

Fuller v Schuster

2011 NY Slip Op 34218(U)

August 31, 2011

Supreme Court, Albany County

Docket Number: 4227-10

Judge: Gerald William Connolly

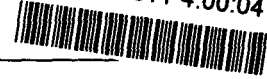
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

Albany County Clerk
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FRANK H. FULLER, JR., Individually as
ADMINSTRATOR of the ESTATE of
JOYCE L. FULLER,

Plaintiff,

DECISION and ORDER

Index No. 4227-10

RJI: 01-11-104513

-against-

MICHAEL SCHUSTER, M.D.; DEBRA M.
ABERDALE, N.P.; JEFFREY HENDERSON, D.O.;
ROY FRUITERMAN, M.D.; RICHARD CLIFT, M.D.;
JOSEPH BIED, M.D.; TODD D. BEYER, M.D.;
RICHARD MacDOWELL, M.D.; BORA
GUMUSTOP, M.D.; ALBANY MEDICAL CENTER
HOSPITAL; FARHAD BAHRASSA, M.D.; HOWARD
SNYDER, M.D.; BENITA BRITTON-BYRD, M.D.;
ALBANY EMERGENCY MEDICINE ASSOCIATES,
P.C.; PRIME CARE PHYSICIANS, PLLC; ALBANY
GASTROENTEROLOGY CONSULTANTS, P.C.; and
COMMUNITY CARE PHYSICIANS, P.C.,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Gerald W. Connolly, Presiding)

APPEARANCES: CARTER, CONBOY, CASE, BLACKMORE,
MALONEY & LAIRD, P.C.
Cathleen B. Clark, R.N., Esq.
Attorneys for Defendants Michael Schuster, M.D.,
Debra M. Aberdale, N.P., Jeffrey Henderson, D.O.,
Roy Fruiterman, M.D., and Richard MacDowell, M.D.
20 Corporate Woods Blvd.
Albany, NY 12211-2362

THE MILLS LAW FIRM, LLP
Attorneys for Plaintiff
1520 Crescent Road
Clifton Park, NY 12065

Connolly, J.:

Defendants Michael Schuster, M.D., Debra M. Aberdale, N.P., Jeffrey Henderson, D.O., Roy Fruiterman, M.D. and Richard MacDowell, M.D., (hereinafter, "the Moving Defendants") in this medical malpractice and wrongful death action, seek an order pursuant to CPLR §3211 (a)(2)(7) and (8), dismissing: (i) plaintiff's claim for pain and suffering of plaintiff's decedent Joyce L. Fuller; and (ii) plaintiff Frank H. Fuller, Jr.'s derivative, individual claim pursuant to CPLR 3211§(a)(2)(7) and (8), alleging that such claims were not properly commenced pursuant to CPLR §305(b). Plaintiff opposes the motion.

Plaintiff commenced the instant litigation on June 30, 2010 by filing a summons with notice pursuant to CPLR 305 (b). The summons with notice provided that "[t]he nature of this action is medical malpractice and wrongful death, arising out of negligent care of and in failing to diagnose cancer in the Plaintiff. The relief sought is monetary damages". The caption of the summons with notice named "Frank H. Fuller, Jr., as ADMINISTRATOR of the ESTATE of JOYCE L. FULLER" as the sole plaintiff. Joyce L. Fuller died on April 10, 2010. Counsel for the Moving Defendants demanded a complaint on October 25, 2010. Plaintiff's counsel served a complaint dated November 18, 2010 which set forth causes of action for: (i) medical malpractice; (ii) wrongful death; and, (iii) a derivative claim brought by Frank H. Fuller, Jr. as Joyce Fuller's husband. The Moving Defendants answered the complaint on November 30, 2010. Thereafter, plaintiff's counsel served an amended complaint on December 17, 2010. The cover letter, as provided by the Moving Defendants, clearly stated in pertinent part, "[p]lease be advised that there have been no modifications or additions pertaining to the allegations herein. We have amended Plaintiff's caption to depict 'Frank H. Fuller, Jr., Individually and as Administrator of the Estate of Joyce L. Fuller'". Thereafter, the Moving Defendants served answers to the Amended Complaint on January 4, 2011. The answers (both the original and the answer to the

amended complaint) raised, *inter alia*, the affirmative defenses of the statute of limitations, lack of personal jurisdiction and failure to state a cause of action. The Moving Defendants now move, by notice of motion dated August 1, 2011, for an order “dismissing plaintiff’s claims for pain and suffering of plaintiff’s decedent and plaintiff Frank H. Fuller, Jr.’s derivative, individual claim pursuant to CPLR 3211(a)(2) (7) and (8), as these claims were not properly commenced in accordance with CPLR §305(b)” (Notice of Motion to Dismiss, Relief Demanded).

The Moving Defendants argue that plaintiff’s claims for pain and suffering of plaintiff’s decedent (Joyce Fuller) and Frank H. Fuller, Jr.’s derivative claim for loss of society must be dismissed as the summons with notice did not include notice of such claims and failed to identify Frank H. Fuller, Jr., individually, as a party plaintiff as required by CPLR §305(b).

Plaintiff, in opposition, argues that such defect in the initial Summons with Notice is a mistake correctable by the Court via CPLR §2001. Additionally, plaintiff argues that CPLR §305(b) provides relief as the Court is to take a liberal construction of the statutory requirements of the contents of a summons with notice served without a complaint. Further, plaintiff argues that defendants’ motion has failed to allege any prejudice as a result of the omission. Finally, plaintiff argues that the Moving Defendants motion should be denied as academic as plaintiff could recommence the action within six months pursuant to CPLR §205(a).

CPLR §305 (b) provides, in pertinent part, that “[i]f the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought”. “The purpose of the CPLR 305 (b) notice is to provide the defendant with at least basic information concerning the nature of [the] plaintiff’s claim and the relief sought. . . . A liberal construction of the statutory requirement of the contents of the notice

accompanying a summons served without a complaint is consistent with the general policy of the CPLR” and “absolute precision is not necessary” (see *Bullis v. American Motors Corp., Subsidiary of Chrysler Corp.*, 175 AD2d 535, 536 [3d Dept 1991] [internal citations and quotations omitted]).

In this case, the Summons with Notice provided that “[t]he nature of this action is medical malpractice and wrongful death, arising out of negligent care of and in failing to diagnose cancer in the Plaintiff. The relief sought is monetary damages”. Based upon the record, the language of the summons with notice provides sufficient notice of the nature of plaintiff’s action (see *Tello v Mental Health Assoc. Of Westchester, Inc.*, 52 AD3d 499 [2nd Dept 2008]; *Darrow v Krzys*, 261 AD2d 778 [3d De pt 1999]; *Bullis v American Motors Corp.*, 175 AD2d 535 [3d Dept 1991]). Further, the plaintiff’s failure to also set forth in the notice the derivative claim is not a jurisdictional defect. The Court also notes that to the extent the Moving Defendants claim prejudice via their reply papers, a review of the record fails to demonstrate prejudice to the Moving Defendants, particularly where the Moving Defendants were aware of the alleged derivative claim since December of 2010 (see generally *Fitzpatrick v Slagowitz*, 201 AD2d 614 [2nd Dept 1994]; *Anderson v Carney*, 161 AD2d 1002 [3d Dept 1990]).¹

Based upon the foregoing, it is hereby

ORDERED that the Moving Defendants motion is denied.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the attorney for the plaintiff. A copy of this Decision and Order

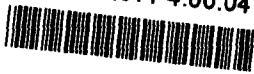
¹Further, to the extent the Moving Defendants assert via the reply that there may a viable statute of limitations defense with respect to certain of the Moving Defendants, such assertion has not been demonstrated, nor did the Moving Defendants move for dismissal on such basis.

and all other papers are herewith delivered to the Albany County Clerk. The signing of this Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry with respect to the Decision and Order.

SO ORDERED.
ENTER.

Dated: August 31, 2011
Albany, New York

Gerald W. Connolly
Gerald W. Connolly
Acting Supreme Court Justice

Albany County Clerk
Document Number 10955266
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Thomas J. Clark
FOR
9/8/11

Papers Considered:

1. Notice of Motion to Dismiss dated August 1, 2011; Attorney's Affidavit of Cathleen B. Clark, Esq. dated August 1, 2011 with accompanying exhibits;
2. Attorney Affirmation in Opposition to Defendants' Motion to Dismiss dated August 15, 2011 with accompanying exhibit A;
3. Reply Affidavit dated August 12, 2011.