Moore v Moldashel
2013 NY Slip Op 33561(U)
December 23, 2013
Sup Ct, Suffolk County
Docket Number: 12-15012
Judge: Ralph T. Gazzillo

SHORT FORM ORDER

INDEX No. 12-15012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-28-13 (001 & 002)
MOTION DATE 4-17-13 (006)
MOTION DATE 4-18-13 (003 & 004)
ADJ. DATE 11-12-13
Mot. Seq. # 001 - MD # 004 - MD
002 - MD # 006 - MotD
003 - MD

TASHAWNA MOORE, as Administratrix of the Estate of JACQUELINE LYLES,

Plaintiff,

- against -

JANICE G MOLDASHEL, M.D., MARUSHKA BINDRA M.D., TEDDY T. LEE, PHILLIPE TASSY, M.D., LYNDA MARTINS M.D., JASON ROSENTHAL, M.D., NEUBERT PHILLIPE M.D.,DANIEL G MURPHY, M.D., STEVEN HORMOZDI, M.D., JONATHAN WINICH, M.D.,CARL-HENRI SANCHEZ M.D., MULCH & CHUGH, LONG ISLAND EMERGENCY CARE, P.C., MERCY MEDICAL CENTER, ST. CATHERINE OF SIENNA MEDICAL CENTER & SOUTHSIDE HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 67 read on this motion for dismissal and to compel ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-4 (untabbed); Notice of Cross Motions and supporting papers (002) 5-13; (003) 14-19; (004) 20-25; (006) 26-34; ; Answering Affidavits and supporting papers 35-38; 39 no affidavit of service; 40-43; 44-47; Replying Affidavits and supporting papers 48-49; 50-52; 53-58; Other 59-62; 63-65; 66-67; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that motion (001) by plaintiff, Tashawna Moore, pursuant to CPLR 602 to consolidate discovery and trial of the two actions under pending under Index No. 11-18996 and Index No. 12-15012, has been rendered academic by consolidation of both actions under Index No. 12-15012 pursuant to the so-ordered stipulation dated September 26, 2013 (Gazzillo, J.), which also amended the caption, and is denied as moot; and it is further

ORDERED that motion (002) by defendants, Phillipe Tassy, M.D., Long Island Emergency Care, P.C., and Lynda Martins, M.D., pursuant to CPLR 3211 and EPTL § 5-4.1 for an order dismissing the cause of action sounding in wrongful death as asserted against them as barred by the statute of limitations, is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness; and it is further

ORDERED that motion (003) by defendants, Jason Rosenthal and Neubert Phillipe, pursuant to CPLR 3211 (a) (5) and EPTL § 5-4.1 for an order dismissing the cause of action sounding in wrongful death as asserted against them as barred by the statute of limitations, is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness; and it is further

ORDERED that motion (004) by defendant, Janice G. Moldashel, M.D., pursuant to CPLR 3211 (a) (5) and EPTL § 5-4.1 for an order dismissing the cause of action sounding in wrongful death as asserted against her as barred by the statute of limitations, is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness; and it is further

ORDERED that motion (006) by defendants, Daniel G. Murphy, M.D. s/h/a Daniel G. Murphy, pursuant to CPLR 3124 and 3126 (2) for an order compelling the plaintiff to comply with his outstanding demands for authorizations dated April 3, 2012, May 22, 2012, May 25, 2012, and November 15, 2012, and notices for discovery and inspection dated September 6, 2012 and December 17, 2012, is granted to the extent that all parties in this consolidated action are directed to appear for a preliminary conference on Thursday, January 23, 2014, at 10:00 a.m., at Supreme Court, Part 6, Riverhead.

In this action for medical malpractice, it is alleged that the defendants negligently departed from the good and accepted standards of care in the treatment rendered by them to plaintiff's decedent, Jacqueline Lyles, based upon their alleged failure to timely and properly diagnose and treat the decedent for meningitis, which is alleged to be the ultimate cause of her death. Jacqueline Lyles died on January 9, 2010. The decedent was the mother of the plaintiff, Tashawna Moore.

An action was commenced on June 10, 2011 by the filing of the summons and complaint with the Clerk of Suffolk County under Index No. 11-18996. The defendants in this action as then commenced were Janice G. Moldashel, Marushka Bindra, Teddy T. Lee, St. Catherine of Siena Medical Center, Daniel G. Murphy, Mercy Medical Center, Steven Hormozdi, Jonathan Winnick, Mulch and Chugh, Carl-Henri Sanchez, and Southside Hospital. Causes of action sounding in negligence, wherein damages are sought for the decedent's conscious pain and suffering, mental anguish, and wrongful death have been asserted against the aforementioned defendants.

An action was commenced on May 15, 2012 by the filing of the summons and complaint with the Clerk of Suffolk County under Index No. 12-15012. The defendants in this action as then commenced are Janice Moldashel, Phillipe Tassy, Long Island Emergency Care, P.C., Lynda Martins, Jason Rosenthal, and Neubert Philippe. Causes of action sounding in negligence, wherein damages are sought for the decedent's conscious

pain and suffering, mental anguish, and wrongful death, have been asserted against the aforementioned defendants.

CPLR 3211 (a) (5) provides for the dismissal of a cause of action that is time-barred by the applicable statute of limitations. It is well-settled that an action by a personal representative for damages for the wrongful death of its decedent must be commenced within two years after the decedent' death (*see* ***Rivera v Viva Bar & Lounge***, 2010 NY Slip Op 30595(U) [Sup Ct, New York County 2010]; EPTL § 5-4.1).

In motion (002) defendants Phillipe Tassy, M.D., Long Island Emergency Care, P.C., and Lynda Martins, M.D. seek dismissal of the wrongful death cause of action as barred by the statute of limitations on the basis that the cause of action for wrongful death was not brought within two years after the decedent's death. The moving defendants assert that decedent died on January 9, 2010, and because the action was commenced against them on May 15, 2012, more than two years after the decedent's date of death, the cause of action for wrongful death is therefore untimely.

In motion (003), defendants Jason Rosenthal and Neubert Phillippe seek dismissal of the wrongful death cause of action as barred by the statute of limitations on the basis that the cause of action for wrongful death was not brought within two years after the decedent's death. The moving defendants assert that decedent died on January 9, 2010, and because the action was commenced against them on May 15, 2012, more than two years after the decedent's date of death, the cause of action for wrongful death asserted in paragraph nine of the complaint, is therefore untimely.

In motion (004), defendant Janice G. Moldashel seeks dismissal of the wrongful death cause of action as barred by the statute of limitations on the basis that the cause of action for wrongful death was not brought within two years after the decedent's death. The moving defendant Moldashel, by counsel, asserts that although Moldashel was a named defendant in the first action commenced under Index No. 11-18996, she was not served process and did not appear in that action. Counsel asserts that Moldashel was served in the second action commenced under Index No. 12-15012, and issue was joined by the service of her answer on or about October 9, 2012. Counsel further asserts that the decedent died on January 9, 2010, and because the action was commenced against Moldashel on May 15, 2012, more than two years after the decedent's date of death, the cause of action for wrongful death asserted in paragraph nine of the complaint, is therefore untimely.

The plaintiff opposes motions (002), (003), and (004) on the basis that jurisdiction was obtained over the named institutions in both actions; the moving defendants are united in interest with the parties over whom jurisdiction has been obtained; that these motions are premature as no preliminary conference has been held in the second action; no depositions of any parties have been obtained; and discovery is minimal.

In ***Brock v Bua***, 83 AD2d 61, 443 NYS2d 407 [2d Dept 1981]), the court stated that a claim asserted against a new party will relate back to the date upon which a plaintiff's claim was previously interposed against the original named defendant despite the fact that the former was not named in the process served upon the latter only if (1) both claims arise out of the same conduct, transaction or occurrence; (2) the party to be joined is united in interest with the original named defendant(s) and, by reason of that relationship, can be charged with notice of the commencement of the action so that the party to be joined with not be prejudiced in maintaining his or her defense due to the delay; and (3) the party to be joined 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 him or her as well (*see also* ***Buran v Coupal,*** 87 NY2d 173, 638 NYS2d 405 [1995]). The court continued that the primary purpose behind the limitation of actions is to relieve defendants of the necessity of preparing a defense

when "evidence has been lost, memories have faded, and witnesses have disappeared." The rationale underlying the "unity of interest" rule is different from that underlying the acquisition of jurisdiction by service of a summons and, unlike the latter, it does not turn upon actual notice to the after-served codefendant that plaintiff is seeking judgment against. Rather, continued the court, it rests upon the sound conclusion that where parties are united in interest their defenses will be the same, and they will either stand or fall together with respect to plaintiff's claim. Timely notice to one of two such defendants will enable them to investigate within the statutory period all the defenses which are available to both. That being the case, timely notice to one is charged to the other, and is not unfair from a Statute of Limitations viewpoint, to apply the claim interposition rule of CPLR 203 (b) to newly added codefendants who are united in interest with the original named defendant. Thus, CPLR 203(b) provides, in substance, that a claim against a codefendant "united in interest" with a timely served defendant shall relate back to the date plaintiff's claim was interposed against the latter (*see* ***Brock v Bua***, *supra*).

In their respective reply papers, the defendants, Rosenthal, Philippe, Moldashel, Tassy, Martins, and Long Island Emergency care, P.C., by counsel, retort that the relation-back theory would not apply, setting forth that each of the prongs of the three-prong test must be satisfied, and that even assuming arguendo that the first two prongs were met, the plaintiff failed to establish the third prong as the defendants were readily identifiable from the hospital chart. However, said hospital records/charts have not been provided in support of such assertion by counsel, and whether or not there was a mistake by plaintiff has not been demonstrated.

Janice G. Moldashel, M.D. submitted an affidavit in which she averred that subsequent to December 2009, and up to the present time, she was not an employee of St. Catherine of Siena Medical Center. Throughout December 2009, she stated, she was an emergency medicine physician in the emergency department at St. Catherine of Siena Medical Center, but was not an employee of St. Catherine of Siena Medical Center during that time period. Instead, she continued, she was an employee of Island Medical Physicians which had an agreement with St. Catherine of Siena Medical Center to provide emergency medical services. It is noted, however, defendant Moldashel has made conclusory legal opinions as to her employment status without having provided any supporting contracts or agreements, precluding this court from making a determination at this time as to whether or not Moldashel is united in interest with St. Catherine of Siena Medical Center, or any other codefendant. The relationship between Island Medical Physicians and St. Catherine of Siena Medical Center has not been demonstrated. It is noted that defendant Moldashel's affidavit is not sworn to be true under penalty of perjury (*see* ***Moore v Prevail***, 242 AD2d 526, 661 NYS2d 665 [2d Dept 1997]).

Accordingly, motion (002) is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness.

Phillipe Tassy, M.D. submitted an affirmation which fails to comport with CPLR 2106 and which is incompetent as it is not sworn to. While Dr. Tassy averred that he saw the decedent on December 31, 2009, and that he was not an employee of Mercy Medical Center, St. Catherine of Siena Medical Center, or Southside Hospital in December 2009 or January 2010, he has not set forth his relationship with the codefendants to enable this court to determine whether or not he is united in interest with any codefendant.

Accordingly, motion (003) is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness.

Lynda Martins, M.D. submitted her affirmation which fails to comport with CPLR 2106 and which is incompetent as it is not sworn to. She affirmed that she was a partner in Long Island Emergency Care, P.C. in

January 2010, and had one encounter with the decedent on January 1, 2010 at Mercy Medical Center. However, Dr. Martins does not indicate the relationship of Long Island Emergency Care with Mercy Medical Center, St. Catherine of Siena Medical Center, or Southside Hospital, except to state that she was not employed by them. No supporting evidentiary proof has been submitted in support of this conclusory affirmation to enable this court to make a determination at this time as to whether or not she is united in interest with any codefendant.

Accordingly, motion (004) is denied with leave to reserve upon completion of discovery and filing of the note of issue and certificate of readiness.

It is further noted that the moving defendants' affidavits and affirmations, as set forth above, have been submitted with their respective replies, and should have been submitted with the moving papers. Therefore, this court has considered plaintiff's sur-reply in response.

In motion (001), plaintiff, Tashawna Moore, seeks to consolidate discovery and trial of the two actions pending under Index No. 11-18996 and Index No. 12-15012. However, such application has been rendered academic in that both actions were consolidated under Index No. 12-15012 pursuant to the so-ordered stipulation dated September 26, 2013 (Gazzillo, J.), and the caption was amended.

Accordingly, motion (001) is denied as moot.

Turning to motion (006), by defendant Daniel G. Murphy for an order compelling the plaintiff to comply with his outstanding demands for authorizations dated April 3, 2012, May 22, 2012, May 25, 2012, and November 15, 2012. and notices for discovery and inspection dated September 6, 2012 and December 17, 2012, is decided to the extent that all parties in this consolidated action are directed to appear for a preliminary conference on Thursday, January 23, 2014, at 10:00 a.m., at Supreme Court, Part 6, Riverhead.

Dated: 12/23/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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