

**Obando v Good Samaritan Hosp.**

2009 NY Slip Op 30454(U)

February 23, 2009

Supreme Court, Suffolk County

Docket Number: 19335-05

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

INDEX  
NO.: 19335-05**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 8 SUFFOLK COUNTY**PRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 12-4-08  
SUBMITTED: 1-8-09  
MOTION NO.: 003-MD\_\_\_\_\_  
x  
IVAN OBANDO, individually and as Executor of  
the Estate of NANCY OBANDO, and as father of  
JASON OBANDO,

Plaintiffs,

-against-

GOOD SAMARITAN HOSPITAL,  
LAWRENCE WOMACK, M.D. and ROBERTO  
AYRES, M.D.,

Defendants.

\_\_\_\_\_  
xLAW OFFICES OF DAVID L. TRUEMAN, P.C.  
Attorney for Plaintiffs  
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Mineola, New York 11501SHAUB, AHMUTY, CITRIN & SPRATT, LLP  
Attorneys for Defendants Lawrence Womack,  
M.D. and Roberto Ayres, M.D.  
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Upon the following papers numbered 1 27 read on this motion to dismiss the cause of action for wrongful death; Notice of Motion and supporting papers 1-17; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 18-21; Replying Affidavits and supporting papers 22-24; Other 25- plaintiff's Mem/Law; 25-27 Supplemental Bills of Particular; it is,

**ORDERED** that this motion (003) by the defendants Lawrence Womack, M.D., and Roberto Ayres, M.D., pursuant to CPLR 3211(a)(5) for an order dismissing the cause of action for wrongful death asserted on behalf of the plaintiff's decedent as barred by the applicable statute of limitations is denied.

This action was commenced by the plaintiff, Ivan Obando, individually, as executor of the estate of Nancy Obando, and as father of Jason Obando, by the filing of a summons and complaint under Index No. 05-19335 on April 29, 2005. Good Samaritan Hospital and John Does, M.D., 1-8 and John Does 9-16 were named as defendants. Causes of action were asserted alleging negligence against all the defendants; medical malpractice against Good Samaritan Hospital and its agents, servants and employees for causing pain and suffering and for causing and contributing to the death of the plaintiff's decedent; and negligent supervision

against Good Samaritan Hospital. On January 19, 2007, another action was commenced by the same plaintiffs under Index No. 07-02327 naming Lawrence Womack, M.D., and Roberto Ayres, M.D., as defendants. That complaint set forth causes of action sounding in negligence and medical malpractice for causing pain and suffering and for causing and contributing to the death of the plaintiff's decedent. By an order dated December 6, 2007 (Emerson, J.), these two actions were consolidated under Index No. 05-19335, and the caption was amended to reflect Good Samaritan Hospital, Lawrence Womack, M.D., and Roberto Ayres, M.D., as defendants. Thereafter, the plaintiff served an amended summons and amended verified complaint reflecting the caption as amended, alleging negligence and medical malpractice by all the defendants for causing and contributing to the plaintiff's decedent's demise and pain and suffering, and alleging negligent supervision by Good Samaritan Hospital of its employees, agents and servants.

The death certificate dated October 20, 2004, sets forth that the immediate cause of death of the plaintiff's decedent, Nancy Lynn Obando, on October 19, 2004, at Good Samaritan Hospital, was acute bacterial pneumonia due to septic shock and acute renal failure. That she also suffered from cystic fibrosis is set forth as another significant condition contributing to her death, but not related to the causes given. She was admitted to Good Samaritan Hospital on September 30, 2004, having been transferred from Brookhaven Memorial Hospital. She was 28 years of age on the date of her death.

The defendants Drs. Womack and Ayres seek summary judgment dismissing the complaint on the ground that the plaintiff's claim for wrongful death is barred by the applicable statute of limitations in that this action was not commenced within two years of the date of death of the plaintiff's decedent. The defendants argue that because the plaintiff's decedent died on October 19, 2004, and this action was not commenced until January 19, 2007, the claim for wrongful death is untimely.

The plaintiff opposes this motion and asserts that the action was timely commenced against the defendant doctors Womack and Ayres. Relying upon the "relation back doctrine" pursuant to CPLR 203, the plaintiff asserts that the defendants are united in interest with the other defendant, who was timely served with the first summons and complaint in which the cause of action for wrongful death was asserted.

In reply, the moving defendants assert, inter alia, that the medical treatment provided to the decedent at Good Samaritan Hospital can be divided into two separate and distinct acts of conduct, transactions, or occurrences. The first is the appropriateness of the various orders by other physicians, and Drs. Womack's and Ayres' reliance upon said orders for the patient's antibiotic management. The second is the responsibility of the staff of the Hospital to carry out said orders through their fulfillment. The moving defendants argue that a departure by either group does not implicate the other group and the mere fact that all of the decedent's treatment occurred at the Hospital does not justify deeming it a single transaction, event, or occurrence.

EPTL 5-4.1 provides in pertinent part, “The personal representative, duly appointed in New York or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent’s death” (*see, Morano v St. Francis Hospital et al*, 100 Misc2d 621, 420 NYS2d 92 [Supreme Court of New York, Dutchess County, 1979]).

The court finds that the first action was timely commenced within the applicable two-year statutory period. The plaintiff’s decedent died on October 19, 2004, and the first action was commenced April 29, 2005. Although the second action substituting Dr. Womack and Dr. Ayres for the John Doe defendants was not commenced within the applicable two-year period because it was commenced January 19, 2007, this court determines that the moving defendants are united in interest with the defendant Good Samaritan Hospital; that both actions arise out of the same conduct, transaction or occurrence; and that the plaintiff has demonstrated that, but for a mistake as to the identity of the parties who will not be prejudiced and who knew of the occurrence when it occurred, the second action relates back to the first action. It is, therefore, deemed timely commenced.

CPLR 203(c) provides, “Claim in complaint where action commenced by filing. In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.” In order for the claims against one defendant to relate back to claims asserted against another, the plaintiff must 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 notice of the institution of the action such that the new party will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against that party as well (**Mondello v New York Blood Center-Greater New York Blood Program**, 80 NY2d 219, 590 NYS2d 19 [1992]; **Brock v Bua**, 83 AD2d 61, 443 NYS2d 407 [2<sup>nd</sup> Dept 1981]; **Thompson v Suffolk County Police Department**, 50 AD3d 1015, 857 NYS2d 181 [2<sup>nd</sup> Dept 2008], *citing* **Buran v Coupal**, 87 NY2d 173, 638 NYS2d 405; CPLR 230(b); **Deluca v Baybridge at Bayside Condominium**, 5 AD3d 533, 772 NYS2d 876 [2<sup>nd</sup> Dept 2004]). In **Thompson v Suffolk County Police Department**, (*supra*), the Appellate Division stated, “Contrary to the Supreme Court’s determination, however, the plaintiffs’ failure to name individual police officers...in the proposed amended complaint did not render it totally devoid of merit or palpably insufficient as a matter of law (citation omitted), nor does the expiration of the applicable statute of limitations bar the proposed amendment. Under the ‘relation back’ doctrine, a plaintiff may be permitted to correct a pleading error by adding a new party united in interest with the previously-named defendants where the statute of limitations has expired (citations omitted).”

On September 30, 2004, the plaintiff's decedent was admitted to Good Samaritan Hospital with a diagnosis of cystic fibrosis, septic shock, and acute respiratory failure. Donald Moyer, D.O., prescribed antibiotics including Vancomycin, Tobromycin and Zosyn, and Dr. Ayres attended to her on a cystic fibrosis/pulmonary consult. She had been sedated and had an endotracheal tube inserted. On December 3, 2004, Dr. Angela Dorsey, D.O., discontinued the orders for Vancomycin and Zosyn. On October 8, 2004, Imipenem and Amikacin were ordered by Tamika Maxwell, D.O., as a standing order. Imipenem was given through October 10<sup>th</sup> at 10 a.m. and the Amikacin through October 11<sup>th</sup> at 10 a.m. Neither order had been discontinued by a physician. On October 11<sup>th</sup> the plaintiff's decedent was transferred from the PICU and was assigned to the care of Dr. Womack. On October 12<sup>th</sup>, Dr. H. Balbi ordered that the Amikacin be re-started every 12 hours for seven days and Vancomycin every 12 hours for seven days. However, counsel for the defendant claims that these orders were not picked up by the pharmacy, and on October 13<sup>th</sup> Dr. Womack first learned that plaintiff's decedent was not receiving the antibiotics as ordered and that it was Hospital policy that medication orders be automatically discontinued after seven days. The Amikacin, Vancomycin and Imipenem were restarted on October 13<sup>th</sup>. The plaintiff's decedent died on October 19, 2004. Accordingly, the court finds that both claims asserted against the Hospital and the moving defendants arose out of the same conduct, transaction, or occurrence.

Lawrence Womack, M.D. testified at his examination before trial that he is an attending physician at Good Samaritan Hospital, which permits him to admit adult patients to the hospital and treat and diagnose them. He first began his affiliation at Good Samaritan Hospital in 2003 when he was employed there as a hospitalist. He received insurance payments from Good Samaritan Hospital as an employee of the hospital until July 2006, when he opened his own practice. At that time, he did not have an outside practice and admitted, treated, and discharged patients from the Hospital. In his affirmation, Dr. Womack avers that he was employed by Good Samaritan Hospital during the decedent's admission of September 30, 2004, through October 19, 2004. He also avers that he was served with a summons and complaint in January or February 2007 and was unaware of any action against the Hospital prior to being served.

Roberto Ayres, M.D., avers in his affirmation that he was employed by Good Samaritan Hospital during the decedent's admission from September 30, 2004, through October 19, 2004. He avers that he was served with a summons and complaint in the instant matter in January or February 2007 and, prior to such service, was unaware of any action the plaintiff had against the hospital.

“As codified in New York's Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (**Buran v Coupal**, 87

NY2d 173, 638 NYS2d 405 [1995]). “To be united in interest it is not necessary to be joint contractors or to have a joint interest. If the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other then they are otherwise united in interest” (**The Prudential Insurance Company of America v Stone**, BI 270 NY2d 154 [1936]).

Both moving defendants were employees of the defendant Hospital during their care and treatment of the plaintiff’s decedent and when the first action was timely commenced. The complaint in the first action sets forth the cause of action for medical malpractice allegedly resulting in the plaintiff’s decedent’s pain and suffering and wrongful death. The Hospital can be vicariously liable for the medical malpractice of its employees (**O’Regan v. Lundie**, 299 AD2d 53, 751 NYS2d 274 [2002]; **Mduba v Benedictine Hospital**, 52 AD2d 450, 384 NYS2d [3<sup>rd</sup> Dept 1976]). In a malpractice action, the defendants are considered united in interest when one is vicariously liable for the acts of the other (**Schiavone v Victory Memorial Hospital et al**, 292 AD3d 365, 738 NYS2d 87 [2<sup>nd</sup> Dept 2002]). By reason of the employer/employee relationship between the moving defendants and the Hospital, the court finds that the moving defendants are united in interest with the defendant Hospital. Moreover, by reason of that relationship, they can be charged with notice of the commencement of the action and, as such, will not be prejudiced in maintaining their defense on the merits.

There is no evidence of bad faith on the plaintiff’s part or prejudice to the defendants because the plaintiff failed to initially identify them (*see*, **Austin v Interfaith Medical Center**, 264 AD2d 702, 694 NYS2d 730 [2<sup>nd</sup> Dept 1999]), nor has it been demonstrated that the plaintiffs have attempted to secure some tactical advantage in the litigation based upon the failure to initially name the moving defendants (**Abbott v Ostad**, 2005 NY Slip Op 51347U, 8 Misc3d 1029A, 806 NYS2d 443 [Supreme Court of New York, Bronx County 2005]). Although the moving defendants assert that they were unaware of any action against the Hospital prior to being served, conspicuously absent in their affirmations is any statement from them that they were unaware of the incident giving rise to this action. Accordingly, the moving defendants knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against them as well.

Accordingly, motion (003) by the defendants Lawrence Womack, M.D., and Robert Ayres, M.D., pursuant to CPLR 3211(a)(5) to dismiss the complaint as barred by the applicable statute of limitations is denied.

Dated: February 23, 2009

**HON. ELIZABETH HAZLITT EMERSON**

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J.S.C.