

Torres v NYU Hosp. Ctr.
2017 NY Slip Op 30350(U)
February 22, 2017
Supreme Court, New York County
Docket Number: 805119/2013
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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: IAS PART 6**

-----X
JUSTINA TORRES,

Plaintiff,

Index No. 805119/2013

-against-

**Decision, Order
And Judgment**

NYU HOSPITAL CENTER, TISCH HOSPITAL,
NYU LANGONE MEDICAL CENTER, K. CHABOS,
R.N., S. ISABELLA, R.N., and DR. SERRANO-GOMEZ,

Defendants.
-----X

In this medical malpractice action, plaintiff alleges that on July 11, 2011, defendants New York University (NYU) Hospital Center, Tisch Hospital, NYU Langone Medical Center (collectively, "defendants"), K. Chabos, R.N., S. Isabella, R.N., and John and Jane Doe defendants negligently used a contrast dye to which she was allergic, resulting in a severe allergic reaction and some permanent injuries. Dr. Claudia Serrano-Gomez, examined plaintiff at her office on July 9, 2011 and performed the medical procedure on July 11 at defendants. In addition, plaintiff presented to Dr. Serrano-Gomez for a follow-up examination on July 14, 2011 during which plaintiff complained of various problems including blisters and edema, and Dr. Serrano-Gomez noted that plaintiff had experienced a delayed allergic reaction to the contrast dye and Norvasc.

Plaintiff filed the complaint on April 5, 2013. Dr. Serrano-Gomez was not a named party at that time.¹ On January 13 and February 6, 2015, defendants sought authorizations from

¹ Neither K. Chabos nor S. Isabella have appeared.

plaintiff for medical providers including Dr. Claudia Serrano-Gomez. Plaintiff provided the authorizations on February 13, 2015. Plaintiff testified at deposition on March 12, 2015, and among other things answered questions about her treatment with Dr. Serrano-Gomez. At some point between March 12, 2015 and November 3, 2015, plaintiff indicated to defendants that she wished to depose Dr. Serrano-Gomez. Defendants informed plaintiff by letter dated November 3, 2015 that the doctor was not their employee but was instead an employee of the NYU School of Medicine. Accordingly, on November 20, 2015, plaintiff served a nonparty subpoena on Dr. Serrano-Gomez at the medical school's address.

The deposition of Dr. Serrano-Gomez took place on December 17, 2015. Upon questioning, the doctor stated that her employer was NYU Medical Center; her errata sheet corrected this to "New York University School of Medicine" for "clarification." Counsel for defendants raised objections on behalf of the doctor at the deposition. Plaintiff filed the note of issue on December 18, 2015. The current trial date for the case is July 12, 2017.

On May 3, 2016, defendants moved to dismiss the action, arguing that Dr. Serrano-Gomez was not their employee and they are not vicariously liable for her conduct.² In response, on June 7, 2016, plaintiff separately moved to toll the statute of limitations under the relation-back doctrine and allow her to add Dr. Serrano-Gomez as a defendant. The Court denied defendants' motion to dismiss based on lack of vicarious liability, finding that although Dr. Serrano-Gomez was not their employee, the evidence raised an issue of fact as to apparent or actual agency. It granted plaintiff's motion to add Dr. Serrano-Gomez, stating that defendants could not assert a

² Defendants also argued there were no grounds for asserting liability against the hospital.

statute of limitations defense on behalf of a nonparty, and that it was for Dr. Serrano-Gomez to raise any such argument. Plaintiff served the doctor with the amended pleadings, following which Dr. Serrano-Gomez filed this motion. Plaintiff opposed the motion and cross-moved to toll the statute of limitations under the relation-back doctrine. For the reasons below, the Court grants the motion and denies the cross-motion.

In her motion, Dr. Serrano-Gomez points out that the statute of limitations expired on the malpractice and lack of informed consent claims in January of 2014. She states that the relation-back doctrine is inapplicable because there is no unity of interest between the hospital and the doctor. She argues that she had no notice that plaintiff would bring an action against her within the limitations period, and no reason to know about the lawsuit until after the expiration of the statute of limitations, when she was subpoenaed. In addition, Dr. Serrano-Gomez argues, plaintiff has not shown that a mistake occurred regarding the doctor's identity or that plaintiff was diligent in her efforts to identify and serve her. On the contrary, Dr. Serrano-Gomez asserts, plaintiff knew the identity of her physician and did not add her as a defendant.

In her combined opposition and cross-motion, plaintiff argues that defendants hid the fact that Dr. Serrano-Gomez was not an employee. She points to the doctor's statement at deposition that she was an employee of the hospital and suggests both that the comment was a deliberate attempt to deceive and that what Dr. Serrano-Gomez characterized as a clarification, see supra at p. 2, constituted a major change to the doctor's testimony. She says that at deposition, defendants' counsel asserted objections on behalf of the doctor, and this proves the unity of interest. She contends that defendants deliberately delayed in providing discovery that would have

revealed Dr. Serrano-Gomez's identity and nonparty status before the statute of limitations expired. She states that Dr. Serrano-Gomez's name was printed on pertinent NYU medical charts.

Dr. Serrano-Gomez's reply emphasizes that plaintiff made no effort to add her to the case even after defendants notified plaintiff that the doctor was not their employee and was a nonparty. She additionally challenges plaintiff's argument that her conduct or that of defendants was deliberately misleading. She claims that she retained defendants' counsel to represent her at the deposition and the objections were on her behalf. In her reply, plaintiff reiterates that defendants and Dr. Serrano-Gomez engaged in deceptive conduct and repeats her arguments for tolling the statute of limitations and deeming Dr. Serrano-Gomez timely served.

The relation-back "doctrine enables a plaintiff to correct a pleading error – by adding either a new claim or a new party – after the statutory limitations period has expired." Buran v. Coupal, 87 N.Y.2d 173, 177 (1995). Courts have discretion in determining whether to apply the doctrine. Id. at 177-78. When a plaintiff seeks to add a new defendant to the case, the court must scrutinize the application carefully, applying a three-part test: 1) both claims arose out of the same conduct, 2) the new party and the current defendants are "united in interest" such that the new party is chargeable with notice and no prejudice will arise, and 3) the new party realized that he or she would have been included in the complaint "but for an excusable mistake by plaintiff as to the identity of the proper parties . . ." Id. at 178 (citation and internal quotation marks omitted). The plaintiff must satisfy all three prongs of the test or the court will not apply the doctrine. Anderson v. Montefiore Med. Center, 41 A.D.3d 105, 107 (1st Dep't 2007).

Contrary to plaintiff's arguments, Dr. Serrano-Gomez was an attending physician at defendant hospitals and an employee of the medical school. Attending physicians are not united in interest with the hospital where the procedure took place. See Garcia v. New York-Presbyterian Hosp., 114 A.D.3d 615 (1st Dep't 2014); Anderson, 41 A.D.3d at 107. Plaintiff's arguments to the contrary speak to the issue of vicarious liability, which is a distinct legal and factual issue. See Garcia, 114 A.D.3d at 616 (rationale for imposing vicarious liability does not satisfy united in interest prong of relation-back test). Moreover, there is no evidence showing that defendants hid the doctor's identity from plaintiff.

Furthermore, plaintiff was aware of the doctor's name by at the latest January or February 2015, when defendants demanded an authorization for her records. Plaintiff also testified about Dr. Serrano-Gomez's treatment at her March 2015 deposition. Despite this, she made no effort to add the doctor as a defendant at that time. She also did not make an effort to add the doctor after defendants explicitly told plaintiff she was not their employee. Because of this, Dr. Serrano-Gomez had no reason to believe that but for a mistake plaintiff would have added her as a defendant. See Crawford v. City of New York, 129 A.D.3d 554, 555 (1st Dep't 2015) (relation-back doctrine inapplicable where identity of the parties was known long before motion to amend). The lack of effort on plaintiff's part further militates in favor of denying relief. See Erdogan v. Toothsavers Dental Serv., P.C., 57 A.D.3d 314, 315 (1st Dep't 2008).

The Court has considered the parties' arguments and they do not alter this decision. Accordingly, it is

ORDERED that motion sequence number four is granted and the cross-motion is denied; and it is further

ORDERED that the action as against Dr. Serrano-Gomez is severed and dismissed; and it is further

ORDERED that the caption is amended to reflect the dismissal, and the amended caption shall read:

-----X
JUSTINA TORRES,

Plaintiff,

Index No. 805119/2013

-against-

NYU HOSPITAL CENTER, TISCH HOSPITAL,
NYU LANGONE MEDICAL CENTER, K. CHABOS, .
R.N., and S. ISABELLA, R.N.,

Defendants.
-----X

And it is further

ORDERED that the Clerk is directed to enter a judgment of dismissal as against Dr. Serrano-Gomez. The rest of the action remains active.

Dated: Feb 22, 2017

ENTER:



JOAN B. LOBIS, J.S.C.