Santos v St. Vincent Hosp. & Med. Ctr. of N.Y.
2002 NY Slip Op 30147(U)
December 19, 2002
Sup Ct, NY County
Docket Number: 123543101
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 6
Justice

Santos, Daudi

INDEX NO. 123543/01

MOTION DATE 10/8/02

- v -

MOTION SEQ. NO. 001

St. Vincent's Hosp

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

	PAPERS NUMBERED
Amended Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits letter dd October 8, 2002	4, 5, 6
Replying Affidavits	

SCANNED JAN 10 2003

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12-19-02 E. Bransten J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

EILEEN BRANSTEN J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART *6*

.... X

DAUDI SANTOS, deceased infant, and JOSE SANTOS and DEA ALVES-SANTOS, Individually and as Father, Mother and Natural Guardians of Daudi Santos, an Infant under 14 years of age,

Index No. 123543101
Motion Dates: 10/8/02
Motion Seq. No.: 001

-against-

ST. VINCENT'S HOSPITAL and MEDICAL CENTER OF NEW YORK, DR. RITA FISCHER, DR. PO CHING FONG, ELIZABETH SETON CHILD BEARING CENTER and KATHERINE CORONA, "JANE DOE" and "MARY DOE",

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

In this medical malpractice and wrongful death action, defendants St. Vincent's Hospital and Medical Center of New York (the Hospital), Dr. Rita Fischer and Dr. Po Ching Fong (collectively, the Hospital defendants) move, pursuant to CPLR 3211 (a) (3)[1], CPLR 3212 and EPTL 5-4.1, for an order dismissing plaintiffs' second, fifth, eleventh and fourteenth causes of action asserted on behalf of Daudi Santos on the ground that plaintiffs lack standing to maintain those claims; and pursuant to CPLR 3211 (a) (7) for an order dismissing plaintiffs' fourth and sixth to twelfth causes of action on the ground that

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[1] Defendants erroneously move in the Amended Notice of Motion and the Amended Notice of Cross-Motion pursuant to 3211 (a) (2) which has no applicability here.

plaintiffs fail to state a cause of action. Defendants Elizabeth Seton Childbearing Center (Elizabeth Seton) and Katherine Corona (Corona) cross-move for the same relief.

Plaintiffs do not dispute that the complaint if defective. Instead, they cross-move for an order, (1) pursuant to CPLR 305 (c), amending the complaint to substitute Jose Santos (Santos), administrator of the estate of Daudi Santos (the infant), as plaintiff, to reform the fourth and sixth to twelfth causes of action, and permitting an amended complaint to be filed ***nunc pro tunc;*** (2) permitting discontinuance of the claims against Corona'; and (3) compelling the Hospital to identify and accept service of the pleadings for the nursing staff in attendance when the infant was delivered. ***See,*** Shatynski Aff. ¶¶ 13-14.

Background

The infant died shortly after birth at the Hospital on December 16,1999 allegedly of injuries associated with his delivery. ***See,*** Poritz Aff. Exh. B at ¶¶ 29-37. On December 14, 2001, Santos and Dea Alves-Santos (Alves-Santos), commenced this action as "father, mother and natural guardian," and individually by filing a summons with notice. On or about, December 20, 2001, the Hospital defendants served plaintiffs with a notice of appearance and a demand for a complaint. ***See,*** Shatynski Aff. Exh. D.

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[2] Plaintiffs also cross-moved for permission to discontinue against Elizabeth Seton. However, in a letter to the Court dated October 8,2002, plaintiffs withdrew that request.

Plaintiffs served the complaint on or about January 14,2002 in which they assert, ***inter alia,*** that Santos applied for letters of administration (letters) on January 11,2002 in New York County Surrogate's Court. ***See, id.,*** Exh. B at ¶ **3.** On January 17,2002, the Surrogate's Court issued Santos letters with "power to prosecute only." ***See,*** Shatynski Aff. Exh. C. However, the administrator was never substituted as plaintiff. The Hospital defendants interposed an answer on or about February 11,2002, and Elizabeth Seton and Corona on or about February 15,2002.

<u>Analvsis</u> .

<u>Amending; the Complaint</u>

Defendants contend that the adult plaintiffs are legally incapable of commencing an action on the infant's behalf because neither of them is a court appointed representative of the infant's estate. Therefore, they contend that several causes of action must be dismissed and amendment should be denied.

It is well settled that claims asserted on behalf of a deceased infant must be commenced by a state appointed personal representative of the estate of the decedent. ***See,*** EPTL 5-4.1 (1). In addition, the allegations in the complaint, including those asserted on behalf of the infant, are inartfully pleaded. Nonetheless, the provisions of the CPLR make amendment possible.

In fact, plaintiffs may amend the summons "if a substantial right of a party against whom the summons issued is not prejudiced." *See,* CPLR 305 (c). In addition,

> [l]eave to amend [pleadings] is freely given absent prejudice or surprise resulting from the delay. CPLR 3025 (b). Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment.

Valdes v. Marbrose Realty, Inc., 289 A.D.2d 28, 29 (1st Dept. 2001) (citations omitted). However, "leave should be denied where the proposed claim is palpably insufficient." *Tishman Constr. Corp. of N.Y.* v. *City of New York,* 280 A.D.2d 374,377 (1st Dept. 2001).

Defendants assert no prejudice from plaintiffs' less than one year delay and their claim of surprise is incredible. The original complaint provides notice that the Surrogate's Court approved Santos' application for letters, *See,* Poritz Aff. Exh. B at ¶ 3. Additionally, read in the light most favorable to plaintiffs, its allegations are sufficient to infer causes of action for wrongful death and medical malpractice. *See, e.g., Mihlovan v. Grozavu,* 72 N.Y.2d 506, 508-509 (1988); *Donnelly v. Morace,* 162 A.D.2d 247 (1st Dept. 1990). Plaintiffs allege that the infant died soon after birth as a result of defendants' negligence and is survived by his parents. They also allege that the defendants', *inter alia,* negligently used a vacuum extractor and failed to perform vital surgery on the infant.

Here, plaintiffs propose no additional transactions or occurrences. The proposed amended complaint asserts wrongful death and medical malpractice claims in two causes of action instead of the original fourteen. *Arriaga* ***v. Michael Laub Co.,*** 233 A.D.2d 244, 245 (1st Dept. 1996). Therefore, plaintiffs may serve an amended complaint.

Ordinarily, such amendment would only apply to the failure to state a cause of action. However, plaintiffs asserted at oral argument that because the action was timely commenced, CPLR 205 (a) affords them six months to re-prosecute the infant's claims. Pursuant to that statute,

> [i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six month period.

See, CPLR 205 (a); ***Carrick v. Central General Hosp.,*** 51 N.Y.2d 242, 250-251 (1980) (defining the test as "whether a prior 'action' was timely commenced [and] whether the manner in which the prior action was 'terminated' rendered the plaintiff ineligible for the six-month extension under the terms of that statute"). The Court of Appeals clarified that "[l]ike any condition precedent, the requirement of a qualified administrator in a wrongful

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death action, while essential to the maintenance of the suit is in no way related to the merits of the underlying claim." Carrick, 51 N.Y.2d at 252.

Like the plaintiffs in Carrick, not only did the within plaintiffs timely commence the action, but any dismissal would be because plaintiffs' failed to satisfy the condition precedent. Consequently, as Santos is now administrator of the infant's estate, he may replead the dismissed causes of action. Therefore, plaintiffs may amend the complaint to substitute the administrator as plaintiff in the infant's stead and to replead the causes of action asserted in the complaint, and the amended complaint may be filed nuncpro tunc.

Adding Additional Defendants

Plaintiffs also cross-move to compel the Hospital to identify the delivery room and pediatric nurses in attendance at the time of the infant's delivery and accept service of the pleadings on the nurses' behalf. In the original complaint, but not in the summons with notice, plaintiffs identified the nurses as "Jane Doe" and "Mary Doe" (the "Does").[3] *See,* Shatynski Aff. in Supp. Exhs. A, E. Also, the original complaint alleges that the "Does" were nurses at the Hospital and midwives at Elizabeth Seton, ***see,*** id., Exh. E at ¶¶ 13, 23, while the proposed amended complaint alleges only that the "Does" are Hospital employees. ***See,*** id., Exh. H at ¶¶ 19, 23.

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[3] Defendants did not reject the complaint on this basis.

In opposition, the Hospital contends that (1) plaintiffs lack legal justification for such relief; (2) the "Does" may no longer be Hospital employees, and if they are, plaintiffs' remedy is limited to the theory of vicarious liability; and (3) it is unclear who actually employed the "Does." *See,* Poritz Aff. in Opp. at ¶¶ 16-22.

It is well settled that plaintiffs may sue "persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction [or] occurrence." CPLR 1002(b); *Stewart Tenants Corp. v. Square Industries, Inc.,* 269 A.D.2d 246 (1st Dept. 2000). Further, "[i]n an action which is commenced by filing, a claim asserted in the complaint is interposed against. . . a co-defendant united in interest with [a] defendant when . . . the summons and complaint or summons with notice is filed." CPLR 203 (c) (1). "[U]nity of interest will be found where there is a relationship between the parties giving rise to vicarious liability of one for the conduct of the other." *Cuello v. Patel,* 257 A.D.2d 499, 500 (1st Dept. 1999) (citations omitted).

Here, plaintiffs may sue the nurses individually or seek to hold their employer vicariously liable for their alleged negligence, and are entitled to know their identities. The "Does" are named defendants and there is merit to a claim of vicarious liability against the Hospital. Therefore, the Hospital may be sufficiently united in interest with the "Does" and

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any other delivery room nurses for service on the Hospital to be deemed service on the "Does" and must provide plaintiffs with their identities.

Nonetheless, on this record, is insufficient evidence that the Hospital must provide nurses' identity. It appears from the original complaint that Elizabeth Seton could have employed the delivery room nurses. Consequently, both Elizabeth Seton and the Hospital must ascertain whether they employed the nurses in attendance on December 19, 1999 and provide plaintiffs with their identities.

Voluntary Discontinuance

With respect to voluntary discontinuance of all claims against Corona, defendants assert that Santos can only discontinue the infant's claims with a court order and Surrogate's Court approval.

This court may discontinue an action involving an infant "upon order of the court and upon terms and conditions, as the court deems proper." CPLR 3217 (a) (2), (b). Besides, the power to prosecute only restrains the administrator from "compromise of the action or the enforcement of a judgment recovered therein . . . ." See, SCPA 702 (1). The limitation "insur[es] that if an action does result in a recovery, the fund is protected for the benefit of all who might be entitled to share in it." ***Estate of Franco,*** 108 Misc. 2d 1084, 1085 (Surr. Ct. Bronx Co. 1981)

This restraint is consistent with the general authority of an attorney employed to prosecute an action. That attorney "may discontinue an action, and he may enter into an agreement to discontinue, but he cannot, without special authority compromise the debt, or relinquish or settle the subject matter of the action." ***Edsall v. Vandemark,*** **39** Barb. **589** (Sup. Ct. N.Y. Co. **1863)** (comparing the general authority of an attorney with that of a guardian ad litem to define the limits of a guardian ad litem's authority).

In any event, it is conceivable that an administrator with limited powers has a legitimate reason for discontinuing against one or more defendants. Discontinuance against Corona might be appropriate because she is employed by Elizabeth Seton who is still a defendant in this matter. ***See,*** Poritz Aff. Exh. B at ¶ **22.** However, a mere request, without more, is insufficient for this Court to deem discontinuance proper. Therefore, plaintiffs may not discontinue against Corona.

In view of the foregoing, it is

ORDERED that defendants' motion to dismiss the second, fifth, eleventh and fourteenth causes of action asserted on the infant's behalf is granted and those causes of action are dismissed; and it is further

ORDERED that defendants' motion to dismiss the fourth and sixth to twelfth causes of action is denied and it is further

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ORDERED that plaintiffs' motion for leave to amend the complaint to substitute Jose Santos, as Administrator of the Estate of Daudi Santos, deceased infant, as plaintiff is granted, and plaintiffs may serve an amended complaint that repleads all of the causes of action in the complaint within 30 days of service of a copy of this order with notice of entry, and the amended complaint shall be filed ***nunc pro tunc.*** In the event that plaintiff fails to serve an amended complaint within such time, leave to replead shall be deemed denied and the action shall be deemed dismissed without prejudice; and it is further

ORDERED that the caption is amended to reflect the substitution as follows:

.... **X**
JOSE SANTOS, as Administrator of the Estate of DAUDI SANTOS, deceased infant, and JOSE SANTOS Individually,

Plaintiffs,

-against-

ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK, RITA FISCHER, M.D., PO CHING FONG, M.D., ELIZABETH SETON CHILD BEARING CENTER, KATHERINE CORONA, "JANE DOE, R.N." and "MARY DOE, R.N.", (fictitious names for delivery room and pediatric nurses present during infant decedent's birth),

Defendants.

---X; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action are amended to substitute Jose Santos, as Administrator of the Estate of Daudi Santos, deceased infant, as plaintiff in the place and stead of said decedent Daudi Santos, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the fourth and sixth to twelfth causes of action within 30 days of service of a copy of this order with notice of entry, and the amended complaint shall be filed ***nuncpro tunc.*** In the event that plaintiff fails to serve an amended complaint within such time, leave to replead shall be deemed denied and the action shall be deemed dismissed without prejudice; and it is further

ORDERED that defendants shall answer the amended complaint within **20** days from the date of said service; and it is further

ORDERED that plaintiffs' cross-motion to compel the Hospital to identify the delivery room and pediatric nurses in attendance at the time of the infant's delivery is granted and accept service of the pleadings on their behalf; and it is further

ORDERED that the Hospital and Elizabeth Seton shall identify the delivery room and pediatric nurses employed by them and in attendance at the time of the infant's delivery within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiffs' cross-motion to discontinue all claims against Katherine Corona, R.N. is denied without prejudice to its renewal; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on the attorneys for defendants within 10 days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 18, 2003 at 10:30 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 19 ,2002

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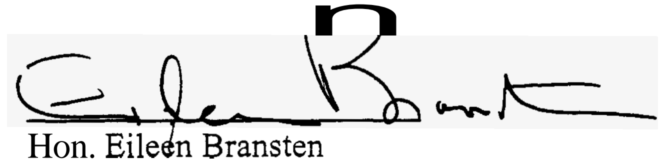

Hon. Eileen Bransten