

**Diprima v Steinberg**

2008 NY Slip Op 30645(U)

February 20, 2008

Supreme Court, Richmond County

Docket Number: 0011203/2004

Judge: Joseph J. Maltese

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

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**Index No.: 11203/2004  
Motion No.:001**

**JOSEPH DIPRIMA, as Administrator of the Estate of  
FRANCES DIPRIMA a/k/a FRAN DIPRIMA,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**SCOTT STEINBERG, M.D.,  
FELICIA JACOB, M.D.,  
TRACY PUZA, M.D.,  
NEVILLE MOBARAKAI, M.D.,  
ADEDAYO DEDEJI, M.D., and  
STATEN ISLAND UNIVERSITY HOSPITAL,**

*Defendants*

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The following items were considered in the review of this motion to add a defendant.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	
Exhibits	Attached to Papers

Plaintiff's motion seeking to add a defendant pursuant to CPLR §§ 203 (b) and (c) is granted in its entirety.

**Facts**

Plaintiff commenced this action by filing a Summons and Complaint with respect to the named defendants on or about April 20, 2004. In his Complaint plaintiff alleged acts of medical malpractice stemming from decedent's hospitalization at Staten Island University Hospital from February 28, 2002 to May 4, 2002. During the deposition of defendant, Dr. Scott Steinberg, ("Steinberg") plaintiff learned that Steinberg was employed as a fellow in advanced laparoscopic surgery by George El Ferzli, M.D as well as a surgical attending physician at Staten Island University Hospital. ("SIUH") According to the deposition of Steinberg, the fellowship with Dr.

Ferzli lasted approximately one year. The following exchange occurred on the record:

Q. Where did you do your fellowship?

A. At Staten Island University Hospital, with Dr. George Ferzli.

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Q. For how long was that fellowship?

A. One year.

Q. When exactly did you complete the fellowship in 2002?

A. June of - - June 30<sup>th</sup>, 2002.

Q. So during the time in which you were involved in the care of Mrs. Diprima, you were actually a fellow in laparoscopic surgery?

A. I had a dual role at the time. I joined Dr. Ferzli's practice - - -

Q. Okay

A. - - - with the intention of learning advanced laparoscopic surgery with him. And I was also an attending at Staten Island Hospital, as part of the arrangement.<sup>1</sup>

Steinberg continued to describe his relationship George El Ferzli, M.D., P.C.(hereinafter "Professional Corporation") in the following exchange:

Q. Did you have any contract with Dr. Ferzli with regard to your becoming an employee of his practice?

A. Yes

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Q. Approximately how many hours were spent in caring for patients associated with the PC?

A. All of my patient care hours were taking care of patients in the PC, because any patient that I saw was part of the PC.

Q. I see. Who paid your salary?

A. Dr. Ferzli.

Q. Okay.

A. Dr. Ferzli's PC.

Q. Who paid your malpractice insurance?

A. Dr. Ferzli's PC.

Q. Did you have health insurance?

A. Yes.

Q. Did Dr. Ferzli pay that also?

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<sup>1</sup> Steinberg Transcript at 9 and 10.

A. Yes.<sup>2</sup>

As a fellow, Steinberg was employed by the Professional Corporation. Decedent, Frances DiPrima's family doctor referred her to Dr. Ferzli. Steinberg described the referral in the following exchange:

Q. Do you know how Mrs. Diprima was referred to you?

A. Yes.

Q. Could you explain how, please?

A. Mrs. Diprima was referred to our practice. And I was on call the day she was referred to our practice.

Q. You were on call for the Emergency Department?

A. For our practice.<sup>3</sup>

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Q. Why don't you tell me what it is that you recall about the day in regard to Mrs. Diprima.

A. I remember evaluating Mrs. Diprima in the emergency Room with Dr. Pecoraro. . .

Q. . . . Why was she evaluated with Dr. Pecoraro?

A. Dr. Pecoraro and I worked very well together, and we had a team approach with a lot of our patient care. You know, it's a collaborative effort taking care of patients, as you know.

Steinberg and Dr. Alphonse Pecoraro ("Pecoraro"), as employees of the Professional Corporation rendered care to the decedent.

Steinberg further clarified his position at the Professional Corporation in the following exchange:

Q. Do you have any office records pertaining to Mrs. Diprima?

A. I do not have any personal office records. I never saw Mrs. Diprima in the office.

Q. No. I understand that.

A. And I'm not sure if Dr. Ferzli had seen her in the office or not. I don't know.

Q. How did the PC bill for your services, if you know?

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<sup>2</sup> Steinberg Transcript at 20 and 21.

<sup>3</sup> Steinberg Transcript at 25.

A. I was billed as an associate of the practice, as an attending.

Q. Did you have to fill something out in order to submit it, so that it could be submitted for payment? Did you yourself have to do some paperwork in regard to billing?

A. Yes.

Q. What did you do in that regard?

A. I would code the operation based on the CPT and ICD-9 codes.

Q. Would you give that to somebody?

A. To the office.

Q. When you say the office, you mean the office of - -

A. George Ferzli, P.C.<sup>4</sup>

Plaintiff moves this court to add the Professional Corporation as a defendant pursuant to CPLR §§ 203 (b) and (c) so as to relate the service of process on it to the original date of service on the current defendants. Defendants argue: 1) that the plaintiffs incorrectly assume that Martin Clearwater & Bell, LLP will represent the Professional Corporation and 2) that it would be “egregious and prejudicial to George El Ferzli, M.D., P.C. if it is added as a party defendant in this action without being served with a proposed Amended Summons and Complaint and receiving notice of this action.”

### **Discussion**

The legislature empowered the courts to amend a complaint to add a new party or claim after the expiration of the statute of limitations in CPLR § 203. This statute relates the subsequent amendment to the pleading back to the original filing of the Summons and Complaint. The statute states in pertinent part that:

(b) In an action which is commenced by service, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when:

1. the summons is served upon the defendant. . .

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(c) In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant

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<sup>4</sup> Steinberg Transcript at 35 and 36.

united in interest with such defendant when the action is commenced.<sup>5</sup>

The Court of Appeals reviewed this statute in *Buran v. Coupal*.<sup>6</sup> In evaluating this statute the Court set forth a three prong test to determine whether adding a party should relate back to an earlier pleading. The Court said the test should consist of:

. . . three conditions [that] must be satisfied in order for claims against one defendant to relate back to claims asserted against another . . . (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 he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.<sup>7</sup>

In the present case there is no dispute between the parties with respect to the first prong. It is undisputed that the claim raised against the Professional Corporation arose out of the care rendered to decedent between February 28, 2002 to May 4, 2002 at Staten Island University Hospital. The parties disagree as to the existence of facts necessary to satisfy prongs two and three of the test as articulated by the Court of Appeals.

Defendants assert that plaintiff’s fail to establish that the proposed defendant, George El Ferzli, M.D., P.C., is ‘united in interest’ with the current defendants. To bolster their position, defendants’ reason that Steinberg’s failure to examine the decedent at the office of the Professional Corporation or to maintain a personal file at the office demonstrates that the parties are not united in interest.

However, plaintiff’s argue that the Appellate Division, Second Department’s holding in

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<sup>5</sup> CPLR § 203 (b) and (c).

<sup>6</sup> 87 NY2d 173 [1995].

<sup>7</sup> 87 NY2d 173 [1995] (internal citations omitted )

*Connell v. Hayden* applies to the case at bar.<sup>8</sup> In that decision the Appellate Division recognized that where physicians are engaged in the practice of medicine through a professional corporation the laws of employers and employees apply. In particular the Appellate Division found “[i]t has been held that employers (masters) and their employees (servants) are united in interest.”<sup>9</sup> The Appellate Division reasoned that the doctrine of *respondeat superior* applies in situations where doctors commit torts while in the employ of a business entity, either in the form of a professional corporation or a hospital. The court further held that the “. . .unity of interest does not turn upon whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first.”<sup>10</sup>

Applying the holding and reasoning from *Connell* case, Steinberg and the Professional Corporation are united in interest. In the case at bar, Steinberg was a fellow of Dr. Ferzli’s, on the payroll of the Professional Corporation during the period of treatment of decedent. Whether Steinberg saw decedent at or kept records at Dr. Ferzli’s office is irrelevant. Steinberg submitted paperwork to the Professional Corporation for billing purposes, which in turn created an invoice for decedent. As such this court finds that there are sufficient facts to support plaintiff’s position that the Professional Corporation is united in interest with the current defendants.

The issue before the court is whether the third prong of the *Buran* test is satisfied. The determination of this issue turns on the fact that Steinberg was no longer employed by the Professional Corporation at the time this action was commenced. This situation is further compounded by the fact that Steinberg had a dual role as fellow to Dr. Ferzli and surgical attending of record for SIUH at the time he treated the decedent.

Defendants argue that the current action brought against defendants was not commenced until April 2004 a year and ten months after Steinberg completed his fellowship with Dr. Ferzli. Furthermore defendants argue, the original complaint served on Steinberg made no reference to the Professional Corporation. Plaintiff contends that Steinberg’s dual role did not come to light

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<sup>8</sup> 83 AD2d 30 [1981].

<sup>9</sup> *Id.* (Internal citations omitted)

<sup>10</sup> *Id.*

until the deposition that took place on March 6, 2007.

The Court of Appeals, citing the United States Supreme Court, said that notice to the defendant within the time set forth in the statute of limitations is the “. . . ‘linchpin’ of the relation back doctrine . . .”<sup>11</sup> The Court held that the proper inquiry for a court considering the third prong is to consider “. . . whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all ‘and that the matter has been laid to rest as far as he is concerned.’”<sup>12</sup>

Based on the facts as presented by the parties this court holds that defendant could not reasonably conclude that plaintiff’s failure to sue the Professional Corporation within the prescribed statute of limitations did not demonstrate that there was no intent to sue it at all. By virtue of his fellowship the Professional Corporation Steinberg received compensation and benefits that included malpractice insurance and personal health insurance. Plaintiff’s counsel asserts that she was not aware of Steinberg’s dual role until his deposition. Defendant’s counsel does not dispute this fact.

Since Steinberg’s status as Dr. Ferzli’s fellow was not readily apparent to plaintiff it is impossible for the Professional Corporation to take the position that plaintiff’s failure to sue it indicated that the matter as it relates to it was laid to rest. To hold otherwise would set a precedent by which professional corporations engaged in the practice of medicine would seek to insulate themselves from liability by employing an endless stream of research fellows with limited tenures to treat patients. Such a holding would remove the very accountability for professionals that the legislature sought to impose on professional corporations. Furthermore, the addition of the Professional Corporation will not prejudice its defense.

### **Conclusion**

Plaintiff sufficiently satisfied that the three prong test as articulated in the *Buran*. As such plaintiff’s motion pursuant to CPLR § 203 (b) and (c) is granted in its entirety.

Accordingly, it is hereby:

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<sup>11</sup> 87 NY2d 173 [1995] (internal citations omitted).

<sup>12</sup> *Id.* (internal citations omitted)

ORDERED, that the proposed Amended Summons and Complaint be served on George El Ferzli, MD., P.C. located at 65 Cromwell Avenue, Staten Island, NY 10304 **on or before March 21, 2008**; and it is further

ORDERED, that the Compliance Conference scheduled for March 20, 2008 is hereby adjourned to **May 7, 2008 at 9:30 A.M.**

ENTER,

DATED: February 20, 2008

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Joseph J. Maltese  
Justice of the Supreme Court