

**Lawyer v City of New York**

2012 NY Slip Op 33467(U)

March 23, 2012

Sup Ct, Bronx County

Docket Number: 309963/09

Judge: Mary Ann Brigantti-Hughes

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

MELISSA LAWYER, as Administratrix of the  
ESTATE OF JEVON SHAMEL LAWYER and  
MELISSA LAWYER, Individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK, 922 SOUTHERN  
LLC, EAST RIVER FAMILY CENTER, LLC,  
DAVID LEVITAN, MARK GOLDBERG, and  
BASIC HOUSING INC.,

Defendants.

X

The following papers numbered 1 to read on the below motions noticed on **October 19, 2011**  
and duly submitted on the Part IA15 Motion calendar of **November 21, 2011**:

<u>Papers Submitted</u>	<u>Numbered</u>
Basic's Affirmation in support of motion, memo of law, exhibits	1,2,3
Co-Def's Affirmation in support of cross-motion, exhibits	4,5
Pl.'s Affirmation in opposition, Exhibits	6,7
Basic's Affirmation in reply to opposition, memo of law, exhibits	8,9,10

In an action seeking damages for personal injuries and wrongful death arising out of an alleged criminal assault, defendant Basic Housing, Inc. (hereinafter "Basic") moves to dismiss the complaint of the plaintiffs, Melissa Lawyer, as Administratrix of the Estate of Jevon Shamel Lawyer and Melissa Layer, individually (collectively "Plaintiff"), pursuant to CPLR 3211(a)(5) since Plaintiff's claims are time barred by the applicable statute of limitations and pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Co-defendants 922 Southern LLC., East River Family Center, LLC., David Levitan, and Mark Goldberg (collectively the "Co-Defendants") cross-move for the same relief. Plaintiff opposes the motion and cross-motion.

I. Factual and Procedural History

This is an action for personal injuries and the wrongful death of decedent Jevon Shamel

Lawyer (individually the “decedent”) on January 10, 2009 while decedent was within the hallway of a homeless shelter on the sixth floor of the premises known as 926 Southern Boulevard, Bronx, New York. Plaintiff alleges that, on that date, decedent was assaulted and shot with a gun multiple times due to the negligence of the defendants.

This action was commenced when Plaintiff filed a summons and complaint against the City of New York (the “City”) on December 9, 2009. The City answered on December 28, 2009. On July 22, 2010, the City moved for summary judgment on the grounds that the apartment building was not city-owned and no special duty was owed. It then came to Plaintiff’s attention that Co-Defendants contracted with the City through the Department of Homeless Services (“DHS”) to provide services to the homeless at 926 Southern Boulevard. Plaintiff therefore filed a cross-motion in response to the City’s summary judgment motion, dated November 20, 2010, to amend the complaint and add Co-Defendants as party defendants. The Court granted both the City’s motion for summary judgment and the plaintiff’s cross-motion for leave to amend the complaint on January 7, 2011. The Order allowed Plaintiff forty-five days to serve the amended pleadings. Notice of Entry was served by the City on February 24, 2011. Plaintiff filed the amended summons and complaint adding Co-Defendants on March 25, 2011 and with the New York Secretary of State on March 28, 2011. Plaintiff later allegedly learned that Basic, a tenant at 926, had contracted with the City to provide services to homeless clients at the homeless shelter. Plaintiff then filed a second amended complaint, adding Basic, on June 9, 2011.

Basic now moves to dismiss pursuant to CPLR 3211(a)(5) and (a)(7) since Plaintiff’s case is time barred since the applicable statute of limitations has expired and for failure to state a cause of action. Co-Defendants have cross-moved for the same relief. The defendants allege that, under EPTL 5-4.1, a wrongful death action must be commenced within two years after the decedent’s death. It is undisputed that this incident occurred on January 10, 2009. Basic was served with a summons and amended complaint dated June 8, 2011. Co-defendants allege that the amended summons and complaint were filed on March 25, 2011, and served March 28, 2011.

In opposition, Plaintiff asserts initially that the statute of limitations of Plaintiff’s personal injuries/conscious pain and suffering claim had not passed, as it was within the three-year statute of limitations. *Cruz v. Mount Sinai Hospital*, 61 A.D.2d 915 (1<sup>st</sup> Dept. 1978). With respect to its

wrongful death action against Co-Defendants, Plaintiff argues that the applicable statute of limitations was tolled, since Plaintiff's motion to amend to include co-defendants was filed within the 2-year statute of limitations for the wrongful death action. *Perez v. Paramount Communications, Inc.*, 92 N.Y.2d 749 (1999)(motion to amend tolls the applicable statute of limitations). As for Plaintiff's wrongful death action against Basic, Plaintiff argues that the claim relates back to Plaintiff's original claims against the City and Co-Defendants in accordance with the three-part test contemplated by *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995).

Basic argues in Reply that the wrongful death claim against Basic do not "relate back" to the complaint filed against the City of New York, since it is not "united in interest" with the City, and Plaintiff has not demonstrated that Basic knew or should have known that but for a mistake, the action would have been brought against him as well.

## II. Analysis

### *(1) The individual loss of consortium claim*

A claim alleging loss of consortium is not encompassed within a wrongful death action. *Monson v. Israeli*, 35 A.D.3d 680 (2<sup>nd</sup> Dept. 2006), citing *Liff v. Schildkrout*, 49 N.Y.2d 622 (1980). It has been held that, as here, where the cause of action alleging loss of consortium was brought in the administrator-plaintiff's individual capacity, it must be dismissed on the grounds that the plaintiff lacks capacity to sue on her own behalf. *Id.* (Internal citations omitted). Accordingly, Plaintiff's loss of consortium claim against all defendants is dismissed.

### *(2) Plaintiff's claims for conscious pain and suffering*

While a wrongful death action is subject to a two-year statute of limitations in accordance with EPTL 5-4.1, a related conscious pain and suffering claim is subject to a three-year statute of limitations, as provided by CPLR 214-a. In this matter, the complaint states causes of action against defendants for both wrongful death and conscious pain and suffering. Since the cause of action for conscious pain and suffering is a separate and distinct cause of action, it is subject to the three-year statute of limitations. See *Dunefsky v. Montefiore Hosp. Med. Center*, 162 A.D.2d

300 (1<sup>st</sup> Dept. 1990). Here, it is undisputed that Plaintiff's amended summons and complaint were served within the applicable three-year statute of limitations.

Basic argues that Plaintiff cannot sustain a conscious pain and suffering claim because decedent died because of a gun shot, and there is no evidence of such conscious pain and suffering. At this juncture, however, the court cannot state as a matter of law that Plaintiff cannot demonstrate such a claim, especially as here, where the claim was adequately pleaded. Accordingly, the motion and cross-motion are denied as to Plaintiff's cause of action for conscious pain and suffering.

*(3) Plaintiff's wrongful death action as to Co-Defendants*

In their cross-motion, Co-defendants argue that Plaintiff's wrongful death action was untimely as it was served outside of the two-year statute of limitations. EPTL 5-4.1. It is well-settled that "the filing of a motion for leave to amend the complaint to add a defendant to a pending action tolls the Statute of Limitations until entry of the order deciding the motion as against the party sought to be added when the motion papers include a copy of the proposed supplemental summons and amended complaint." *Perez v. Paramount Communications*, 92 N.Y.2d 749 (1999). "Where the motion, including the proposed supplemental summons and amended complaint, is filed with the court within the applicable limitations period, but the ruling by the court does not occur until after expiration, dismissal is inappropriate and would offend the CPLR's liberal policies of promoting judicial economy and preventing a multiplicity of suits." *Id.*, citing *Blanco v. American Tel. & Tel. Co.*, 90 N.Y.2d 757 (1997); *City of New York v. Long Isl. Airports Limousine Serv. Corp.*, 48 N.Y.2d 469 (1979); CPLR 104.

In this matter, Plaintiff filed leave to serve an amended summons and complaint upon the cross-moving defendants on November 20, 2010, within the 2-year statute of limitations. Plaintiff was granted leave to amend and serve the amended pleadings in an Order that was entered with the Bronx County Clerk on February 23, 2011 and served on Plaintiff on February 24, 2011. The Order gave Plaintiff forty-five (45) days to serve the amended pleadings on the defendants. Plaintiff served the co-defendants on March 25, 2011, which was within the time proscribed by the Order. Accordingly, the amended summons and complaint alleging an action

for wrongful death was timely served on co-defendants, as the applicable two-year statute of limitations was tolled by virtue of the motion for leave to amend. The balance of Co-Defendants' cross-motion, therefore, is denied.

*(4) Plaintiff's wrongful death action as to Basic*

Plaintiff argues that its claim for wrongful death against all defendants relates back to Plaintiff's underlying wrongful death claim against the City for purposes of Statute of Limitations. Basic argues that the wrongful death claim against Basic do not relate back to the complaint filed against the City of New York, since it is not "united in interest" with the City, and Plaintiff has not demonstrated that Basic knew or should have known that but for a mistake, the action would have been brought against it as well.

Basic established his prima facie entitlement to judgment as a matter of law dismissing the second amended complaint insofar as asserted against them since it is undisputed that the statute of limitations had expired prior to the plaintiff's service and filing of the second amended complaint, in which Basic was first named as a defendant. Accordingly, the burden then shifted to the plaintiff to raise a triable issue of fact, in opposition to that showing, as to the applicability of the "relation-back doctrine" with respect to Basic. *Boodoo v. Albee Dental Care*, 67 A.D.3d 717, 718 (2<sup>nd</sup> Dept. 2009).

To apply the "relation-back" doctrine to salvage an otherwise time-barred claim asserted against a new party, the party seeking to apply the doctrine must establish (1) both claims arise out of the same conduct, transaction or occurrence; (2) the new party is "united in interest" with the original respondent such that their respective defenses are the same and they stand or fall together, and (3) because of this relationship, the new party knew or should have known that but for a mistake by petitioner in failing to identify all proper parties, the action would have been brought against him as well. *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995); *Euroway Contracting Corp. v. Mastermind Estate Development Corp.*, 59 A.D.3d 157 (1<sup>st</sup> Dept. 2009). Although the parties might share a multitude of commonalities, including shareholders and officers, this unity-of-interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand. *See American Stock Exchange, LLC v. Mopez, Inc.*, 230 F.Supp.2d 333

(S.D.N.Y. 2002). It is not enough that the parties have a common interest in the outcome of the lawsuit. Rather, the parties must stand together or fall together so that a judgment against one will similar affect the other. *See Xavier v. RY Management Co., Inc.*, 45 A.D.3d 677 (2<sup>nd</sup> Dept. 2007). If the old and proposed new defendants have different defenses to the claims asserted against them, their interests would not stand or fall together and they would not be united in interest. *See Cahn v. Ward Trucking, Inc.*, 68 A.D.3d 491 (1<sup>st</sup> Dept. 2009). Indeed, co-defendants are united in interest for purposes of CPLR 203 only when one defendant is responsible for the acts or omissions of the other. Unity in interest will be therefore found when one of the parties is vicariously liable for the acts of another. *See Alamo v. Citident, Inc.*, 72 A.D.3d 498 (1<sup>st</sup> Dept. 2010).

Here, Plaintiff has failed to demonstrate that defendant Basic and any co-defendant were united in interest. There is no indication that Basic and Co-Defendants or the City were or are vicariously liable to one another. The record herein fails to indicate that Basic and the cross-movants are related, except possibly as landlord and tenant. There is also no indication that Basic's identity was ever concealed from Plaintiff. *See Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255 (1<sup>st</sup> Dept. 2005). The computer print-out entitled "Audit Report" concerning Basic's contract with the Department of Homeless Services does not in itself establish Basic's vicarious liability or unity of interest with any other defendant. Moreover, there is no indication here that Basic had actual or constructive knowledge of the commencement of an action against them within the applicable limitations period. It has been stated that the "linchpin" of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period. *Alvarado v. Beth Israel Medical Center*, 60 A.D.3d 981 (2<sup>nd</sup> Dept. 2009). Accordingly, Plaintiff's wrongful death action as to Basic is time-barred and therefore dismissed.

#### IV. Conclusion

Accordingly, it is hereby

ORDERED, that Basic and Co-Defendants' motion to dismiss is granted to the extent that plaintiff Melissa Lawyer's individual loss of consortium claim is dismissed with prejudice, and it is further,

ORDERED, that Basic and Co-Defendants' motion to dismiss is denied as to Plaintiff's conscious pain and suffering claim, and it is further,

ORDERED, that Co-Defendant's motion to dismiss Plaintiff's wrongful death claim is denied, and it is further,

ORDERED, that Basic's motion to dismiss Plaintiff's wrongful death claim is granted, and Plaintiff's wrongful death claim against Basic is dismissed with prejudice.

The above constitutes the Decision and Order of this Court.

Dated: March 23, 2012



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Hon. Mary Ann Brigantti-Hughes, J.S.C.