to the amended pleadings was received from defendant/third-party plaintiff.

Plaintiff argues that, "[i]n the case at bar, there would be no prejudice to the parties by the granting of plaintiff's motion to the extent that the parties have engaged in numerous Court conference (*sic*) with Your Honor regarding the various transfers, liquidation and/or receipt by the Defendant/Third-Party Plaintiff and Third-Party Defendant of various of the Resident's assets which serve as a basis for liability in this matter, as well as the fact that based upon the Defendant/Third-Party Plaintiff and Third-Party Defendant's respective deposition testimony..., the assets at issue were split equally between the Defendant/Third-Party Plaintiff and Third-Party Defendant, as the Resident's only children. Thus, the Plaintiff has the same claims against the Third-Party Defendant in this matter as it has against the Defendant/Third-Party Plaintiff herein concerning the transfer, liquidation and/or receipt of the Resident's assets under the Debtor and Creditor Law ("DCL") §§ 270, 273, 275, 276 et.seq. To the extent said assets, inclusive of the Resident's aforestated real property and various other assets as testified by the Defendant/Third-Party Plaintiff and Third-Party Defendant during the course of their depositions..., were transferred and/or liquidated for little or no consideration rendering the Resident and/or her estate insolvent as a result thereof, then the Plaintiff has valid claims against both the Defendant/Third-Party Plaintiff and Third-Party Defendant arising under the DCL."

In opposition to plaintiff's motion, third-party defendant argues that there is no question that adding her as a main defendant is severely prejudicial. Third-party defendant first asserts that "an action of fraudulent transfer has a statute of limitations period of six years from the time of the purported transfer. The Third Party Defendant CANNOT have a claim brought against her when the time has elapsed. The alleged fraudulent transfer of the real property occurred on or about 2003. The alleged fraudulent transfer of any other properties also occurred in excess of the six year statute of limitations. Since the Third Party Defendant was not brought into this case until after the statute of limitations had elapsed, she CANNOT be brought into this action as a Defendant in the overall action." Third-Party Defendant then argues that "it would be highly prejudicial to the Third Party Defendant if she were to be added as a Defendant in this matter. As a Third Party Defendant, in the event the Plaintiff were successful in their litigation in this matter, they would have sole recourse against the Defendant. If the Third Party Defendant were to be added they would have recourse against her directly instead of having to deal simply with the Defendant. In American Home Assurance Co., cited by Plaintiff, the court granted leave to amend the caption, but in that case, the defendant, and the proposed defendant sought to be added were interrelated companies (both being part of the AIG insurance group). In the instant case, defendant, RALPH MEROLA and the third party defendant, GAIL AUDREY WEBER, are totally distinct entities."

Third-party defendant adds that, "the Plaintiff has been aware of the Third Party Defendant for a significant period of time and should have brought this action against her a long time ago if they felt they had cause. Once again, the prejudice of this is untenable and not within the realm of the intent of the statute to allow amendments to the pleadings. In essence the entire defense of this proceeding would be altered if this were allowed."

In reply to third-party defendants' opposition, plaintiff argues that "[a]s for any claim as to the expiration of the statute of limitation, counsel once again conveniently neglects the fact that the transfers and/or liquidation of the Resident's assets did not occur until *after* the Resident's demise in November, 2005, and without knowledge by the Plaintiff as to the precise dates thereof since it was not provided with discovery relative thereto. As such, the Third-Party Defendant cannot have it both ways. She cannot claim the statute of limitation as a basis for precluding Plaintiff from amending its pleadings to include claims concerning the liquidation of the Resident's assets which ultimately rendered the Resident's estate insolvent and unable to pay the existing debt to Plaintiff, while at the same time claiming a lack of knowledge as to what assets and/or when said assets were liquidated."

Plaintiff further submits that "[i]n any event, the statute of limitations would nonetheless 'relate back' to the commencement of Plaintiffs (*sic*) original claims against the Defendant/Third-Party Plaintiff in July, 2008....The relation back doctrine requires proof that (1) the claims arise out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of the relationship can be charged with such notice of the institution of the actions and that the new party will not be prejudiced in maintaining its defense on the merits, and (3) the new party know or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against that party as well....In the instant case, the requirements of the relation back doctrine are satisfied."

Generally, leave to amend a pleading should be freely granted. *See* CPLR § 3025(b). The party seeking such amendment must demonstrate a proper basis for same. *See Wieder v. Scala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dept. 1990). Such an application must be supported by an

affidavit that the proposed amendment is meritorious. *See Zaid Theatre Corp. v. Suna Realty Co.*, 18 A.D.3d 352, 797 N.Y.S.2d 434 (1st Dept. 2005). A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept.1985). The merits of the proposed amended pleading will not be reviewed "... unless the insufficiency or lack of merit is clear and free from doubt." *Id. at* 740, 741. Mere lateness is not a barrier to the amendment. In the absence of significant prejudice the court will not deny a delayed application for leave to amend a pleading. Lateness combined with significant prejudice to the non-moving parties is required in order to defeat the motion. *See Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957, 471 N.Y.S.2d 55 (1983).

Where an action has been certified ready for trial, judicial discretion in permitting the amendment of a pleading should be discreet, circumspect, prudent, and cautious. *See American Cleaners, Inc. v. American International Specialty Lines Insurance Company*, 68 A.D.3d 792, 891 N.Y.S.2d 127 (2d Dept. 2009); *Evans v. Kringstein*, 193 A.D.2d 714, 598 N.Y.S.2d 64 (2d Dept. 1993); *Pellegrino v. New York City Transit Authority*, 177 A.D.2d 554, 576 N.Y.S.2d 154 (2d Dept. 1991); *Yavorski v. Dewell*, 288 A.D.2d 545, 732 N.Y.S.2d 263 (3d Dept. 2001); *Symphonic Electronic Corp. v. Audio Devices, Inc.*, 24 A.D.2d 746, 263 N.Y.S.2d 676 (1st Dept. 1965).

With respect to the timing of plaintiff's request to have the third-party defendant made a defendant in the main action, the Court notes several significant dates prior to said application. In or about May 2010 (almost two years ago), defendant/third-party plaintiff commenced a third-party action against third-party defendant. This is obviously the point in time when plaintiff was made aware of the alleged involvement of the third-party defendant. In September 2010, after

knowing for approximately four months of the third-party defendant's alleged involvement, plaintiff filed a motion to amend the Summons and Verified Complaint by adding Ralph Merola, Jr., as Administrator of the Estate of Ilene Merola, as a party defendant. Plaintiff did not, at that time, move to add the third-party defendant as a defendant in the main action. On November 12, 2010 (almost a year and a half ago), the Examinations Before Trial of defendant/third-party plaintiff and third-party defendant took place. Plaintiff now uses said testimony, that, as previously mentioned, was obtained approximately a year and a half ago, as a basis for the instant motion to add the third-party defendant as a defendant in the main action. It is now, after the case had been scheduled for trial for four months before was taken off the trial calendar due to a stipulated vacatur of the Note of Issue, that plaintiff makes this delayed application. For the past two years, the third-party defendant has been proceeding on a different theory of the case than she would have been had she had been a named defendant in the main action. The Court finds that to name her as a party defendant at this juncture would be significantly prejudicial to her. It is evident that plaintiff was well aware, for approximately two years, of the third-party defendant's existence and her alleged involvement in the finances of her deceased mother.

Furthermore, with respect to the statute of limitations argument, the Court does not find that the requirements of the relation back doctrine have been satisfied in this case. The Court does not find that the third-party defendant by reason of her sister-brother relationship can be charged with notice of the institution of the action. Plaintiff brought suit against defendant/third-party plaintiff in 2008. It was not until two years later that the third-party action was commenced. Additionally, it was defendant/third-party plaintiff who received the invoices from plaintiff with respect to his mother's care at plaintiff's facility and it was plaintiff who was Attorney-in-Fact for his mother, as well as Administrator of her estate. There is no evidence that third-party

defendant had any knowledge of the alleged debt to plaintiff and therefore should have had notice of the institution of the action. Simply being in a brother-sister relationship does not unite defendant/third-party plaintiff and third-party defnedant in interest. Plaintiff's claim that, since third-party defendant is the sister of defendant/third-party plaintiff, third-party defendant had notice of the commencement of plaintiff's action is purely speculative and lacks merit.

The Court also finds that there is no evidence that third-party plaintiff knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the actions would have been brought against her as well. In fact, there is no allegation whatsoever, that there was a mistake by plaintiff as to the identity of the proper parties. In fact, plaintiff moved to amend the Summons and Complaint to make sure that the proper party of "Ralph Merola, Jr., as Administrator of the Estate of Ilene Merola" was added.

Furthermore, plaintiff admits in its reply affirmation that "Plaintiff did not learn of the distribution and/or liquidation of other assets belonging to the Resident until depositions of the parties were conducted on **November 12, 2010**. (emphasis addded)" Nevertheless, despite learning this information on that date, plaintiff waited approximately a year and a half to make the instant motion. The Court finds that the significant delay in bringing the instant application severely prejudices the third-party defendant.

Therefore, the Court finds not only that the third-party plaintiff would be severely prejudiced if plaintiff's instant application was granted, but also finds that the applicable statute of limitations (even if using the commencement date of 2005) has run therefore preventing third-party defendant from being brought into the main action.

Accordingly, the Court, in exercising its discretion, holds that plaintiff's motion, pursuant to CPLR §§ 1003 and 1009, for an order granting it leave to add third-party defendant as a direct

defendant; pursuant to CPLR § 3025(b) for an order granting it leave to serve a Supplemental Summons and Amended Verified Complaint as to the new party; and for an order directing the Clerk of Court to amend the caption accordingly is hereby **DENIED.**

All parties shall appear for a Trial Recertification Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on April 26, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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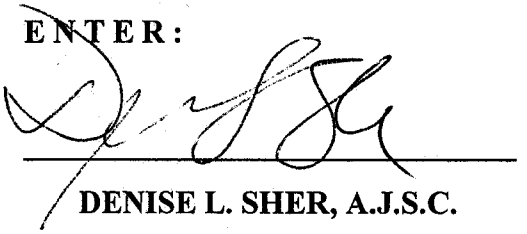

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 18, 2012