

Patino v Incorporated Vil. of Garden City

2011 NY Slip Op 33734(U)

April 19, 2011

Supreme Court, New York County

Docket Number: 7723/10

Judge: Roy S. Mahon

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

FELIPE PATINO,

Plaintiff(s),

- against -

INCORPORATED VILLAGE OF GARDEN CITY,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 7723/10

**MOTION SEQUENCE
NO. 1**

**MOTION SUBMISSION
DATE: February 14, 2011**

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendants for an Order pursuant to CPLR Rule 3211, dismissing the verified complaint of plaintiff, Felipe Patino, as against defendant, the Village of Garden City, upon the grounds that said verified complaint is barred by the applicable statute of limitations, is determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on August 1, 2008 at approximately 12:30 pm on the sidewalk located on the eastern side of Edgemere Road, Garden City, New York under the railroad trestle over Edgemere Road on the western perimeter of the Garden City Country Club. At that sidewalk location there is a guardrail which separates the side walk from Edgemere Road. At the time of the alleged occurrence, the plaintiff was operating a golf cart heading north on the sidewalk and a non-party to the instant action Richard S. Mohan was operating a golf cart heading south. As the plaintiff swerved to avoid the golf cart operated by Mr. Mohan, the plaintiff struck the guardrail causing injury to the plaintiff's leg.

The plaintiff served a notice of claim upon the defendant on October 29, 2008. The Court notes that on the same day pursuant to the uncontroverted submission by the defendant the plaintiff served a notice of claim upon two additional municipal entities: the Town of Hempstead and the County of Nassau. As a result of the latter, the plaintiff on June 22, 2009 commenced an action naming the County of Nassau; the Nassau County Department of Public Works; the Town of Hempstead and the driver of the other golf cart Richard S. Mohan as defendants by filing a Summons and Verified Complaint with the Nassau County Clerk which was assigned index number 12064/09. The plaintiff did not name the defendant in the instant action

as a defendant in the action commenced on June 22, 2009. After issue was joined in that action, the defendant therein Richard S. Mohan commenced a third party action against the Village of Garden City on March 25, 2010. Thereafter on April 21, 2010, the plaintiff commenced the instant action against the Village of Garden City.

The statute of limitations for an action to be commenced against a village such as the defendant herein is one year and ninety days from the date of occurrence (*see General Municipal Law §50-i*). In light of the fact that the incident in issue occurred on August 1, 2008, the commencement of the plaintiff's action against the defendant Village of Garden City on April 21, 2010 is outside of the applicable statute. As such, the defendants seeks the requested relief pursuant to CPLR §3211(a)(5).

The plaintiff contends in opposition that pursuant to the provisions of CPLR §203(c), the instant defendant is united in interest with the defendants County of Nassau and Town of Hempstead and as such pursuant to the concept of relation back the action against the defendant Village of Garden City is not barred by the applicable one year ninety day statute of limitations. Said §203© provides:

"(c) 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 examining the issue of the concept of united in interest, the Court in **Mondello v New York Blood Center**, 80 NY2d 219, 590 NYS2d 19 set forth:

"The only part of Supreme Court's ruling now before us is the dismissal of the wrongful death causes of action against the defendant Blood Center on Statute of Limitations grounds. The court noted that the two-year bar of EPTL 5-4.1 would apply to those actions, unless plaintiff could demonstrate that the Blood Center and the Hospital were united in interest within the meaning of CPLR 203(b). If such unity of interest were present, the amended and new complaints of 1989 would relate back for Statute of Limitations purposes to the date of the originally commenced action in 1987. The court concluded, however, that the Hospital and Blood Center were "at more joint tortfeasors and not parties united in interest."

The Appellate Division, First Department, reversed the dismissal of the wrongful death causes of action (*175 AD2d 718*). It adopted and applied the relation back test formulated by the Appellate Division, Second Department, in *Brock v Bua* (*83 AD2d 61, 69, supra*), which embossed the bare language of CPLR 203(b) with a three-pronged application. The Appellate Division found all three prongs satisfied in this case.

Its analysis of the second prong, unity of interest of the defendant parties, has emerged as the central dispositive focus of this appeal. The Appellate Division noted that unity of interest will generally be found where one of the parties is vicariously liable for the conduct of the other (*Raschel v Rish*, *69 NY2d 964*). It found vicarious liability between the Hospital and the Blood Center rooted in a perceived State policy reflected in certain regulations of the New York State Department of Health (*175 AD2d, at 722, supra*). These

regulations, among other things, declare that "[t]he governing body [of the hospital] shall be responsible for services furnished in the hospital whether or not they are furnished by outside entities under contracts" (10 NYCRR 405.2[h] [emphasis added]). The Appellate Division thus found it unnecessary to determine whether, "even in the absence of these regulatory provisions, the facts of this case might present an exception to the general rule that parties are not liable for the negligence of independent contractors either because plaintiff reasonably looked only to the Hospital for the performance of this service or because the harm caused arose from a danger inherent in the work" (175 AD2d, at 722, *supra*). We find it necessary to address and resolve the latter questions because plaintiff now concedes that the regulation relied on by the parties and Appellate Division up to this point in the litigation was not in effect at the relevant time at issue. It simply is not dispositive in this case.

The CPLR 203(b) relation back rule provides in pertinent part that a "claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest when: 1. the summons is served upon the defendant" (*compare, Shaw v Cock, 78 NY 194 [1879]*). The Appellate Division, in *Brock v Bua* (83 AD2d 61, *supra*), gave the rule a three-prong specificity, patterned largely after the Federal "relation back" test codified in rule 15© of the Federal Rules of Civil Procedure (*see generally, 1 Weinstein-Korn-Miller, NY Civ Prac* ¶203.5, at 2-92, 2093; *compare also, Duffy v Horton Mem. Hosp., 66 NY2d 473, 476- 477*). The *Brock* test examines whether (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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action in interest as well (*Brock v Bua, supra* at 69). All three features must be met for the statutory relation back remedy to be operative

We endorse the *Brock* test and apply it in this case, concluding essentially that the second prong is not met. Because we conclude that the Hospital cannot be held vicariously liable for the alleged negligence of the Blood Center in the discharge of the Blood Center's discrete responsibilities, we cannot say that the interest of the Hospital and the Blood Center "in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect "the other" (*Prudential Ins. Co. v Stone, 270 NY 154, 159*).

Mondello v New York Blood Center, supra at 225-226

The plaintiff in opposition offers no proof as to the manner in which the three independent municipal corporations in the respective actions are united in interest as that standard is articulated by the Court in *Mondello v New York Blood Center, supra*. Additionally, while the plaintiff contends that the defendant Village of Garden City's application is premature as discovery has not been undertaken, the plaintiff misconstrues the defendant's application as one pursuant to CPLR §3212 rather than one brought pursuant

to CPLR §3211.

Based upon the foregoing, the defendant Incorporated Village of Garden City's application for an Order pursuant to CPLR Rule 3211, dismissing the verified complaint of plaintiff, Felipe Patino, as against defendant, the Village of Garden City, upon the grounds that said verified complaint is barred by the applicable statute of limitations, is **granted**.

SO ORDERED.

DATED: 4/19/2011

Rays. Mahan
..... J.S.C.

ENTERED
APR 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE