

Johnsen v Silich

2008 NY Slip Op 31235(U)

April 22, 2008

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 PART DCM 3**

**Index No.: 101932/2007
Motion No.:003**

**WALTER N. JOHNSEN, JR., Individually, and
DEBRA JOHNSEN, Decedent by
WALTER N. JOHNSEN, JR.,as ADMINISTRATOR**

Plaintiff

against

**ROBERT J. SILICH, M.D.,
ROBERT J. SILICH, M.D., P.C.,
AND STATEN ISLAND UNIVERSITY HOSPITAL**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants' motion pursuant to *CPLR* § 2221 seeking leave to reargue the Court's Decision and Order dated December 13, 2007 is granted. Defendants' further motion seeking to amend that decision to dismiss the second, sixth, seventh and eighth causes of action contained in plaintiffs' complaint is granted in part and denied in part.

Facts

The present motion arises out of an ambiguity contained in this court's Decision and Order dated December 13, 2007. In that decision this court found that the continuous treatment doctrine applied to plaintiffs' malpractice claim against the named defendants. However, that decision failed to address defendants' motion to dismiss the second, sixth, seventh and eighth causes of action.

Discussion

Leave to reargue is governed pursuant to *CPLR* § 2221:

A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.¹

This court will overlook the fact that defendants incorrectly designated their motion as being subject to *CPLR* § 2221(e) as they quoted the proper paragraph in their affirmation. While this court specifically acknowledged the plaintiffs' ability to utilize the continuous treatment doctrine as it related to its medical malpractice claim; it failed to address the additional causes of action alleged in their complaint. As such reargument is appropriate.

The causes of action specifically challenged by defendants are: the second cause of action for negligence against all defendants; the sixth cause of action against Staten Island University Hospital ("SIUH") for negligent hiring and retention; the seventh cause of action against SIUH for inadequate staffing; and the eighth cause of action against SIUH for negligent hospital administration. The court shall address each of these causes of action in turn.

Negligence

As the plaintiff specifically alleged detailed medical malpractice claims in their first cause

¹ *CPLR* § 2221(d).

of action against Drs. Silich and Roesler; the second cause of action raised against all defendants sounds in negligence. As their second cause of action alleges further negligence against both the doctors and the additional defendants, it is this court's opinion that the second cause of action is based on ordinary negligence only. There are no factual allegations contained in this portion of the complaint that would indicate that an additional medical malpractice claim is asserted against SIUH.

The statute of limitations for a claimed personal injury is codified in *CPLR* § 214(5); which allows a plaintiff three years to commence an action. In a case involving negligence the Statute of Limitations begins to run at the time the negligent act is committed.² Defendant, SIUH argues that plaintiff's last contact with it occurred on August 8, 2003. Plaintiffs contend that the non-medical malpractice based causes of actions sounding in negligence were continuous torts that are preserved by a theory termed "continuous wrongs" by plaintiffs' attorney.

The court does not find this argument persuasive. Plaintiff fails to cite any authority that would grant this court the ability to toll the Statute of Limitations in a personal injury case alleging ordinary negligence. In *Playford v. Phelps Memorial Hospital Center*³, the Appellate Division, Second Department faced a situation where a hospital mistakenly switched the HIV test results of two patients, thereby incorrectly relating the results to the two patients. In that case the court found that this was a result of ordinary negligence. In denying plaintiff's request to toll the Statute of Limitations the court reasoned that ". . . until the Legislature provides otherwise, the three-year Statute of Limitations applicable to a 'negligence' action like the one at bar . . . Commences to run on the date of the 'occurrence' of the injury, not on the date when it was 'discovered.'"⁴ In this case there is neither statutory authority, nor case law that would support

² *Jensen v. City of New York*, 288 AD2d 346, [2d Dep't., 2001]; *Playford v. Phelps Memorial Hospital Center*, 254 AD2d 471, [2d Dep't., 1998].

³ *Playford v. Phelps Memorial Hospital Center*, 254 AD2d 471, [2d Dep't., 1998].

⁴ *Id.*

plaintiff's "continuous wrong" theory. As such the second cause of action contained in plaintiff's complaint as it currently is drafted is dismissed.

Negligent Hiring and Retention; Inadequate Staffing and Negligent Hospital Administration

SIUH correctly argues that the sixth, seventh and eighth causes of action may not be entitled to a tolling of the Statute of Limitations granted to actions sounding in medical malpractice. The Court of Appeals in *Bleiler v. Bodnar* stated that not every claim of negligence asserted against a hospital concerns medical malpractice.⁵ Specifically, in some instances the negligence alleged is not the failure to furnish medical treatment to a patient, but a failure of a separate and distinct duty to a patient.⁶

As the previous motion before this court was for summary judgment before the parties completed any discovery, this court cannot, as a matter of law, hold that these particular causes of action are not entitled to the tolling of the Statute of Limitations pursuant to the continuous treatment doctrine.

The prior order of this court shall be amended to state that defendant, SIUH's motion to dismiss the sixth, seventh and eighth causes of action is denied. SIUH may bring a further motion to dismiss the aforementioned causes of action after the completion of discovery.

Conclusion

Defendant, SIUH's motion to reargue the Decision and Order of this court dated December 13, 2007 is granted. Upon reargument, that decision shall be amended to read that plaintiffs' second cause of action sounding in ordinary negligence is dismissed. Defendant, SIUH's motion to dismiss sixth, seventh and eighth causes of action is denied. At this stage in

⁵ *Bleiler v. Bodnar*, 65 NY2d 65, [1985].

⁶ *Id.*

the litigation this court cannot, as a matter of law, find that plaintiffs cannot use the continuous treatment doctrine to toll the Statute of Limitations.

Accordingly, it is hereby:

ORDERED, that defendant SIUH's motion to reargue pursuant to *CPLR* § 2221(d) is granted; it is further

ORDERED, that the Decision and Order of this court dated December 13, 2007 is amended to dismiss plaintiffs' second cause of action against SIUH; it is further

ORDERED, that the Decision and Order of this court Dated December 13, 2007 is amended to indicate that plaintiffs' sixth, seventh and eighth causes of action are not dismissed as it cannot be determined as a matter of law that these claims of negligence do not relate to the duty to provide medical treatment to the patient; it is further

ORDERED, that defendant SIUH may bring a further motion to dismiss the aforementioned causes of action after the completion of discovery; and it is further

ORDERED, that all parties return to DCM 3 for a status conference on **May 2, 2008 at 9:30 A.M.**

ENTER,

DATED: April 22, 2008

Joseph J. Maltese
Justice of the Supreme Court