

Magalhaes v Staten Is. Univ. Hosp.

2009 NY Slip Op 33090(U)

December 23, 2009

Supreme Court, Richmond County

Docket Number: 011173/02

Judge: Joseph J. Maltese

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

**Index No. 011173/02
Motion No.:7, 8, 9, 10**

**NICHOLAS MAGALHAES, as Administrator of the Estate of
ELYSE MAGALHAES, and NICHOLAS MAGALHAES,
Individually,**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**STATEN ISLAND UNIVERSITY HOSPITAL, DANIEL
MEGNA, M.D., ROBERT SILICH, M.D., JOHN COOKE,
M.D., and STATEN ISLAND EMERGENCY PHYSICIANS,
P.C.**

Defendants

The following items were considered in the review of motions: for dismissal and summary judgment made by John Cooke, M.D. and Staten Island Emergency Physicians, P.C.; for summary judgment made by Daniel Megna, M.D. and Robert Silich, M.D.; and motion made by Nicholas Magalhaes, individually and as administrator, to dismiss the motion of John Cooke, M.D., and to preclude apportionment of liability to Daniel Megna, M.D. and Robert Silich, M.D.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4
Notice of Cross-Motion and Affidavits Annexed	2, 3
Answering Affidavits	5
Replying Affidavits	6, 7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

A motion was made by John Cooke, M.D. (“Dr. Cooke”) and Staten Island Emergency Physicians, P.C. (“SIEP”) pursuant to New York Civil Practice Law and Rules (“CPLR”) §3211¹ for dismissal and under CPLR §3212² for summary judgment. Dr. Cooke’s motion for dismissal is granted. SIEP’s motions for dismissal and for summary judgment are denied in their entirety.

The motions of Daniel Megna, M.D. (“Dr. Megna”) for summary judgment pursuant to CPLR §§ 3211³ and 3212⁴ are granted in their entirety. The cross motion made by Robert Silich, M.D. (“Dr. Silich”) for summary judgment pursuant to CPLR 3212⁵ is granted in its entirety. The cross motions made by the plaintiffs, Nicholas Magalhaes (“Mr. Magalhaes”), individually and as administrator of the Estate of Elyse Magalhaes (“Mrs. Magalhaes”), is granted in that the motion for dismissal made by Dr. Cooke is denied; and the cross motion is granted in so far as Dr. Megna and Dr. Silich shall not be apportioned liability, and in so far as denying the motion of SIEP for dismissal and summary judgment.

Facts

Statement of Facts

Mrs. Magalhaes had a prior history of peptic ulcer disease treated with Prilosec©. When she felt better, she stopped taking her medication. Then, at some time in the in the weeks and months preceding her entry to the Emergency Room (“ER”) of Staten Island University Hospital (“SIUH”), Mrs. Magalhaes began taking large amounts of Excedrin© and aspirin. She

¹CPLR § 3211 (a)(5).

²CPLR § 3212 (a).

³CPLR § 3211 (a).

⁴CPLR § 3212 (a).

⁵*Id.*

experienced five days of nausea and vomiting, and after seeing blood in both her vomit and stool on October 14, 1999, she entered the ER at about 7:30 PM. In the ER, Mrs. Magalhaes was administered fluids and Pepcid© intravenously under the supervision of the ER physician, Dr. Cooke. Nasogastric drainage was initiated. Dr. Megna, a gastroenterologist, was called at about 11:30 PM and arrived at the ER sometime between 12:30 and 1:00 AM on October 15, 1999, by which time anesthesiology, nursing and the endoscopy suite were mobilized. When Dr. Megna first evaluated Mrs. Magalhaes in the ER he ordered that she be transfused with blood.

Mrs. Magalhaes was then brought to the endoscopy suite and Dr. Megna performed esophago-gastro-duodenoscopy. Ulcers in the stomach and duodenum, and active bleeding were visualized. During the procedure, Mrs. Magalhaes became temporarily hypotensive, but her blood pressure was again stabilized. Dr. Megna was unable to control bleeding and he consulted with Dr. Silich, a surgeon. Dr. Silich came to the hospital and performed emergency surgery at about 3:30 AM on October 15, 1999. Dr. Silich identified multiple problems during this surgery. He identified a large duodenal ulcer with active bleeding, and both the duodenum and the duodenal ulcer adhered to the pancreas. Dr. Silich performed a hemigastrectomy and a gastrojejunostomy, and created a feeding jejunostomy. A bile leak occurred at the time of surgery which Dr. Silich repaired.

Dr. Silich continued to care for Mrs. Magalhaes during her subsequent extended hospitalization. She developed sepsis, and Dr. Silich performed an exploratory laparotomy on October 23, 1999. During that surgery, he found that his patient, Mrs. Magalhaes', choledochoduodenostomy had developed a leak, and suction drains were placed. Although there were some temporary signs of improvement during her hospitalization, Mrs. Magalhaes deteriorated and finally suffered a terminal cardiac event, in association with the Systemic Inflammatory Response Syndrome ("SIRS") and Acute Respiratory Distress Syndrome ("ARDS"). She expired on March 27, 2000 while still in the hospital.

Motion for Dismissal Made by Dr. Cooke and SIEP.

The Plaintiffs initially brought action against SIUH, Dr. Megna and Dr. Silich on July 8, 2002. A motion was made to amend the complaint by adding Dr. Cooke and SIEP as defendants. Service of this motion was made on March 20, 2008, and the motion was granted on April 17, 2008. Supplemental summons and amended verified complaint were dated May 13, 2008 . These were answered on June 4, 2008, in which answer the statute of limitations for medical malpractice⁶ was cited.⁷ Dr. Cooke and SIEP moved for dismissal and for summary judgment on April 22, 2009, again citing the statute of limitation.

A defendant may move to dismiss on the grounds of the statute of limitations.⁸ A defense based upon a statute of limitations may be made at any time before service of a responsive pleading is required, but is waived unless raised in a timely answer or motion to dismiss.⁹ Leave to amend a complaint may be freely granted at any time provided that the terms are just.¹⁰ Unless otherwise directed by law or court order, an answer or reply to the amended pleading is required within 20 days after the service of the amended pleading.¹¹ In one action based upon alleged medical malpractice, the Appellate Division, Second Department affirmed a lower court granting leave to amend a bill of particulars after four and one-half years had passed from the commencement of the original action and less than two months before the scheduled date of

⁶CPLR § 214-a.

⁷Defendants Dr. Cooke and SIEP, Notice of Motion, Exhibit C, page 3, ¶ 10.

⁸CPLR § 3211 (a) 5.

⁹CPLR § 3211 (3); *Crook v. E.I. DuPont de Nemours & Co.*, 81 NY 2d 807, 808 [1993].

¹⁰CPLR § 3025 (b).

¹¹CPLR § 3025 (d).

trial.¹² In the instant action, the defendant raised the issue of the applicable statute of limitations in a timely fashion within an answer to an amended complaint, and the argument was preserved for motions.

New York Civil Practice Law and Rules (“CPLR”) § 203 permits the interposition of a claim against a defendant or co-defendant united in interest with a defendant when an order of attachment is granted.¹³ Further, in the Appellate Division, Second Department, this “relation-back” doctrine may be interposed against a defendant or co-defendant medical provider as the ostensible agent of a hospital principal, providing that the hospital has vicarious responsibility for that medical provider’s actions.

In *Mendrzycki v. Cricchio*, a medical malpractice action ruled upon by the Appellate Division, Second Department, an original complaint was amended when a new party was added to the caption and a new cause of action was asserted.¹⁴ On appeal, the defendants were granted dismissal on grounds of the statute of limitations.¹⁵ There, the defendant asserted an affirmative defense within a response made to the amended complaint made within 20 days.¹⁶ The principle is that the defendants must have an opportunity to respond to the amended complaints pursuant to CPLR 3025 (d) as though the amended complaint were the original, with defenses of the amended complaint, as though they were original.¹⁷

¹²*Sampson v. Contillo*, 55 AD 3d 591, 592 [2008].

¹³CPLR § 203 (b) 4.

¹⁴*Mendrzycki v. Cricchio*, 58 AD 3d 171, 173 [2d Dept 2008].

¹⁵CPLR § 3211 (a) (5); *Mendrzycki v. Cricchio*, 58 AD 3d at 177..

¹⁶*Mendrzycki v. Cricchio*, 58 AD 3d 171, 176 [2d Dept 2008].

¹⁷*Mendrzycki v. Cricchio*, 58 AD 3d 171, 173 [2d Dept 2008].

In this instant proceeding, the time to assert the affirmative defense of the statute of limitations was properly preserved by the answer to the amended summons served. The defendants' answer both raised the affirmative defense and was made within 20 days from the time of service of the supplemental service and amended verified complaint after May 13, 2008.¹⁸ The defense of the statute of limitations was therefore not waived because it was included in a timely answer to the motion to amend the complaint.

The relation back doctrine allows a fresh tolling of an appropriate statute of limitations, relating the actions of a defendant back to a previous, timely filed action, if certain conditions are met. Thus, an action is not truly time-barred when the claims in an amended filing made against a defendant may be related back to claims previously and properly asserted against a co-defendant.¹⁹ Validation of the relation back doctrine relies upon “(1) both claims [arising] 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.”²⁰ The criterion of “excusable” mistake was clarified by a correction that eliminated any necessity that the mistake be excusable.²¹

Once the affirmative defense of an expired statute of limitations is appropriately raised by the defendant, the burden of proof shifts to the plaintiff to show that the relation-back doctrine

¹⁸Defendants Dr. Cooke and SIEP, Notice of Motion, Exhibit C, Verified Answer to Amended Verified Complaint, dated June 3, 2008, page 4.

¹⁹See CPLR 203 (b) and (e); *Buran v. Coupal*, 87 NY 2d 863, 863-4 [1995]; and *Brock v. Bua*, 83 AD2d 61, 65 [2d Dept 1981]..

²⁰*Brock v. Bua*, 83 AD2d at 69.

²¹*Buran v. Coupal*, 87 NY 2d at 866.

applies according to the above criteria.²²

Application of the Relation Back Doctrine

It is undisputed that the particulars asserted against SIUH include particulars applicable to Dr. Cooke and to SIEP. Mrs. Magalhaes' entry into SIUH began with care rendered in the ER by Dr. Cooke and SIEP on October 14, 1999.²³ Thus, the claims against Dr. Cooke, SIEP, and SIUH arise, at least in part, from the same occurrence, Mrs. Magalhaes hospitalization. The first prong of the relation back doctrine applied against Dr. Cooke and SIEP is satisfied.

Mrs. Megalhaes entered the Emergency Room of SIUH on October 14, 1999, to be treated by the physician on call at SIUH, not by her regular physician.²⁴ She entrusted herself to SIUH and to its ER personnel, including Dr. Cooke and SIEP, as ostensible and apparent agents of SIUH. SIUH bears vicarious liability for the actions of its apparent agents, Dr. Cooke and SIEP.²⁵ Accordingly, SIUH is vicariously liable for the actions of Dr. Cooke and SIEP where the patient sought care from the hospital rather than from the specific physician.²⁶

Apparent authority exists when a third party would reasonably believe an actor has

²²*Buran v. Coupal*, 87 NY 2d 863 *et passant*.

²³Plaintiff's Notice of Motion to Add John Cooke, M.D. and SIEP as Defendants in the action, Plaintiff's Affirmation in Support, ¶ 3.

²⁴Plaintiff's Notice of Motion to Add John Cooke, M.D. and SIEP as Defendants in the action, Plaintiff's Affirmation in Support, Exhibit A, Emergency Room Triage Sheet.

²⁵*Schiavone v. Victory Memorial Hospital*, 292 AD2d 365, 366 [2d Dept 2002].

²⁶*Schiavone v. Victory Memorial Hospital*, 292 AD2d at 366; *see also Mduba v. Benedictine Hospital*, 52 AD 2d 450, 453- 454 [3d Dept 1976].

authority to act on behalf of the principal.²⁷ An agent is ordinarily subject to liability to a third party only when the third party is harmed by discrete conduct attributed individually to the agent.²⁸ Under principles of agency, vicarious liability is predicated upon the principle of “*respondeat superior*”,²⁹ and upon the employer being responsible for the acts of an employee.³⁰

Merely having the same purpose such as dismissal of an action against each of two parties “does not create a unity of interest.”³¹ “[U]nity of interest will generally be found where one of the parties is vicariously liable for the conduct of the other.”³² It had been stated that “[f]or a hospital to be vicariously liable for the negligence of a physician, ordinarily, an employment relationship, rather than an affiliation, is required.”³³ However, the proper principle has long been that “[o]ne who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.”³⁴

The instant action pertains to medical malpractice and relates to a physician and to a professional association, respectively Dr. Cooke and SIEP, each acting as apparent agents for a

²⁷Restatement [Third] of Agency, §2.03.

²⁸*Id.* § 7.01 and 7.02..

²⁹*Morris v. Snappy Car Rental*, 84 NY 2d 21, 27 [1994].

³⁰*N.X. v. Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002].

³¹*Red Hook/Gowanus Chamber of Commerce v. N.Y. City Bd. Stads. & Appeals*, 5 NY 3d 452, 457 [2006].

³²*Mondello v. N.Y. Blood Ctr.*, 80 NY 2d 219, 225 [1992].

³³*Raschel v. Rish*, 69 NY 2d 694, 697 [1986].

³⁴*Mduba v. Benedictine Hosp.*, 52 AD 2d 450, 453 [3d Dept 1976].

medical service provider, SIUH. The Appellate Division, Second Department holds that a physician acting for an institution that is vicariously liable for that physician's actions is united in interest to the institution. This principle of vicarious liability has been extended to the "relation back" doctrine codified in CPLR 203.³⁵ It is possible for vicarious liability to exist between equals, such as a man and wife.³⁶ A physician shareholder in a medical professional corporation was joined into an action against the corporation after the expiration of the statute of limitations using the relation-back doctrine and invoking unity of interest.³⁷ Additionally, union of interest has been founded on the basis of membership in a partnership against which an action was brought.³⁸

Certainly, an agent, such as a managing agent may share the immunity conferred upon an employer under Workmen's Compensation.³⁹ The Appellate Division, Second Department stated that a subject acting as an employee creates a unity of interest "for purposes of the relation-back doctrine regardless of 'whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first.'"⁴⁰ Another basis for unity of interest may be a contractual obligation to indemnify a principal for losses arising from medical malpractice.⁴¹ The Appellate Division, Second Department has also invoked reciprocal unity of interest when a party to an

³⁵CPLR § 203 (b).

³⁶*Seudath v. Mott*, 202 AD 2d 658, 659 [2d Dept. 1994], and *Buran v. Coupal*, 87 NY 2d at 175.

³⁷*Nani v. Gould*, 39 AD 3d 508, 508 [2d Dept 2007].

³⁸*Connell v. Hayden*, 83 AD 2d 30, 31-2 [2d Dept 1981].

³⁹*Alvarez v. Cunningham Assoc., L.P.*, 21 AD 3d 517, 518 [2d Dept 2005].

⁴⁰*Id.* at 509; citing: *Connell v. Hayden*, 83 AD 2d at 48; *Astudillo v. Flushing Hosp. Med. Ctr.*, 18 AD3d 588, 589 [2d Dept 2005]; *Schiavone v. Victory Memorial Hosp.*, 300 AD 2d 294 [2d Dept 2002]; and *Austin v. Interfaith Med. Ctr.*, 264 AD 2d 702 [2d Dept 702].

⁴¹*Austin v. Interfaith Med. Ctr.*, 264 AD 2d at 702-3.

original action is vicariously liable for the actions of a party named in an amended complaint.⁴² Therefore, in the realm of medical malpractice, vicarious liability flows in bilateral directions and includes responsibility for the actions of an affiliate, not just for a subordinate. Within the special provenance of licensed medical providers, public policy supports broadened bases for responsibility of professional actions by mutually inter-related medical providers.

In their motion to dismiss, Defendants Dr. Cooke and SIEP refer to a standard for union in interest derived from the mutual interest of spouses against an insurance provider.⁴³ “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.’”⁴⁴ Dr. Cooke and SIEP also cite to a case in which it was held that a covering physician, whose only responsibility was the temporary care of a patient in the temporary and immediate absence of a patient’s regular physician, did not share vicarious liability with the regular physician.⁴⁵ These actions are dissimilar to the instant action and are not dispositive.

Therefore, the Defendants Dr. Cooke and SIEP are united in interest with SIUH by the principal of reciprocal vicarious liability as elucidated by the Appellate Division, Second Department. Furthermore, the defendants Dr. Cooke and SIEP have not asserted adverse prejudice in maintaining a defense on the merits caused by an application of the relation-back doctrine. The second prong of the relation back doctrine is satisfied for Dr. Cooke and SIEP.

⁴²*Schiavone v. Victory Memorial Hosp.*, 300 AD 2d at 295; and implicitly in *Astudillo v. Flushing Hosp. Med. Ctr.*, 18 AD 3d at 589.

⁴³*Prudential Ins. Co. v. Stone*, 270 NY 154 (1936).

⁴⁴*Prudential Ins. Co. v. Stone*, 270 NY at 159.

⁴⁵*Orso v. Shaffer*, 155 AD 2d 508 [2d Dept 1989]; citing *Kavanaugh v. Nussbaum*, 71 NY 2d 535, 542 [1988].

The Plaintiffs assumed that a signature on the Emergency Room record was that of the Mrs. Magalhaes' personal physician, Dr. Sidlow.⁴⁶ According to the Plaintiff, it was learned on April 11, 2005 that the signature on the emergency room chart was actually that of Dr. Cooke.⁴⁷ The Plaintiff relates multiple futile efforts to track Dr. Cooke through his successive residences in Brooklyn and New Jersey. In February 2008, SIUH informed the Plaintiff that SIEP had responsibility for the Emergency Room at the time Mrs. Maghalaes entered SIUH.⁴⁸ When finally located in February 2008, Dr. Cooke also indicated that SIEP had responsibility for the ER at the time in question.⁴⁹ The requisite mistake for the relation-back doctrine was mistaking Dr. Cooke's signature on the Emergency Room record for that of Dr. Sidlow, and the assumption that Mrs. Magalhaes was seen by Dr. Sidlow in the ER, and not by SIEP and Dr. Cooke.

In *Alvarado v. Beth Israel Med. Ctr.*, a physician who may have caused an duodenal perforation during a procedure was only identified as a potential defendant when questioned as a third party after the expiration of the statute of limitations.⁵⁰ In that action, there was no evidence in the record that the defendant "had notice of the pending action before being subpoenaed to give a deposition as a non-party witness."⁵¹ In such a circumstance, the Appellate Division, Second Department held that an individual "could have reasonably concluded that the Plaintiffs' failure to sue him within the applicable limitations period meant they had no intent to sue him, and thus, that the matter had been laid to rest."⁵² Notice, whether actual or constructive, is the

⁴⁶Plaintiff's Notice of Cross-Motion, Affirmation in Opposition to Defendant's Motion to Dismiss, page 3, ¶ 6.

⁴⁷*Id.*, page 4, ¶ 6.

⁴⁸*Id.*, page 4, ¶ 7.

⁴⁹*Id.*, page 5, ¶ 8.

⁵⁰*Alvarado v. Beth Israel Med. Ctr.*, 60 AD 3d 981, 981-2 [2d Dept, 2009].

⁵¹*Id.* at 983.

⁵²*Id.*

‘linchpin’ of the relation-back doctrine.⁵³

Generally, it is a plaintiffs’ burden to demonstrate each element of the relation-back doctrine as it pertains to each defendant.⁵⁴ Here, the Plaintiffs argue that “the P.C. [SIEP] provided emergency room physician services at the time of the filing of the complaint in 2002.”⁵⁵ Since SIEP was still providing emergency room services contemporaneously to the filing of the complaint, one may impute actual or constructive notice of the action to SIEP at the time this action was commenced. SIEP knew or should have known of this action and that it was not included because of a mistake made by the Plaintiff. Therefore, the plaintiff has completed a showing of the third prong of the relation back doctrine against SIEP. Each element of the relation-back doctrine applies against SIEP, and the motion made by SIEP for dismissal is not granted.

It is also the burden of the plaintiff to provide evidence in the record that Dr. Cooke had actual or constructive notice of the action.⁵⁶ Dr. Cooke was no longer working at SIUH after the summer of the year 2000 and this action commenced in 2002.⁵⁷ Further, the record is bare of any evidence of an association between Dr. Cooke and SIEP at the time of the commencement of this action. It is not shown by evidence in the record that Dr. Cooke knew or should have known of this action. Therefore, evaluation of the third prong of the criteria for the relation-back doctrine fails to show the Plaintiffs demonstrated that Dr. Cooke had either actual or constructive

⁵³*Shapiro v. Good Samaritan Regional Hosp. Med. Ctr.*, 42 AD 3d 443, 444 [2d Dept 2003].

⁵⁴*Spaulding v. Mount Vernon Hosp.*, 283 AD 2d 634, 635 [2d Dept 2001]; *see also Austin v. Interfaith Med. Ctr.*, 264 AD 2d at 703.

⁵⁵Plaintiff’s Reply Affirmation, ¶ 10.

⁵⁶*Alvarado v. Beth Israel Med. Ctr.*, 60 AD 3d at 983.

⁵⁷Dr. Cooke’s Notice of Motion, Affirmation in Support, page 12, ¶ 41.

knowledge of this action before the expiration of the statute of limitations. In the absence of a showing that Dr. Cooke knew or should have known of this action, the relation-back doctrine fails against Dr. Cooke. Concomitantly, without actual or constructive knowledge, it is impossible to impute a knowledge of a mistake. The Plaintiffs have failed to show the third prong of the relation back doctrine applies to Dr. Cooke and his motion for dismissal is granted.

SIEP also moved for summary judgment based upon the plaintiff's failure to timely commence this action.⁵⁸ However, the continuing action against SIEP is properly based upon the relation-back doctrine of CPLR 203 (b). Therefore, the motion for summary judgment made by defendant SIEP is denied in its entirety as having been rendered moot.

Motion by Dr. Megna and Cross Motion by Dr. Silich for Summary Judgment

An unopposed motion is made by Dr. Megna for dismissal pursuant to CPLR 3211 and for summary judgment pursuant to CPLR 3212. In his motion, Dr. Megna proffers the expert testimony of William Winkler, M.D. ("Dr. Winkler"),⁵⁹ with a copy of the pleadings and supported by other available proof as required.⁶⁰ Dr. Winkler specifically refutes the allegations put forth in the Plaintiffs' bill of particulars. Cross motion by the Plaintiffs seeks only to preclude limiting the remaining liability based upon alleged negligence of Dr. Megna. The Plaintiff's cross motion does not oppose summary judgment in favor of Dr. Megna. Neither Dr. Silich nor Dr. Cooke address Dr. Megna's motion for summary judgment.

⁵⁸Defendants Dr. Cooke and SIEP Notice of Motion, Affirmation in Support, pages 1-2, ¶ 3.

⁵⁹Defendant Dr. Megna, Notice of Cross Motion, Physician's Affidavit by Dr. Winkler, *passim*.

⁶⁰CPLR § 3212 (b).

In order to succeed under CPLR § 3212, there must be no facts sufficient to require a trial of any issue of fact.⁶¹ In a motion to which is appended an affirmation presenting expert opinions the burden of proof shifts to the party opposing.⁶² Here, Dr. Winkler's affirmation accomplishes that shift of the burden of proof. The plaintiff has not responded in opposition to the motion made by Dr. Megna for summary judgment.

Dr. Silich presents his own affidavit in support of motion for summary judgment with a copy of the pleadings and other supporting proof required to move for summary judgment.⁶³ Within his affidavit, Dr. Silich responds to the allegations contained in the bill of particulars with specificity and in a non-conclusory manner. The Appellate Division, Second Department has permitted defendants in medical malpractice to establish entitlement "to summary judgment based on their affidavits which were detailed, specific, and factual in nature indicating that their treatment of the infant plaintiff did not depart from good and accepted medical practice."⁶⁴ Dr. Silich's affidavit is adequate to shift the burden of proof to the parties nominally opposed to his cross motion. The Plaintiff has not responded in opposition to Dr. Silich's motion for summary judgment. Neither Dr. Megna nor Dr. Cooke address Dr. Silich's motion.

Summary judgment is therefore granted in favor of Dr. Megna and Dr. Silich.

⁶¹*Id.*; *Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978], quoting *Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; and *Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003].

⁶²*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; and *In the Matter of Javon T. v. Ashton T.*, 2009 NY Slip Op *1 [2d Dept 2009].

⁶³CPLR § 3212 (b).

⁶⁴*Nyrell Joiner-Pack v. Sykes*, 54 AD 3d 727, 729 [2d Dept 2008].

Cross Motion to Preclude SIUH from Limiting Liability Based upon Alleged Negligence or Malpractice of Dr. Megna and Dr. Silich.

Plaintiffs cross move to preclude defendants from limiting liability based upon the alleged negligence or malpractice of Dr. Megna and Dr. Silich. The plaintiff contends that defendants' failure to oppose motion for preclusion, forfeits an opportunity to limit the liability benefits under Article 16. To avert preclusion of apportionment of liability, the plaintiff relies upon a quoted requirement to provide before trial "a contrary evidentiary showing if a grant of the relief sought, together with all attendant ramifications, is to be avoided."⁶⁵ In this manner, the Supreme Court of Nassau County, and its followers in unreported decisions,⁶⁶ seem to place the *prima facie* burden on defendants to permit apportionment of liability by pre-trial evidentiary submission.

In the case of *Marsala v. Weinraub*, the Appellate Division, Second Department affirmed a lower court decision denying a motion to preclude a defense under CPLR Article 16 by defendants.⁶⁷ The concurrence amplified that decision by stating, "whenever a plaintiff sues multiple defendants, *CPLR article 16* will apply unless the plaintiff can show that one of the situations in *CPLR 1602* applies."⁶⁸ In affirming the court below, the Appellate Division quoted, "[t]he statute (*CPLR article 16*) does not require that a party asserting limited liability must bear the burden of establishing the liability of their co-defendants; it merely provides that a defendant must prove by a preponderance of the evidence 'its equitable share of the total liability.'⁶⁹

⁶⁵*Drooker v. South Nassau Communities Hosp.*, 175 Misc. 2d 181, 184 [Supr. Ct. Nassau Cty. 1998].

⁶⁶*See* Plaintiffs' Notice of Cross Motion, Affirmation in Opposition to Defendant's Motion to Dismiss, and in Support of Plaintiff's Cross-Motion, page 14-15, ¶ 29, and Exhibit E.

⁶⁷*Marsala v. Weinraub*, 208 AD 2d 689 [2d Dept 1994].

⁶⁸*Marsala v. Weinraub*, 208 AD 2d at 690 (Concurrence by Ritter).

⁶⁹*Id.* at 694.

Subsequently, the Appellate Division, Second Department has determined that a release given to one defendant did not preclude a different defendant from attempting to demonstrate that the released defendant was partially or wholly responsible for the accident [citations below].”⁷⁰

However, CPLR § 1601 provides “that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action...”⁷¹ Hence, a condition predicate under CPLR § 1601 for apportioning an equitable share of liability to a non-party is an inability to obtain jurisdiction. As an alternative, “a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies.”⁷² Further exclusions to apportionment of liability are available,⁷³ but are not asserted by the plaintiff.

The plain reading of CPLR § 1601 requires the precondition of an inability to obtain jurisdiction in order to apportion liability to a non-party. The discharge from this action of Dr. Megna and Dr. Silich is on grounds other than an inability to obtain jurisdiction. Hence, the cross motion to preclude the remaining defendants from seeking apportionment or otherwise limiting liability based upon any alleged liability of Dr. Silich, Dr. Megna is granted.

⁷⁰*McNally v. Corwin*, 30 AD3d 482, 485 [2d Dept 2006]; *citing Barry v. Hildreth*; 9 AD 3d 341, 342 [2d Dept 2004]; *and Kwasny v. Feinberg*; 157 AD 2d 396, 401 [2d Dept 1990].

⁷¹CPLR § 1601 (1).

⁷²CPLR § 1603.

⁷³CPLR § 1602 (1) - (13).

Conclusion

In the instant action, the defense of statute of limitations was properly preserved in the answer to the amended complaint and asserted in the Notice of Motion by Dr. Cooke and SIEP. Since the amended action against these defendants was commenced beyond the statute of limitations specified in CPLR 214-a, and because this defense was properly asserted, the motion to dismiss the action against Dr. Cooke and SIEP was reviewed under the relation-back doctrine. The Plaintiffs failed to demonstrate the third prong of the relation-back doctrine against Dr. Cooke. Dr. Cooke's motion for dismissal succeeds. A remaining motion for summary judgment made by Dr. Cooke is rendered moot by dismissal of the action. The plaintiff has successfully asserted the relation-back doctrine against SIEP and the motion for dismissal and summary judgment made by SIEP is denied. The cross motion to dismiss the motion of Dr. Cooke and SIEP by the Plaintiffs is denied in so far as applicable to Dr. Cooke, and granted in so far as applies to SIEP.

Dr. Megna and Dr. Silich have each requested respective motions for summary judgment based on expert affidavits, a copy of the pleadings and other available proof. There is no opposition to their motions for summary judgment. In the absence of issues of fact that require findings of fact, motion for summary judgment is granted to Dr. Megna and Dr. Silich.

The Plaintiffs make a cross motion to preclude remaining defendants SIUH and SIEP from asserting a defense of limited liability by apportionment of liability to Dr. Megna and Dr. Silich. To apportion liability to a non-party, it must be shown that jurisdiction over the non-party was unobtainable. The cross motion to preclude apportionment of liability to defendants removed from the action is granted.

Accordingly, it is hereby:

ORDERED, that the motion of the Defendant John Cooke, MD for dismissal is granted; and the defendant John Cooke, M.D.'s motion for summary judgment is rendered moot; and it is further

ORDERED that the motions for dismissal and for summary judgment by Staten Island Emergency Physicians, P.C. are denied in the entirety; and it is further

ORDERED, that the motion by Daniel Megna, M.D. for summary judgment is granted in its entirety; and it is further

ORDERED, that the motion by Robert Silich, M.D. for summary judgment is granted in its entirety; and it is further

ORDERED, that the motion to preclude remaining defendants from seeking apportionment or otherwise limiting their own liability based upon any alleged negligence of remaining defendants is denied in its entirety; and it is further

ORDERED, that the caption shall now read:

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

Index No. 011173/02

**NICHOLAS MAGALHAES, as Administrator of the Estate of
ELYSE MAGALHAES, and NICHOLAS MAGALHAES,
Individually,**

Plaintiffs

against

**STATEN ISLAND UNIVERSITY HOSPITAL, and
STATEN ISLAND EMERGENCY PHYSICIANS, P.C.**

Defendants

and it is further

ORDERED, that the parties shall return to DCM Part 3 for a pre-trial conference on
Monday, January 25, 2010.

ENTER,

DATED: December 23, 2009

Joseph J. Maltese
Justice of the Supreme Court