

Lenza v NYU Langone Med. Ctr.
2017 NY Slip Op 32401(U)
October 5, 2017
Supreme Court, Richmond County
Docket Number: 150271/2015
Judge: Kim Dollard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM Part 4

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JANET LENZA, as Executrix of the Estate of LOUIS
R. LENZA, Deceased, and JANET LENZA,

Present:
HON. KIM DOLLARD

Plaintiffs,

-against-

DECISION AND ORDER

NYU LANGONE MEDICAL CENTER, JOSEPH
HERBERT, M.D., P.C., JOSEPH HERBERT, M.D.,
and SVETLANA ZHOVTIS RYERSON, M.D.,

Index No. 150271/2015

Motion 002

Defendants,
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The following papers were fully submitted on August 25, 2017:

Pages Numbered

Notice of Motion by plaintiff for leave to serve and file a second supplemental summons and amended complaint substituting Bette Herbert, as Executrix of the Estate of Joseph Herbert, M.D.; extending plaintiff's time to serve the amended pleading; and to amend the caption, with supporting affirmation and Exhibits (Dated May 23, 2017)1

Affirmation in Opposition by counsel for defendants, NYU and Ryerson, with Exhibits (Dated July 20, 2017).....2

Reply affirmation by Plaintiff (Dated August 23, 2017).....3

This medical malpractice action was commenced on March 26, 2015 by filing a summons and complaint captioned : LOUIS R. LENZA and JANET LENZA v. NYU LANGONE MEDICAL CENTER, JOSEPH HERBERT, M.D., P.C., JOSEPH HERBERT, M.D., and SVETLANA ZHOVTIS RYERSON, M.D.

When the complaint was filed, the plaintiff was unaware that on January 2, 2015, and prior to institution of the lawsuit, the defendant, JOSEPH HERBERT, M.D., had expired.

The summons and complaint was served upon defendant, JOSEPH HERBERT, M.D., P.C., on April 10, 2015 by serving the Secretary of State.

On May 26, 2015, plaintiff, LOUIS LENZA died. The case was stayed and on or about December 9, 2016, permission was granted to substitute JANET LENZA, as Executor of the Estate of LOUIS LENZA, in place of the deceased plaintiff. By order of this Court of the same date, a default judgment was granted against the defendant, JOSEPH HERBERT, M.D., P.C. The Order also permitted an additional 180 days for the plaintiff to serve the defendant, JOSEPH HERBERT, M.D.

On February 1, 2017, a Supplemental Summons and Amended Complaint was filed substituting JANET LENZA, as Executor of the Estate of LOUIS LENZA. Issue was joined with respect to the supplemental summons and complaint by defendants, NYU LANGONE MEDICAL CENTER and RYERSON, M.D., on or about February 22, 2017.

Mr. Tracy, counsel for plaintiff, states that soon thereafter, he learned that the location of Dr. Herbert's death was in Bergen County, New Jersey. He inspected the Surrogate Court file in that County, and learned that on March 16, 2015, letters testamentary were issued to Bette Herbert. Mr. Tracy spoke to the Estate attorney who agreed to accept process on behalf of Mrs. Bette Herbert. Plaintiff, now being aware of the identity of the estate representative, requests leave of court to substitute Bette Herbert, as Executrix of the Estate of Joseph Herbert, M.D., as a defendant and to serve a second supplemental summons and complaint reflecting this change.

The defendants, NYU LANGONE and RYERSON, oppose the motion on the basis that the first action is a nullity as to Dr. Joseph Herbert, because this defendant died prior to the filing of the initial summons and complaint. Defendants further contend that plaintiff cannot now institute a new action because the statute of limitations has expired.

In plaintiff's Reply Affirmation, Mr. Tracy states that shortly after the action was started, he received a letter dated April 7, 2015, from NYU Langone stating that Dr. Herbert was no longer affiliated with the hospital. He was not advised that Dr. Herbert had died. On June 3, 2016, Mr. Stilwell, partner of Mr. Tracy, spoke to defense counsel and requested information about Dr. Herbert's death, such as estate information or a death certificate for purposes of making a motion. However, no information was forthcoming. By December of 2016, plaintiff's counsel had learned Dr. Herbert's address and mailed a copy of the supplemental summons and complaint to the address

of the late Dr. Herbert and his wife, Bette Herbert. The supplemental summons and complaint was forwarded to the Estate attorney who forwarded it to the deceased doctor's malpractice carrier.

Plaintiff asserts that since defendant, JOSEPH HERBERT, M.D., is united in interest with JOSEPH HERBERT, M.D., P.C., the action is timely, as it relates back to the date of service upon JOSEPH HERBERT, M.D., P.C.

The relation-back doctrine, codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are "united in interest" (Buran v. Coupal, 87 N.Y.2d 173, 177, 638 N.Y.S.2d 405, 661 N.E.2d 978, 1995).

In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) 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 the new defendant as well (see Buran v. Coupal, supra at 178, 638 N.Y.S.2d 405, 661 N.E.2d 978; Nani v. Gould, 39 A.D.3d 508, 833 N.Y.S.2d 198, 2nd Dept., 2007; Porter v. Annabi, 38 A.D.3d 869, 833 N.Y.S.2d 555, 2nd Dept., 2007).

The first two conditions have been satisfied in this case. The claims against JOSEPH HERBERT, M.D., and his professional medical group, JOSEPH HERBERT, M.D., P.C., arise out of the same medical treatment and the physician/medical group, relationship is sufficient to establish the requisite unity of interest (see, Raschel v. Rish, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 22, 504 N.E.2d 389, 1986).

Unity of interest, as an element for the relation-back doctrine with respect to statute of limitations, exists between a medical professional corporation and the doctor employed by the corporation (Perillo v. Dilamarter, 151 A.D.3d 1710, 56 N.Y.S.3d 742, 4th Dept., 2017).

Additionally, merely mistake, not excusable mistake, is required under the relation back doctrine, before a new defendant may be added after the expiration of limitations period [Buran case (supra)]. The Buran court noted, however, that "when a plaintiff intentionally decides not to assert

a claim against a party known to be potentially liable, 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” (*supra*, at 181, 638 N.Y.S.2d 405, 661 N.E.2d 978).

The defendant contends that this last condition has not been met and that Bette Herbert, as Executor of the Estate of Joseph Herbert, M.D., was intentionally not sued and further that this new defendant did not have notice of the action. However, as plaintiff’s counsel makes clear in his affirmation in support of the motion and reply affirmation, plaintiff’s counsel requested information regarding the deceased physician and his estate and it was always the intent to sue the estate of the deceased physician. This is further evidenced by prior motion practice wherein this court granted plaintiff’s motion for an additional 180 days to serve the deceased physician.

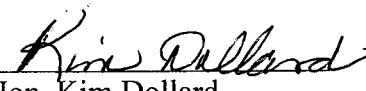
Moreover, with respect to the notice element, the plaintiff timely served the deceased physician’s professional corporation on April 10, 2015 through the Secretary of State, who would have mailed the complaint to the physician. Since the deceased physician’s spouse was appointed executrix, it would be reasonable to assume that she would be taking care of the affairs of her late husband, and therefore would have received notice of the complaint within the statute of limitations, as extended by the 120 day period afforded by virtue of CPLR§ 306-b(a) (see, *Nardi v. Hirsh*, 245 A.D.2d 205, 666 N.Y.S.2d 607, 1st Dept., 1997).

Accordingly, based upon the foregoing, it is,

ORDERED, that plaintiff is granted leave to file and serve the second supplemental summons and amended complaint adding Bette Herbert, as Executrix of the Estate of Joseph Herbert, M.D., as a defendant within 60 days of this Order; and it is further,

ORDERED, that the caption is further amended to substitute NYU HOSPITALS CENTER for and in place of NYU LANGONE MEDICAL CENTER.

Dated: 10/5/17

ENTER

Hon. Kim Dollard
Acting Justice Supreme Court