Roman v St Pre
2014 NY Slip Op 33950(U)
January 30, 2014
Supreme Court, Kings County
Docket Number: 23345/11
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of January 2014.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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ELBA ROMAN,

Plaintiff(s),

- against -

MULLER ST PRE, M.D. and WYCKOFF HEIGHTS MEDICAL CENTER,

Defendant(s).

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DECISION AND ORDER

Index No.: 23345/11

The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1–3
Opposing Affidavits (Affirmations)	4–5, 6–8
Reply Affidavits (Affirmations)	
____ Affidavit (Affirmation)	
Other Papers	

Plaintiff, Elba Roman (Roman), by Amended Notice of Motion (#3), seeks an order, pursuant to CPLR 3025 [b], granting her leave to serve an amended summons and complaint adding Jaipaul Ramkelawan, M.D. (Dr. Ramkelawan) and Wyckoff Emergency Medicine Services, P.C. as defendants; and, pursuant to CPLR 203 [b], [c] and [f], deeming the claims asserted against the newly added defendants to relate back to the time when plaintiff interposed claims against the original

defendants.

The defendant Muller St. Pre, M.D. (Dr. St. Pre) cross-moves for an order, pursuant to 22 NYCRR §202.21 [e], vacating the Note of Issue and Certificate of Readiness, striking the matter from the trial calendar and granting Dr. St. Pre sixty days, from the restoration of the case to the trial calendar, to move for summary judgment.

BACKGROUND

In this action for medical malpractice plaintiff alleges that on October 30, 2009 the defendants failed to timely diagnose and treat her diverticulitis. It is alleged that the defendants failed to recognize the significance of her complaints of bilateral lower quadrant pain, fever, chills and sweats and improperly discharged her from the hospital's emergency department. Plaintiff alleges that as a consequence of the delay in diagnosis and treatment she suffered, *inter alia,* a perforated sigmoid colon, requiring a colon resection.

On October 14, 2011 plaintiff commenced this action against Dr. St. Pre and Wyckoff Heights Medical Center (the hospital). The hospital and Dr. St. Pre served a Verified Answer on or about March 19, 2 012. Plaintiff served Verified Bills of Particulars on or about April 17, 2012, and a preliminary conference was held on April 19, 2012. Plaintiff filed a Note of Issue and Certificate of Readiness on June 7, 2013.

Plaintiff's Motion

In support of her motion, plaintiff alleges that during the deposition of Dr. St. Pre, which occurred on March 4, 2013, "[i]t was revealed ... that Dr. St. Pre was employed by Wyckoff Emergency Medicine Services P.C. on October 30, 2009 ... [and] that a second physician [also] was

involved in the care of Elba Roman on October 30, 2009." Plaintiff asserts that on March 6, 2013 plaintiff demanded that the hospital provide the October 30, 2009 emergency department staffing schedule, and that on or about March 12, 2009 plaintiff learned that Dr. Ramkelawan "was the physician who wrote notes in the chart ... under 'final clinical impression' and 'discharge orders.'" Plaintiff now seeks permission to add Dr. Ramkelawan and Wyckoff Emergency Medical Services, P.C. as defendants.

Generally absent prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*American Cleaners, Inc. v American Intl. Speciality Lines Ins. Co.*, 68 AD3d 792, 794 [2009], citing *G.K. Alan Assoc., Inc. v Lazzari,* 44 AD3d 95, 99 [2007]). The fact that a party moves to amend its pleadings after the filing of the note of issue and certificate of readiness for trial does not preclude the granting of the motion (see CPLR 3402). "However, where the application for leave to amend is made long after the action has been certified for trial, 'judicial discretion in allowing such amendments should be discreet, circumspect, prudent, and cautious'" (*American Cleaners, Inc. v American International Speciality Lines Ins. Co.*, 68 AD3d at 794, citing *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828 [2008] and *Clarkin v Staten Isl. Univ. Hosp.*, 242 AD2d at 552 [1997]).

Nevertheless, the determination as to whether to grant such leave is within the trial court's broad discretion (*Henry v MTA,* 106 AD3d 874, 874-875 [2013], citing *Gitlin v Chirinkin,* 60 AD3d 901, 902 [2009]). Here, three months after the note of issue was filed and four months after learning of the involvement of the proposed additional defendants, plaintiff filed the instant motion for leave

to amend the complaint. The delay was brief and the claims against the defendant to be added is vicarious in nature (*Henry v MTA,* 106 AD3d at 875). Moreover, to avoid any potential prejudice to the parties the note of issue can be vacated and a reasonable time period provided for additional discovery (*id., Alvarado v Beth Israel Medical Center,* 78 AD3d 873, 874 [2010]).

"As codified in CPLR 203 (c) '... the relation back doctrine allows a claim asserted against a defendant in an amended filing [which would otherwise be barred by expiration of the statute of limitations] to relate back to claims previously asserted against a codefendant ... where the two defendants are 'united in interest' (CPLR 203 [b])' (*Buran v Coupal,* 87 NY2d 173, 177 ...). For the rule allowing relation back to the original date of filing ... to apply, a plaintiff is required to prove that: '(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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party 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 that party as well' [*Austin v Interfaith Med. Ctr.,* 264 AD2d 702, 703 ...]" (*Sally v Keyspan Energy Corp. et al.,* 106 AD3d 894, 896-897).

The burden is on the plaintiff to establish the applicability of the relation back doctrine (*Spaulding v Mt. Vernon Hospital,* 283 AD2d 634, 635 [2001]).

"Defendants are united in interest with one another only when their relationship with each other is such that their interest 'in the subject-matter [of the action] is such that [the defendants] stand or fall together and that judgment against one will similarly affect the other' [*Prudential Ins. Co. v*

Stone, 207 N.Y. 154, 159 ...]. '[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff' [*Connell v Hayden,* 83 AD2d at 42-43 ...]. However, defendants, are not united in interest if there is the mere possibility that the new party could have a different defense than the original party [citations omitted]. Accordingly, joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable [citations omitted]" (*LeBlanc v Skinner,* 103 AD3d 202, 210 [2012]).

Here, while both Dr. St. Pre and Dr. Ramkelawan participated in plaintiff's care, the record reflects that each provided distinct services to the plaintiff at different times.[1] Absent some showing by the plaintiff that one may be held liable for the acts or omissions of the other, it cannot be said that these two physicians are united in interest (*see Monir v Khandakar,* 30 AD3d at 489).

However, "[a] professional corporation may be held vicariously liable for the tort of its employee committed within the scope of the corporate business" (*Monir v Khandakar,* 30 AD3d 487, 489 [2006]). In this case there is evidence before the court that at the time of the alleged malpractice Dr. St. Pre was acting within the scope of his duties as an employee of Wyckoff Medicine Services, P.C. The liability of the corporation arises only as a result of malpractice which may have been committed by Dr. St. Pre (*id.; see also Monir v Khandakar*, 30 AD3d at 489). Because of its

[1]Dr. St. Pre testified that his shift ended at 7:00 P.M. and that he turned over plaintiff's care to the oncoming doctor, telling him "I've ordered some test and he'll have to look at them and "decide from there what to do next (Tr. pp 25-26). Dr. Ramkelawan has been identified as the physician who discharged the plaintiff from the hospital.

employer-employee relationship with Dr. St. Pre the corporation knew, or should have known, that but for a mistake as to its identity, and the relationship between the parties, the action would have been brought against it as well (*id.*).

Defendant's Cross-Motion

A motion to vacate a note of issue and certificate of readiness made more than 20 days after their service may be granted only were "a material fact in the certificate of readiness is incorrect" or upon "good cause shown" (22 NYCRR 202.21 [e]; *see Witherspoon v Surat Realty Corp.*, 82 AD3d 1087, 1088 [2011]). "To satisfy the requirement of 'good cause', the party seeking vacatur must 'demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice'" (22 NYCRR 202.21 [d]; *Torres v Saint Vincents Catholic Medical Center*, 71 AD3d 873, 873 [2010]). Here, plaintiff's belated discovery of the identity of Dr. St. Pre's employer and the potential need for additional discovery warrants striking the note of issue and certificate of readiness (*id.*). Accordingly, it is

ORDERED, that the plaintiff's amended motion (# 3) is granted to the extent of permitting plaintiff to add Wyckoff Emergency Medicine Services, P.C. as a defendant and to serve it with the supplemental summons and amended verified complaint within 30 days of entry of this order, and the amended motion is otherwise denied; and it is further

ORDERED, that the caption is amended to read as follows:

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ELBA ROMAN,

Plaintiff(s),

- against -

Index No.: 23345/11

MULLER ST PRE, M.D. and WYCKOFF HEIGHTS MEDICAL CENTER, and WYCKOFF EMERGENCY MEDICINE SERVICES, P.C.

Defendant(s).
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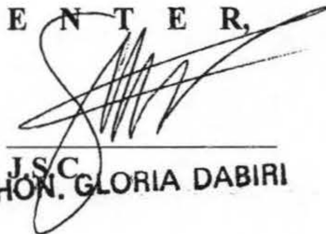
; and it is further

ORDERED, that the plaintiff's motion (#2) is deemed withdrawn; and it is further

ORDERED, that the cross-motion of the defendant Muller St. Pre, M.D. is granted to the extent that plaintiff's Note of Issue and Certificate of Readiness are vacated and the parties may move for summary judgment no later than 60 days after refiling of the Note of Issue (Kings County Supreme Court Uniform Civil Term Rule, Part C, Rule 6); and it is further

ORDERED, that counsel for each of the parties appear for a conference in Part 2 of this Court on March 21, 2014 at 9:30 A.M.

E N T E R,



J.S.C.
HON. GLORIA DABIRI