SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

ACCURSIO GRAFFEO and LANA GRAFFEO,

Plaintiff(s),

MOTION DATE: 8/15/07
INDEX NO.: 362/07
SEQ. NO. 1-5

-against-

SAUL MODLIN, M.D., MAUREEN DEL RE, M.D., DUMITRU ANDRIES, M.D., SAUL MODLIN, M.D., P.C., WINTHROP UNIVERSITY HOSPITAL ASSOCIATION and THE NASSAU COUNTY HEALTHCARE CORPORATION,

Defendant(s)

The parties' respective applications are determined as hereinafter provided.

The plaintiffs filed this medical malpractice action on January 8, 2007 alleging, in sum, that during an August 25, 2007 surgical procedure at the defendant Winthrop University Hospital (and thereafter on 9/06/05 and 9/07/05) the plaintiff Accursio Graffeo was negligently intubated and extubated thereby damaging his vocal cords. He was discharged on September 30, 2005.

On or about March 12, 2007, however, Winthrop's counsel notified the plaintiffs' attorney that the defendant Dumitru Andries, M.D., an assistant anesthesiologist on August 25, 2005 (see plaintiffs' 1/2/06 complaint, para. 31), was not its employee but rather "a resident employed by the Nassau University Medical Center who was rotating through [Winthrop] as part of the residency program with the Nassau University Medical Center" (see Exhibit A to the plaintiffs' 7/5/05 cross motion). On April 26, 2007, or forty-five days later, the plaintiffs therefore filed a supplemental summons and amended verified complaint adding that defendant (see Nassau Health Care Corporation's Exhibit B). Service of the amended pleading was reportedly effectuated upon it on May 18, 2007 (6/20/07 affirmation of Jane Holden, Esq., para.

5).

It presently seeks summary dismissal of the plaintiffs' complaint as against it due to their failure to serve a notice of claim (see General Municipal Law Section 50-e) and subsequently commence an action against it on or before December 30, 2006 or within a year and ninety days of Mr. Graffeo's September 30, 2005 discharge (see General Municipal Law Section 50-i[1]). It also interposed a June 7, 2007 answer to the amended pleading (see Nassau Health Care Corporation's Exhibit C) which includes those affirmative defenses.

Dr. Andries was personally served with a copy of the plaintiffs' complaint on May 10, 2007 in Virginia where he relocated after completing his residency program (see Exhibit B to the plaintiffs' 7/9/07 motion). The plaintiffs seek entry of a default judgment against him due to his failure to interpose a responsive pleading. Conversely, he moves, pursuant to CPLR 3211(a)(5), for summary dismissal of the action as against him as untimely. The plaintiffs have also cross moved, pursuant to General Municipal Law Section 50-e(5) and CPLR Section 203[b], for leave to serve a notice of claim, nunc pro tunc, because Dr. Andries and the Nassau Health Care Corporation are (or were) allegedly united in interest. Finally on August 1, 2007 Dr. Andries withdrew the fifth affirmative defense (failure to serve a notice of claim) of his July 20, 2007 proposed answer (Exhibit C to his 7/20/07 cross motion) in exchange for the plaintiffs' acceptance of his pleading (see Exhibit A to the 8/10/07 reply affirmation of Craig V. Rizzo, Esq.). Alternatively, his seventh affirmative defense (failure to comply with the applicable statute of limitations) has not been withdrawn.

In a neat bit of circular reasoning, the plaintiffs contend that service upon the defendant Nassau Health Care Corporation relates back to the claim against its employee, i.e., Dr. Andries (see 7/5/07 affirmation of Harry I. Katz, Esq.), while service upon Dr. Andries is timely because he is united in interest with the defendant Nassau Health Care Corporation (see 7/27/07 affirmation of Harry I. Katz, Esq.).

The law is well settled that service of a notice of claim is

a condition precedent to an action against a municipality or a public corporation (see General Municipal Law Section 50-e; King Wu, 18 AD3d 716, 717). "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 are 'united in interest' (Buran v Coupal, 87 AD2d 173, 177). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, 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 known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well" (Shapiro v Good Samaritan Regional Hosp. Med. Ctr., 42 AD3d 443 [2nd Dept; 7/10/07]; see Buran supra at 178). "The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the statute of limitations has expired" (Monir v Khandakar , 30 AD3d 487, 488 quoting Spaulding v Mount Vernon Hosp., 283 AD2d 634, 635).

"Notice to the new defendant within the applicable limitations period is the 'linchpin' of the relation-back doctrine" (Shapiro supra). Here, the defendant Nassau Health Care Corporation argues, inter alia, that it can not be charged with notice of the institution of the action since the alleged malpractice occurred at Winthrop and, upon completion of his residency, Dr. Andries relocated to Virginia.

"A professional corporation may be held vicariously liable for the torts of its employee committed within the scope of the corporation's business" (Monir supra at 489; see Connell v Hayden, 83 AD2d 30, 46) and therefore it may be found to be united in interest with the employee (see e.g., Nani v Gould, 39 AD3d 508, 509; Monir supra at 489). However, even assuming, arguendo, that Dr. Andries and the Nassau Health Care Corporation are united in interest, the plaintiffs' action against him was not commenced

until January 8, 2007 or beyond a year and ninety days after Mr. Graffeo's September 30, 2005 discharge, i.e., December 30, 2006 (see General Municipal Law Section 50-i[1][c]) and the court lacks authority to extend that period (see N.M. v Westchester County Health Care Corporation, 10 AD3d 421, 423). Indeed, Dr. Andries was not served until May 10, 2007 or more than 120 days after the January 8, 2007 filing of the action (see CPLR Section 306-b). Lastly, the plaintiffs' reliance upon the tolling provision of CPLR Section 207 because of Dr. Andries' subsequent relocation and continuous absence from the jurisdiction is misplaced. The cause of action accrued prior to his departure and therefore he "was at all times subject to long-arm jurisdiction" (Immediate v St. John's Queens Hospital, 65 AD2d 783; see Rescigno v Montefiore Hosp. & Medical Ctr. , 65 AD2d 602). "CPLR 207 does not apply where an alternate basis for service of process outside of the state exists" (Immediate supra at 783). "Service could have been effected, pursuant to CPLR 313, by any of the methods set forth in CPLR 308" (Rescigno supra at 602).

Accordingly, the defendants Nassau County Health Care Corporation and Dumitru Andries' motions, pursuant to CPLR 3211(a)(5) and General Municipal Law Section 50-i(1), to summarily dismiss the plaintiffs' action as against them as time barred are granted and the plaintiffs' motions for leave to serve and file a late notice of claim, nunc pro tunc, and for entry of a default judgment as against Dr. Andries are denied.

The failure of Dr. Del Re's prior counsel to timely respond to the plaintiffs' March 1, 2007 notice to admit appears to have been inadvertent and due, inter alia, to the need to obtain the relevant medical record (see 7/10/07 affirmation of Theodore F. Goralski, Jr., Esq., para. 4). That branch of Dr. Del Re's motion which is to withdraw her admission to the notice to admit and compel the plaintiffs' acceptance of her belated July 12, 2007 response is therefore granted (see Torres v McCormick, 35 AD3d

443, 444). That branch of the motion which is to strike the notice to admit is dismissed as academic.

Dated: 9-11-07

A.J.S.C.