

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

2014 NY Slip Op 33668(U)

November 25, 2014

Supreme Court, New York County

Docket Number: 116085/2007

Judge: Alice Schlesinger

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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____
Justice

PART **IA** PART 16

Index Number : 116085/2007
WILSON, JANE
vs.
SOUTHAMPTON URGENT MEDICAL
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied in accordance with the accompanying memorandum decision.*

FILED

DEC 01 2014

NEW YORK COUNTY CLERKS OFFICE

RECEIVED

DEC -1 2014

TRIAL SUPPORT OFFICE

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

Dated: **NOV 25 2014**

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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. 005

-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.

FILED

DEC 01 2014

NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

In the motion now before the Court, defendant Dr. Andrea Libutti is renewing her prior motion for summary judgment pursuant to CPLR §2221 based on an invitation by the Appellate Division of this Department to do that. *Wilson v Southampton Urgent Medical Care, P.C., et al.*, 112 AD3d 499. In a decision entered August 15, 2012, this Court denied the motion for summary judgment by the sole defendants remaining in the case, Southampton Urgent Medical Care, PC ("Urgent Care"), Dr. Mark Kot and Dr. Libutti. 36 Misc. 3d 1234 (a).¹ That motion was based on the argument that claims arising before June 4, 2005 were time-barred. For the reasons stated in the decision based on the continuous treatment doctrine, I found that the claims were not barred, and the Appellate Division affirmed this decision. However, at the end of that affirmance (at p 501), the Appellate Division stated as follows:

¹In earlier motions, I had dismissed the action against other defendants.

Defendant Libutti argues that the action should nevertheless be dismissed as against her because she was not added as an additional defendant until March 31, 2008, more than 2½ years after the decedent was last treated at Urgent Care on July 21, 2005. This statute of limitations defense may ultimately prove to be meritorious ... but it is improperly raised for the first time on appeal However, since defendant Libutti was not represented by separate counsel on the original motion, under the particular circumstances of this case we direct that she be afforded the opportunity to renew her motion for summary judgment to raise the defense, which does not apply to the other defendants.

(citations to various Appellate Division, Second Department, cases omitted).

Some history should be provided at this point. The decedent Tracy A. Allen died on December 20, 2005 of lung cancer that had metastasized to her brain. She was 38 years old at the time. On December 4, 2007, plaintiff Jane Wilson, Administratrix of Ms. Allen's Estate, commenced a timely action for medical malpractice, lack of informed consent and wrongful death.

Several years earlier, Ms. Allen had made Urgent Care her primary care provider after her first visit there on September 1, 2003. She went to the Clinic two more times in 2003, but the claims that plaintiff is making on behalf of Ms. Allen's Estate do not include any treatment provided in that year. However, the following year, 2004, Ms. Allen went to Urgent Care five times. As noted in my earlier decision, it was Ms. Allen's visit of August 9, 2004, that the plaintiff first points to, alleging that Ms. Allen was not properly diagnosed and treated.

As further noted in that decision, the three moving defendants had argued that none of the visits up to June 4, 2005 should be included in the claims against them because they were time-barred as having occurred more than 2½ years before the action was

commenced. I found that because of the various symptoms and/or complaints that Ms. Allen had made during the earlier visits, these visits were sufficiently connected to her lung cancer condition to have allowed the doctrine of continuous treatment to be applied. This was the finding affirmed by the Appellate Division in 2014, as noted above.

As stated by the appellate court, while the action was originally commenced on December 4, 2007, Dr. Libutti was not added as a defendant until a few months later, on March 31, 2008, more than 2½ years after Ms. Allen was last treated at Urgent Care on July 21, 2005. That delay appeared to be the reason why the Court believed that Dr. Libutti, a physician who worked part-time at Urgent Care, had a colorable claim that the action against her was time-barred.

The decedent was treated by Dr. Libutti on three occasions: March 30, May 18, and July 21, 2005, the last date being her final visit to the Clinic. On the first on March 30, 2005, Ms. Allen was seen by Dr. Libutti, to whom she complained of one-sided headaches and other matters. Dr. Libutti referred the patient to Southampton Hospital for a CT scan of her head. After the scan was found to be normal, the patient was referred back to Dr. Libutti, who prescribed Vicodin for pain. The May 18th visit concerned complaints of tick bites for which Dr. Libutti prescribed an antibiotic.

But on July 21, 2005, Ms. Allen went back to the Clinic again complaining of a headache, and Dr. Libutti saw her and referred her to a neurologist Dr. Henry Moreta. This doctor examined Ms. Allen in August 2005 and arranged for her to have a brain MRI on August 30. The MRI showed abnormal lesions in the right and left brain. This finding was followed up by an admission to Southampton Hospital, where a work-up revealed a cancerous mass in the patient's right lung.

In the original and renewal motions, Dr. Libutti has sustained her burden to dismiss by showing that the action against her was commenced more than two and a half years after the patient's last visit to Urgent Care on July 21, 2005. Again, the action was commenced against Urgent Care and Dr. Kot, the facility's sole shareholder and main doctor, on December 4, 2007.²

The issue here as argued by plaintiff in opposition concerns the relation-back doctrine referenced in CPLR §203. Does it apply to these facts? In other words, was the March 31, 2008 amendment adding Dr. Libutti timely because it related back to the commencement of the action against Dr. Kot and the Clinic?

The First Department here cited two Second Department cases as to why Dr. Libutti's renewal of her summary judgment motion was appropriate, *Lopez v Wyckoff Hgts. Med. Ctr.*, 78 AD3d 664 (2010) and *Boodoo v Albee Dental Care*, 67 AD3d 717 (2009). Both of these cases discuss the relation back doctrine, and in both the court decided in favor of the defendant, finding that the doctrine did not apply. Also in both, the courts found that the plaintiff failed to raise triable issues of fact as to the third prong of this doctrine, which is whether the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well. See, *Buran v Coupal*, 87 NY2d 173 (1995).

²In both the Reply and the moving papers, counsel cites CPLR §210(a) and argues that the one year provided after a patient's death to bring an action expired in and around September 31, 2005. Ms. Allen, however, did not die until months later, on December 20, 2005. (¶15). The September 31, 2005 date must be in error. Also, no one raised issues pursuant to §210(a) in the earlier motion.

The relation back doctrine applies to situations such as this one where service has occurred after the expiration of the statute of limitations. After the defendant has made out a prima facie case, as was done here, that the action against her is time-barred, the burden is on the plaintiff to prove that the relation back doctrine applies.

There are three prongs to the doctrine. The first is that both claims, the one made against the original defendants in a timely fashion as well as the one later made against the newly added defendant, arose out of the same conduct, transaction, and/or occurrence. This prong is generally the easiest factor to show, and the plaintiff does show that here. Clearly, the claims against Urgent Care, Dr. Kot and Dr. Libutti all arise from the multiple visits to Urgent Care wherein Ms. Allen came to the Clinic, saw both doctors and made complaints that arguably were referable to her lung and/or brain cancer.

The second prong is that the new defendant must be “united in interest” with the original defendant. This prong is fact-intensive. Not surprisingly, counsel here differ on whether it has been shown. Counsel for the plaintiff argues that Dr. Libutti is united in interest with Dr. Kot and his Clinic, but defense counsel disagrees.

On two prior occasions in the history of this case, I found no such unity of interest, the first in regard to Dr. Bradley Gluck and Southampton Radiology in a decision dated January 7, 2011, and the second in regard to Dr. Gandolfi, Dr. Michael Ameres and their employer 24-7 in a decision dated November 23, 2011. In both of these decisions, I found that the moving defendants were not sufficiently connected with the named institutional defendant Southampton Hospital to have been united in interest with the Hospital.

However, the circumstances are very different with regard to Dr. Libutti. Dr. Libutti was in fact connected with Urgent Care when the action was first commenced in December

2007. While she might have viewed herself as a part-time, independent contractor at Urgent Care, she was employed there on a per diem basis and received an annual W-2 tax statement. She testified at her deposition that she had began working at Urgent Care in July 2004. Then for the next year through July 2005 she worked there one day a week. After July 2005, she continued to be associated with Urgent Care, but her schedule was less fixed and she came in only on those days when Urgent Care requested.

Significantly, in 2011 when Dr. Libutti was deposed, three years after she was added as a defendant, she still worked at Urgent Care. In fact, she testified that during the preceding year 2010, she had worked at Urgent Care between 5 and 10 days. Finally, as emphasized by plaintiff's counsel and noted above, Dr. Libutti testified that she received a W-2 tax form at the end of each year from this facility.

In her reply papers, Dr. Libutti submits an affirmation (although as a named defendant, she was required to submit an affidavit) which states: "I last worked at Southampton Urgent Medical Care, P.C. in 2012" (§10) and "I have not worked at Southampton Urgent Medical Care, PC since 2012" (§12). Therefore, based on this continued working relationship from 2004 through 2012, encompassing the time when Ms. Allen was a patient, I find that Dr. Libutti is united in interest with Urgent Care and Dr. Kot.

The final prong is the prong that the plaintiffs failed to establish in *Lopez* and *Boodoo*, the cases cited by Appellate Division in this case. That prong refers to knowledge that the newly added defendant either had or should have had that the action was commenced. In that connection, it is useful to discuss an argument raised by moving counsel, which is that there was no "mistake" made by plaintiff's counsel here that prevented an earlier joinder of Dr. Libutti.

Here defendant cites to *Goldberg v Boatmax*, 41 AD3d 255 (1st Dep't 2007), which in turn cites to *Cintron v Lynn*, 306 AD2d 118 (1st Dep't 2003). In the latter case, the court quotes the Court of Appeals in *Buran*, 87 NY2d at 180, stating that "the 'lynchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period." 306 AD2d at 119. This factor focuses in part on what the plaintiff knew or should have known with regard to the defendant originally omitted but added later on. If the plaintiff genuinely did not realize that the omitted defendant was involved via some mistake, although not necessarily an excusable mistake, then at least pursuant to *Buran (supra)* the omitted defendant can be added. Although here, too, the time factor is important.

On this basis, defendant charges that plaintiff's counsel knew or should have known before the initial complaint was filed of Dr. Libutti's involvement with Ms. Allen. But counsel for the plaintiff denies this claim. She asserts that while she was in possession of decedent's medical records — the best and sometimes only source of information in a wrongful death action — the only clearly printed names there were of Urgent Care and Dr. Kot, and Dr. Libutti's name was not printed. Nor was her name included in the doctor's handwritten notes. Counsel insists she was not aware of Dr. Libutti until about three months after the complaint was filed.

Defense counsel takes issue with this assertion and points out that Dr. Libutti was identified on the typed radiology report of March 30, 2005 prepared by Dr. Gluck, as Dr. Libutti had ordered the SCAN. However, as this is the only reference to Dr. Libutti identified by her counsel, it certainly lends itself to the concept that counsel made a mistake in not realizing the significance of Dr. Libutti's role in plaintiff's care.

In all the cases cited, *Boodoo*, *Lopez*, *Goldberg* and *Cintron*, the facts relevant to whether a genuine mistake was made by plaintiff are very different from the ones here. It would appear that it was these differences that compelled the courts not to find the existence of the third factor.

The facts in *Boodoo* can be gleaned from the moving defendant's successful brief to the Second Department wherein counsel asked the appellate court to reverse the lower court's decision allowing the inclusion of John Choi, DDS (2009 WL 8527392). Counsel there argued that it was not a mistake by the plaintiff that caused counsel to fail to name Dr. Choi in the original complaint filed on October 29, 2002. The complaint alleged dental malpractice between October 1999 and October 2000. It was not until six years later, and two years after the action was first commenced, that plaintiff decided to add Dr. Choi, on December 1, 2006.

What is more, the joinder of Dr. Choi was not sought until three and a half years after the statute of limitations had run. Further, even though Dr. Choi had been clearly identified in the records, counsel for the plaintiff did not begin deposing any defendant until November of 2006; he waited four years after the action was commenced. Finally, Dr. Choi had stopped working at Albee Dental Care in January 2006, which was ten months before the action was even begun. Is there any surprise that on these facts the Appellate Division found that "the plaintiff failed to establish that Choi knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well..." 67 AD3d at 718.

It is not determinative to this factor that the defendant doctor states, as she does here in her Reply Affirmation, that she did not know about the lawsuit until she was served

(¶ 4). What is relevant is whether the defendant's connection to the institutional defendant was such that the defendant "by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits." *Boodoo*, 67 AD3d at 718.

The other case cited by the Appellate Division here, *Lopez*, has facts similar to those in *Boodoo*. There, the Second Department indicated (at 665) that the record established that the moving defendant Dr. Nazaire "was no longer working at the defendant hospital or employed by the defendant professional corporation at the time of the commencement of the action against those entities, and there is no evidence of actual or constructive knowledge [presumably the plaintiff] within the limitations period of the commencement of the action against them."

However, that was not the situation here. A continuing relationship was established here. By Dr. Libutti's own words, she continued to work at Urgent Care during the year that she was served, 2008, as well as succeeding years, up until the end of 2012. Also, despite her statement that she did not know, a statement I earlier characterized as not determinative, Urgent Care seems to have been a relatively small clinic, as evidenced by the fact that it was staffed by only one full-time employee, its principal defendant Dr. Mark Kot. There may have been other part-time employees like Dr. Libutti who came to the Clinic on days when Dr. Kot was not there. Still, it does seem that under such circumstances Dr. Libutti might well have learned about the lawsuit against Dr. Kot and the Clinic, particularly since she had treated the decedent named in this lawsuit on several occasions and the patient died soon after, five months after her visit with Dr. Libutti.

In further analyzing the cases, one a First Department case cited by moving counsel, was *Garcia v NY Presbyterian Hospital*, 114 AD3d 615 (2014), is particularly interesting. There, the court also found that a failure by the plaintiff to provide any basis for the claim “that the proposed defendant ‘knew or should have known’ that the action would have been brought against him to, but for a mistake by the plaintiffs as to the identity of the proper parties...” 114 AD3d at 616 (citations omitted). There the party whom the plaintiff sought leave to add as a defendant had made only two notes in the injured plaintiff’s medical chart, and they were made before the complained of procedure had been performed. Further, that doctor was a surgeon who was merely affiliated with the hospital.

The original Court found that the relation back doctrine did not apply to allow the addition of a new defendant after the statute of limitations. The First Department explained that the idea of vicarious liability would not support the inclusion of the new defendant because it appears that he was not actually employed by the hospital but simply affiliated with it. The court concluded with the point that the newly added defendant might well have assumed that, since other doctors had been sued and he was not, he probably would not be. Here, unlike *Garcia*, the doctrine of vicarious liability based on the actions of Dr. Libutti could be argued successfully against Urgent Care.

In a case where the First Department allowed the inclusion of a new party, *Gaspari v. Sadeh*, 61 AD3d 405 (2009), the prong which was the “lynchpin” of the relation back doctrine was the finding of notice to the defendant within the applicable statute of limitations. There, the newly added defendant, similar to Dr. Libutti here, had personally examined the plaintiff on two occasions and was still employed by the originally named

defendant when that defendant was timely sued. However, unlike Dr. Libutti, that defendant, Marlene Finkelstein, did not deny knowing about the action, while here Dr. Libutti did.

In *Goldberg, supra*, the case moving counsel relies on to argue that plaintiff here cannot meet her burden as to the third prong of relation back, the facts are clearly distinguishable. There, the “plaintiff knew the identities of the intended defendants and their role in the alleged wrongful disposition of property nearly one year before he sought to add them to the action and, accordingly, his failure to name them earlier cannot be characterized as a mistake for relation-back purposes.” 41 AD3d at 255, citing to *Buran, supra*.

Further, in *Goldberg*, in the original complaint, despite knowing the intended defendants’ names, the plaintiff named them merely as “John Doe”. Additionally, the plaintiff described these intended defendants as persons in possession of plaintiff’s boat. However, when the action was commenced, the subject boat had been out of their possession for nearly two years. Thus, there was insufficient proof “to place the intended defendants on notice that they were targets of plaintiff’s claims.” 41 AD3d at 256, citing *Cintron v Lynn*, 306 AD2d 118 (2003).

Finally, in a case cited in *Goldberg, Cintron v. Lynn*, the First Department again found that the first two prongs of the relation back doctrine had been established, but the third had not. The complaint against the original defendants, Toothsavers and Jerry Lynn, was commenced in June 2000, within the two and one-half year statute of limitations for claims allegedly occurring from July through December of 1997. The intended defendant,

dentist Yelena Simkhayeva, did not know about the action as she had terminated her employment with Toothsavers in May 1998, two years before the lawsuit was commenced.

Further, the complaint gave the date of the malpractice as "on or about December 17, 1997," a day when this defendant did not treat the plaintiff. Counsel for the plaintiff conceded that the complaint had been "inartfully drafted." 306 AD2d 118.120. But this error was a further indication that Dr. Simkhayeva would not have known she might be implicated in the alleged negligent acts. In contrast here, Dr. Libutti was still working at Urgent Care when her patient died and when a suit was brought, and the dates of the alleged negligence included dates of Dr. Libutti's treatment.

Therefore, I find that the action against Dr. Libutti should continue as not barred by the statute of limitations because all three prongs of the relation back doctrine have been shown. First, the dates in 2005 when Dr. Libutti cared for Ms. Allen involved the same conduct, transaction, or occurrence alleged in the complaint; that is, a failure to properly diagnose and treat the decedent's lung cancer. Second, by her employment relationship with defendant Urgent Care, which included receipt of a W-2 from them, when the treatment was rendered and the lawsuit was commenced and service was made upon her, Dr. Libutti was united in interest with Dr. Kot and Urgent Care.

Finally, there was no dilatory inaction by counsel for the plaintiff. There was a mistake by counsel, but it is an understandable one based on her inability to read the notes in the record and her not connecting the name on the radiology report of the referring doctor with Dr. Libutti. It must be remembered that while this doctor was not served until March 31, 2008, after the statute of limitations expired, it was only about three months past that date. But more importantly, service was completed sufficiently close to the

commencement of the suit on December 4, 2007, that since Dr. Libutti was continuing to work at Urgent Care on both dates, she should have known that but for counsel's inability to read her uninitialed notes in the record, the action would have been brought against her as well.

Therefore, the relation back doctrine applies here, and Dr. Libutti's motion to renew her motion for summary judgment is denied.

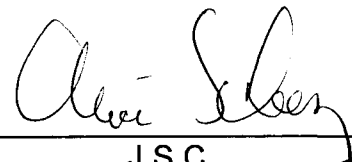
Accordingly, it is hereby

ORDERED that the motion by defendant Andrea Libutti is in all respects denied.

A final pre-trial conference is scheduled for December 17, 2014 at 11:00 a.m.

Dated: November 25, 2014

NOV 25 2014



J.S.C.
ALICE SCHLESINGER

FILED

DEC 01 2014

**NEW YORK
COUNTY CLERK'S OFFICE**