

Tolkoff v Goldstein

2009 NY Slip Op 31789(U)

August 6, 2009

Supreme Court, Suffolk County

Docket Number: 11319/2006

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 11319/2006

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr. _____

 DONNA TOLKOFF, AS ADMINISTRATRIX OF
 THE ESTATE OF JAYMEE TOLKOFF,

Plaintiff(s),

-against-

DAVID GOLDSTEIN, M.D., JAGPREET
 DHILLON, M.D., LONG ISLAND DIAGNOSTIC
 IMAGING, JOHN T. MATHER MEMORIAL
 HOSPITAL, DIMITRI PYRROS, M.D., NORTH
 SHORE PULMONARY ASSOCIATES, JAY M.
 BARBAKOFF, M.D., WALTER SZCZUPAK,
 M.D., ANTHONY C. THEODORIS, M.D. AND
 LONG ISLAND MEDICAL IMAGING,

Defendant(s).

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ORIG. RETURN DATE: June 23, 2009
FINAL RETURN DATE: July 23, 2009
MTN. SEQ. #: 002-WDN
 003-MotD

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Upon the following papers numbered 1 to 38 read on this motion and amended motion to amend the caption, to lift the stay and for related relief: Notice of Motion and supporting papers 1 - 15; Amended Notice of Motion and supporting papers 16 - 30; Affirmations (3) in Partial Opposition 31 - 38; it is,

ORDERED that the motion (002) for an amendment of the caption of this action to reflect the appointment of an administratrix on behalf of one of the defendants and to add an additional defendant, to lift the stay of this action and for related relief is deemed withdrawn in view of the amended notice of motion (003); and it is further

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ORDERED that the Court notes for the record the death of the defendant David Goldstein, M.D. after the commencement of this action and the appointment of the administratrix of his estate, Margaret M. Goldstein; and it is further

ORDERED that the plaintiff's amended motion (003) for leave to amend the caption to reflect the substitution of Margaret M. Goldstein, as Administratrix of the Estate of David Goldstein, M.D. for the deceased defendant David Goldstein, M.D. is granted; and it is further

ORDERED that the request to add the additional party defendant, Zelen & Pyrros, M.D., P.C., is granted; and it is further

ORDERED that the caption shall be amended and shall now read as follows:

DONNA TOLKOFF, as Administratrix of the Estate
of JAYMEE TOLKOFF,

Plaintiff,

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-against-

MARGARET M. GOLDSTEIN, as Administratrix
of the Estate of DAVID GOLDSTEIN, M.D.,
JAGPREET DHILLON, M.D., LONG ISLAND
DIAGNOSTIC IMAGING, JOHN T. MATHER
MEMORIAL HOSPITAL, DIMITRI PYRROS, M.D.,
ZELEN & PYRROS, M.D., P.C., NORTH SHORE
PULMONARY ASSOCIATES, JAY M.
BARBAKOFF, M.D., WALTER SZCUZUPAK, M.D.,
ANTHONY C. THEODORIS, M.D. and LONG
ISLAND MEDICAL IMAGING,

Defendants.

and it is further

ORDERED the stay of this action due to the death of the deceased defendant is hereby lifted; and it is further

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ORDERED that the proposed supplemental summons and amended verified complaint, as provided to the court with this amended notice of motion, shall be deemed served upon the originally named defendants and, as to the substituted defendant and the additional named defendant, personal service shall be made within 45 days of the date of entry of this decision and order in accordance with the applicable provisions of the CPLR; and it is further

ORDERED that pursuant to 22 NYCRR 202.8(f) the parties in this action are directed to appear for a preliminary conference on September 10, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m., said date allowing time for the defendants to serve answers to the amended verified complaint herein.

This is a medical malpractice action in which one of the defendant doctors, David Goldstein, M.D., died on April 5, 2008 after the action was commenced. Margaret M. Goldstein was appointed the administratrix of the estate of David Goldstein, M.D. on July 11, 2008.

The plaintiff makes this application to substitute the administratrix of the Goldstein estate for David Goldstein, M.D. as well as asking the court to lift the stay of this action currently in place due to Dr. Goldstein's death as well as for leave to add an additional defendant, Zelen & Pyrros, M.D., P.C. (hereinafter Pyrros P.C.).

Three defendants submit partial opposition to this motion. Two of the defendants only object to the statement of facts as submitted in support of the motion. The court notes their objections but finds the facts relevant to the relief requested (substitution of administratrix, lifting of stay and addition of another defendant), not to be at issue. As to any other facts stated, they are not relevant to the relief requested and are not binding upon the parties as findings of fact.

The third affirmation in partial opposition is submitted on behalf of the defendant Dimitri Pyrros, M.D. and only opposes the addition of the defendant Pyrros, P.C.

The relief with regard to substituting the administratrix Margaret M. Goldstein for the late David Goldstein, M.D. and lifting the stay with regard to this action are granted without opposition. As to the request for leave to add the additional defendant Pyrros P.C., that is granted over the objection of Dr. Dimitri Pyrros.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing parties (see, CPLR 3025 [b]; *Sarro v Sarro*, 238 AD2d 330, 656 NYS2d 916 [1997]) and as long as such a proposed amendment is not palpably improper or insufficient as a matter of law (see *Rosner v Mira, Inc.*, 16 AD3d 277, 278, 792 NYS2d 41, 43 [1st Dept 2005]; *Amica Mut. Ins. Co. v Hart Alarm Systems Inc.*, 218 AD2d 835, 629 NYS2d 874 [3d Dept 1995]). In opposing such an application, the burden is upon the opponent to overcome the heavy presumption of the validity of such an application (see *Otis Elevator Co. v 1166 Ave. of the Americas Condominium*, 166 AD2d 307, 564 NYS2d 119 [1st Dept 1990]).

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In arguing for the addition of Pyrros P.C., the plaintiff states that during the course of discovery, medical records were obtained from Dr. Pyrros which indicated that Dr. Pyrros was actually employed by Pyrros P.C. Accordingly, the plaintiff now seeks to add Pyrros P.C. as a defendant.

In further support of this part of the motion, the plaintiff cites cases supporting the proposition that, under the relation back doctrine, the addition of a party may be made after the statute of limitations period has run where it is alleged that (1) the same transaction or occurrence is clearly involved, (2) there is a unity of interest, and (3) the proposed additional defendant knew or should have known that it was involved but for the mistaken omission by the plaintiff (*see Mondello v New York Blood Ctr.*, 80 NY2d 219, 226, 590 NYS2d 19, 23 [1992]; *Marino v Westchester Medl. Group, P.C.*, 50 AD3d 861, 865 NYS2d 210 [2d Dept 2008]; *Brock v Bua*, 83 AD2d 61, 443 NYS2d 407 [2d Dept 1981]).

The plaintiff contends that all three prongs of the relation back test have been met here. First of all, according to the plaintiff, clearly, whether the claim is against Dr. Pyrros or his professional corporation/employer, Pyrros P.C., the same acts are involved. Secondly, the unity of interest between Dr. Pyrros and Pyrros P.C. is apparent since there is an employer/employee relationship in which Pyrros P.C. would be vicariously liable and it is well established that vicarious liability satisfies the unity of interest factor (*see Mondello v New York Blood Ctr.*, 80 NY2d 219, 225, 590 NYS2d 19, 22 [1992]; *Brock v Bua*, 83 AD2d 61, 443 NYS2d 407 [2d Dept 1981]). And lastly, in view of this ongoing unity of interest and the nature of a professional corporation, it is reasonable to attribute the notice of the medical malpractice claim against Dr. Pyrros to Pyrros P.C. as well. Moreover, the “excusability of the mistake [of omission] is not an absolute requirement under New York law [cite omitted]” (*Buran v Coupal*, 87 NY2d 173, 179, 638 NYS2d 405, 409 [1995]).

In opposition, Dr. Pyrros has the burden of overcoming the heavy presumption of the validity of this application (*see Otis Elevator Co. v 1166 Ave. of the Americas Condominium*, 166 AD2d 307, 564 NYS2d 119 [1st Dept 1990]). Dr. Pyrros’s contentions in opposition to this application do not satisfy this burden.

Dr. Pyrros argues that the proposed amended verified complaint and the submissions in support of adding Pyrros P.C. do not say that the claims against Pyrros P.C. are based upon Dr. Pyrros’s acts rather than separate acts of Pyrros P.C. The court disagrees. The complaint clearly indicates that the acts of Dr. Pyrros are being attributed to the Pyrros P.C.

Dr. Pyrros also argues that Pyrros cannot be vicariously liable for the acts of Dr. Pyrros and, in any event, the proposed amended complaint does not actually say Pyrros is vicariously liable. No authority is provided for the theory that a professional corporation cannot be vicariously liable for the acts of its employee whereas it is well established that the opposite is true. And as to there being no stated vicarious liability claim, the court’s reading of the proposed amended verified complaint leads to a different conclusion, to wit: the complaint clearly states that the liability of Pyrros P.C. arises out of the employment of Dr. Pyrros and, as so stated, is enough to satisfy a claim for vicarious liability.

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Lastly, Dr. Pyrros contends that there is no proof that the failure to originally name Pyrros P.C. as a defendant was the result of a mistake. This argument also must fail because while the word "mistake" may not have been used, it is clear that the omission was due to a mistaken belief that Dr. Pyrros acted solely as an individual doctor and not as part of a professional medical corporation and, furthermore, this mistaken omission was not discovered until discovery had begun in this action.

In any event, as previously noted herein, the Court of Appeals has held that an excusable mistake is not an "absolute requirement" under the relation back doctrine (*Buran v Coupal*, 87 NY2d 173, 179, 638 NYS2d 405, 409 [1995]).

Accordingly, this part of the plaintiff's application is also granted and leave is provided to supplement the summons and to amend the complaint with the addition of the defendant Pyrros P.C. as provided herein.

This constitutes the decision and order of the court.

Dated:

August 6, 2009

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.