Flenyol v Kamen
2020 NY Slip Op 32130(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 162192/2015
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

TIA FLENYOL,

Plaintiff,

- v -

STEWART M. KAMEN, M.D., NEW YORK – PRESBYTERIAN HEALTHCARE SYSTEM, INC., NEW YORK - PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER, THE ALLEN HOSPITAL and FOOT ASSOCIATES N.Y.,

Defendants.

Index No. 162192/2015
Motion Seq. No. 004

DECISION & ORDER

Cross-Motion: ☐ **Yes** ■ **No**

Plaintiff TIA FLENYOL ("plaintiff") moves for leave to file and serve an amended complaint to add STUART FRAMM, M.D. ("Dr. Framm), COLUMBIA DOCTORS ("Columbia Doctors"), and COLUMBIA UNIVERSITY as defendants in this action pursuant to the relation-back doctrine. Plaintiff also requests that if the court grants her application, that the proposed supplemental summons and amended complaint annexed to her moving papers be deemed served on Dr. Framm and Columbia Doctors. Plaintiff further requests that the court extend her time to file a note of issue in order to conduct further discovery with respect to Dr. Framm and Columbia Doctors.[1]

Defendants THE NEW YORK AND PRESBYTERIAN HOSPITAL s/h/a NEW YORK – PRESBYTERIAN HEALTHCARE SYSTEM, INC., NEW YORK – PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER, and THE ALLEN HOSPITAL (collectively "NYPH") oppose the motion. Dr. Framm and Columbia Doctors also oppose the

[1] Plaintiff requests a further deposition of Dr. Framm on the issue of "unity of interest" before the instant motion is decided. The court denies plaintiff's application, and will address plaintiff's request for a further deposition of Dr. Framm on the issue of "unity of interest," *infra*.

motion. Defendants STEWART M. KAMEN, DPM ("Dr. Kamen"), s/h/a STEWART M. KAMEN, M.D. and STEWART KAMEN DPM, P.C. d/b/a FOOT ASSOCIATES, NEW YORK (collectively "Dr. Kamen"), submit an affirmation in support of plaintiff's motion.

For the reasons discussed below, the court denies the motion.

BACKGROUND AND ARGUMENTS

This action was commenced with the filing of the summons and complaint on December 1, 2015. Plaintiff alleges that she was under the care of Dr. Kamen, a podiatrist, from January through August of 2013, and that Dr. Framm consulted and treated her at Dr. Kamen's office as an infectious disease specialist for a foot infection that resulted in an amputation. Plaintiff saw Dr. Framm on four occasions.[2]

Plaintiff argues that Dr. Framm is united in interest with the "Columbia defendants,"[3] and that Dr. Framm holds himself out to be a "Columbia doctor." Plaintiff contends that while Dr. Framm denies being affiliated with the "Columbia defendants," his office records bear a Columbia University Medical Center letterhead, on which Dr. Framm documented his visits with plaintiff. Plaintiff also notes that Dr. Framm represented on two separate occasions that he was an employee of "the Hospital."[4] Plaintiff highlights that Dr. Framm stated that he was employed by "the Hospital" when he was contacted pursuant to an *Arons* authorization, and that during a non-party deposition on March 8, 2018, Dr. Framm testified that he was not an employee of "the Hospital," but was employed by Columbia University "as a whole," and was doing business as Columbia Doctors.[5] According to plaintiff, Dr. Framm provides coverage of the infectious disease service to "the Hospital" when needed, and Dr. Framm's income tax returns identify the Board of Trustees of Columbia University as his employer.

Additionally, plaintiff points out that based on her counsel's experience requesting medical records from Columbia Doctors on other cases, the Medical Records Department of New York

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[2] Because plaintiff's treatment with Dr. Framm ended on July 3, 2013, the statute of limitations as to Dr. Framm expired two-and-a-half years later on January 3, 2016.
[3] Plaintiff uses the terms "Columbia Doctors" and "Columbia defendants" interchangeably throughout her motion. It is unclear who "Columbia defendants" refer to.
[4] Plaintiff uses the term the "Hospital," but does not specify which hospital.
[5] Plaintiff notes that Columbia Doctors is the name of the faculty practice organization of Columbia University.

Presbyterian Hospital controlled and processed Columbia Doctors' record requests. Plaintiff also notes that Dr. Framm is a witness in "the Hospital's" control based on a November 15, 2017 so-ordered stipulation which stated that Dr. Framm would be produced by counsel for "the Hospital" as a "Hospital" witness. Moreover, plaintiff argues that during Dr. Framm's non-party deposition, Dr. Framm acknowledged that he had spoken with Amanda Tate, Esq. ("Ms. Tate"), counsel for the "Columbia defendants" about this case, and that he had met Ms. Tate in connection with this case prior to his deposition. Plaintiff also highlights that during the initial introduction of counsel during Dr. Framm's deposition, plaintiff's counsel confirmed "the off the record mention that Dr. Framm already knew Ms. Tate," and that Ms. Tate stated that "to any extent with respect the doctor may have talked prior to us going on the record about any representation that I or -- or the doctor had with myself or my office before this deposition. It is strictly privileged . . ." As such, plaintiff posits that Ms. Tate's communication with Dr. Framm is only "privileged" if Dr. Framm and the "Columbia defendants" are united in interest.

Plaintiff also argues that her claims against Dr. Framm and Columbia Doctors not only arise out of the same conduct and occurrence as those asserted against the original defendants, but are identical in nature. Plaintiff also posits that upon information and belief, Dr. Framm and Columbia Doctors are affiliated with "the Hospital" "to the extent that the Hospital is vicariously liable for the conduct of Dr. Framm and Columbia Doctors." Moreover, plaintiff maintains that because Dr. Framm and Columbia Doctors are united in interested with the original defendants, Dr. Framm and Columbia Doctors can be charged with notice of the commencement of the action to the extent that they "are not prejudiced in the conduct of their defense."

Lastly, plaintiff argues that but for her mistake in not realizing that Dr. Framm was "not an employee of the Columbia defendants," the action would have been brought against Dr. Framm and Columbia Doctors. Plaintiff avers that because of the negligent treatment of her infection and osteomyelitis, and in light of her allegations against the "original Columbia defendants," Dr. Framm and Columbia Doctors knew, or should have known that the action would have included them as defendants.

In opposition, NYPH argues that it is not united in interest with Dr. Framm since Dr. Framm is not, and was not an employee of NYPH, the originally named-defendant, during the relevant period of alleged malpractice. NYPH contends that by correspondence dated May 9, 2017,

it advised all parties that Dr. Framm was not an employee of NYPH during the time period at issue. NYPH also annexes an affidavit of Diane Dalzell, NYPH's Director of Human Resources, who states that Dr. Framm was not an employee of NYPH "during the time period of January 1, 2013 to July 31, 2013, nor has [Dr. Framm] ever been an employee of NYPH from that time period until the present." Rather, NYPH notes that Dr. Framm's tax returns list his employer as The Board of Trustees of Columbia University. Notwithstanding the same, NYPH had agreed to voluntarily produce Dr. Framm for a non-party deposition, however, it was determined that Dr. Framm would have separate counsel represent him at his deposition.

NYPH also states that Dr. Framm saw plaintiff on four occasions as a consultant at Dr. Kamen's behest, however, Dr. Kamen did not ask Dr. Framm to write any prescriptions for plaintiff, and did not discuss with Dr. Framm the antibiotics he prescribed to plaintiff on June 19, 2013. Similarly, NYPH posits that it was Dr. Kamen who prescribed an MRI of plaintiff's foot on July 3, 2013, and performed all surgical procedures on plaintiff over a period of six months. NYPH also highlights that Dr. Framm did not speak to plaintiff, or Dr. Kamen about plaintiff's care after July 3, 2013. NYPH further points out that plaintiff was never admitted to the Allen Hospital. As such, NYPH argues that Dr. Framm may not have the same defenses as NYPH or Dr. Kamen.

Additionally, NYPH asserts that plaintiff has failed to show a relationship between Columbia Doctors and Columbia University or NYPH that would give rise to a finding of vicarious liability. NYPH submits that plaintiff's assertion that a HIPPA authorization bearing the name NYPH and the words "Columbia doctors" links Columbia Doctors to Columbia University or NYPH is baseless since the documents are devoid of any reference to Columbia University. NYPH also avers that plaintiff cannot demonstrate unity of interest between Columbia Doctors and NYPH or Columbia University because there are no direct claims as against NYPH. Similarly, NYPH contends that plaintiff has failed to show that NYPH exercised authority over Dr. Framm and Columbia Doctors sufficient to establish unity in interest. Furthermore, NYPH argues that a physician cannot be held vicariously liable for the negligence of a hospital as liability cannot be transferred backwards to a physician to establish unity in interest.

NYPH further argues that Dr. Framm and Columbia Doctors did not know, nor should have known, that but for a mistake, the action would have been brought against them. NYPH asserts that Dr. Framm, an infectious disease doctor, was not an employee of NYPH during the relevant

time period, and did not work in the same practice group as Dr. Kamen, a podiatrist. NYPH also highlights that Dr. Kamen's practice included two other physicians, neither of whom are named as defendants in this action although they may have rendered treatment to plaintiff in Dr. Kamen's absence. In that regard, NYPH reiterates that Dr. Framm saw plaintiff as a consultant at Dr. Kamen's behest over a four-month period, and that Dr. Framm neither discussed plaintiff's care after plaintiff's July 3, 2013 visit, nor had any knowledge of plaintiff's medical treatment after July 3, 2013. As such, NYPH argues that Dr. Framm would not have a reasonable expectation to be on notice of a lawsuit.

Likewise, NYPH argues that Columbia Doctors and Columbia University would not have a reasonable expectation to be on notice of a lawsuit involving treatment rendered by Dr. Kamen, a podiatrist who was employed by a separate group and who performed ambulatory debridement procedures. NYPH also notes that plaintiff's treatment did not require admission to a hospital, including the Allen Pavilion or Columbia University Medical Center.

Moreover, NYPH argues that plaintiff's failure to include Dr. Framm as an original defendant is not due to a mistake in Dr. Framm's identity. According to NYPH, plaintiff possessed Dr. Kamen's medical records prior to the commencement of this litigation, which referenced Dr. Framm's name on April 17, 2013 and July 3, 2013. Lastly, NYPH argues that the court should deny plaintiff's request for a further deposition of Dr. Framm on the issue of unity in interest as plaintiff has already had an opportunity to inquire about Dr. Framm's care and treatment.

Dr. Framm and Columbia Doctors also oppose plaintiff's motion. Dr. Framm and Columbia Doctors argue that NYPH is separate and distinct from The Trustees of Columbia University, and that since plaintiff never alleged any "specific wrongs" against NYPH, plaintiff's claims against NYPH are not "identical" to those asserted against Dr. Framm. Dr. Framm and Columbia Doctors also aver that while Dr. Framm may have consulted with plaintiff on four occasions, his role as an infectious disease specialist is not coterminous with the care rendered by Dr. Kamen, a podiatrist. Similarly, Dr. Framm and Columbia Doctors maintain that Dr. Framm does not answer for the conduct of NYPH, and that there is no evidence that Dr. Framm "is or would be vicariously liable for the conduct of the already named defendants." As such, Dr. Framm and Columbia Doctors underscore that Dr. Framm, as an attending physician, would have different defenses from those asserted by NYPH.

Additionally, Dr. Framm and Columbia Doctors argue that plaintiff has had the opportunity to depose Dr. Framm as a non-party witness on March 8, 2018, but did not inquire as to Dr. Framm's "knowledge of the original litigation." Rather, Dr. Framm and Columbia Doctors point out that plaintiff's position is based on the premise that because Dr. Framm "failed to properly diagnose and treat plaintiff's condition[,] [Dr. Framm] knew of the potential and merits of the original action." In that regard, Dr. Framm and Columbia Doctors highlight that plaintiff was not under a mistaken belief as to Dr. Framm's identity prior to the commencement of the lawsuit, but rather, plaintiff was only mistaken as to Dr. Framm's employment status. However, Dr. Framm and Columbia Doctors posit that this fact alone should not have prevented plaintiff from naming Dr. Framm as a defendant at the commencement of this action.

Moreover, Dr. Framm and Columbia Doctors note that plaintiff did not seek leave to sue Dr. Framm after the completion of Dr. Kamen's deposition in November of 2017, after the completion of Dr. Framm's deposition in March of 2018, or after the dismissal of Dr. Kamen's third-party action against Dr. Framm in November of 2018.[6] Finally, Dr. Framm and Columbia Doctors argue that plaintiff's motion should be denied due to procedural defects. Dr. Framm and Columbia Doctors highlight that while plaintiff's notice of motion only seeks leave to serve and file an amended complaint, plaintiff requests a further deposition of Dr. Framm at the end of her affirmation. Similarly, Dr. Framm and Columbia Doctors point out that while plaintiff's notice of motion lists Dr. Framm, Columbia Doctors and Columbia University, plaintiff's affirmation makes no reference to Columbia University, and plaintiff's proposed amended complaint does not list Columbia University as an intended defendant.

In support of plaintiff's motion, Dr. Kamen argues plaintiff was under his care as well as the care of Dr. Framm[7] from January through July of 2013 for evaluation and treatment of her left foot wound. Dr. Kamen asserts that since Dr. Framm was involved in evaluating and treating plaintiff for a potential infectious process, the allegations against Dr. Framm are the same as those asserted against Dr. Kamen and NYPH. Accordingly, Dr. Kamen avers that his defenses as well

[6] Dr. Kamen attempted to commence a third-party action against Dr. Framm and Columbia Doctors twice, however, both actions were dismissed by the Hon. Judith McMahon. Dr. Kamen has filed two notices of appeal dated on August 2, 2018 and December 14, 2018, however, the time in which to perfect each appeal has since expired.

[7] Dr. Kamen references his own name "Dr. Stuart Kamen," but this appears to be a typographical error.

as those of Dr. Framm and the hospital are "united in interest" against plaintiff's claim of a failure to detect and treat an infectious process. Moreover, Dr. Kamen posits that it is illogical to oppose plaintiff's request to add Dr. Framm as a defendant in this action as Dr. Framm may be responsible for elements of liability and damages, or for a percentage of potential exposure assigned by a jury.

Additionally, Dr. Kamen notes that pursuant to an *Arons* authorization, his attorney spoke with Dr. Framm, who stated that he was an employee of the "co-defendant/hospital," and that the conversation ended since NYPH and Columbia University Medical Center were existing defendants who were represented separately. Dr. Kamen also points out that Dr. Framm was deposed on March 8, 2018 as a non-party witness "on behalf of [NYPH]," which was memorialized in a court order dated November 15, 2017. Dr. Kamen further highlights that Ms. Devon Lawrence, "a business associate of Columbia Doctors," certified plaintiff's medical records.

In reply, plaintiff argues that counsel for NYPH met with Dr. Framm about this litigation without an *Aron's* authorization, which shows that NYPH has access and control of Dr. Framm. Plaintiff also asserts that she demanded that NYPH provide all policies that cover Dr. Framm as an additional insured for medical malpractice, and that NYPH did not deny that Dr. Framm was an additional insured under its liability policy. Rather, plaintiff points out that NYPH avoided affirmatively admitting or denying whether NYPH's liability policies cover Dr. Framm.

Plaintiff reiterates that she has satisfied the elements of the relation-back doctrine. Namely, plaintiff asserts that allegation of malpractice against Dr. Framm and NYPH are identical in nature (failure to timely diagnose and treat osteomyelitis). Plaintiff also contends that contrary to NYPH's argument, Dr. Framm does not need to be employed by NYPH to be unified in interest. Finally, plaintiff maintains that she learned that Dr. Framm was employed by NYPH, not Dr. Kamen, only after the expiration of the statute of limitations.

DISCUSSION

I. Relation-Back Doctrine

"The relation-back doctrine allows causes of action asserted against a new defendant in an amended complaint to relate back to causes of action previously asserted against a codefendant in the same action for statute of limitations purposes" (*Uddin v. A.T.A. Constr. Corp.*, 164 A.D.3d 1400, 1401 [2d Dept. 2018]; CPLR § 203). To invoke the relation-back doctrine, a plaintiff must

establish that "(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 commencement of the action such that it will not be prejudiced in maintaining its defense on the merits; and (3) the new defendant knew 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 it as well" (*Montalvo v. Madjek, Inc.*, 131 A.D.3d 678, 679 [2d Dept. 2015] citing *Buran v. Coucal*, 87 N.Y.2d 173 [1995]).

Notably, "The 'linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period" (*Rivera v. Wyckoff Heights Med. Ctr.*, 175 A.D.3d 522, 524 [2d Dept. 2019]). "Once a defendant has demonstrated that the statute of limitations has expired, the burden is on the plaintiff to establish the applicability of the relation-back doctrine" (*Montalvo*, 131 A.D.3d at 679, *supra*).

Here, the first prong of the relation-back doctrine is not in dispute as plaintiff's claims arose out of the alleged negligent care and treatment of plaintiff's foot infection and osteomyelitis. Accordingly, the court will address the second and third prongs of the relation-back doctrine *seriatim*.

a. *Unity in Interest*

Plaintiff has failed to establish that Dr. Framm and Columbia Doctors are united in interest with NYPH or NYPH/Columbia University Medical Center such as to invoke the relation-back doctrine. "Defendants are united in interest only when their interest 'in the subject-matter [of the action] is such that [the defendants] stand or fall together and that judgment against one will similarly affect the other'" (*Montalvo,* 131 A.D.3d at 679–80, *supra* [citations omitted]). "Defendants are not united in interest if there is a possibility that the new party could have a different defense than the original party" (*id.*).

Here, there is no showing that NYPH or Columbia University Medical Center exercised any authority or control over Dr. Framm or Columbia Doctors such as to impose vicarious liability onto NYPH or Columbia University Medical Center for the acts of Dr. Framm or Columbia Doctors (*Teer v. Queens Long Island Med. Grp., P.C.*, 303 A.D.2d 488, 490 [2d Dept. 2003]). Indeed, plaintiff's vague reference to "the Hospital" and the "Columbia defendants" do not identify

which defendant(s) Dr. Framm and Columbia Doctors are united in interest with, or how NYPH or Columbia University Medical Center exerted any control over Dr. Framm and Columbia Doctors. To be sure, plaintiff's bare allegations that Dr. Framm was employed by Columbia University "as a whole," and that Dr. Framm stated that he was employed by "the Hospital" when he was contacted pursuant to an *Arons* authorization without any indication as to his role and duties under NYPH/Columbia University Medical Center, are insufficient to show that NYPH or Columbia University Medical Center is vicariously liable for the acts of Dr. Framm and Columbia Doctors (*Teer*, 303 A.D.2d 488 at 490, *supra* ["[T]he evidence does not support a finding of vicarious liability based on the principle of apparent or ostensible agency" "where [there was] no contact between Dr. Hitti and the decedent, or evidence that the Medical Group exercised control over Dr. Hitti's work, such that the decedent would reasonably believe that the Medical Group performed laboratory services"]; *see generally, Xavier v. RY Mgmt. Co.*, 45 A.D.3d 677, 679 [2d Dept. 2007] ["In a negligence action, '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'"]).

Likewise, Dr. Framm's income tax returns identifying the Board of Trustees of Columbia University as his employer, and a letterhead bearing the heading of Columbia University Medical Center do not indicate whether Dr. Framm's care and treatment of plaintiff during the relevant period of time was under the authority, supervision, or control of NYPH/Columbia University Medical Center (*Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 79 [1986] ["Nor is affiliation of a doctor with a hospital or other medical facility, not amounting to employment, alone sufficient to impute the doctor's negligent conduct to the hospital or facility."]). Similarly, the mere fact that Dr. Framm may have provided infectious disease services to "the Hospital" when needed does not establish that Dr. Framm's care and treatment of plaintiff during the relevant period of time was under the control of NYPH/Columbia University Medical Center, or show that Dr. Framm's interests with NYPH/Columbia University Medical Center were united at the time that Dr. Framm treated plaintiff.

Moreover, the court is unpersuaded by plaintiff's argument that NYPH controlled and processed Columbia Doctors' record requests based on her counsel's office's experience in *other*

cases. Such facts are irrelevant to the court's present analysis and consideration, and do not amount to a unity of interest between Dr. Framm and NYPH or Columbia University Medical Center.

Furthermore, Dr. Framm's statement that he had spoken with counsel for the "Columbia defendants" concerning this case does not meet the required showing that Dr. Framm and Columbia Doctors' interests "'in the subject-matter [of the action] is such that [they will] stand or fall together and that judgment against one will similarly affect the other'" (*Montalvo,* 131 A.D.3d at 679–80, *supra*). Indeed, Dr. Framm, who treated plaintiff on only four occasions on Dr. Kamen's behalf, may have different defenses from NYPH/Columbia University Medical Center who treated plaintiff beyond the time that Dr. Framm treated plaintiff (*see, e.g., Royce v. DIG EH Hotels, LLC*, 139 A.D.3d 567, 569 [1st Dept. 2016] [denying leave to amend the complaint pursuant to the relation-back doctrine where "[p]laintiff failed to establish that Imagination Group and defendant are united in interest, since the two entities would have different defenses to the Labor Law § 200 and common-law negligence claims."]; *Montalvo*, 131 A.D.3d at 680, *supra*). Accordingly, plaintiff has failed to establish that Dr. Framm and Columbia Doctors are united in interest with NYPH/Columbia University Medical Center sufficient to invoke the relation-back doctrine.

b. *Mistake*

Even if plaintiff were to establish that Dr. Framm and Columbia Doctors were united in interest with NYPH/Columbia University Medical Center, plaintiff cannot demonstrate that NYPH/Columbia University Medical Center "knew or should have known that, but for a mistake . . . as to the *identity* of the proper parties, the action would have been brought against [them] as well" (*Montalvo*, 131 A.D.3d at 679, *supra* [emphasis added]). Indeed, plaintiff was not under any mistaken belief as to Dr. Framm's identity or his role in her care and treatment. To be sure, plaintiff has treated with Dr. Framm on four separate occasions with respect to her foot infection, and does not deny the fact that she possessed Dr. Kamen's records prior to the commencement of this action, which referenced Dr. Framm's treatment on April 17, 2013 and July 3, 2013 (*see, Cardamone v. Ricotta*, 47 A.D.3d 659, 661 [2d Dept. 2008] ["[D]efendants could reasonably have concluded that the plaintiff's failure to sue them within the applicable periods of limitations meant that there was no intent to sue them at all and that the matter had been concluded as far as they were concerned" where "decedent's chart referenced Dr. Liu as being part of the anesthesia team during the

plaintiff's fatal surgery, and a resident's note mentioned Dr. Vosswinkel as being present when the plaintiff was intubated and brought into the operating room late in the evening of September 19, 2002[,] [and] "there was 'no sworn allegation by plaintiff that [these documents were] not available to plaintiff before the statute[s] of limitations expired'"]; *see also, Royce*, 139 A.D.3d at 569, *supra* [denying leave to amend the complaint pursuant to the relation-back doctrine where plaintiff "was aware of Imagination Group's involvement in this action long before the statute of limitations expired, and yet failed to join it as a defendant within the limitations period"]; *Pappas v. 31-08 Cafe Concerto, Inc.*, 5 A.D.3d 452, 453 [2d Dept. 2004] ["[T]he party suing "intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the [party suing] should not be given a second opportunity to assert that claim after the limitations period has expired"]).

Moreover, as NYPH correctly argues, although Dr. Kamen and Dr. Framm's depositions were held in November of 2017 and March of 2018, respectively, plaintiff did not seek leave to amend the complaint to add Dr. Framm and Columbia Doctors as defendants in this action until August 19, 2019, almost two years after Dr. Kamen's deposition, and more than one year after Dr. Framm's deposition.[8] Plaintiff similarly failed to seek leave to add Dr. Framm as a defendant in this action after Dr. Kamen's third-party action was dismissed against Dr. Framm on November 28, 2018. In that regard, it can hardly be argued that plaintiff was unaware of Dr. Framm's identity, or was under any mistake as to Dr. Framm's identity in this matter (*Davis v. Sanseverino*, 145 A.D.3d 519, 520 [1st Dept. 2016] ["Even if the relation back doctrine did apply, relation back would not be proper because his delay in bringing suit was not due to any "mistake" with respect to defendants' identities, which were known to plaintiff at all relevant times."]).

[8] *See, Garcia v. New York-Presbyterian Hosp.*, 114 A.D.3d 615, 616 [2014] [where "plaintiffs first moved to add two other physicians as party defendants, and then allowed the statute to elapse without bringing suit against him, he could have concluded that there was no intent to sue him 'at all' 'and that the matter has been laid to rest as far as he is concerned'"]; *Goldberg v. Boatmax://, Inc.*, 41 A.D.3d 255, 256 [1st Dept. 2007] ["[P]laintiff knew the identities of the intended defendants and their role in the alleged wrongful disposition of property nearly one year before he sought to add them to the action, and, accordingly, his failure to name them earlier cannot be characterized as a mistake for relation-back purposes"]); *Bryant v. S. Nassau Communities Hosp.*, 59 A.D.3d 655, 656–57 [2d Dept. 2009] ["[A]lthough the appellants were aware of the existence of the lawsuit and that the plaintiff had, two years earlier, sought to join them as party defendants, they reasonably could have concluded that the plaintiff decided that no meritorious claim could be brought against them"]).

Furthermore, plaintiff's mistaken belief as to Dr. Framm's employer does not establish that plaintiff lacked knowledge as to Dr. Framm's identity for purposes of commencing a lawsuit against Dr. Framm (*Soto v. Bronx-Lebanon Hosp. Ctr.*, 93 A.D.2d 481 [1st Dept. 2012] ["No mistake can be shown [where] plaintiff's intentional decision not to initially assert a claim against Dupret, a party know to be potentially liable."]). As such, it was reasonable for Dr. Framm to conclude that plaintiff did not intend to sue him, and that "the matter [had] been laid to rest" (*Crawford v. City of New York*, 129 A.D.3d 554, 555 [1st Dept. 2015] [the relation-back doctrine did not apply where, "[P]laintiff does not deny that he was aware of the proper identity of these defendants four one-half months prior to the expiration of the statute of limitations [and] nevertheless waited another two years to move to amend the complaint, after he had filed a note of issue"]). Accordingly, based on plaintiff's failure to meet the requirements of the relation-back doctrine, plaintiff's motion for leave to amend the complaint to add Dr. Framm and Columbia Doctors as defendants in this action must be denied.

II. Further Deposition of Dr. Framm and Extension to File a Note of Issue

Based on the foregoing, plaintiff's application for a further deposition of Dr. Framm on the issue of unity in interest, and for an extension of time to file a note of issue in order to conduct further discovery with respect to Dr. Framm and Columbia Doctors are denied as moot.

As such, it is hereby

ORDERED that plaintiff's motion for leave to serve and file an amended complaint to add STUART FRAMM, M.D., COLUMBIA DOCTORS, and COLUMBIA UNIVERSITY as defendants in this action pursuant to the relation-back doctrine is DENIED; and it is further

ORDERED that plaintiff's request that the proposed supplemental summons and amended complaint annexed to her moving papers be deemed served on STUART FRAMM, M.D. and COLUMBIA DOCTORS is DENIED; and it is further

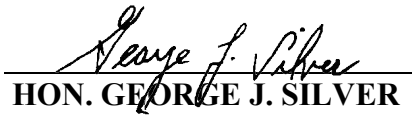
ORDERED that plaintiff's application for a further deposition of STUART FRAMM, M.D. is DENIED as moot; and it is further

ORDERED that plaintiff's application that the court extend her time to file a note of issue is DENIED as moot;[9] and it is further

ORDERED that the remaining parties are directed to appear for a virtual or in-person conference before the court on July 27, 2020 at 11:00 A.M.

This constitutes the decision and order of the court.

Dated: July 1, 2020



HON. GEORGE J. SILVER

[9] Plaintiff shall not file a note of issue until all discovery is certified as complete via a stipulation signed by all parties.