

Estate of Fogarty v Town of Southold

2014 NY Slip Op 32765(U)

October 22, 2014

Supreme Court, Suffolk County

Docket Number: 13-14124

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

The Estate of John Fogarty v Town of Southold
Index No. 13- 14124
Page No. 2

ORDERED that the cross motion by the plaintiff for leave to amend the caption herein to reflect a change in the plaintiff's name to "Georgeanna Fogarty, as the Administratrix of The Estate of John Fogarty" is granted; and it is further

ORDERED that, upon service of a copy of this order with notice of entry, the Clerk of the Court shall amend the court file for this action to reflect the change in the plaintiff's name to "Georgeanna Fogarty, as the Administratrix of The Estate of John Fogarty;" and it is further

ORDERED that the motion by the defendants Town of Southold, Southold Town Police and Southold Police Officer Zuhoski for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint pursuant to EPTL 5-4.1 and GML 50-h is deemed a motion to dismiss pursuant to CPLR 3211, and is denied.

This wrongful death action is based upon the alleged negligence of the defendants in, among other things, responding to a heart attack suffered by the decedent John Fogarty as he walked in the Town of Southold, New York on March 30, 2010. The plaintiff alleges that two police officers employed by the defendants Town of Southold and Southold Town Police responded to the scene and failed to provide emergency medical attention or administer CPR to the decedent, and that said police officers "discontinued an en route ambulance call" resulting in the decedent's personal injuries and death. In addition, the plaintiff alleges that the defendant Cutchogue Fire District (District) recalled the emergency medical technicians and ambulances en route to the scene.

The plaintiff initially commenced an action against the defendants by the filing of a summons with notice on March 19, 2012 (First Action), approximately 11 days before the statute of limitations would bar the action. However, said action named the Cutchogue Fire Department (Department) as the defendant rather than the District. The defendants, including the Department, appeared and demanded service of a complaint, which was served on or about April 12, 2012. By order dated December 28, 2012, the Court (Farneti, J.) dismissed the First Action on the ground that a personal representative had not been appointed for the Estate of John Fogarty. The plaintiff commenced this action by the filing of a summons and complaint on May 29, 2013, naming the District as a defendant.

The District now moves to dismiss the complaint pursuant to CPLR 3211(a)(3), CPLR 3211(a)(5), EPTL 5-4.1(1), and GML 50-h(5) on the grounds that the plaintiff lacks capacity to bring this action, that the action is barred by the statute of limitations, and that the plaintiff has failed to appear for a municipal hearing before commencing the action. The plaintiff cross-moves for leave to amend the caption to name Georgeanna Fogarty as the Administratrix of The Estate of John Fogarty in place of the plaintiff.

It appears that many of the salient facts are undisputed herein. The plaintiff served a notice of claim upon the defendants, including the Department, on June 21, 2010 and June 22, 2010, said notice was stamped received by the District on the earlier date, and the defendants timely served notices seeking municipal hearings pursuant to GML 50-h. The notice of hearing served by the Department was issued by the same attorney representing the District in this action. Thereafter, the parties agreed to adjourn the municipal hearings until letters of administration could be obtained for the estate of the

The Estate of John Fogarty v Town of Southold
Index No. 13- 14124
Page No. 3

decedent. Because the decedent was in the final stages of obtaining a divorce from his wife at the time of his passing, the process of obtaining said letters was seriously delayed. Counsel for the plaintiff contends, and the defendants do not dispute, that “[i]n order to preserve the rights of the Estate a previous action ... was commenced by the filing of a Summons with Notice on or about March 19, 2010,” that “[t]he defendant’s (*sic*) appeared in the action by filing of Notices of Appearance and Demands for Complaints,” and that the District “is responsible for the ... Department and operates the same.” After the First Action was dismissed as set forth above, the plaintiff “re-filed this action listing herself as the administratrix of the estate” within six months.

The District contends that, because it was not named as a party in the First Action, the plaintiff cannot utilize CPLR 205(a) which allows a plaintiff to commence a new action based upon the same occurrence within six months of the termination of a prior action, that the statute of limitations bars this action, and that the plaintiff is not entitled to take advantage of the “relation back” doctrine contained in CPLR 203(b) in order to timely commence this action. Here, it is undisputed that the applicable statute of limitations expired on March 30, 2012, and that this action is untimely absent a saving provision in the CPLR.

CPLR 205 (a) provides that “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.” It well settled that CPLR 205(a) is a “remedial provision protecting the right of litigants who have given timely notice of the assertion of their claims,” which should be broadly construed to accomplish its purpose where a proceeding has been terminated for a flaw unrelated to the merits of the claim (*Matter of Morris Invs. v Commissioner of Fin. of City of N.Y.*, 69 NY2d 933, 516 NYS2d 635 [1987]; *see also Goldstein v New York State Urban Development Corp.*, 64 AD3d 168, 879 NYS2d 524 [2 Dept 2009]; *Matter of Winston v Freshwater Wetlands Appeals Bd.*, 224 AD2d 160, 646 NYS2d 565 [2d Dept 1996]). In addition, it has been held that, where a timely action has been dismissed due to a lack of representative capacity, said representative is eligible to receive the benefit of CPLR 205(a) if the defect is cured in the subsequent action (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 417 NYS2d 231 [1979]; *see also Carrick v Central Gen. Hosp.*, 51 NY2d 242, 434 NYS2d 130 [1980]; *Snodgrass v Professional Radiology*, 50 AD3d 883, 855 NYS2d 243 [2d Dept 2008]).

Here, it is determined that the plaintiff is entitled to the benefit of CPLR 205(a) as the complaint adequately cures the defect that a personal representative was not appointed prior to the commencement of the First Action, and despite the failure of the plaintiff to correctly set forth the name of said representative in the caption in this action. The complaint sets forth in paragraph one that The Estate of John Fogarty is pending in Suffolk County, and that Georgeanna Fogarty was appointed administratrix of said estate on July 12, 2012. In addition, the complaint is verified by Georgeanna Fogarty, as the administratrix of The Estate of John Fogarty.

The Estate of John Fogarty v Town of Southold
Index No. 13- 14124
Page No. 4

Based on this determination, that branch of the District's motion which seeks to dismiss the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacks capacity to sue, and that branch of said motion pursuant to EPTL 5-4.1(1), which is essentially duplicative of the prior branch¹, are denied (*Carrick v Central Gen. Hosp.*, *supra*; *Snodgrass v Professional Radiology*, *supra*). In addition, based on said determination, it is appropriate to consider the plaintiff's cross motion to amend the caption in this action to reflect the change of name of the plaintiff to Georgeanna Fogarty, as the Administratrix of The Estate of John Fogarty, before continuing. Pursuant to CPLR 3025(b) leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see Kiaer v Gilligan*, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; *Kinzer v Bederman*, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]; *Charleson v City of Long Beach*, 297 AD2d 777, 747 NYS2d 802 [2d Dept 2002]). Courts are unlikely to deny the request if the proposed amendments do not prejudice the opponent by changing the basic issues of the action, or, by adding significant factual allegations of which the party is unaware (*Symphonic Electronic Corp. v Audio Devices*, 24 AD2d 746, 263 NYS2d 676 [1st Dept 1965]; *Rogers v South Slope Holding Corp.*, 255 AD2d 898, 680 NYS2d 772 [4th Dept 1998]; see also *Francis v Bein-Aime*, 4 Misc3d 1002[A], 791 NYS2d 869 [Sup Ct, Bronx County 2004]; *Rodriguez v State*, 153 Misc2d 363, 581 NYS2d 972 [Ct CI 1992]).

Here, the District does not address the plaintiff's application for leave to amend the caption, nor does it contend that it would be prejudiced thereby. "Mistakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party surely fall within the category of those irregularities which are subject to correction by amendment, particularly when the other party is not prejudiced and should have been well aware from the outset that a misdescription was involved" (*Cutting Edge v Santora*, 4 AD3d 867, 771 NYS2d 462 [4th Dept 2004] quoting *Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 345 NYS2d 721 [4th Dept 1973]; see also *Matter of Levine*, 82 AD3d 524, 918 NYS2d 445 [1st Dept 2011]; *Tilden Dev. Corp. v Nicaaj*, 49 AD3d 629, 854 NYS2d 418 [2d Dept 2008]). The record fails to disclose how the District would be prejudiced by correction of the plaintiff's name.² Accordingly, the plaintiff's motion for leave to amend the caption in this action is granted.

¹ EPTL 5-4.1, entitled "Action by personal representative for wrongful act, neglect or default causing death of decedent," at subsection 1, states that "[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death."

² The additional defendants appearing in this action also do not address the plaintiff's application for leave to amend the caption in their submission, nor do they contend that they would be prejudiced thereby. Thus, it is deemed unnecessary to further address the issue of the plaintiff's motion.

However, the question remains whether this action is barred by the statute of limitations on the ground that the plaintiff failed to name the District as a defendant in the First Action. That is, whether the plaintiff is entitled to the benefit of the “relation back” doctrine contained in CPLR 203(b) and (c). CPLR 203(b) and (c) provide that a claim interposed against one defendant is also interposed against a defendant “united in interest” with that defendant. Thus, where the statute of limitations has run with respect to an unnamed party, process may still issue, and the unnamed party joined if it is determined that it is “united in interest” with the party against whom process was actually served under the “relation back doctrine” (*Buran v Coupal*, 87 NY2d 173, 177, 638 NYS2d 405 [1995]; *Mondello v New York Blot Ctr.-Greater N.Y. Blood Program*, 80 NY2d 219, 590 NYS2d 19 [1992]; *Murphy v Kirkland*, 88 AD3d 267, 275, 928 NYS2d 333 [2d Dept 2011]; *Monir v Khandakar*, 30 AD3d 487, 818 NYS2d 224 [2d Dept 2006]; *Cruz v Vinicio* 259 AD2d 294, 686 NYS2d 409 [1st Dept 1999]). “Parties are united in interest only where the interest in the subject matter of the action is such that their defenses will be the same and they will either stand or fall together with respect to the plaintiff’s claim” (*Monir v Khandakar*, *supra* at 489, quoting *Losner v Cashline, L.P.*, 303 AD2d 647, 757 NYS2d 91 [2d Dept 2003]).

It undisputed that the two-year statute of limitations has expired on the plaintiff’s wrongful death claim as the decedent passed away on March 30, 2010 and this action was not commenced until May 29, 2013 (*see* EPTL 5-4.1[1]). Thus, “[t]he burden is on the plaintiff to establish the applicability of the relation back doctrine once a defendant has demonstrated that the Statute of Limitations has expired (citation omitted)” (*Spaulding v Mount Vernon Hosp.*, 283 AD2d 634, 635, 727 NYS2d 359 [2d Dept 2001]). Three conditions must be satisfied in order for the plaintiff’s putative claim against the District to relate back to the claim against the Department. The plaintiff must show:

- (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 [it] will not be prejudiced in maintaining [its] defense on the merits and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [it] as well.

Buran v Coupal, *supra* at 178; *Mondello v New York Blood Ctr.-Greater N.Y. Blood Program*, *supra* at 226; *Murphy v Kirkland* *supra* at 275-276).

The District does not address the first two conditions of the relation back test in its papers. Considering that the claim originally made against the Department is only properly brought against the District, it is determined that said claims “arose out of the same conduct, transaction or occurrence.” As to the second condition, “[i]t has been held that ‘when because of some legal relationship between the defendants they necessarily have the same defenses to the plaintiff’s claim, they will stand or fall together and are therefore united in interest’” (*Preferred Elec. & Wire Corp. v Duracraft Prods.*, 166 AD2d 425, 426, 560 NYS2d 489 [2d Dept 1990], quoting *Connell v Hayden* 83 AD2d 30, 443 NYS2d 383 [2d Dept 1981]). Here, it is undisputed that the District is responsible for and operates the Department, and that the Department was properly served in the First Action. Therefore, there is no unfairness in holding that the Department and the District are united in interest (*id.*). Moreover, it

The Estate of John Fogarty v Town of Southold
Index No. 13- 14124
Page No. 6

cannot be said that the District would be prejudiced as it actually received the notice of claim filed by the plaintiff within the applicable limitations period (*see id.*; *see also Monir v Khandakar, supra*), and its attorney was directly involved in all of the previous and current proceedings.

Additionally, the third condition has been met because The District should have known that, but for the plaintiff's mistake in naming the Department in the First Action, the action would have been timely commenced against it. Moreover, the record supports the administratrix's contention that she should not have been expected to understand the structure of the Department and the District for the purposes of litigation. This is true despite the District's contention that her excuse should be deemed unreasonable because she has family members who are members of the District's Board of Fire Commissioners. Therefore, under the circumstances herein, the plaintiff is entitled to the benefit of the relation back doctrine and this action is deemed timely commenced. Accordingly, that branch of the District's motion which seeks to dismiss the complaint pursuant to CPLR 3211(a)(5) is denied.

The final branch of the District's motion seeks dismissal of the complaint pursuant to GML 50-h(5) on the ground that this action was commenced prior to the plaintiff's compliance with the District's notice of hearing dated June 30, 2010. GML 50-h(5) provides, in pertinent part, that "[w]here a demand for examination has been served ... no action shall be commenced against the city, county, [or] town ... against which the claim is made unless the claimant has duly complied with such demand for examination, ... [t]he action ... may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city, county, [or] town ... shall reschedule the hearing for the earliest possible date available."

Here, it is undisputed that the plaintiff was in the impossible position of being unable to comply with the defendants' notices of hearing prior to the expiration of the statute of limitations regarding its claims for the wrongful death of the decedent, that the parties agreed to an indefinite adjournment of the hearings, and that counsel for the plaintiff kept the defendants advised as to the progress of its attempt to obtain letters of administration for the estate. In addition, the District has failed to submit any evidence that it attempted to re-schedule the municipal hearing of the plaintiff, or that the plaintiff failed to, or refused to, appear at such a hearing. "Generally, a plaintiff who has failed to comply with a demand for a hearing ... is precluded from commencing an action against a municipality (citations omitted). When, however, the hearing has been postponed indefinitely beyond 90 days after service of the demand and the municipality does not reschedule the hearing, a plaintiff's failure to appear for a hearing will not warrant dismissal of the complaint" (*October v Town of Greenburgh*, 55 AD3d 704, 865 NYS2d 646 [2d Dept 2008]; *see also Billman v City of Port Jervis*, 71 AD3d 932, 897 NYS2d 507 [2d Dept 2010]; *Cheeseboro v New York City Hous. Auth.*, 55 AD3d 428, 864 NYS2d 919 [1st Dept 2008]; *Southern Tier Plastics, Inc. v County of Broome*, 53 AD3d 980, 862 NYS2d 175 [3d Dept 2008]). Accordingly, the final branch of the District's motion is denied, and said motion is denied in its entirety.

The plaintiff's cross motion having been determined as set forth above, the Court now turns to the cross motion for summary judgment served by the defendants Town of Southold, Southold Town Police, and Southold Police Officer Zuhoski (Town). Initially, the Court notes that the Town's cross


The Estate of John Fogarty v Town of Southold
Index No. 13- 14124
Page No. 7

motion was made prior to the service of an answer by the Town. Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made before issue is joined, and the requirement is strictly enforced (*City of Rochester v Chiarella*, 65 NY2d 92, 490 NYS2d 174 [1985]; *see also Gaskin v Harris*, 98 AD3d 941, 950 NYS2d 751 [2d Dept 2012]; *Union Turnpike Assoc., LLC v Getty Realty Corp.*, 27 AD3d 725, 812 NYS2d 628 [2d Dept 2006]; *Miller v Nationwide Mut. Fire Ins. Co.*, 92 AD2d 723, 461 NYS2d 128 [4th Dept 1983]). However, a review of the Town’s submission reveals that it essentially makes the same arguments regarding EPTL 5-4.1 and GML 50-h(5) as set forth in the District’s motion to dismiss. Therefore, the Town’s motion is deemed a motion to dismiss the complaint pursuant to CPLR 3211, and it is denied for the reasons set forth above.

In making these determinations, the Court declines to speak to the outstanding issues regarding when, or if, municipal hearings should be scheduled herein, and leaves it to the parties to determine the course of the litigation moving forward.

Counsel for the plaintiff is directed to serve of a copy of this order with notice of entry upon the Clerk of the Court.

Dated: 10/22/14



J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION NON-FINAL DISPOSITION