

Wilson v Southampton Urgent Med. Care, P.C.

2011 NY Slip Op 33942(U)

November 23, 2011

Sup Ct, NY County

Docket Number: 116085/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART 1A PART 16

Index Number : 116085/2007

WILSON, JANE

VS.

SOUTHAMPTON URGENT MEDICAL

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by various defendants*
to dismiss is granted in accordance with
the accompanying memorandum decision.

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: NOV 23 2011

Alice Schlesinger

ALICE SCHLESINGER S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
JANE WILSON, as Administratrix of the Goods
Chattels and Credits which were of TRACY A. ALLEN,
Deceased,

Plaintiff,

Index No. 116085/07
Motion Seq. No. 002

-against-

SOUTHAMPTON URGENT MEDICAL CARE, P.C.,
MARK R. KOT, 24/7 EMERGENCY CARE, P.C.,
ALAN GANDOLFI, MICHAEL AMERES,
SOUTHAMPTON RADIOLOGY, P.C.,
BRADLEY GLUCK, ANDREA LIBUTTI, and
SOUTHAMPTON HOSPITAL,

Defendants.

-----X
SCHLESINGER, J.:

FILED

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COUNTY CLERK'S OFFICE

In January 2011, I dismissed this medical malpractice action against two defendants who had been brought in as defendants after the action had been commenced on December 4, 2007 against other defendants. The defendants whose actions were dismissed were Dr. Bradley Gluck and his employer South Hampton Radiology, P.C. The basis of the motion was those defendants' affirmative defense that the statute of limitations barred any actions against them. One of the salient points in that earlier decision was the fact that both Dr. Gluck and South Hampton Radiology were not employees of Southampton Hospital. Therefore, I found that the relation back doctrine did not apply in the circumstances there. In reaching that decision, I cited a dispositive decision from the First Department, *Anderson v. Montefiore Medical Center*, 41 AD3d 105 (2007).

Before the Court now is a motion brought by three other defendants under similar circumstances to the earlier Gluck motion. Specifically, the moving defendants here are

Dr. Allen Gandolfi, Dr. Michael Ameres and their employer 24/7 Emergency Care, P.C. Similar to Dr. Gluck, neither one were employed by Southampton Hospital. However, unlike Dr. Gluck, these two physicians worked in the Emergency Department of Southampton Hospital, as opposed to the Radiology Department.

According to the moving papers, each of these defendants saw the decedent on only one occasion. Dr. Gandolfi saw Ms. Allen in the emergency room of the hospital on January 10, 2005, and Dr. Ameres saw her on August 25, 2005. Each saw her for complaints unrelated to each other. Ms. Allen died on December 20, 2005.

The action was commenced, as earlier stated, on December 4, 2007. But these two individuals and their employer were not added as defendants until March 31, 2008. Therefore the argument made in the moving papers is that in the first instance the action against them is untimely, pursuant to §214-a of the CPLR by being more than two years after Ms. Allen's death. Moving counsel also argues that, pursuant to *Anderson*, supra the relation back doctrine does not operate here.

Similar to my decision in the Gluck case, I find in the first instance that these moving defendants have made out a prima facie case for granting their motion. Under these circumstances, the burden shifts to the plaintiff, as it did in the Gluck decision, to prove or at least suggest that there are issues as to the three factors that are relevant in the determination as to whether or not there is such a relation back.

Here, the plaintiff fails once again to show that. The first factor is that the conduct against the original defendants as well as the added defendants arise out of the same occurrence or transaction. Arguably that is the case here. Second, plaintiff must show that the new parties are "united in interest" with the original defendant, Southampton Hospital.

It is here that the plaintiff can not make such a showing. As stated earlier, the two physicians were not employed by the hospital and their employer, defendant 24/7 is an entity separate from the hospital. Therefore pursuant to *Anderson*, supra while the hospital, Southampton may well be vicariously liable for the acts of these independent doctors and of their employer, the doctors and their employer would not be similarly vicariously liable for the acts of the hospital.

Here, counsel for the plaintiff attempts to distinguish both *Anderson* and this Court's previous decision regarding Dr. Gluck. Her argument seems to be that since the negligence of the hospital's Emergency Department is one in the same with the negligence, or claimed negligence of the physicians, that this makes them united in interest. I am not convinced by this argument. Frankly, I see no distinction between these doctors and their relationship to Southampton Hospital and the circumstance of Dr. Gluck or the doctors who were dismissed in the *Anderson* case. In all three situations, while the hospital could be vicariously liable for the acts of the physicians, the opposite would not be true.

As an example of vicarious liability, one discussed in oral argument on this motion, if there was an employee of the hospital, such as a nurse practitioner who was claimed to be negligent in this action, the emergency room defendants would not be vicariously liable for her conduct, as long as each acted independently from her. Such could be an instance of vicarious liability but one where this doctrine would not operate. It would not operate because there is no legally recognized relationship between the emergency room doctors and an independently acting employee of the hospital, such as a negligent nurse practitioner.

Therefore, under the authority of Anderson, I reach the same conclusion here that I reached in my earlier decision relating to Dr. Gluck. I find that the plaintiff has not met their burden of showing that the relation back doctrine operates and therefore these moving defendants were brought into the case beyond the requisite statute of limitations. Since the action is therefore untimely against them, it is dismissed.

Accordingly, it is hereby

ORDERED that the motion by defendants 24/7Emergency Care, P.C., Alan Gandolfi, M.D., and Michael Ameres, M.D. to dismiss the action against them as untimely and in violation of the statute of limitations is granted and the complaint is hereby severed and dismissed as against those defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 23, 2011

NOV 23 2011


J.S.C.
ALICE SCHLESINGER

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE