

<b>Weiner v Jaber</b>
2018 NY Slip Op 33143(U)
December 3, 2018
Supreme Court, New York County
Docket Number: 805350/16
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11-----X  
DANIEL H. WEINER,

Plaintiff,

INDEX NO. 805350/16

-against-

SAMER JABER, MD, RIGEL DERMATOLOGY, PLLC,  
and SCHWEIGER DERMATOLOGY, PLLC,  
Defendant.-----X  
JOAN A. MADDEN, J.:

Defendant Schweiger Dermatology, PLLC moves for an order (i) pursuant to CPLR 214, 214-a and CPLR 3211(a)(5) dismissing the complaint on statute of limitations grounds, (ii) pursuant to CPLR 2221 vacating the court's decision and order dated June 5, 2018 ("June 5 order") to the extent it granted plaintiff leave to amend to add Schweiger Dermatology, PLLC as a defendant, or, alternatively, (iii) pursuant to CPLR 2221 granting leave to reargue the June 5 order and, upon reargument, denying leave to amend. Plaintiff, appearing *pro se*, opposes the motion.

Background

This is an action for medical malpractice which arises out of the alleged failure to diagnose plaintiff with melanoma. Plaintiff sought medical care from defendant Samer Jaber, M.D. ("Dr. Jaber") of Rigel Dermatology, PLLC ("Rigel") for melanoma screening beginning on February 4, 2013, and continuing until September 15, 2014. The complaint originally named Schweiger Dermatology, Group, LLC, ("Schweiger Group, LLC") as opposed to Schweiger Dermatology, PLLC, as a defendant, and alleged that Schweiger Group, LLC, which purchased Rigel in 2014, was negligent in its training and supervision of Dr. Jaber.

Schweiger Group LLC moved for summary judgment on the ground that it was not the correct entity to sue in this medical malpractice action as it does not provide medical care or

employ doctors or physician assistants but, instead, provides “non-medical services such as payroll processing and accounting.” Schweiger Group, LLC also asserted that the correct defendant is the entity known as Schweiger Dermatology, PLLC.

Plaintiff opposed the motion and cross-moved to compel discovery. Plaintiff asserted that defendant Schweiger Group, LLC had failed to comply with his discovery demands related to identifying the correct defendant.

On January 25, 2017, the parties appeared for oral argument on the motion and cross-motion, and the court issued an interim order directing defendant Schweiger Group, LLC to produce certain documents and permitting plaintiff to conduct a deposition of non-party Schweiger Dermatology, PLLC, the entity alleged by Schweiger Group, LLC to be the correct defendant. The court also gave the parties dates for supplemental submissions after Schweiger Dermatology, PLLC’s deposition, and a date for continued argument on the motion and cross-motion.

On February 14, 2018, Joseph Luceri appeared for a deposition on behalf of Schweiger Dermatology, PLLC. Mr Luceri testified that he is employed by defendant Schweiger Group, LLC, currently as Chief Development Officer and as Chief Financial Officer.

After the deposition, the parties submitted supplemental papers, including the transcript of Mr. Luceri’s deposition. On May 17, 2018, the parties appeared for the continued argument on the motion and cross-motion. Schweiger Group, LLC asserted that it is not a correct defendant, while plaintiff opposed the dismissal of Schweiger Group, LLC, but also sought to add Schweiger Dermatology, PLLC as a defendant.

In the June 5 order, the court granted Schweiger Group, LLC ‘s motion to for summary judgment, on the ground that the undisputed record demonstrated that no physician-patient

relationship existed between it and the plaintiff, as Schweiger Group, LLC, did not and does not provide any medical treatment or medical services. The court wrote that:

Based on Mr. Luceri's unrefuted testimony, [Schweiger Group, LLC] merely provides management services and non-medical administrative support to the three separate "medical entities" that provide the medical services and medical treatment: Schweiger Dermatology, PLLC, Schweiger Dermatology, PC, and Citywide Dermatology, LLC.... The moving defendant admits that one of those three "medical entities," Schweiger Dermatology, PLLC, is the correct defendant in this action.<sup>1</sup>

In addition, based on defendant's representation Schweiger Dermatology, PLLC was the correct defendant, the court permitted plaintiff to amend the complaint to add Schweiger Dermatology, PLLC as a defendant even though plaintiff did not make a formal cross motion for this relief.

On June 18, 2018, plaintiff filed his amended complaint naming Schweiger Dermatology,

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<sup>1</sup>The court also wrote that:

It appears that some confusion may have been created by the use of the nearly identical name, "Schweiger Dermatology Group" with and without the "LLC" designation. Notably, the name "Schweiger Dermatology Group" is the name that appears throughout the company's website and on its letterhead. As Mr. Luceri explained, however, Schweiger Dermatology Group (without the "LLC") is a "d/b/a" for the three "medical entities" listed above, and that Schweiger Dermatology Group, LLC (with the "LLC"), is a separate entity that provides management services to those three medical entities. He also explained that a "management services agreement" exists between "Schweiger Dermatology Group, LLC and each of those three entities whereby the LLC, as I refer to it, provides essentially a number of non-medical services for each of those entities." Defendant submits a copy of Second Amended and Restated Management Services Agreement between Schweiger Dermatology Group, LLC as "Manager" and Schweiger Dermatology, PLLC as "Practice," which details the managerial and administrative functions performed by Schweiger Dermatology Group.

PLLC as a defendant. The complaint alleges the Dr. Jaber worked at Rigel, which was purchased by Schweiger Dermatology, PLLC in 2014. The third count in the complaint, for negligent supervision, is asserted against Schweiger Dermatology, PLLC and alleges that Schweiger Dermatology, PLLC was negligent in its training and supervision of Dr. Jaber, and that plaintiff's injuries were a direct and proximate cause of such negligence.

Schweiger Dermatology, PLLC now moves to dismiss the amended complaint on statute of limitations grounds, arguing that the claims asserted against it in the amended complaint are time barred by the applicable two and a half year statute of limitations, citing CPLR 214-a. Specifically, it argues that the acts alleged in the amended complaint occurred no later than September 15, 2014, the limitations for claims sounding in medical malpractice expired on March 15, 2017, which is approximately fifteen months before plaintiff filed the amended complaint on June 18, 2018. Moreover, Schweiger Dermatology, PLLC argues that to the extent the claim asserted against it is for negligent hiring, such claim would be time-barred by the three-year statute of limitations applicable to that claim, citing CPLR 214.

Schweiger Dermatology, PLLC also argues that the claims are untimely even though the court granted leave to plaintiff to amend the complaint to add it as a defendant, and that the June 5 order should be vacated or, upon reargument, the court should deny plaintiff's request to amend to add it as a defendant.

Plaintiff opposes the motion, arguing that the amended complaint is not untimely as it relates back to the original complaint, asserting that it is undisputed that his claims in the amended complaint and those in the original complaint arise out of the same medical treatment, citing, inter alia, Schiavone v. Victory Memorial Hosp., 292 AD2d 365 (2d Dept 2002). Plaintiff also argues that Schweiger Dermatology, PLLC knew or should have known about the

action the close corporate relationship and elements of common ownership and control between it and the originally named defendant Schweiger Group, LLC. Specifically, plaintiff points to the testimony of Mr. Luceri, Schweiger Group LLC's Chief Development Officer and as Chief Financial Officer that *inter alia*, Dr. Eric Schweiger is the Chief Executive Officer of Schweiger Group LLC and is the President and Chief Medical Officer of Schweiger Dermatology, PLLC; that Dr. Schweiger is the largest shareholder of Schweiger Group, LLC and owns 100 % of Schweiger Dermatology, PLLC; and that the two companies share the same corporate address.

In reply, Schweiger Dermatology, PLLC argues the plaintiff has not met his burden of showing the relation back doctrine applies, asserting that there is no unity of interest between it and the originally named defendant, and that Dr. Jaber is an independent contractor for whom it is not vicariously liable. As for its relationship with Schweiger Group, LLC, Schweiger Dermatology, PLLC asserts that the record establishes that the two entities are distinct and separate entities and its knowledge of the action cannot be imputed based on the timely service of the complaint on Schweiger Group, LLC.

#### Discussion

New York law permits a plaintiff to name an additional defendant after the statutory limit for asserting claims has expired, provided that the additional defendant is united in interest with the first-named defendant (CPLR 203 [b]). "The relation back doctrine is aimed at liberalizing strict formalistic requirements while respecting the important policies inherent in the statute of limitation." Hemmings v St. Mark's Hous. Assn., 169 Misc 2d 155, 156-157 (Sup Ct, Kings County 1996), appeal dismissed 242 AD2d 284 (2d Dept 1997). In Mondello v New York Blood Center 80 NY2d 219, 226 (1992), the Court of Appeals adopted the following test, to determine whether the addition of a new party relates back to an earlier pleading:

(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship he can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

Here, plaintiff has met the first requirement as the claims in the original complaint and those in the amended complaint arise out of the same alleged medical malpractice. With respect to the third requirement, the Court of Appeals has held that a plaintiff need not show that a mistake is excusable as long as the omission in joining the parties is not intentional or based on tactical advantage. See Buran v Coupal 87 NY2d 173, 176 (1995). In this case, there is nothing to suggest that plaintiff's failure to initially join Schweiger Dermatology, PLLC was intentional or done for tactical advantage. Indeed, it appears that the mistake was the result of defendant's use of Schweiger Group with and without the LLC, both on the company's website and on its letterhead, even though it is a "d/b/a" for the three "medical entities" including Schweiger Group, LLC and Schweiger Dermatology, PLLC.

The remaining issue is whether the new plaintiff, Schweiger Dermatology, PLLC is united in interest with Dr. Jaber, the Schweiger Group, LLC, and/or Rigel. "To be 'united in interest' it is not necessary to be joint contractors or to have a joint interest. 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 'otherwise united in interest' " Grossman v. New York City Health and Hospitals Corp., 178 AD2d 323, 324 (1<sup>st</sup> Dept 1991), quoting Prudential Ins. Co. v. Stone, 270 NY 154, 159 (196), quoting former Civil Practice Act § 16; see CPLR 203(b).

Under this standard, the court finds that as Schweiger Dermatology, PLLC is united in



interest with the previously named defendants as its defenses and potential liability rises and falls with that of the previously named defendants since like these defendants its liability hinges on Dr. Jabar's alleged malpractice. See Alamo v. Citident, Inc., 72 AD3d 498 (1<sup>st</sup> Dept 2010)(finding that dentist was united in interest with the dental practice which was timely served with the complaint); see also Rivera v. Fishkin, 48 AD3d 663 (2d Dept 2008)(cataract patient's medical malpractice claim against professional corporation related back to his claim against physician who performed cataract surgery and eye care clinic, when eye care clinic was mistakenly named as defendant). Moreover, as the successor-in-interest to Regal, Schweiger Dermatology, PLLC's claims relate back to those asserted against Regal. See 17 East 96<sup>th</sup> Street Corp v. Madison 96<sup>th</sup> Associates, LLC, 60 AD3d 480, 481 (1<sup>st</sup> Dept 2009)(reversing trial court's denial of motion to amend complaint finding that the relation back doctrine applied and allowed for the addition of new defendant condominium owner, which was successor-in-interest to original named defendant sponsor).

Additionally, Dr. Jabar's apparent status as an independent contractor, as opposed to an or an employee of Schweiger Dermatology, PLLC's is not determinative of whether the two are united in interest. See Schiavone v. Victory Memorial Hospital, 292 AD2d at 366 (holding that emergency room physician, who was an independent contractor of the hospital, was united in interest with the hospital since the physician was not a specific physician of plaintiff's choosing); Teer v. Queens Long Island Medical Group, P.C., 303 AD2d 488, 490 (2d Dept 2003)(vicarious liability can be based agency relationship where medical group exercises control over physician).

Next, the court finds Schweiger Dermatology, PLLC knew or should have known of the action at the time was commenced as the record demonstrates the close corporate relationship between Schweiger Group and Schweiger Dermatology PLLC, including that have the same



executive officer, share the same address, and have common ownership. See 17 East 96<sup>th</sup> Street Corp v. Madison 96<sup>th</sup> Associates, LLC, 60 AD3d at 481 (successor to sponsor was not an unrelated party and therefore had notice of the subject litigation); Uddin v. ATA. Construction Corp., 164 AD3d 1400 (2d Dept 2018)(newly named defendant had notice of the action within the applicable limitations period since it was jointly operated with earlier named defendant); Rivera v. Fishkin, 48 AD3d at 664 (professional corporation knew or should have known of the mistake of plaintiff in identifying the proper parties based on its relationship with the physician and/or clinics).

Accordingly, as the claims against Schweiger Dermatology PLLC relate back to those asserted in the original complaint, defendants' motion to dismiss on statute of limitations grounds and/or to vacate or reargue the June 5 order is denied.

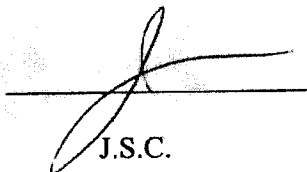
#### Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss on statute of limitations grounds and/or to vacate or reargue the June 5 order is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, on December 20, 2018, at 11 am at 60 Centre Street, New York, NY.

DATED: December 3 2018

  
J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.