Milano v Smithtown Psychiatric Servs., LLP.
2007 NY Slip Op 32408(U)
August 1, 2007
Supreme Court, Suffolk County
Docket Number: 0024859/2006
Judge: Paul J. Baisley
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SHORT FORM ORDER **INDEX NO. 24859/2006**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

JACK A. MILANO, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF KEITH A. MILANO, DECEASED,

Plaintiff,

-against-

SMITHTOWN PSYCHIATRIC SERVICES, LLP., THOMAS A. ARONSON, M.D., SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE, WYETH A/K/A WYETH, INC., F/K/A WYETH AYERST, INC. F/K/A AMERICAN HOME PRODUCTS CORP. and WYETH PHARMACEUTICALS A/K/A WYETH PHARMACEUTICALS, INC., F/K/A WYETH-AYERST PHARMACEUTICALS, INC.,

Defendants,

ORIG. RETURN DATE: January 4, 2007
FINAL RETURN DATE: April 26, 2007
MTN. SEQ. #: 004-MG

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Upon the following papers numbered 1 to 21 read on this cross motion for leave to amend the pleadings: Notice of Motion and supporting papers 1 - 8; Affirmations on Opposition and supporting papers 9 - 19; Reply Affirmation and supporting papers 20 - 21; it is,

ORDERED that this cross motion (004) by the plaintiff for leave to amend the caption of this action pursuant to CPLR 3025 is granted; and it is further

ORDERED that the summons and verified complaint shall be amended only insofar as the caption in this action which shall now read:

JACK A. MILANO, as Administrator of the Estate of
KEITH A. MILANO, Deceased,

Plaintiff,

-against-

SMITHTOWN PSYCHIATRIC SERVICES, LLP, THOMAS
A. ARONSON. M.D., SMITHKLINE BEECHAM CORP.
d/b/a GLAXOSMITHKLINE, WYETH a/k/a WYETH, INC.
f/k/a WYETH AYERST, INC. f/k/a AMERICAN HOME
PRODUCTS CORP., and WYETH PHARMACEUTICALS
a/k/a WYETH PHARMACEUTICALS, INC., f/k/a
WYETH-AYERST PHARMACEUTICALS, INC.,

Defendants.

and it is further

ORDERED that the plaintiff is directed to file and serve the amended summons and amended verified complaint within 20 days of the date of this order upon counsel for the defendants pursuant to CPLR 2103(b)(1), (2) or (3); and it is further

ORDERED that the respective answers served in response to the original summons and verified complaint by the defendants shall be deemed as served in response to the amended summons and amended verified complaint; and it is further

ORDERED that the parties are directed to appear for a Preliminary Conference on August 7, 2007 in the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action for wrongful death, medical malpractice and other related causes of action arising out of the suicide of the deceased on September 5, 2004. The deceased's father was issued a certificate of voluntary administration by the Suffolk County Surrogate's Court on July 7, 2005 and, in that capacity, commenced this action as of September 1, 2006 - just four days before the applicable limitations period as to the wrongful death causes of action would have expired (*see* EPTL 5-4.1[1]).

The defendants then brought a motion (001) and cross motions (002 & 003) to dismiss, basically for lack of capacity. The plaintiff concedes that he did not have authority as a voluntary administrator to bring this action but by way of his own cross motion (004 - the instant application before the court), he seeks leave to amend the caption to reflect that he now has been issued limited letters of administration which do allow him to bring this action on behalf of the estate.

The limited letters of administration were issued while the motion and cross motions were pending and, as a result, the defendants all withdrew their applications to dismiss. That leaves only the cross motion for leave to amend for the court's consideration.

Some of the defendants, however, oppose the cross motion for leave to amend the caption on the basis that as to the wrongful death causes of action, the plaintiff is now time-barred and as to the one cause of action for the infliction of emotional distress brought on behalf of the plaintiff in his individual capacity, this is inappropriate as a matter of law because the plaintiff is not a party in his individual capacity.

Specifically, as to the statute of limitations argument, these defendants contend that since the plaintiff as voluntary administrator had no capacity or authority to bring the action, that the original commencement of the action was without effect and, thus, when he subsequently did have the appropriate authority to bring an action - which was after the period in which to bring a wrongful death action - he had no viable action to relate back to in order to overcome the limitations issue.

In reply to these arguments, the plaintiff contends that, as a matter of law, he is entitled to amend and to continue this action under these facts and circumstances and, in any event, even if the court had terminated or may terminate the action, he would still, nevertheless, be entitled to recommence the action pursuant to CPLR 205(a) which would allow the recommencement within six months after said termination.

The law is well-settled that leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing parties (see, CPLR 3025 [b]; ***Sarro v Sarro***, 238 AD2d 330, 656 NYS2d 916 [2d Dept 1997]). In this regard, both sides cite various cases and point out the distinctions in the cases cited by the other side but the court finds one case, in particular, to be dispositive of this issue.

In ***Fulgum v Town of Cortland Manor*** (19 AD3d 444, 797 NYS2d 507 [2d Dept 2005]), the plaintiffs were granted leave to amend their complaint in an action to add an additional party plaintiff where, like here, the original plaintiffs did not have standing to bring the action in the first instance. In addition, as in this case, the defendant raised statute of limitations objections insofar as the applicable time limitation had expired before the amendment was sought and granted.

In affirming the granting of leave to amend, the appellate division stated that,

> "The amendment, which sought only to shift the claims from the plaintiffs to a party which could have asserted those claims in the first instance, is proper since such an amendment, by its nature, did not result in surprise or prejudice to the appellant, who had prior knowledge of the claim and an opportunity to prepare a proper defense [citations omitted" (*Id.,* at 445-446, 509).

This is the same situation in this case: The initial action was timely brought but by a party who had no authority to assert the claims at issue. Nevertheless, the defendants here, as in ***Fulgum***, were given timely notice of the claim as well as the opportunity to prepare a defense.

In addition, as to the statute of limitations issue, the appellate division went on to say in ***Fulgum***:

> "[The new] party plaintiff was not barred by the applicable statute of limitations. The amendment relates back to the original complaint, since the substance of the claims of [the new party plaintiff] and those of the [original party plaintiffs] are virtually identical . . . as in the original complaint and [the new party plaintiff] is closely related to [the original party plaintiffs][citations omitted]" (*Id.*, at 446, 509).

Again, the circumstances in ***Fulgum*** are on all fours with the instant case. Accordingly, the plaintiff is granted leave to amend the caption of the complaint to substitute the administrator of the deceased estate for the voluntary administrator (who is the same individual) and the statute of limitations issue is without merit since the amendment relates back to the original complaint which was timely filed by a plaintiff "closely related" to the substituted plaintiff and with the claims being identical to the original complaint.

The court also finds the holding in ***Snay v Cohoes Mem. Hosp.*** (110 AD2d 1021, 487 NYS2d 899 [3d Dept 1985] to be applicable, notwithstanding the defendants' contentions to the contrary. In ***Snay***, under similar circumstances as here, the court stated that the commencement of the original action "cannot be considered a nullity" because the original action was commenced by way of an "appropriate method prescribed by the CPLR" (*Id.,* at 1022, 900).

Inasmuch as the defendants have already answered the original verified complaint and inasmuch as the amended complaint only amends the caption and not the substance of the complaint, the verified answers of the defendants shall be deemed to be their answers to the amended verified complaint.

Turning now to the request to dismiss the cause of action sounding in intentional infliction of emotional distress because it is brought on behalf of the administrator of the estate in his individual capacity and said administrator is not a party to this action in his individual capacity, such an application may not be considered by the court where it is requested within an opposing affirmation rather than by way of a cross motion (*see* CPLR 2215; ***Thomas v Drifters, Inc.,*** 219 AD2d 639, 631 NYS2d 419 [2d Dept 1995]). Accordingly, regardless of its apparent merit, the court will not entertain this request in the absence of a motion or cross motion for said relief.

This decision constitutes the order of the court.

Dated: August 1, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR. J.S.C.