

Lissak v Cerabona

2002 NY Slip Op 30027(U)

January 29, 2002

Supreme Court, New York County

Docket Number: 0115763/5763

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. STANLEY L. SKLAR PART 29

Justice

Lissale et ux
Cerabona et al

INDEX NO. 115763/97
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO. 003

The following papers, numbered to ___ were read on this motion to/for _____

Notice of Motion Order to Show Cause Affidavits Exhibit
Answering Affidavits Exhibits
Reply Affidavits

PAPERS NUMBERED

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion

SCANNED
FEB 06 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 1/29/02
J.S.C.



Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

-----X
 LISSAK, et ux

Index No. 115763/97

-against-

CERABONA, et al
 -----X

Sklar, J.:

Plaintiffs in this medical malpractice action which was commenced against St. Vincent's Hospital and Drs. Franco Cerabona and Sunil Trasi move by affirmation dated November 1, 2001 for an order permitting plaintiffs to add Orthopedic Surgical Specialists of Manhattan, P.C., which is alleged to be united in interest with Dr. Cerabona, and St. Vincent's Radiology Group, P.C., Dr. Trasi's employer, as defendants in this action and deeming the proposed amended complaint and pleadings served. Plaintiffs maintain that the three-pronged test of Brock v Bua, [83 AD2d 61 (2d Dept), 1981] as modified by Buran v Coupal, [87 NY2d 173 (1995)] applies to permit the addition of these two entities as defendants and to render any action commenced against them timely through the relation-back doctrine.

According to the proposed amended complaint this action arises out of treatment rendered by Dr. Trasi on or about February 12, 1996 and out of a course of treatment rendered by Dr. Cerabona between approximately February through March 1996.

The court's computer indicates that this action was commenced on September 2, 1997. Dr. Trasi was deposed on December 22, 1998 and testified that he treated the plaintiff as an employee of St. Vincent's Radiology Group, P.C. According to Dr. Trasi's counsel (See:

Santoro aff ¶ 13) plaintiff's counsel has had "for the duration of this litigation" a May 20, 1996 letter from Dr. Cerabona which is headed "Orthopedic Surgical Specialists of Manhattan", and which forms the basis for plaintiffs' request to add Orthopedic Surgical Specialists of Manhattan, P.C. as a defendant (See: aff in support of motion ¶ 23). Neither in any reply papers nor at oral argument on January 3, 2002 did plaintiffs' counsel dispute that he was aware of the existence of Orthopedic Surgical Specialists of Manhattan for the duration of the litigation. Plaintiffs' counsel concedes that during discovery he never questioned Dr. Cerabona about his employment status. See: aff in support of motion ¶ 23

The May 20, 1996 letter did not indicate that Orthopedic Surgical Specialists of Manhattan was a professional corporation. According to Dr. Cerabona's counsel who opposes this motion, although efforts had been made to ascertain the legal relationship between Dr. Cerabona and the professional corporation, her firm has not yet been able to confirm the nature of that relationship. Moreover counsel notes that plaintiffs have offered no proof confirming the relationship between the two or showing that any relevant relationship existed during the relevant time period. Thus Dr. Cerabona's counsel, who also represents St. Vincent's Hospital, requests that the motion be denied without prejudice to renew "upon confirmation of said outstanding information".

Plaintiffs, as discussed in my prior order of March 16, 2001, filed a note of issue on July 24, 2000 certifying that this case was trial ready. Several weeks before the scheduled trial date plaintiffs served a "further supplemental" bill of particulars without leave of court adding for the first time a claim for loss of earnings in the amount of eighty million dollars. I struck that pleading in my March 16, 2001 order but in a decision dated July 26, 2001 granted plaintiffs

leave to amend their pleadings to add such a claim, struck the note of issue, directed expeditious discovery on that issue, and scheduled the case for a conference to ensure that discovery was proceeding apace. At that conference a deadline of February 15, 2002 was set for filing a new note of issue.

Plaintiffs' counsel concedes that he has known of the existence of the two proposed additional defendants "for some time" but has currently decided, more than four years after this action was commenced, that he would like to add these two parties because now that plaintiffs are asserting a loss of earnings claim, he wants to make sure that there are more parties from which to collect any judgment.

The motion is in the exercise of my discretion denied. First I note that it is not entirely clear whether Dr. Cerabona and Orthopedic Surgical Specialists of Manhattan, P.C. are united in interest. The letter on which plaintiffs rely does not indicate that the proposed additional defendant was a professional corporation at the time in issue, and plaintiffs offer no evidence (e.g. a certificate of incorporation) indicating that the alleged corporation was in existence at the relevant time. Nor did plaintiff seek to inquire at Dr. Cerabona's deposition whether he was acting as an employee of any individual or entity at the time in issue. Second, while plaintiffs' counsel suggests that no new claims are being interposed, other than the alleged vicarious liability of the two entities for the physician defendants (See: aff in support of motion ¶17 which asserts that the claims arise out of "the exact same conduct"), the proposed amended pleading is broader and could encompass other claims. Third, this case is old. It was taken off the calendar for a limited purpose and expeditious discovery was ordered. If plaintiffs' application were to be granted the case would be further delayed by the additional discovery required. See: *Buran*,

supra at 181 (“ a court would be justified in denying a plaintiff the benefit of the doctrine in order to prevent delay or disruption in the normal course of the lawsuit.”) . See also: *Loewy v Stuart Drug & Surgical Supply, Inc*, 1999 WL76939 (SDNY), at p 8, adhered to on reconsideration 1999 WL 216656

Fourth, plaintiffs’ failure to previously add the two proposed additional defendants was not due to a mistake but was concededly a tactical decision made by plaintiffs’ counsel who was admittedly well aware of the existence of these two defendants for years. See: *Buran*, supra at 181; *Ramos v Cilluffo*, 276 AD2d 475, 476 (2d Dept, 2000); *Brener & Lewis Mft Co v Estate of Crespi*, 268 AD2d 243 (1st Dept, 2000); *Lavigna v Capital Cities, ABC, Inc.*, 257 AD2d 470 (1st Dept, 1999); *Loewy*, supra at 7-8; *Leylegian v Federal Paper Board Co., Inc*, 251 AD2d 60, 61 (1st Dept, 1998); *Greene v Davidson*, 210 AD2d 108 (1st Dept, 1994); *A to Z Associates v Cooper*, 215 AD2d 161 (1st Dept, 1995) With respect to *Orthopedic Surgical Specialists of Manhattan, P.C.*, assuming arguendo that it was united in interest with *Dr. Cerabona*, it is undisputed that plaintiffs’ counsel was aware of the letter upon which this motion was based for the duration of this litigation, and thus could have added that professional corporation prior to the expiration of the Statute of Limitations. Therefore plaintiffs’ counsel attempt to show that he was thinking of suing *Dr. Cerabona’s* alleged employer by searching half a year before this action was commenced for an entity filed with the name “*Franco P. Cerabona, M.D.*” is unavailing. I further note that *Dr. Cerabona* would not necessarily have any ownership interest in any entity that might have employed him. Further that plaintiffs’ counsel had no interest in adding any entity which employed *Dr. Cerabona* is demonstrated by counsel’s admitted failure to ask him during discovery about his employment status. With respect to *St. Vincent’s Radiology Group*,

P.C., Dr. Trasi's employer, it is clear that plaintiffs decision not to sue Dr. Trasi's employer was not due to a mistake. First plaintiffs' counsel does not indicate that any search was made for an entity bearing Dr. Trasi's name, and once plaintiffs' counsel learned of Dr. Trasi's alleged actual employer no attempt was made to add it for almost three years, and then only because of belief that there would be insufficient insurance coverage in the event of a plaintiffs' verdict. One of the purposes of the Statute of Limitations is to "put stale claims to repose, thereby freeing a potential defendant from the fear that [its] involvement in the events of the distant past may able the subject of litigation against [it]". Brock, supra at 70 Under the circumstances here where the events in issue occurred close to six years ago, and where the plaintiff was well aware of the existence of the proposed additional defendants for years and for tactical reasons decided not to add them earlier I decline in the exercise of my discretion to grant the plaintiffs' motion because to do so would undermine this goal.

Accordingly the motion is denied. Settle order.

Dated: 1/29/02



J.S.C.