Armour v Saxon
2020 NY Slip Op 32244(U)
June 13, 2020
Supreme Court, Nassau County
Docket Number: 600972/16
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

LINDA ARMOUR,

Plaintiff,

- against -

PENNY SAXON, M.D., ZWANGER-PESIRI RADIOLOGY, SOUTH SHORE WOMEN'S MEDICAL ASSOCIATES, LLC and JOAN S. HASELKORN, M.D.,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 600972/16
Motion Seq. Nos.: 01, 02
Motion Dates: 04/10/17
04/10/17

The following papers have been read on these motions:

	Papers Numbered
Order to Show Cause (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01) and Exhibits	3
Reply Affirmation in Support of Cross-Motion (Seq. No. 02)	4

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

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3215, for an order granting a default judgment against defendant Penny Saxon, M.D. ("Dr. Saxon"); or, in the alternative, moves, pursuant to CPLR § 306-b, for an order granting an extension of time to serve the Supplemental Summons and Verified Complaint in this action upon defendant Dr. Saxon.

Defendant Dr. Saxon opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3211(a)(5), for an order dismissing plaintiff's Verified Complaint as against her due to plaintiff's failure to bring a cause of action against her within the time set forth in the Statute of

Limitations pursuant to CPLR § 214-a. Plaintiff opposes the cross-motion.

This is an action for alleged medical malpractice. In support of the motion (Seq. No. 01), counsel for plaintiff submits that, "[t]his firm was retained on February 13, 2017 and a Consent to Change Attorney was filed with this Court on March 13, 2017.... Upon review of Plaintiff's file, your affirmant observed that Plaintiff's prior counsel was in receipt of Answers from all Defendants but Defendant SAXON. Upon information and belief, Plaintiff's prior counsel had served Defendant SAXON at her place of employment on or about April 6, 2016... To date it is Plaintiff's prior counsel's understanding that Defendant SAXON has been properly served. As such, Defendant SAXON is in default. If this Court determines that Defendant SAXON was not properly served or the Affidavit is defective, Plaintiff requests this Court to grant Plaintiff an extension of time to serve the Supplemental Summons and Complaint in this action on Defendant SAXON, pursuant to CPLR § 306-b." *See* Plaintiff's Affirmation in Support Exhibits A and B.

Plaintiff alleges proof of jurisdiction by annexing a copy of the Affidavit of Service of the Supplemental Summons and Verified Complaint upon defendant Dr. Saxon. *See* Plaintiff's Affirmation in Support Exhibit B. Plaintiff argues defendant Dr. Saxon's alleged default in the Affirmation of Counsel. Plaintiff submits the Verified Complaint as proof of her claims. *See* Plaintiff's Affirmation in Support Exhibit D; CPLR § 3215(f); *Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (1st Dept. 1987).

Alternatively, counsel for plaintiff contends, that, if the Court finds that defendant Dr. Saxon was not served with the Supplemental Summons and Verified Complaint, or that the Affidavit of Service was defective, the Court should grant plaintiff an extension of time for service of same upon defendant Dr. Saxon. Counsel for plaintiff states that, "[h]ere, there is good cause to extend Plaintiff's time to serve the Defendant SAXON. Defendant SAXON was served

at her place of employment within 120 days of purchasing the Index Number and, it was prior counsel's understanding that Defendant SAXON was properly served process and had notice of the lawsuit.... If this Court determines that defendant SAXON was not properly served or service was defective, SAXON has not been prejudiced by the delay. This action is still in its infancy, and this motion is being made less than a year following the filing of the Complaint and service of same.... In the instant matter, the statute of limitations has expired. If this Court determines that Defendant SAXON was not properly served and denies an extension of time to serve Defendant SAXON, it will be fatal to Plaintiff's claims against that Defendant. Plaintiff's cause of action against Defendant SAXON for medical malpractice is meritorious. The claim involves the failure to diagnosis (*sic*) and/or misdiagnosis of breast cancer. Defendant SAXON was the radiologist that read the diagnostic testing of the breast and failed to diagnose a mass in the breast. Plaintiff was subsequently diagnosed more than a year later with stage four breast cancer. Further, it is submitted that Defendant SAXON will not be prejudiced by this Court extending Plaintiff's time to serve her. The statute of limitations having expired does not itself support a finding of prejudice since prejudice involves the impairment of a defendant's ability to defend on the merits, not the loss of a procedural or technical advantage. [citation omitted]. Accordingly, if this Court determines that the Defendant was not properly served or service is defective, Plaintiff should be granted an extension of time to serve Defendant SAXON for good cause shown or in the interest of justice pursuant to CPLR § 306-b."

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for defendant Dr. Saxon argues, in pertinent part, that, "[p]laintiff's Verified Complaint alleges medical malpractice on the part of DR. SAXON during the time period of May 28, 2011 through November 23, 2013.... Therefore the statute of limitations for any medical malpractice claims herein expired as of May 23, 2016. As stated above, plaintiff's former counsel

served process upon Mt. Sinai Medical Center, 1468 Madison Avenue, New York, New York 10029 on April 6, 2016. In the Affidavit of Service, plaintiff's former counsel claimed this address to be DR. SAXON's 'place of business.'... In her affirmation, DR. SAXON denies having worked at Mt. Sinai in April of 2016. In fact, DR. SAXON indicates that her only affiliation with Mt. Sinai was during the time of her fellowship, which ended in 2012, almost 4 years before plaintiff's purported service of process upon that address.... Since this was clearly not DR. SAXON's place of business on April 6, 2016, plaintiff's attempt at service of process upon DR. SAXON on that date was defective. During the time period subsequent to plaintiff's defective service of process upon DR. SAXON, plaintiff made no attempt whatsoever to ensure proper service upon DR. SAXON. From April 6, 2016 to date, plaintiff's first and only contact with DR. SAXON was the recent Order to Show Cause seeking a default judgment against DR. SAXON. When the record is clear that the statute of limitations has expired, 'the burden shift[s] to the plaintiff to raise a question of fact as to whether the statute of limitation was tolled or was otherwise inapplicable, or whether he actually commenced the action within the applicable limitations period' [citations omitted]. Plaintiff has in no way satisfied this burden. In fact, in paragraph 18 the Affirmation in Support of the Order to Show Cause, plaintiff's counsel admits that the statute of limitations has expired in this action..... Based upon the foregoing, plaintiff has failed to bring a cause of action against DR. SAXON within the time limit set forth in the statute of limitations pursuant to CPLR 214-a. Therefore, the Court does not have jurisdiction over DR. SAXON. It is respectfully requested that plaintiff's complaint against Dr. SAXON be dismissed in its entirety." *See* Defendant Dr. Saxon's Affirmation in Opposition Exhibit F.

With respect to plaintiff's alternative request for leave to extend the time of service, counsel for defendant Dr. Saxon argues that, "[i]t is submitted that plaintiff has failed to establish an entitlement to an extension for 'good cause' or 'in the interest of justice.' The record is clear, as it is extensively set forth in the above Affirmation, that plaintiff has completely failed to demonstrate she exercised reasonably diligent efforts to serve process upon DR. SAXON.

Plaintiff made only one attempt to serve DR. SAXON in this matter, at a place with which DR. SAXON had not been affiliated for almost 4 years. After that one attempt at service, plaintiff failed to contact DR. SAXON again until the institution of the instant Order to Show Cause. Plaintiff's counsel also made no attempt to contact this office to discuss the matter and took no efforts to prosecute this action for almost one year. Based upon the foregoing, plaintiff has failed to demonstrate that she is entitled to leave, based upon 'good cause,' to extend the time for service of a Summons and Complaint pursuant to CPLR 306-b. Plaintiff has also failed to establish her entitlement to an extension of time for service of the summons and complaint in the 'interest of justice.' In deciding whether to grant an extension of time to serve the summons and complaint in the 'interest of justice,' the court may consider 'diligence, *or lack thereof*, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiff's request for the extension of time, and prejudice to the defendant.' (emphasis added) [citations omitted]. As stated above, the records is clearly devoid of any evidence of diligence on the part of plaintiff to effectuate proper service of process on DR. SAXON. As far as the statute of limitations in this matter, the plaintiff has conceded that the statue of limitations has expired.... In addition, plaintiff has provided no evidence whatsoever of a meritorious claim. In plaintiff's affirmation in support of the Order to Show Cause, counsel asserts that 'Plaintiff's cause of action against Defendant DR. SAXON for medical malpractice is meritorious. The claim involves that failure to diagnosis and/or misdiagnosis of breast cancer. Defendant DR. SAXON was the radiologist that read the diagnostic testing of the breast and failed to diagnose a mass in the breast.' ... An attorney's affirmation is, in no way, evidence of a meritorious cause of action. Plaintiff does not offer any testimony from medical experts and/or medical findings to support a claim of a meritorious cause of action. Thus, plaintiff has failed to establish the existence of a meritorious cause of action. [citations omitted]. As discussed above, the statute of limitations in this matter expired approximately 11 months ago. Plaintiff made no

attempt to cure the defect in service of process on DR. SAXON. Instead of realizing a defect in service and attempting to re-serve DR. SAXON in a timely manner, plaintiff waited almost a year and moved for a default judgment against DR. SAXON. It was only at this time that plaintiff sought leave for an extension of time to serve the summons and complaint on DR. SAXON. The above-referenced delays on the part of plaintiff serve as prejudice suffered by DR. SAXON. This passage of time serves to wear away at DR. SAXON's ability to recall pertinent details of the case, as well as the existence of any records which may be pertinent to the case. Therefore, based on the foregoing, plaintiff has failed to show entitlement to an extension of time to serve the summons and complaint in this matter based upon the 'interest of justice.'"

In opposition to the cross-motion (Seq. No. 02) and in further support of the motion (Seq. No. 01), counsel for plaintiff submits that, "[p]laintiff's prior counsel informed our office that service of the Supplemental Summons and Verified Complaint on Defendant SAXON was first attempted at Zwanger-Pesiri Radiology but was rejected, and a second attempt was subsequently made at what was believed to be Defendant Saxon's place of employment."

Counsel for plaintiff adds that, "[i]n the event this Court grants Plaintiff's application, there is no demonstrable prejudice to Defendant SAXON. Several factors to this point include that (1) Defendant SAXON's attorneys had notice of this action from its inception resulting in no actual delay in notice, (2) in Defendant SAXON's affirmation she does not deny ever having knowledge of a lawsuit against her nor does she say that she does not remember details of the case or that the additional time will affect her ability to recall events, (3) this case is still in its infancy and, the Plaintiff's Order to Show Cause was filed less than one year following the filing of the Complaint and service of same, and (4) Defendant SAXON is a radiologist who interpreted mammograms and sonograms of the Plaintiff LINDA ARMOUR and, all of those radiological studies and reports are available for review. There can be no reasonable claim that the delay has prejudiced the Defendant. Additionally, upon information and belief, radiologists review films, determine what is present in those films, and subsequently draft a report as to their

findings. They tend to have little to no direct contact with the patients. As in this case, all of the medical records pertinent to this case are in existence with nothing hindering Defendant SAXON's access to them, as well as nothing affecting her ability to review the films and her own reports."

In further support of the opposition, counsel for plaintiff submits the Affidavit of Jordan Haber, M.D., FACR, a board certified radiologist. *See* Plaintiff's Affirmation in Opposition and in Further Support Exhibit E.

Counsel for plaintiff contends that, "[t]he affidavit of Dr. Haber ... clearly shows that there is a meritorious case against Defendant SAXON. There is no reasonable claim of prejudice by the Defendant. Discovery of this action is at an early stage and no depositions have been held to date. Counsel for SAXON also represents Defendant ZWANGER-PESIRI RADIOLOGY who were (*sic*) properly served and filed an answer. This instant application to this Court has been made within one year of the service of process on the Defendant and within a few weeks of Plaintiff's present counsel's retention."

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired." *Singh v. New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.)*, 107 A.D.3d 780, 970 N.Y.S.2d 33 (2d Dept. 2013); *Macaluso v. Del Col*, 95 A.D.3d 959, 944 N.Y.S.2d 589 (2d Dept. 2012); *Romanelli v. Disilvio*, 76 A.D.3d 553, 907 N.Y.S.2d 258 (2d Dept. 2010). Thereafter, the burden "shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period." *Singh v. New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.), supra* at 781. *See also Benjamin v. Keyspan Corp.*, 104 A.D.3d 891, 963 N.Y.S.2d 128 (2d Dept. 2013).

Notably, "[w]here a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." *See Lang v. Wycoff Heights Medical Center*, 55 A.D.3d 793, 866 N.Y.S.2d 313 (2d Dept. 2008); *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dept. 2007); *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974); *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011); *Marist College v. Brady*, 84 A.D.3d 1322, 924 N.Y.S.2d 529 (2d Dept. 2011); *Alden Personnel, Inc. v. David*, 38 A.D.3d 697, 833 N.Y.S.2d 136 (2d Dept. 2007). Nevertheless "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Cornely v. Dynamic HVAC Supply, LLC*, *supra* at 987. *See also Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dept. 2012); *Armouth Intern., Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438 (2d Dept. 2000).

The Court finds that the evidence presented in the instant motion shows that defendant Dr. Saxon was not properly served with the Supplemental Summons and Verified Complaint since the location where service was allegedly made upon her was not her place of business, nor had it been for a length of time.

Consequently, the branch of plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3215, for an order granting a default judgment against defendant Dr. Saxon, is hereby **DENIED**.

However, with respect to the branch of plaintiff's motion (Seq. No. 01), pursuant to CPLR § 306-b, for an order granting an extension of time to serve the Supplemental Summons and Verified Complaint in this action, and defendant Dr. Saxon's cross-motion (Seq. No. 02), pursuant to CPLR § 3211(a)(5), for an order dismissing plaintiff's Verified Complaint as against her due to plaintiff's failure to bring a cause of action against her within the time set forth in the Statute of Limitations pursuant to CPLR § 214-a, the Court finds that the "relation back doctrine" applies.

The relation back doctrine allows claims asserted against a new defendant to relate back to claims previously asserted. *See Cardamone v. Ricotta*, 47 A.D.3d 659, 850 N.Y.S.2d 511 (2d Dept. 2008); *Nani v. Gould*, 39 A.D.3d 508, 833 N.Y.S.2d 198 (2d Dept. 2007). CPLR § 203(f) is the CPLR's principal "relation back" statute. It provides that for limitations' purposes a claim in an amended pleading will be deemed to relate back to the time the claim in the original pleading was interposed as long as the original one gives notice of the transaction or occurrence out of which the claim in the amended pleading arises.

For the rule allowing relation back to date of service or filing of the original complaint to be operative in an action in which a party is added beyond the applicable limitations period, a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the commencement of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party 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 that party as well. *See Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405 (1995); *Mondello v. New York Blood Center-Greater New York Blood Program*, 80 N.Y.2d 219, 590 N.Y.S.2d 19 (1992); *Cardamone v. Ricotta*, *supra*; *Nani v. Gould*, *supra*.

As a general matter, unity of interest, for purposes of this statute governing the relation back of the limitations period, will be found where there is a relationship between the parties giving rise to the vicarious liability of one for the conduct of the other. *See Mondello v. New York Blood Center-Greater New York Blood Program*, *supra*.

An employment relationship does create vicarious liability under the doctrine of *respondeat superior*. In *Cohen v. Winter*, 144 Misc.2d 503, 544 N.Y.S.2d 921 (Sup. Ct N.Y. County 1989), a medical malpractice action, the defendant radiologist was held to be "united in interest" with the defendant clinic where he worked, such that service on the clinic prior to the

expiration of the statute of limitations was sufficient to put the radiologist on constructive notice of the claims. As the employer, the defendant clinic was vicariously liable for the tort of its employee radiologist.

In *Roseman v. Baranowsli*, 120 A.D.3d 482, 990 N.Y.S.2d 621 (2d Dept. 2014), the plaintiff filed medical malpractice actions against physicians and a professional corporation. The Court ruled that the trial court erred in denying plaintiff's motion of adding another physician as defendant since plaintiff's claims against the said physician related back to his claims against previously named defendants, where all claims arose out of conduct of physicians employed by the professional corporation, including the new physician, in allegedly discharging the patient from the hospital prematurely. The defendants were all united in interest, and the patient's medical records clearly referenced the new defendant as the physician who discharged the patient. *Id.*

In the instant matter, defendant Dr. Saxon has demonstrated that the statute of limitations has expired against her. However, the Court finds that the three prong requirement to invoke the relation back statute has satisfied. Defendant Dr. Saxon was the radiologist employed by defendant Zwanger-Pesiri Radiology ('Zwanger-Pesiri") who read the diagnostic testing of plaintiff's breast and allegedly failed to diagnose a mass in the breast. Defendant Dr. Saxon is represented by counsel who also represent defendant Zwanger-Pesiri, who was properly and timely served in this matter. Since defendant Dr. Saxon was an employee of defendant Zwanger-Pesiri said defendants are "united in interest." The Court also finds that defendant Dr. Saxon should have known that, but for a mistake by prior counsel for plaintiff as to plaintiff's correct current place of business, the action would have been timely brought against her as well. *See Buran v. Coupal, supra.*

Furthermore, the Court would additionally note that justice disfavors defaults and prefers that issues be resolved on the merits. *See Ahmad v. Aniolowisk*, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2d Dept. 2006); *Moore v. Day*, 55 A.D.3d 803, 866 N.Y.S.2d 303 (2d Dept. 2008); *Toll*

Brothers, Inc. v. Dorsch, 91 A.D.3d 755, 936 N.Y.S.2d 576 (2d Dept. 2012); *Eichen v. George B. Jr. Realty, Inc.*, 154 A.D.2d 428, 547 N.Y.S.2d 236 (2d Dept. 1989).

Accordingly, the branch of plaintiff's motion (Seq. No. 01), pursuant to CPLR § 306-b, for an order granting an extension of time to serve the Supplemental Summons and Verified Complaint in this action upon defendant Dr. Saxon, is hereby **GRANTED**. And it is further

ORDERED that plaintiff shall serve the Supplemental Summons and Verified Complaint upon defendant Dr. Saxon **on or before June 28, 2017**.

Defendant Dr. Saxon's cross-motion (Seq. No. 02), pursuant to CPLR § 3211(a)(5), for an order dismissing plaintiff's Verified Complaint as against her due to plaintiff's failure to bring a cause of action against her within the time set forth in the Statute of Limitations pursuant to CPLR § 214-a, is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on July 31, 2017, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED

JUN 14 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

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

Dated: Mineola, New York
June 13, 2017