| **Branch v Community Coll. of the County of Sullivan** |
| --- |
| 2016 NY Slip Op 32842(U) |
| February 1, 2016 |
| Supreme Court, Sullivan County |
| Docket Number: 1908-2015 |
| Judge: Stephan Schick |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF SULLIVAN**

----------X

Sharon Branch, as Administratrix of the
Estate of Robert Bastian, deceased,

Plaintiff,

-against- **DECISION & ORDER**

Community College of the County of Sullivan,

Defendants,

----------X

Motion Return Date: January 20, 2016
RJI No.: 52-37619 2015
Index No.: 1908-2015

Appearances: Michael H. Sussman, Esq.
Sussman & Watkins
Attorney for the Plaintiff
PO Box 1005
Goshen, NY 10924

Annemarie Dempsey, Esq.
Law Office of Thomas K. Moore
701 Westchester Ave., Suite 101W
White Plains, NY 10604

Schick, J.:

This matter comes before this Court by way of Defendant's motion for an order dismissing Plaintiff's complaint for failure to state a cause of action and for failure to timely commence the action within the applicable two year statute of limitations and for such other and further relief as this Court deems just and proper. Plaintiff opposes.

This matter arises from the tragic death of a Sullivan County Community College student, Robert Bastian. Mr. Bastian had a previously unknown heart ailment which caused him to suffer a cardiac event at the Sullivan County Community College (hereinafter SCCC) Dormitory on November 8, 2007. Plaintiff alleges that had the dormitory or the school been equipped with an automatic external defibrillator, or an adequate emergency response plan, Mr. Bastian would have survived.

Under the two year statute of limitations,[1] suit would have had to be filed by November 8, 2009. Plaintiff filed suit against Sullivan County on January 5, 2009. This suit was dismissed by Supreme Court. The dismissal was affirmed by the Appellate Division, Third Department, and the Court of Appeals.

Plaintiff filed the current suit on August 21, 2015, five years and nine months after the required statute of limitations time expired and well over seven years after the tragic event. Under the section of the verified complaint marked "jurisdiction," Plaintiff alleges that "...the instant suit relates back to that filed in this court on January 5, 2009..."[2]

> The test for determining whether a claim asserted against a new party relates back to the date upon which the claim was interposed against the original named defendants is set forth in Buran v Coupal (87 NY2d 173...) and requires that (1) both claims arise out of the same conduct, transaction or occurrence, (2) the party to be joined is united in interest with the original named defendant (s) and, by reason of that relationship, can be charged with notice of the commencement of the action so that the party to be joined will not be prejudiced in maintaining his or her defense due to the delay and (3) the party to be joined 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 or her as well (id. at 178). There is a caveat to the third element: "When a plaintiff intentionally decides not to assert a claim against a party ..., there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired" (id. at 181).[3]

Certainly, the first prong is satisfied: Both suits arose from the tragic death of Mr. Bastian.

The second prong, "the party to be joined is united in interest with the original named defendant,[4]" is more problematic.

The Court of Appeals considered this question at length in *27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 164 (1st Dept. 2002) in determining if the school and

---

[1]EPTL §5-4.1.

[2]Verified Complaint paragraph 7.

[3]*27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 163-164 (1st Dept. 2002).

[4]*27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 163-164 (1st Dept. 2002).

the dormitory/DOT group were united in interest:

> They are not juridically related so as to make each a stand-in for the other. In no sense are they alter egos of each other. Petitioners argue that, notwithstanding, they are united in interest because they are "so inseparably intertwined that the presumption is warranted that they will both be desirous of reaching the same result" ... Even if this were so, parties whose arguments on the merits "stand or fall together" are united in interest only if a "judgment against one will similarly affect the other" ... Since an adverse judgment would affect them differently, a project sponsor and a governmental agency that approves its proposed development are not united in interest ...

In the instant matter, the Third Department already considered this topic[5]:

> According to plaintiff, SCCC is an alter ego of defendant and should be treated as a department of defendant for liability purposes. We cannot agree. Although defendant has a role in the fiscal oversight of SCCC as its local sponsor ... it is the board of trustees, established pursuant to Education Law § 6306 (1), that is responsible for its day-to-day management ... By statute, the board of trustees has "care, custody, control and management of the lands, grounds, buildings, facilities and equipment used for the purposes of [the] college" ... (citations omitted.)
>
> Here, defendant established that, beyond its role as sponsor and contributor of a portion of SCCC's operating budget, it does not have input into the board's allocation of resources and has no role in the day-to-day operation and management of the school. Moreover, defendant established that it did not own the building where decedent suffered his fatal heart attack.

The Court of Appeals affirmed this rationale in *Branch v County of Sullivan*, 25 N.Y.3d 1079 (2015). Accordingly, it cannot be said that the County of Sullivan and SCCC are alter egos of each other.

The Third Department explained in *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 A.D.3d 1474, 1475 (3rd Dept 2014), that

> Unity of interest is demonstrated where "the interest of the parties in the subject-matter is such that they [will] stand or fall together and that

---

[5] *Branch v County of Sullivan*, 112 A.D.3d 1119, 1119-1120 (3rd Dept.2013).

> judgment against one will similarly affect the other" ...

In *De Sanna v. Rockefeller Ctr., Inc.*, 9 A.D.3d 596, 598 (3rd Dept. 2004), it held that

> A unity of interest has been found to exist where "the defenses available . . . will be identical, [which occurs] . . . where one is vicariously liable for the acts of the other" (citations omitted.)[6]

Niether SCCC nor the County of Sullivan are vicariously liable for the acts of the other. Nor would an adverse judgment against SCCC affect the County of Sullivan: They are separate entities with interaction at budget time.[7] "Since an adverse judgment would affect them differently, [they] are not united in interest ..."[8]

Moreover, the second prong continues that the party to be joined,

> by reason of that relationship, can be charged with notice of the commencement of the action so that the party to be joined will not be prejudiced in maintaining his or her defense due to the delay ...[9]

Taking Plaintiff's allegation as true, more than seven years before this suit was filed, SCCC was copied on the notice of claim against the County of Sullivan. Then, over seven years later, it gets sued. Seven years is a very long time. It cannot be said that the passage of seven years has not prejudiced SCCC in maintaining a defense.

The third prong, that

> the party to be joined 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 or her as well ...

also fails.

Mr. Bastian's cardiac event happened at SCCC. That there was no AED at the dormitory or that allegedly no emergency plan was in place at the College is the crux of the

---

[6] *De Sanna v. Rockefeller Ctr., Inc.*, 9 A.D.3d 596 (3rd Dept. 2004)

[7] *Branch v County of Sullivan*, 112 A.D.3d 1119, 1119-1120 (3rd Dept.2013).

[8] *27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 164 (1st Dept. 2002).

[9] *27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 164 (1st Dept. 2002).

complaint. There can be no mistake that SCCC could have been named in the suit. However, not only did Plaintiff not name SCCC in the initial complaint and did not seek to add SCCC when Supreme Court initially dismissed the suit, it instead litigated, all the way to the Court of Appeals, its right to sue the County, instead of SCCC. This determined course of conduct implicates the caveat to the third prong:

> "When a plaintiff intentionally decides not to assert a claim against a party ... there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired" ...[10]

As the Third Department held in the *Matter of Ayuda, supra* at 1476,

> As petitioners were fully aware of the existence of these [potential parties] but "failed to appreciate that [they] were legally required to be named in proceedings of this type," petitioners' error was not encompassed by the [relation back] doctrine ...

Accordingly, as Plaintiff's complaint fails two prongs of the three prong relation back doctrine, it is hereby

**ORDERED**, that Defendant's motion to dismiss is granted.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

**SO ORDERED**

Dated: Monticello, NY
February 1, 2016

**ENTER**

HON. STEPHAN G. SCHICK, JSC

---

[10] *27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 163-164 (1st Dept. 2002).