

Johnsen v Silich

2007 NY Slip Op 34055(U)

December 13, 2007

Supreme Court, Richmond County

Docket Number: 0101932/2007

Judge: Joseph J. Maltese

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

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**WALTER N. JOHNSEN, Jr., and
DEBRA JOHNSEN,**

Plaintiffs,

DCM PART 5

Present:

Hon. Joseph J. Maltese

-against-

Decision and Order

**ROBERT J. SILICH, M.D.,
ROBERT J. SILICH, M.D., P.C.,
DANIEL ROESLER, M.D., and
STATEN ISLAND UNIVERSITY HOSPITAL,**

Index No. 101932/07

Motion No. 1824-001

2006-002

Defendant(s).

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The following papers numbered 1 to 7 were used on these motions the 25th day of September, 2007:

	Pages Numbered
Notice of Motion to Strike by Defendant Robert J. Silich, M.D., and Robert J. Silich, M.D., P.C., with Supporting Papers and Exhibits (dated June 14, 2007).....	1
Notice of Motion to Dismiss by Defendant Staten Island University Hospital and Daniel Roesler, M.D., with Supporting Papers and Exhibits (dated June 28, 2007).....	2
Affirmation in Opposition to Defendant Silich’s Motion to Strike the Complaint, with Exhibits (dated July 3, 2007).....	3
Reply Affirmation in Support of Motion to Strike Complaint (dated August 13, 2007).....	4
Affirmation in Opposition to Defendants Staten Island University Hospital and Daniel Roesler, M.D.’s Motion to Dismiss and/or Strike the Complaint, with Exhibits (dated August 13, 2007).....	5
7	
Affirmation in Partial Support of the Motion of Staten Island University Hospital, with Exhibits (dated September 7, 2007).....	6
Reply Affirmation of Defendant Staten Island University Hospital (dated September 19, 2007).....	7

Upon the foregoing papers, the motion (No. 1824) of defendants ROBERT J. SILICH, M.D., and ROBERT J. SILICH, M.D.,P.C. (hereinafter “SILICH”) to strike the complaint against them is granted, as is so much of the cross motion of defendants STATEN ISLAND UNIVERSITY HOSPITAL (hereinafter “SIUH”) and DR. DANIEL ROESLER, M.D. for like relief.

Plaintiffs commenced this medical malpractice action alleging that defendants, and especially DR. SILICH, failed to properly diagnose and treat a leiomyosarcoma in plaintiff WALTER N. JOHNSON, JR. (hereinafter “plaintiff”). It is further alleged that plaintiff suffered multiple recurrences of his cancer, and developed subsequent infections surrounding the areas of excision, eventually requiring a wide radical resection to be performed at Sloan-Kettering Memorial Hospital.

In a pre-answer motion, defendant SILICH seeks an order pursuant to CPLR 3024(b) striking the complaint in its entirety or, in the alternative, striking numerous paragraphs in the complaint as scandalous, prejudicial and unnecessary. According to the doctor, plaintiff’s counsel has “outlandishly embellished his composition with seemingly endless scandalous, prejudicial and irrelevant exposition, in utter disregard of the most liberal conception of professional and acceptable pleadings under the CPLR”.

In opposition, plaintiff contends that SILICH has failed to demonstrate that the allegations in the complaint are scandalous, prejudicial or irrelevant. According to plaintiff, the complaint explains the course of treatment to which he was subjected while under the care of DR. SILICH, including misdiagnoses, erroneous predictions and unfounded assumptions that caused plaintiff to undergo three improper procedures, and receive improper post-operative care. Moreover, plaintiff contends that the newspaper article of an unrelated similar case involving the doctor was intentionally attached to the complaint in order alert the Court of the driving force behind the plaintiff’s seeking redress, *i.e.*, to prevent additional casualties as a result of the doctor’s negligence. Plaintiff also takes issue with defense counsel’s referral to his wife as the “deceased plaintiff wife”, claiming that the import of MRS. JOHNSON becoming ill during the “multiple rounds of malpractice” to which he was subjected is very relevant to the action.

According to the complaint, plaintiff claims to have relied in choosing a doctor upon the misleading advertising of SIUH and SILICH regarding the latter’s record of success, as well as the prestige of both the hospital and doctor. Accordingly, any allegations regarding these advertisements are alleged to be relevant. Plaintiff also contends that he has thoroughly complied with the pleading requirements of the CPLR by separately stating and numbering each cause of action, and inserting

sub-paragraphs to make the complaint easier to read. According to plaintiff, had he not provided such detailed allegations, defense counsel would have moved to dismiss the complaint for factual insufficiency. Finally, plaintiff contends that any facts bearing upon the subject matter of the litigation should not be stricken, as they are a proper subject of inquiry. In sum, plaintiff maintains that the defendant doctor has not sufficiently shown that he is aggrieved by the allegations to warrant striking the complaint.

In their separate pre-answer motion, defendants SIUH and DR. DANIEL ROESLER seek dismissal of the complaint under CPLR §3211(a)(3) and (5), contending that the action against them was not commenced within the statutory time period allowed under either CPLR 214-a (for medical malpractice actions), or CPLR 214(5) (for tort actions predicated on negligence). Respectively, these time periods are two and one-half years after the last date of treatment (for medical malpractice), and three years from the date of the occurrence for ordinary negligence. According to SIUH, plaintiff was last seen at the defendant hospital on August 6, 2003, and the action against it was not commenced until May 8, 2007, *i.e.*, three years and nine months later.

These defendants also contend that co-plaintiff DEBRA JOHNSEN died in July, 2006, and that no administrator or administratrix of her estate has been appointed. Accordingly, plaintiff lacks the capacity to sue on her behalf, and the action has been improperly brought in her name.

In the alternative, the hospital requests that the Court strike each cause of action on the ground that it contains irrelevant, prejudicial and scandalous matter. Finally, the hospital requests that it be granted 30 days within which to serve an answer should its motion be denied.

In opposition to the hospital's motion, plaintiff contends that SILICH was an agent of SIUH, which is therefore chargeable with the continuous course of treatment he provided to plaintiff until November 29, 2004, when plaintiff terminated his relationship with both and sought treatment from another physician and hospital. Plaintiff further contends that he was continuously being treated for the same disease or condition from the inception of his relationship with DR. SILICH and SIUH through November 29, 2004, and that the statute of limitations for commencing an action against the hospital was therefore tolled until then.

In addition, plaintiff claims that SIUH openly advertised its ties to SILICH while proclaiming his excellence in performing oncological surgery, and that SILICH similarly advertised his affiliation with the defendant hospital. Accordingly, plaintiff contends that these defendants are united in

interest for purposes of applying the continuous treatment doctrine, and that the action against the hospital is timely.

With regard to his claims against the hospital, *e.g.*, negligent hiring and staff retention, plaintiff contends that each is timely, as they are continuing wrongs that did not accrue until the date of the last wrongful act.

As for the deceased co-plaintiff, plaintiff contends that DEBRA JOHNSEN was still alive when the action was commenced, and therefore any claim regarding her lack of capacity to sue is incorrect. In this regard, plaintiff requests that the Court amend the caption to reflect plaintiff's status as the administrator of her estate, and submits copies of both her death certificate and Letters of Administration in support. As a result, it is claimed that any derivative claims brought in the name of co-plaintiff should be continued.

As for the cause of action for a permanent injunction barring the purportedly misleading advertising of defendants' skills and/or the quality of their services, plaintiff contends that his request is based on the moral belief that such conduct should be restrained in order to protect the public, and that judicial intervention is necessary to prevent the dissemination to the public of "false" and "misleading" information about DR. SILICH.

As for the hospital's claim that the complaint contains irrelevant, scandalous and prejudicial matter, plaintiff contends that there is nothing prejudicial about any of his allegations. Rather, he claims that he was prejudiced by defendants' sub-standard care and treatment. According to plaintiff, the allegations in the complaint are proper and relevant to demonstrate (1) the continuous course of treatment rendered to him by the hospital, (2) the unity of interest between each of the defendants, and (3) the totality of the mismanaged care rendered jointly and severally by these defendants.

The motion and cross motion to strike are granted. In the opinion of this Court, the complaint is so encumbered with unnecessary verbiage and statements of opinion regarding the reputation and skills of DR. SILICH and the care plaintiff received at SIUH that it obscures the real issues in the case and makes answering these allegations in the form in which they are tendered impracticable. Accordingly, the complaint will be stricken without prejudice to the service of an amended pleading in conformity with CPLR 3013 and 3014, *i.e.*, a plain and concise statement of the material facts constituting each cause of action. Neither scandalous nor prejudicial matter or

statements of opinion are necessary to sustain a pleading, and may cause undue prejudice to these defendants (*see* JC Mfg. v. NPI Elec., 178 AD2d 505). Moreover, the striking of such matter will cause plaintiff no harm, any such ruling does not *ipso facto* preclude its admissibility at trial (*see* Schacter v. Massachusetts Protective Assn, 30 AD2d 540). Rather, the prejudice to be avoided at this stage of the litigation is that which a party may suffer by having to meet, *e.g.*, during discovery, damaging allegations that may well prove irrelevant at trial (*see* Siegel, McKinney's Practice Commentaries, Cons. Laws of NY, Book 7B, CPLR 3024, C3024:4, p323). Finally, it is a waste of judicial resources for a court to parse a complaint so thoroughly encumbered with collateral matters when the service of a proper pleading will remedy the situation (*see* Tankoos v. Conford Realty Co., 248 AppDiv 614).

With regard to the motion to dismiss on the ground that the action against the hospital and DR. ROESLER is untimely, it is the opinion of this Court that plaintiff has produced sufficient evidence regarding the hospital's relationship with DR. SILICH as to raise a triable issue as to whether the continuous treatment doctrine may be applied to render the action timely as against SIUH.

Under the continuous treatment doctrine, the time within which to bring a malpractice action is tolled until the date of a patient's last treatment "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (McDermott v. Torre, 56 NY2d 399, 405 *quoting* Borgia v. City of New York, 12 NY2d 151, 155). In this way, the doctrine operates to preserve the physician-patient relationship in the belief that the most efficacious medical care will be rendered when the attending physician remains on a case from onset to cure (*see* McDermott v. Torre, 56 NY2d at 408). Moreover, the doctrine may be applied to bar a hospital from raising a statute of limitations defense where the treatment in question is provided by one of its physicians within the scope of his employment, or where some other relevant relationship exists between the treating physician and the hospital (*cf.* Meath v. Mishrick, 68 NY2d 992). Naturally, it is the plaintiff who bears the burden of proof on the issue (*see* Nykorchuck v. Henriques, 78 NY2d 255).

Here, the facts alleged in the complaint sufficiently demonstrate that plaintiff was continuously under the care of DR. SILICH with regard to the lump in his right chest, and that a physician-patient relationship continued between them with regard to its treatment until November 29, 2004. Moreover, the facts alleged by plaintiff are sufficient to raise triable issues regarding the relationship between SIUH and DR. SILICH, and whether the nature of that relationship is sufficient

to impute the doctor's actions to the hospital for purposes of the statute of limitations (*see Ruane v. Niagara Falls Mem. Med. Ctr.*, 60 NY2d 908). In particular, it has been alleged that DR. SILICH was the Director of Surgical Oncology at the hospital; that the hospital openly advertised its affiliation with DR. SILICH; and that plaintiff claims to have relied upon such advertised affiliation in seeking treatment at SIUH. In addition, the second of plaintiff's three surgeries was performed by DRS. SILICH and ROESLER at SIUH on August 6, 2003, where he remained for three days following that surgery to receive radiation treatment. These and any other facts developed during discovery, will have to be considered together in order to determine whether the nature of the relationship between SIUH and SILICH was such as to warrant the application of the continuous treatment doctrine to the hospital (*see Sosnoff v. Jackman*, – AD3d –, NY Slip Op 8439; *Contu v. Albert*, 18 AD3d 692; *Claire v. St. James Mercy Hosp.*, 298 AD2d 943).

Accordingly, the hospital defendants may renew their motion to dismiss the amended complaint as untimely following the completion of discovery.

Finally, as plaintiff has submitted sufficient proof with regard to his appointment as the administrator of DEBRA JOHNSEN's estate, said status may be properly reflected in the caption of any amended complaint.

In view of this disposition, the Court need not address any further issue.

Accordingly, it is hereby:

ORDERED that the motion of defendants ROBERT J. SILICH, M.D. and ROBERT J. SILICH, M.D.,P.C. to strike the complaint pursuant to CPLR 3024(b) is granted; and it is further

ORDERED that so much of the motion of defendants STATEN ISLAND UNIVERSITY HOSPITAL and DR. DANIEL J. ROESLER to strike the complaint pursuant to CPLR 3024(b) is granted; and it is further

ORDERED that the plaintiffs are granted leave to serve an amended complaint, in proper format, *nunc pro tunc* upon these defendants within 20 days of the service upon them of a copy of this Decision and Order with Notice of Entry; and it is further

ORDERED that the caption of any amended complaint and answers shall properly state DEBRA JOHNSEN, decedent by WALTER N. JOHNSEN, as Administrator; and it is further

ORDERED that the Clerk enter judgment accordingly.

All parties shall appear for a status conference in DCM Part 3 at 9:30 a.m. on **January 8, 2008.**

E N T E R,

Dated: December 13, 2007

J.S.C.