SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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SAMANTHA KAHAN, as Administratrix of the Estate of VALERIE KAHAN, Deceased, SAMANTHA KAHAN, Individually, and the Estate of PAUL KAHAN, Deceased, by Administratrix SAMANTHA KAHAN,

Plaintiffs,

-against-

CAMPBELL HALL, LLC, CAMPBELL HALL HEALTH CARE CENTER, INC., CAMPBELL HALL REHABILITATION CENTER, INC., GO GREEN EXPRESS HOME SERVICES, GO GREEN EXPRESS INC. and WARRINER SMITH INC.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF006363-2017

DECISION AND ORDER

Motion Date: November 17, 2020

The following papers numbered 1 to 9 were read and considered on (1) a motion by the Defendant Warriner Smith Inc., pursuant to CPLR §§3211, to dismiss the Plaintiffs' wrongful death causes of action as against it as time barred; and (2) a motion by the Defendants Go Green Express Home Services and Go Green Express Inc., pursuant to CPLR §§3211, to dismiss the Plaintiffs' wrongful death causes of action as against them as time barred.

Notice of Motion- Salvi Affirmation- Exhibits A-G	1-3
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Affirmation in Support- Salvi	7
Affirmation in Opposition- Cambareri	8
Affirmation in Reply- Salvi	9

Upon the foregoing papers, it is hereby,

ORDERED, that the motions are granted.

Introduction

The Plaintiffs commenced this action to recover damages for personal injuries and

wrongful death. The Plaintiffs allege that the decedent, Valerie Kahan, sustained personal injuries on October 31, 2016, while a resident of Campbell Hall Nursing Home located in Campbell Hall, Orange County, New York, which resulted in her death on December 21, 2016. Specifically, that a hot water pipe over the decedent's bed burst, causing severe burns.

Factual and Procedural Background

The Defendant Warriner Smith, Inc. (hereinafter "Warriner") moves to dismiss the Plaintiffs' wrongful death causes of action as against it as time-barred.

In support of the motion, Warriner submits an affirmation from counsel, Debra Salvi.

In relevant part, Salvi notes that the decedent died on December 21, 2016. Thus, she asserts, the two year statute of limitation on a wrongful death cause of action expired on December 21, 2018.

Here, she notes, although the original Verified Complaint was filed on August 11, 2017, it did not name Warriner as a Defendant. Rather, Warriner was first named as a Defendant in an Amended Verified Complaint filed on July 23, 2019, which is more than seven (7) months after the statute of limitations on a wrongful death cause of action expired. Thus, she argues, the wrongful death claims as against Warriner are time barred and must be dismissed.

The Defendants Go Green Express Home Services and Go Green Express Inc. (hereinafter referred to collectively as the "Go Green Defendants") also move to dismiss the Plaintiffs' wrongful death claims as against them as time barred.

The Go Green Defendant note that they too were first named as Defendants in the Amended Verified Complaint filed on July 23, 2019.

In opposition to the motions, the Plaintiffs submit an affirmation from counsel, Mark

Cambareri.

In relevant part, Cambareri asserts that Warriner and the Go Green Defendants (hereinafter referred to collectively as the "Moving Defendants") were added to the case after other Defendants in the case "suggested that the Moving Defendants were negligent in their work at the facility prior to the accident." Cambareri avers:

> "Subsequently, the Moving Defendants provided responses to discovery demands. These were chiefly a proposal and two invoices. These were not lengthy construction contracts. The scope of work did not express the exact locations of the work undertaken to someone that did not know the geography of the facility. To my knowledge the responses did not provide any names of witnesses. My review of the documents made me believe that the relationship was contractual and would provide a basis for alleging contribution but did not arise to vicarious liability. Therefore, the Plaintiffs cannot demonstrate the Moving Defendants were united in interest with the non-moving Defendants.
>
> Notably, the non-moving defendants have not presented any opposition.
>
> Whereupon, I invite the Court to search the record."

In reply, Warriner submits an affirmation from counsel, Debra Salvi.

Salvi asserts that the Plaintiffs, without expressly identifying it as such, attempt to rely on the "relation back" doctrine to save their pleading. However, she argues, they failed to demonstrate any of the elements of the same. Indeed, she notes, the Plaintiffs admit that they "cannot demonstrate the Moving Defendants were united in interest with the non-moving Defendants."

Moreover, she asserts, Warriner interposed cross-claims against other Defendants, who are represented by separate attorneys.

At a minimum, she argues, the Court should not be burdened with the task of searching the record to try to establish the elements of the relation back doctrine when they don't exist.

In reply, the Go Green Defendants argue that the Plaintiffs failed to demonstrate that the relationship back doctrine is applicable, and that the Court should not be tasked with searching the record for evidence to the contrary.

Discussion/Legal Analysis

In general, the statute of limitation on a wrongful death cause of action is two years from the date of death. *EPTL § 5-4.1.*

Here, the Plaintiffs do not dispute that a wrongful death claim was not timely interposed as against Warriner or the Go Green Defendants within this two year limit.

Rather, as noted by the Moving Defendants, the Plaintiffs attempt to rely on the "relation back" doctrine, although they do not expressly name it as such.

The relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where the two defendants are "united in interest." *Buran v. Coupal*, 87 N.Y.2d 173 [1995]; *Roseman v. Baranowski*, 120 A.D.3d 482 [2nd Dept. 2014].

In order for the doctrine to apply, the 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 institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have know that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well. *Buran v. Coupal*, 87 N.Y.2d 173 [1995]; *Roseman v. Baranowski*, 120 A.D.3d

482 [2nd Dept. 2014].

Defendants are united in interest with one another only when their relationship with each other is such that 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. *LeBlanc v. Skinner*, 103 A.D.3d 202 [2nd Dept. 2012]. The question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff.

Defendants are not united in interest if there is the mere possibility that the new party could have a different defense than the original party. *LeBlanc v. Skinner*, 103 A.D.3d 202 [2nd Dept. 2012]. Accordingly, joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable. However, joint tortfeasors will be deemed to be united in interest where one is vicariously liable for the other, such as where one tortfeasor is the agent of the other. *LeBlanc v. Skinner*, 103 A.D.3d 202 [2nd Dept. 2012].

Accordingly, the parties are united in interest where there is a jural or legal relationship giving rise to potential vicarious liability. *LeBlanc v. Skinner*, 103 A.D.3d 202 [2nd Dept. 2012]. "Underlying the doctrine of vicarious liability ... is the notion of control. The person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences." *Kavanaugh v. Nussbaum*, 71 N.Y.2d 535, 546; *LeBlanc v. Skinner*, 103 A.D.3d 202 [2nd Dept. 2012]. Agency is a jural relationship between a principal and an agent, which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. *LeBlanc v. Skinner*,

103 A.D.3d 202 [2nd Dept. 2012].

The third prong of the test *supra* focuses, *inter alia*, on whether the defendant to be added could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all, and that the matter has been laid to rest as far as he or she is concerned. *Buran v. Coupal*, 87 N.Y.2d 173 [1995]; *Shapiro v. Good Samaritan Regional Hosp. Medical Center*, 42 A.D.3d 443 [2nd Dept. 2007].

The "linchpin" of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period. *Roseman v. Baranowski*, 120 A.D.3d 482 [2nd Dept. 2014]. The burden of the demonstrating the applicability of the doctrine is on the Plaintiff. *Alvarado v. Beth Israel Medical Center*, 60 A.D.3d 981 [2nd Dept. 2009].

Here, the Plaintiffs did not meet their burden of demonstrating that the relation back doctrine was applicable. Indeed, they appear to admit that they can't, but nonetheless invite the Court to search the record and perform its own analysis in their place and stead. However, the Court notes, although the case has been pending for over three years, and the Moving Defendants have been parties for a year and a half, the Plaintiffs do not even provide the most basic facts that might suggest the applicability of the doctrine. Rather, they merely make a vague suggestion that the Moving Defendants might have performed some contract work somewhere in the nursing home. Nothing about such a scenario, on its face, would suggest that the Moving Defendants are united in interest with the nursing home defendants.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motions are granted and the Plaintiffs' wrongful death causes of action are dismissed insofar as asserted against the Defendants Warriner Smith Inc., Go Green

Express Home Services and Go Green Express Inc.; and it is further,

ORDERED, that the parties, by counsel, are directed to appear for a conference, on Tuesday, April 20, 2021, at 1:30 p.m., at the Orange County Supreme Court House, Courtroom #3, 285 Main Street, Goshen, New York, if the Courts are open to the public at that time. If not, a virtual conference will be scheduled on said date, at a time to be determined by the Court.

The foregoing constitutes the decision and order of the court.

Dated: January 29 , 2021
Goshen, New York

ENTER

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