Anderson v J.D. Posillico, Inc.
2015 NY Slip Op 31240(U)
July 16, 2015
Supreme Court, Suffolk County
Docket Number: 4044/2014
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 4044/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

KENDRA ANDERSON, as administratrix of the goods, chattels and estate of DELANO MIGUEL ANDERSON, KENDRA ANDERSON, as administratrix of the goods, chattels and estate of LARISSA SIEGE REECE, and KENDRA ANDERSON, Individually,

Plaintiffs,

-against-

J.D. POSILLICO, INC., POSILLICO CIVIL, INC., POSILLICO CIVIL GROUP, POSILLICO ENVIRONMENTAL, INC., POSILLICO CONSULTING, LLC, POSILLICO MATERIALS, LLC, POSILLICO DRILLING, INC., POSILLICO DEVELOPMENT, LLC, POSILLICO GROUP, INC., POSILLICO PAVING, INC., POSILLICO CONSULTING, INC., WILEY ENGINEERING, P.C., JOHNSON ELECTRICAL CONSTRUCTION CORP., LESLIE-JOHNSON CORP., DMJM HARRIS, VILLAGE DOCK, INC., STONY BROOK MANUFACTURING COMPANY, INC., HAPCO ALUMINUM POLE PRODUCTS, HAPCO, HAPCO, INC., and ATHENA LIGHT & POWER, LLC,

Defendants.

ORIG. RETURN DATE: APRIL 25, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: APRIL 25, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: APRIL 25, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 003
MOTION: MG

ORIG. RETURN DATE: APRIL 25, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 004
MOTION: MG

ORIG. RETURN DATE: JULY 25, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 005
MOTION: MG

ORIG. RETURN DATE: MAY 30, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 006
MOTION: MG

ORIG. RETURN DATE: JUNE 13, 2013
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 007
CROSS-MOTION: XMD

ORIG. RETURN DATE: MAY 21, 2014
FINAL SUBMISSION DATE: MAY 21, 2014
MTN. SEQ. #: 008
MOTION: MG

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Upon the following papers numbered 1 to 39 read on these motions and cross-motion FOR DISMISSAL AND CONSOLIDATION. Notice of Motion and supporting papers 1-3; Reply Affirmation and Opposition to Plaintiff's Cross-motion and supporting papers 4, 5; Notice of Motion and supporting papers 6-8; Reply Affirmation and Opposition to Plaintiff's Cross-motion and supporting papers 9, 10; Notice of Motion and supporting papers 11-13; Affirmation in Opposition to Cross-motion and in Further Support of Motion 14; Notice of Motion and supporting papers 15-17; Reply Affirmation and supporting papers 18, 19; Amended Notice of Motion and supporting papers 20-22; Reply Affirmation 23; Notice of Motion and supporting papers 24-26; Notice of Cross-motion and supporting papers 27-29; Affirmation in Opposition and Reply and supporting papers 30, 31; Affirmation in Opposition and supporting papers 32, 33; Reply Affirmation and supporting papers 34, 35; Notice of Motion and supporting papers 36-38; Other Stipulation dated March 21, 2014 - 39.

Defendant KEARNEY-NATIONAL INC. d/b/a HAPCO i/s/h/a HAPCO ALUMINUM POLE PRODUCTS (hereinafter "HAPCO") seeks an Order of dismissal, pursuant to CPLR 3211 (a) (5), on the grounds of statute of limitations.

HAPCO, during the relevant time period herein, was a distributor of lighting products used in roadway construction projects and has been sued in its capacity as a supplier of goods under a theory of strict products liability.

The procedural facts are as follows: plaintiff commenced this action by the filing of a summons with notice on January 25, 2013. The single vehicle accident occurred on January 26, 2009, at or about 1:00 a.m. Delano Miguel Anderson and Larissa Siege Reece were passengers in the vehicle and perished in the incident. Both were minors at the time of their deaths.

There was also an additional action brought by plaintiff against the State of New York in the Court of Claims under UID #2013-050-067, which plaintiff alleges was commenced on January 15, 2011. It appears that the notice of claim was filed on that date. An additional action was brought by plaintiff against the Estate of Arthur William Reece and the County of Suffolk in Supreme Court under Index No. 2306/2011, commenced on January 19, 2011. Plaintiff's current attorneys claim that plaintiff's prior attorney failed to sue the defendants herein, who now seek dismissal pursuant to CPLR 3211 (a) (5) on statute of limitations grounds. On such a motion to dismiss, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his

cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies (*see Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]; *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403 [2007]; *6D Farm Corp. v Carr*, 63 AD3d 903 [2009]; *Savarese v Shatz*, 273 AD2d 219 [2000]).

The complaint sets forth causes of action sounding in negligence on behalf of the plaintiff's decedents seeking damages for conscious pain and suffering. The complaint further seeks damages for wrongful death. The applicable statute of limitations period for a survivorship action for conscious pain and suffering is three years from the date of injury or one year from the date of death, whichever is longer, pursuant to CPLR 210 (a) and CPLR 214 (5).

CPLR 210 provides in pertinent part:

> § 210. Death of claimant or person liable; cause of action accruing after death and before grant of letters
>
> (a) Death of claimant. Where a person entitled to commence an action dies before the expiration of the time within which the action must be commenced and the cause of action survives, an action may be commenced by his representative within one year after his death

(CPLR 210 [a]).

CPLR 214 provides in pertinent part:

> § 214. Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud
>
> The following actions must be commenced within three years:

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> 5. an action to recover damages for a personal injury except as provided in sections 214-b, 214-c and 215

(CPLR 214 [5]).

Moreover, as to wrongful death causes of action, the Estates, Powers and Trusts Law provides in pertinent part as follows:

> § 5-4.1. Action by personal representative for wrongful act, neglect or default causing death of decedent
>
> 1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; provided, however, that an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, two thousand one, other than a decedent identified by the attorney general of the United States as a participant or conspirator in such attacks, must be commenced within two years and six months after the decedent's death

(EPTL 5-4.1).

The longer of the two applicable statute computations results in a January 26, 2012 deadline for commencement. As stated above, this action was commenced on January 25, 2013, approximately one year after the applicable commencement deadline. Thus, plaintiffs' causes of action for conscious pain and suffering were not timely commenced.

For the wrongful death cause of action, the applicable time period of limitation for commencement of the action was two years from the date of death, in this case January 26, 2011. Even if the plaintiffs' representative were to argue

that the statute for wrongful death would not run until two years after the appointment of the representative, in this case the representative Kendra Anderson asserts in her complaint that she was appointed Administratrix on October 28, 2010, the applicable two year period of limitation expired on October 28, 2012. There is no allegation that Kendra Anderson as the sole distributee herein was an infant at the time of the commencement of the action or at any time during the two year period prior to the commencement of the action.

Therefore, the causes of action asserted against HAPCO are time-barred.

Defendant WILEY ENGINEERING, P.C. (hereinafter "WILEY") moves for relief pursuant to CPLR 3211 (a) (5), and asserts the identical argument as HAPCO. WILEY further seeks dismissal of the action as without jurisdiction due to plaintiffs' representative's failure to include a sum certain for which judgment could be taken in the event of default as required by statute.

WILEY provided professional engineering services in connection with the base and pole equipment required by the contract. WILEY has been sued herein in its capacity as a professional engineering firm and the complaint alleges professional malpractice in the performance of their professional duties in connection with the contract.

The causes of action asserted against WILEY are likewise time-barred.

Defendants J.D. POSILLICO, INC., POSILLICO CIVIL. INC., POSILLICO CIVIL GROUP, POSILLICO ENVIRONMENTAL, INC., POSILLICO CONSULTING, LLC, POSILLICO MATERIALS, LLC, POSILLICO DRILLING, INC., POSILLICO DEVELOPMENT, LLC, POSILLICO GROUP, INC., POSILLICO PAVING INC., and POSILLICO CONSULTING, INC. (hereinafter the "POSILLICO defendants") seek an Order of dismissal pursuant to both CPLR 3211 (a) (5) and (7).

The POSILLICO defendants allege that J.D. Posillico, Inc. was the original entity performing the services connected with contract No. D260398 and that the name was amended to Posillico Civil, Inc. Plaintiff's representative has also named Posillico Environmental, Inc., Posillico Consulting, LLC, Posillico

Materials, LLC, Posillico Drilling Inc., Posillico Development, Llc., Posillico Group, Inc., Posillico Paving Inc., and Posillico Consulting, Inc. The POSILLICO defendants contend that none of these additional entities was contracted for and that none provided any services in connection with this contract.

The CPLR 3211 (a) (5) arguments advanced by the POSILLICO defendants are identical to the arguments asserted by defendants HAPCO and WILEY. The Court finds that HAPCO, WILEY and POSILLICO have met their burden of establishing *prima facie* that the time in which to sue had expired prior to the commencement of this action.

Defendant ATHENA LIGHT AND POWER, LLC (hereinafter "ATHENA") seeks an Order, pursuant to CPLR 3211 (a) (5) and 305 (b). ATHENA, as with HAPCO, is in the supply chain as a distributor of the pole and base. The action against ATHENA as with HAPCO is based upon a theory of strict products liability.

The statute of limitations analysis concerning ATHENA is identical to the other defendants, and as with the other defendants ATHENA has successfully made out a defense. Under any theory, the action against ATHENA is time-barred.

Defendants JOHNSON ELECTRICAL CONSTRUCTION CORP. and LESLIE-JOHNSON CORP. (hereinafter the "JOHNSON defendants") seek relief pursuant to CPLR 3212 and 3211 (a) (5). The statute of limitations arguments are identical to those set forth hereinabove as asserted by the HAPCO, WILEY, POSILLICO and ATHENA defendants. The analysis in this regard is identical. The action against the JOHNSON defendants is time-barred.

Defendant VILLAGE DOCK, INC. (hereinafter "VILLAGE DOCK") seeks an Order, by Notice of Motion dated April 9, 2013 and then by Amended Notice of Motion dated July 12, 2013, dismissing the complaint with prejudice pursuant to CPLR 305 (b) and 3211 (a) (5) and (7). This is a pre-answer motion wherein VILLAGE DOCK seeks to reserve all procedural rights relative to the service of their answer in the event the action as against VILLAGE DOCK continues. It is outside the time frame for a pre-answer motion. VILLAGE DOCK asserts that it had no role whatsoever concerning the instrumentality which is alleged to be the cause of the injury and death of the plaintiff's decedents.

VILLAGE DOCK's arguments are identical to the arguments set forth hereinabove by the other defendants as it concerns CPLR 3211 (a) (5). VILLAGE DOCK sets forth the applicable limitations as contained within CPLR 214 (5), CPLR 210 (a) relative to pain and suffering, and EPTL 5-4.1 relative to wrongful death.

Although mentioned by counsel for VILLAGE DOCK as Exhibit "B," there is no affidavit within the submission from either Curtis Lambert or any other representative of VILLAGE DOCK. However, plaintiff's opposition to the myriad motions to dismiss only opposes the motions of defendants POSILLICO, WILEY, JOHNSON and HAPCO. The Court is without opposition as to the motions to dismiss by defendants VILLAGE DOCK, ATHENA and AECOM. As a result, the motions to dismiss pursuant to CPLR 3211 (a) (5) submitted by defendants VILLAGE DOCK, ATHENA and AECOM are unopposed; in any event, there is no viable argument against dismissal pursuant to CPLR 3211 (a) (5).

Defendant DMJM, now known as Aecom (hereinafter "AECOM"), also seeks an Order of dismissal pursuant to CPLR 3211 (a) (5). Aecom's allegations effectively set forth the applicable statutes of limitations. The action as against AECOM is similarly untimely.

Accordingly, the complaint is time-barred as against the defendants who have moved pursuant to CPLR 3211 (a) (5). As will be more fully discussed, *infra*, plaintiff has the burden of establishing the legal basis for the application of the "relation back" doctrine.

CONSOLIDATION

Plaintiff, by Notice of Cross-motion, seeks an Order, pursuant to CPLR 305, permitting plaintiff to amend its summons with notice and, pursuant to CPLR 602, consolidating the within action with the action that was filed under Index No. 2306/2011, entitled *Kendra Anderson, administratrix of the goods, chattels and estate of Delano Miguel Anderson, Kendra Anderson as administratrix of the goods, chattels and estate of Laurissa Seige Reece and Kendra Anderson v. County of Suffolk and Ernest N. Reece, Administrator of the goods, chattels and estate of Arthur W. Reece, Jr.*, and the action commenced by the Estate of Arthur William Reece entitled *Ernest Reece, as Administrator of the*

Estate of Arthur William Reece, Deceased, on Behalf of Infants, and as Conservator of Jezoar Reece and Zahyr Reece v. J.D. Posillico, Inc., Johnson Electrical Construction Co., Wiley Engineering, P.C., Athena Light and Power, Topinka & D'Angelo Inc., and Hapco, under Index No. 24476/2010. In addition, plaintiff argues that the doctrine of relation back should accrue to her benefit by virtue of the concept of "unity of interest" between and among the various parties to this and other timely commenced actions. Plaintiff makes general assertions of fairness as well as the intent and spirit of the relevant statutes of limitations.

CPLR 602 provides in pertinent part:

> (a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay

CPLR 602 (a). While there are certainly common questions of fact between and among these actions which support consolidation, there are a number of legal questions which are unrelated as to quantum of proof and the facts required for each of them. The current division between the cases is appropriate in that here a jury would be called upon to determine theories of liability sounding in negligence, professional negligence and strict products liability. Between and among the current defendants in the *Anderson* matter, the contractors involved in the performance of the work and the suppliers of the base and poles have demonstrated interactions which flow naturally from the formation and performance of the contract. To add the County of Suffolk and the operator of the vehicle would inject theories of negligence as well as defenses unrelated to the performance of the contract and the various duties and obligations imposed thereunder.

In support of the motion for consolidation, plaintiff's attorney asserts that the Estate of Arthur William Reece timely commenced its action against defendants WILEY, POSILLICO and JOHNSON on July 8, 2010. Defendants ATHENA, TOPINKA & D'ANGELO INC. and HAPCO were later added to the *Reece* action by amended verified complaint dated January 26, 2012. The Court

is concerned that further consolidation would confuse the trier of fact (*see Velasquez v C.F.T., Inc.*, 240 AD2d 178 [1997]; *Zimmerman v Mansell*, 184 AD2d 1084 [1992]; *Held v Ball*, 123 AD2d 507 [1986]).

In addition, by consolidating all three actions, the Estate of Reece would be both plaintiff and defendant in the same action. Consolidation is improper where confusion and harm would result from the fact that plaintiff in one action was the defendant in the other action (*Atkinson v Roth*, 297 F 2d 570 [3d Cir 1961]), and where jury confusion would result when consolidation causes a party to be identified as both a plaintiff and a defendant (*Geneva Temps, Inc. v New York Communities, Inc.*, 24 AD3d 332, 335 [2005]).

Also, the *Reece* action in its current state is already a consolidated action wherein this Court, by Order dated October 2, 2012, consolidated the supply chain defendants, including the impleaded manufacturer, with the engineering firm, contractor and sub-contractor construction defendants. Consolidation of actions where the same party is plaintiff in one and defendant in the other is contrary to case law and would certainly raise the complexity of an already complex case.

Moreover, there are significant procedural shortcomings in plaintiff's application for consolidation; "the record has demonstrated that plaintiff has not made [her] cross motion on notice to all parties who would be affected by the proposed consolidation" (*see Five Riverside Dr. Towers Corp. v Chenango, Ltd.*, 111 AD2d 1025, 1026 [1985]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C602:3). The affidavit of service accompanying the cross-motion indicates service only upon the parties in the current action. There is no indication of proper service as against the other parties to the other actions who are not parties to the action herein. CPLR 602 (a) by its terms requires a motion, and the motion must be on notice to all affected parties.

APPLICABILITY OF CPLR 203

In response to the defendants' motions to dismiss pursuant to CPLR 3211 (a) (5), plaintiff asserts that CPLR 203 (b) bars the statute of limitations defense interposed by HAPCO, WILEY, POSILLICO, and JOHNSON. CPLR 203 provides in pertinent part:

> § 203. Method of computing periods of limitation generally
>
> (b) Claim in complaint where action commenced by service. In an action which is commenced by service, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when:
>
> 1. the summons is served upon the defendant;
>
> * * *
>
> (c) Claim in complaint where action commenced by filing. In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced

(CPLR 203 [b] [1], [c]).

Plaintiff argues that in satisfaction of the requirements of CPLR 203, plaintiff's claims against HAPCO, WILEY, POSILLICO, and JOHNSON relate back to the claim against the State on a theory of the State's vicarious liability for the negligence of HAPCO, WILEY, POSILLICO, and JOHNSON. Plaintiff further asserts that the *Reece* action involves the same defendants. These are two separate and distinct arguments.

VICARIOUS LIABILITY AND "UNITY OF INTEREST"

Plaintiff's assertion that the State of New York is vicariously liable for the actions of the general contractor and subcontractors is not clearly argued in their papers. There are cases which hold that where an entity is vicariously liable for the actions of another in the performance of an act, the relation back doctrine as it concerns the "unity of interest" between the two entities is satisfied by the vicarious liability of the one for the other for the performance of that act. Plaintiff argues here the State is vicariously liable for the acts of the contractor and subcontractors. Plaintiff argues that timely service upon the State affords plaintiff the benefit of the relation back doctrine as against those for whom the State is

vicariously liable. The cases so holding are ostensibly *sui generis* and in the absence of some contractual or other demonstration of affiliation beyond simply being parties to a contract, there is no relation back based upon unity of interest.

The "classic test" for determining unity of interest is "that if 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," then they are united in interest (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1997] [internal quotation marks omitted]). A unity of interest "will be found where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*id.*; *Cuello v Patel*, 257 AD2d 499, 500 [1999]).

***BRUNERO v CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION*, 121 AD3d 624 (2014)**

In *Brunero*, the Conservancy which owned the vehicle involved and employed the operator of the vehicle had formed a partnership by agreement in the form of a contract

> "in which they acknowledged that they had formed an effective 'public/private partnership.' Under the Agreement, the Conservancy is required to provide specified maintenance services in Central Park to the 'reasonable satisfaction' of the City, and the City is broadly required to indemnify the Conservancy "from and against any and all liabilities . . . arising from all services performed and activities conducted by [the Conservancy] pursuant to this agreement in Central Park' "

(*Brunero*, 121 AD3d at 626). In conclusion on this point, the *Brunero* court held:

> The City is vicariously liable for the Conservancy's negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties are thus united in interest (*see Quiroz v Beitia*, 68 AD3d 957, 959-960, 893 NYS2d 70

> [2d Dept 2009]; *Austin v Interfaith Med. Ctr.*, 264 AD2d 702, 704, 694 NYS2d 730 [2d Dept 1999]). Further, since the City has a nondelegable duty to maintain Central Park, it is vicariously liable for negligence committed by the contractor in the course of fulfilling that duty (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258, 898 NE2d 539, 869 NYS2d 356 [2008]; *see also Vanderburg*, 231 AD2d at 147-148

(*Id.*). In the case at bar, the general contractor, POSILLICO, was contractually obligated to indemnify the State for any liability arising out of the project. The Court has been provided with what purports to be a copy of a portion of the contract in question as part of plaintiff's submission. There is no indication that POSILLICO or any of the defendants are vicariously liable for the negligence of the State. POSILLICO is the only contracting party. The argument bears no relevance to the remaining defendants and plaintiff makes no similar argument in relation to any defendant but POSILLICO. The State may be liable for the acts of POSILLICO, but POSILLICO is not liable for the acts of the State (*see Anderson v Montefiore Med. Ctr.*, 41 AD3d 105 [2007]. Unlike the relationship in *Brunero*, where the City of New York and the Conservancy were liable for the acts of each other, here POSILLICO is in no way liable for the acts of the State. There is no "unity of interest" and therefore no relation back to the action commenced by this plaintiff against the State of New York. It is plaintiff's burden to provide the Court with a basis to avoid dismissal given the commencement of the action well beyond all periods of limitation, and plaintiff has failed to do so. Contractual indemnity as contained within the contract between POSILLICO and the State of New York is insufficient to provide a "unity of interest" as between the State of New York and POSILLICO.

<u>THE REECE ACTION</u>

In addition to the foregoing, an action was timely commenced against the defendants in this action by the representative of the Estate of Reece, the deceased driver of the vehicle. As discussed, this is a one car accident which took the lives of the driver as well as the two infant passengers of the vehicle. POSILLICO, WILEY and JOHNSON had actual notice of the operative facts and

circumstances by timely service upon them of the pleadings in the *Reece* action. HAPCO was also sued by Reece in a separate action that was timely filed.

As an alternative theory, plaintiff suggests that if the matters are consolidated, any objection concerning timeliness of the action would be overcome pursuant to CPLR 203 (f), which provides:

> (f) Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading

(CPLR 203 [f]). Even were consolidation to be permitted, the analysis and the conclusion to consolidate is not an amendment of a pleading as concerns particular defendants who were timely served. This Court is unaware of any reported support for plaintiff's claim that CPLR 203 (f) cures the untimely commencement of an action by consolidation deemed to be an amendment of the prior timely pleading by the later untimely pleading.

The case of *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 NY2d 716 (1998), cited by ATHENA dealt with intervention in an Article 78 proceeding, not consolidation of filed actions. In addition, subsequent clarification in *Giambrone v. Kingsharbor Multicare Center*, 104 AD3d 546 (2013), applied a traditional relation-back analysis in the context of intervention. The attempt here is not to amend pleadings to add a party or a theory of liability; it is not an application of the plaintiff in the previously timely-filed action to add a party or a new theory. Although significant in its consequences, the untimely filing of an action in the absence of a valid relation back finding precludes recovery as against those defendants not originally named.

POSILLICO, perhaps as succinctly as has been stated in these papers, states at paragraph 14 of the opposition to the cross motion, "[h]ere, Plaintiff is not amending a timely-filed pleading, and is not seeking to add any party to a timely-commenced action, nor is plaintiff seeking to be substituted in to any viable action." That certainly is clear – even clearer is the fact that:

> "Plaintiff cannot reasonably argue that she was mistaken as to the identity of any party because she simply did not commence this Action, in a timely manner, as against any Defendant herein. Thus, there is nothing for these claims to 'relate back' to and the doctrine cannot, and does not, apply"

(Perillo Affirmation in Opposition to Cross Motion and in Further Support of Motion to Dismiss, August 1, 2013, at ¶ 14). The attempt to satisfy the unity of interest requirement as between POSILLICO and the State by the existence of an indemnification agreement does not satisfy that requirement. There was no partnership or other relationship between the State and POSILLICO or between the State and any of the defendants. The State contracted directly with defendants POSILLICO and WILEY only. The assertion of a contractual provision for indemnification does not make POSILLICO vicarious liable for the actions of the State. There is no indication by plaintiff that any of the defendants in the current action had any sort of close relationship, partnership, common management or facilities, common employees or equipment or any of the other criteria which would define unity of interest.

There is no timely commenced action. Plaintiff failed to commence any action in a timely fashion, other than the action against the State of New York in the Court of Claims and the action against the County of Suffolk and defendant Reece. There has been no demonstrated unity of interest as between any defendant and the County of Suffolk. Defendant Reece is an adverse party against whom the plaintiff seeks damages for negligence and wrongful death. There is certainly no unity of interest as between any defendant and Reece by any definition or legal principle. Reece was the owner and operator of the vehicle.

None of the construction or engineering defendants is united in interest with the defendants from the other timely filed actions, i.e., the State of New York, the County of Suffolk or the Estate of Reece. There are no other defendants against whom a timely action has been commenced to choose from.

The possible new theories of liability, the increase in damages to the defendants, and the pain and suffering and wrongful death claims of the plaintiff's decedents, are an expansion of the liability of the existing defendants in the

timely filed actions beyond that which they already face in the action in which the Estate of Reece is the plaintiff.

The Court is unable to fashion any cognizable theory within the current statutory framework which would allow an assertion by plaintiff of a relation back to defeat the affirmative defense of statute of limitations under the present circumstances.

In all of the derivative claim cases cited by plaintiff, a timely action had been commenced and the derivative plaintiff was being added to a properly and timely commenced action. In those cases, the very existence of the derivative plaintiff's claim is dependent upon the pre-existing timely filed action of the main claimant. Here, plaintiff's attempt to analogize those cases to the current facts before the Court is unpersuasive. The adding of a new claim or a new party under the cases cited presumes an existing action of some sort commenced by the primary plaintiff. The Court can find no case wherein a plaintiff's decedent's representative was allowed to commence an entirely new action. Plaintiff's assertion that a different plaintiff's commencement of an action against the same defendants arising out of the same incident serves to save the untimely filed action has no precedent in the law. As noted, plaintiff's assertion of relation back is not an amendment of an existing timely-filed action. The action herein is by any calculation time-barred.

NOTICE

It is true that the *Reece* complaint may have put several of the defendants here on notice; however, notice itself is not sufficient to satisfy the relation back. To carry plaintiff's argument to its logical conclusion, any prospective plaintiff who fails to file suit in a timely manner will be permitted to file suit *if* another plaintiff has filed a timely suit against the same defendant arising from the same incident. That is a change which under our present statutory scheme will require the action of the State Legislature. There has been no tolling or waiver of the defense and there is no cognizable theory of equitable estoppel.

The law of relation back presumes a pre-existing timely action against defendants who share a "unity of interest" with the defendants in the time-barred action. An action arising out of the same incident previously and timely

filed by a different plaintiff against the same defendants does not inure to a plaintiff who failed to file an action against those very same defendants. While the prior suit arises from the same incident, plaintiff Anderson does not get the benefit of plaintiff Reece's previously and timely filed action against the same defendants.

There are three timely filed actions in connection with this one car accident. Two were filed by this plaintiff in her representative capacity, to wit: one against the State of New York in the Court of Claims and one against the County of Suffolk and the driver of the vehicle in Supreme Court, Suffolk County. The third action was filed by the appointed representative of the operator of the vehicle against some of the defendants the plaintiff herein seeks to sue.

To allow a relation back in these circumstances is tantamount to a repeal of the Statute of Limitations. Relation back may be a protection against the assertion of the Statute of Limitations, but that protection is only afforded when the three-prong test is fully met within the context of a timely filed action.

Plaintiff here seeks to cobble together a patchwork of theories that would somehow make this plaintiff's untimely action against these defendants timely by excepting it from the Statute of Limitations. Plaintiff seeks to combine disparate components of this action plus three others to deny the defendants herein the protection of the Statute of Limitations.

Although commenced by a different plaintiff, the plaintiff herein asserts that these defendants knew of the subject accident and that defending against the prior timely action brought by the operator of the vehicle should prevent any claim of prejudice in an untimely action brought by the passengers in the same vehicle. Both the operator and the passengers claim negligence resulting in pain and suffering and wrongful death. This would seem to place them on notice, and the preparation for the timely-filed action would be similar if not identical to the preparation of the untimely action. While this poses an interesting question, there is no statutory framework or precedent for the assertion.

We have a timely-filed action against these defendants by a different plaintiff, two timely-filed actions by this plaintiff against different defendants, but no timely filed action by this plaintiff against these defendants. The temptation to

mix and match is compelling, particularly where the party bringing suit represents two minor infant passengers who perished in the accident. What plaintiff seeks is not an amendment of a pleading but the commencement of a new action by a new plaintiff as far as these defendants are concerned.

The Second Department has made the point clearly:

> The defendant made a *prima facie* showing of its entitlement to judgment as a matter of law by demonstrating that the causes of action in the complaint were asserted after the expiration of the applicable statute of limitations (*see* CPLR 213 [2]; *Lynford v Williams*, 34 AD3d 761, 762, 826 NYS2d 335 [2006]). Contrary to the Supreme Court's determination, in opposition, the plaintiff, whose causes of action were asserted in a untimely filed complaint, as opposed to in an amendment to a timely filed complaint (*see* CPLR 1002 [a], 3025 [b]; *cf. Fulgum v Town of Cortlandt Manor*, 19 AD3d 444, 445-446, 797 NYS2d 507 [2005]; *Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 100, 735 NYS2d 13 [2001]; *Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 457-459, 536 NYS2d 792 [1988]), in an intervenor's complaint in a timely commenced action (*see* CPLR 1013), or in an untimely commenced action that could be consolidated with a timely commenced action (*see* CPLR 602; *cf. DeLuca v Baybridge at Bayside Condominium I*, 5 AD3d 533, 535, 772 NYS2d 876 [2004]), failed to demonstrate the applicability of the relation-back doctrine (*see Buran v Coupal*, 87 NY2d 173, 177-178, 661 NE2d 978, 638 NYS2d 405 [1995]; *Mondello v New York Blood Ctr.–Greater N.Y. Blood Program*, 80 NY2d 219, 226, 604 NE2d 81, 590 NYS2d 19 [1992]; *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 476-478, 488 NE2d 820, 497 NYS2d 890 [1985]; *Caffaro v Trayna*, 35 NY2d 245, 249-250, 319 NE2d 174, 360 NYS2d 847 [1974]; CPLR 203 [b], [f])

(*see also Last v Guardian Life Ins. Co. of Am.*, 72 AD3d 1032 [2d Dept 2010]).

From all of the submissions of the parties, as well as the Court's own research, there is no salvation of this action based on any viable assertion of relation back derived from some unity of interest or any other cognizable legal theory supported by the current statutes or case law.

Wherefore,

HAPCO's motion to dismiss (seq. #001) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against HAPCO is **DISMISSED**;

WILEY's motion to dismiss (seq. #002) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against WILEY is **DISMISSED**;

POSILLICO's motion to dismiss (seq. #003) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against POSILLICO is **DISMISSED**;

ATHENA's unopposed motion to dismiss (seq. #004) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against ATHENA is **DISMISSED**;

VILLAGE DOCK's unopposed motion to dismiss (seq. #005) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against VILLAGE DOCK is **DISMISSED**;

JOHNSON's motion to dismiss (seq. #006) pursuant to CPLR 3212 and 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against JOHNSON is **DISMISSED**;

AECOM's unopposed motion to dismiss (seq. #008) pursuant to CPLR 3211 (a) (5) is **GRANTED**, and plaintiff's complaint against defendant AECOM is **DISMISSED**;

The Court, *sua sponte*, dismisses the remainder of plaintiff's complaint in its entirety;

Plaintiff's cross motion to consolidate (seq. #007) pursuant to CPLR 602 is **DENIED**; and

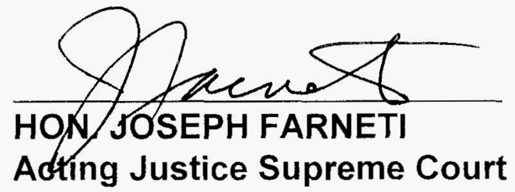
[* 20]

All other relief requested is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Submit Judgment on Notice.

Dated: July 16, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**