SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

VALERIE STRAW,

Plaintiff,

-against-

SUSAN PANNULLO, M.D.,
MARY VESONIARAKI-STAMBOUZOU, M.D.,
ARKADIY BAUMVAL, P.A.,
JORDAN B. GLASER, M.D.,
SUYING LUO SONG, M.D.,
HOONEY KAHNG, M.D.,
STATEN ISLAND UNIVERSITY HOSPITAL,
SANFORD R. NALITT INSTITUTE FOR
CANCER AND BLOOD RELATED DISEASES
and BAXTER INTERNATIONAL, LLC
a/k/a BAXTER HEALTHCARE CORPORATION,

Defendants.

Index No: 10818/03
Calendar No: 1230-005

DECISION & ORDER

HON. JOSEPH J. MALTESE

Action No. 1

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BAXTER INTERNATIONAL, INC., and BAXTER
HEALTHCARE CORPORATION,

Third-Party Plaintiff(s),

-against-

INTEGRA LIFESCIENCES HOLDINGS CORPORATION
and INTEGRA NEUROSCIENCES**,**

Third-Party Defendant(s).

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---x

VALERIE STRAW,

Plaintiff.

-against-

INTEGRA LIFESCIENCES HOLDINGS CORPORATION,
INTEGRA NEUROSCIENCES PR, INC. and
NEUROCARE GROUP HEYER-SCHULTE,

Defendants.

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Index No. 10989/04
Calendar No. 971-002
1435-006

Action No. 2

The following papers numbered 1 to 9 were submitted on these motions on August 17, 2007:
:

Notice of Motion for Summary Judgment by Defendant (in Action No. 2),
Integra Neurosciences PR, Inc., f/k/a Integra Lifesciences Holdings Corporation
and Heyer-Schulte Neurocare, Inc., with Supporting Papers, Exhibits and
Memorandum of Law
(dated March 28, 2007).....1

Notice of Motion to Reargue by Defendant/Third-Party Plaintiff (in Action No. 1)
Baxter International, Inc. and Baxter Healthcare Corporation,
with Supporting Papers and Exhibits
(dated April 24, 2007).....2

Affirmation in Opposition
(dated November 28, 2006; resubmitted May 11,2007).....3

Notice of Cross Motion by Plaintiff,
with Exhibits
(dated May 11, 2007).....4

Affirmation in Opposition by Plaintiff,
with Exhibits
(dated May 25, 2007).....5

Reply Affirmation in Further Support of
Defendant Baxter's Motion for Reargument,
with Exhibits
(dated June 1, 2007).....6

Reply Affidavit in Further Support of
Integra's Motion and in Opposition to
Plaintiff's Cross Motion, with Memorandum of Law
(dated June 20, 2007).....7

Reply Affirmation by Plaintiff,
with Exhibits
(dated June 28, 2007).....8

Reply Affirmation in Opposition to
Plaintiff's Cross Motion
(dated August 9, 2007).....9

Upon the foregoing papers, (1) the motion (No. 971) for summary judgment by defendant in Action 2, Integra Neurosciences PR, Inc., f/k/a Integra Lifesciences Holding Corporation and Heyer-Schulte Neurocare, PR, Inc. ("Integra"), (2) plaintiff's cross motion (No. 1435) and (3) the motion (No. 1230) for leave to reargue by defendants in Action No. 1, Baxter International, Inc. and Baxter Healthcare Corporation ("Baxter") each is denied.

In this personal injury action, plaintiff seeks to recover damages for injuries allegedly sustained after the surgical implantation of an "Ommaya Reservoir" on or about March 25,1999. An Ommaya Reservoir is a dome-shaped surgical device that is implanted under a patient's scalp in an effort to deliver anti-cancer drugs to the fluid surrounding the brain. The reservoir was also intended to remove fluid for further testing. Plaintiff testified that beginning approximately one week after the device was implanted and continuing until its surgical removal on September 15, 2000, she suffered from headaches. According to the post-operative report dated September 15, 2000 (*see* Plaintiff's Cross Motion, Exhibit "B"), a portion of the device had broken off and "migrated posterior to the initial implantation site and had separated from the catheter".

According to the complaint in Action No.1 (Index No. 10818/03), dated March 12, 2003 (Plaintiff's Cross Motion, Exhibit "F"), plaintiff claimed that the Ommaya Reservoir was improperly designed and manufactured, and that plaintiff was caused to suffer permanent and disabling injuries as a result. To the extent relevant, the complaint against Baxter is based on allegations of negligence and breach of warranty, as well as strict products liability in the design, manufacture, distribution and marketing of the Ommaya Reservoir. In response, on or about January 21, 2004, Baxter commenced a third-party action for indemnification and/or contribution in Action No. 1 against Integra, contending that the latter was the proper defendant. In this regard, Baxter

alleged that while it manufactured the Ommaya Reservoir prior to June 1994, it did so through a wholly-owned division ("Heyer Schulte") that was sold in June of that year to Heyer Schulte Neurocare, a separate and wholly unaffiliated corporation. Baxter further alleges that in or around 1999, third-party defendant Integra purchased Heyer-Schulte Neurocare, and acquired all of its assets and liabilities. As previously indicated, the Ommaya Reservoir was implanted in plaintiff on March 25, 1999.

In view of these allegations, on March, 30, 2004 plaintiff instituted a second action (Action No. 2) against Integra and Heyer-Schulte Neurocare, i/s/a Neurocare Group Heyer-Schulte (hereinafter, collectively, "Integra"), under Index Number 10989/04 (*see* Integra's Exhibit "A"). According to the complaint and amended complaint in that action, plaintiff extended her earlier allegations of strict products liability, negligence, and breach of warranty against Integra relative to the design, manufacture and sale of the allegedly defective Ommaya Reservoir. Both compensatory and punitive damages were requested.

Integra asserts in its motion for summary judgment dismissing the complaint in Action No. 2, that all of plaintiff's claims against it are barred by the statute of limitations. According to Integra (1) it is undisputed that the last possible date of sale of this Ommaya Reservoir was March 25, 1999, the date of implantation of the device, and (2) Uniform Commercial Code §2-725 clearly provides that the statute of limitations for breach of warranty is four years from the latest possible date of sale. As a consequence, Integra asserts that the statute of limitations on plaintiff's breach of warranty claim against it expired on March 25, 2003, over one year prior to the commencement of Action No. 2. In addition, Integra maintains that plaintiff's causes of action for negligence and strict products liability are barred by the three-year statute of limitations set forth in CPLR 214-c. As applicable in this case,

"CPLR 214-c provides that the time for initiating a cause of action for damages resulting from exposure to a harmful substance begins to run from the date that the 'injury' was discovered or could have been discovered with reasonable diligence "(Matter of New York County DES Litig., 89 NY 2d 506, 508-509), *i.e.,* "when, based upon an objective level of awareness of the dangers and consequences of the particular substance, 'the injured party discovers the primary condition on which the claim is based (*see* p 7)'" (MRI Broadway Rental v United States Min. Prods. Co., 92 NY 2d 421, 429). Accordingly, Integra asserts that the statute of limitations began to run on these causes of action no later than September 15, 2000, the date on which the attempted removal of the reservoir resulted in the discovery of the alleged defect, and expired three years, later on September 15, 2003, five months prior to the commencement of Action No. 2.

In opposition, plaintiff concedes that she "discovered" her injuries for the purpose of CPLR 214-c more than three years prior to the commencement of her action against Integra, but that the commencement of Action No. 1 against Baxter was timely, and that under CPLR 203, the timely assertion of her claims against Baxter "relate back" to render the claims against Integra timely. In addition, plaintiff claims that Integra's motion is premature, citing CPLR 3212(f).

"[T]he relation back doctrine [CPLR 203(b)] allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest' "(Buran v Coupal [87 NY 2d 173, 177 (1995)]. However, in order to be applicable, the doctrine requires a plaintiff to establish that "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its

defense on the merits by the delayed, otherwise stale, commencement of the action against it, and (3) the new party 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 that party as well" (Austin v Interfaith Med. Ctr., 264 AD2d 702, 703). Critically, it is mere mistake – not an excusable mistake – which allows a plaintiff the benefit of this doctrine [*see* Buran v Coupal, 87 NY 2d at 179-181 (1995)]. Nevertheless, all three features must be present in order for CPLR §203(b) to apply.

Here, plaintiff's claims against each of the corporate defendants clearly arose out of a single occurrence, *i.e.,* the implantation of the allegedly defective device into plaintiff's brain. Further, there is no indication that plaintiff's failure to join Integra as defendants in Action No. 1 was done intentionally for tactical advantage or in bad faith. Rather, it appears that prior to Baxter's institution of its third-party action against Integra, plaintiff was merely mistaken about the identity of the manufacturer of the device that injured her, believing that it was the Heyer-Schulte division of Baxter, which became an independent company in June of 1994 and was acquired by Integra in 1999. As a result, the only remaining question is whether or not Integra and Baxter (via its Heyer-Schulte division) may be considered "united in interest " for purposes of CPLR 203(b).

In this case, given the nature of the contractual and legal formalities attendant the divestiture of subsidiaries and the acquisition or absorption of one corporation by or into another, plaintiff should be entitled, at the very least, to depose the representatives of these corporations and examine the actual divestiture and acquisition documents in an effort to determine the nature and timing of their relationship *inter se* before being required to defend the application of the relation-back doctrine. Emblematic of the inherent difficulties to be encountered is the apparent concession that the divestiture agreement between Baxter and Heyer-Schulte Neurocare leaves the determination of

which corporate entity may be responsible for any damages caused by the Ommaya Reservoir dependent upon whether or not this particular device was "batch coded " or released as a "finished good" prior to the closing date of their agreement on or about June 29, 1994 (*see* Plaintiff's Exhibit "H"). Also relevant is the nature of their agreement, if any, to apportion liability for items already in the marketplace. Never having seen these documents or examined the executives of any of these corporations plainly leaves this plaintiff at a distinct disadvantage in her attempt to apply the relation-back doctrine to Integra.

The foregoing determination renders academic plaintiff's cross motion for time to complete discovery.

Finally, Baxter's motion (No. 1230) for leave to reargue the decision and order of this Court dated March 13, 2007 is denied. Reargument was never intended to serve as a vehicle to permit an unsuccessful party to argue again the same questions previously decided (*see* Foley v. Roche 68 AD2d 558), but rather to demonstrate that the Court overlooked or misapprehended the relevant facts and/or misapplied controlling principles of law (*see* CPLR 2221[d][2]). No such circumstance has been demonstrated herein.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment (No.971) by defendants in Action No. 2, Integra Lifescience Holdings Corporation, Integra Neurosciences PR, Inc. and Heyer-Schulte Neurocare, Inc. i/s/a Neurocare Group Heyer-Schulte, is denied with leave to renew following the completion of discovery; and it is further

ORDERED, plaintiff's cross motion (No. 1435) is denied as academic; and it is further

ORDERED, that the motion for reargument (No. 1230) by defendant/third-party plaintiff in Action No. 1 Baxter International, Inc. and Baxter Healthcare Corporation is denied.

All parties shall appear for a status conference in DCM Part 3 at 9:30 a.m. on **November 26, 2007.**

ENTER,

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Joseph J. Maltese
Justice of the Supreme Court

DATED: November 5, 2007