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| <b>Patrick v Comprehensive Med. Supply, Inc.</b>                                                                                                                                                                               |
| 2020 NY Slip Op 35790(U)                                                                                                                                                                                                       |
| April 16, 2020                                                                                                                                                                                                                 |
| Supreme Court, Suffolk County                                                                                                                                                                                                  |
| Docket Number: Index No. 21260/2014                                                                                                                                                                                            |
| Judge: William B. Rebolini                                                                                                                                                                                                     |
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI  
Justice

Nancy Patrick,

Plaintiff,

-against-

Comprehensive Medical Supply, Inc.,  
Argus Holdings Enterprises, Inc., and UTR, LLC,

Defendants.

Motion Sequence No.: 003; MG; CD

Motion Date: 7/17/19

Submitted: 8/28/19

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Clerk of the Court

Upon the following papers read on the motion for summary judgment: Notice of Motion and supporting papers by defendants, filed June 24, 2019; Answering Affidavits and supporting papers by plaintiff, filed August 15, 2019; Replying Affidavits and supporting papers by defendants, filed August 28, 2019; it is

**ORDERED** that defendants' motion, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint, is granted in its entirety.

In this personal injury action, plaintiff, Nancy Patrick, alleges that she tripped and fell on a crack in a concrete ramp at 1 Village Plaza, Kings Park, New York, on November 15, 2011. Plaintiff

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originally commenced this action on October 28, 2014, against defendants Comprehensive Medical Supply, Inc. (Comprehensive Medical), and Argus Holdings Enterprises, Inc. (Argus Holdings). In February 2016, Comprehensive Medical and Argus Holdings moved for summary judgment dismissing the complaint, and plaintiff cross-moved in April 2016 to amend her complaint to add UTR, LLC (UTR), as a defendant.

By order dated August 9, 2016, this court denied the motion for summary judgment by Comprehensive Medical and Argus Holdings and granted plaintiff's motion for leave to amend her complaint to add UTR as a defendant. The court held that Comprehensive Medical and Argus Holdings had not met their prima facie burden on the motion for summary judgment. The court also held that, based on the evidence that had been adduced, Comprehensive Medical and UTR "may have been engaged in a joint venture in the operation and maintenance of the premises." Accordingly, the court granted plaintiff's cross motion to amend the pleadings to add UTR as a defendant. Because discovery had not yet occurred, the court deferred consideration of UTR's statute of limitations defense.

Now that discovery has concluded, defendants move for summary judgment dismissing the complaint. Argus Holdings asserts that it did not own or maintain 1 Village Plaza. Comprehensive Medical also contends that it did not own or maintain 1 Village Plaza, and instead owned 12 Renwick Avenue, an adjacent premises in Kings Park. UTR admits that it owned 1 Village Plaza, but posits that the action is barred by the statute of limitations, as more than three years elapsed until plaintiff added it as a defendant. UTR further asserts that the amended complaint does not relate back to the original complaint as against Comprehensive Medical, because UTR and Comprehensive Medical are separate and unrelated corporate entities that are not united in interest. Defendants submit, among other things, the amended complaint and answer to the amended complaint, a transcript of plaintiff's deposition, photographs of the accident site, an affidavit from nonparty Steven Reichman, the owner and managing member of both Comprehensive Medical and UTR, a transcript of Reichman's deposition, and an affidavit from Elizabeth McQuilkin, a land surveyor. In opposition, plaintiff asserts that the complaint, insofar as asserted against UTR, is timely under the relation back doctrine, and that there is a question of fact as to whether Comprehensive Medical maintained 1 Village Plaza. Plaintiff submits, among other things, her own affidavit and the affidavit of Paula Buzby, plaintiff's co-worker at the time of the incident.

Plaintiff testified that she worked for nonparty Utopia Home Care, which had an office in 1 Village Plaza. Plaintiff further testified that as she was walking into 1 Village Plaza on the morning of the accident, the heel of one of her shoes hit a crack in a cement ramp, causing plaintiff to fall. Plaintiff did not know, at the time of her accident, who owned the building. In her affidavit, plaintiff admitted that the ramp on which she fell was located at 1 Village Plaza, and that she believed, based upon conversations with co-workers, that Reichman was Utopia Home Care's landlord.

Paula Buzby stated in her sworn affidavit that Reichman was Utopia Home Care's landlord. She based that assertion on Reichman's representations to her that he was the landlord. Buzby

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averred that she called Reichman for various maintenance and repair issues, and that Reichman performed the requested maintenance and repairs.

In his sworn affidavit, Reichman stated that he is the sole owner and managing member of both Comprehensive Medical, a limited liability company that owns real property at 12 Renwick Avenue in Kings Park, and UTR, a limited liability company that owns real property at 1 Village Plaza in Kings Park. Reichman stated that he has "never owned, been employed [by], or been associated with a company called Argus Holdings Enterprises." He did purchase a South Carolina company called Argus Enterprises, Inc., which was licensed to do business in New York and maintained an office at 1 Village Plaza from 2003 until 2006, but he sold his interest in that company in 2010. Reichman clarified that as of the date of plaintiff's accident, "there was no entity with the name 'Argus' that owned, operated, maintained, repaired, or was a tenant" at either 1 Village Plaza or 12 Renwick Avenue. Based on photographs that were marked during depositions, Reichman averred in his affidavit that the concrete ramp on which plaintiff fell is part of 1 Village Plaza and is owned and maintained by UTR. Reichman described Comprehensive Medical and UTR as "separate and distinct legal entities" with "no legal interrelationship. Neither is the parent or subsidiary of the other. Neither has the authority to control nor is responsible for the other." Reichman further testified that Comprehensive Medical "is not a principal or agent for UTR, nor is UTR a principal or agent for Comprehensive [Medical], nor have they ever acted in such capacity. They are two separate legal entities created to own separate pieces of real estate." Although Reichman was unable to find bank statements from 2011, he stated that UTR and Comprehensive Medical maintained separate bank accounts, and he submitted bank statements from 2012 for two different accounts, one for UTR and one for Comprehensive Medical. Expenses related to 12 Renwick Avenue were paid from Comprehensive Medical's account, and expenses related to 1 Village Plaza were paid from UTR's account. Reichman also submitted bills and estimates from various contractors from 2010 until 2012 showing that each entity hired its own contractors. Reichman additionally presented a portion of his 2011 tax return, in which he separately listed the properties' income and expenses. The lease between UTR and plaintiff's employer, Utopia Home Care, was also proffered by Reichman. Finally, Reichman attached a certified copy of the deed purportedly for 1 Village Plaza, and an uncertified copy of the deed purportedly for 12 Renwick Avenue. Neither deed identifies the subject property by street address.

In his deposition, Reichman testified that he was the owner and managing member of both Comprehensive Medical and UTR. He stated that Comprehensive Medical has owned 12 Renwick Avenue since 2005, and that UTR has owned 1 Village Plaza since 2003. The two properties are adjacent to each other. He was not familiar with Argus Holdings Enterprises, Inc., though he was an owner of Argus Enterprises, Inc., before he sold it in 2010. Reichman has maintained the books and records for UTR and Comprehensive Medical since 2011, including at the time of the accident. Both UTR and Comprehensive Medical maintained an office at Reichman's house. Reichman said that he has always filed separate tax returns and kept separate bank accounts for Comprehensive Medical and UTR. Reichman confirmed that UTR and Comprehensive Medical do not share expenses. Comprehensive Medical and UTR were both insured by the same insurance policy. In 2011, Reichman personally handled snow removal at both 12 Renwick Avenue and 1 Village Plaza.

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In 2011, tenants of both 1 Village Plaza and 12 Renwick Avenue would communicate with Reichman if they had any problems.

Elizabeth McQuilkin, a licensed land surveyor, submitted an affidavit in support of defendants' motion for summary judgment. She reviewed and submitted photographs of the concrete ramp on which plaintiff fell and surveys that she created of both 1 Village Plaza and 12 Renwick Avenue. There is no indication that either survey was publicly filed. Based on the photographs and surveys, she stated that the concrete ramp in question was part of 1 Village Plaza.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*Id.*).

As an initial matter, although successive motions for summary judgment are generally disfavored (e.g. *Burbige v Siben & Ferber*, 152 AD3d 641, 58 NYS3d 562 [2d Dept 2017]), the Court will allow Argus Holdings and Comprehensive Medical to move for summary judgment a second time. Their second motion is based, in part, on evidence adduced during discovery, including depositions, whereas the first motion for summary judgment was made before the parties began discovery (*North Fork Preserve, Inc. v Kaplan*, 68 AD3d 732, 890 NYS2d 93 [2d Dept 2009]; *Auffermann v Distl*, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]). Here, entertaining the second motion for summary judgment "will further the ends of justice and eliminate an unnecessary burden on the resources of the courts" (*Graham v City of New York*, 136 AD3d 747, 748, 24 NYS3d 754, 756 [2d Dept 2016], *lv denied* 27 NY3d 907, 36 NYS3d 621 [2016]; see *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, — NYS3d — [2d Dept 2019]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 33 NYS3d 284 [2d Dept 2016], *lv denied* 28 NY3d 910, 47 NYS3d 226 [2016]) and obviate the need for a trial (*Rose v Horton Med. Ctr.*, 129 AD3d 977, 816 NYS2d 174 [2d Dept 2006]).

The court will address the arguments made by each defendant separately. Argus Holdings contends that it did not own, operate, or maintain 1 Village Plaza or 12 Renwick Avenue. It is well-settled that "liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (*Knight v 177 W. 26 Realty, LLC*, 173 AD3d 846, 847, 103 NYS3d 503, 504 [2d Dept 2019]; see *McManamon v Rockland County Ancient Order of Hibernians*, 166 AD3d 955, 89 NYS3d 219 [2d Dept 2018]; *Khanimov v McDonald's Corp.*, 121 AD3d 1050, 995 NYS2d 202 [2d Dept 2014]). Here, Reichman explained that Argus Enterprises, Inc.—incorrectly sued as Argus Holdings Enterprises, Inc.—was a South Carolina entity that had no connection to or with 1 Village Plaza or 12 Renwick Avenue at the time of plaintiff's

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accident, and that he sold his share in that entity in 2010, before the accident. Reichman said that no entity with “Argus” included in its name was responsible for 1 Village Plaza or 12 Renwick Avenue. Reichman explained that Comprehensive Medical owned 12 Renwick Avenue and that UTR owned 1 Village Plaza. In addition, plaintiff submitted a certified deed and certified survey of 1 Village Plaza. The deed is admissible under CPLR 4518 (c) and the survey was authenticated by McQuilkin, its creator (*see City of New York v Gowanus Indus. Park, Inc.*, 65 AD3d 1071, 886 NYS2d 427 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 315 [2010]; *Valentine v Smith*, 90 AD2d 919, 457 NYS2d 929 [3d Dept 1982]). The description of the property in the deed matches the survey, such that the Court can identify the deed as relating to 1 Village Plaza. The deed identifies UTR as the property’s owner. Accordingly, defendants have shown that Argus Holdings does not own 1 Village Plaza, the property on which plaintiff admits the accident happened. Plaintiff does not oppose the motion insofar as it seeks summary judgment on behalf of Argus Holdings. Accordingly, so much of the motion as seeks summary judgment on behalf of Argus Holdings is granted.

Comprehensive Medical also contends that it did not own, operate, or maintain 1 Village Plaza. In opposition, plaintiff avers that a jury could conclude that Reichman “performed work under the guise of Comprehensive [Medical] in the maintenance of the UTR property.” Plaintiff claims that “Reichman forces a fiction on this Court that when he performs work for Comprehensive [Medical], he is only operating as a representative of that entity, while he works on UTR’s behalf on all UTR concerns.” As explained above, defendants have shown, through the deed for 1 Village Plaza and the survey for 1 Village Plaza, that UTR owns that property. Reichman also explained that Comprehensive Medical owns 12 Renwick Avenue, not 1 Village Plaza. And, contrary to plaintiff’s argument, Reichman showed—through his testimony, affidavit, and records submitted with his affidavit, that he acted in his capacity as owner of Comprehensive Medical in relation to 12 Renwick Avenue and in his capacity as owner of UTR in relation to 1 Village Plaza (*see Archie v Ma’s & Papa Joe’s, Inc.*, 70 AD3d 985, 896 NYS2d 121 [2d Dept 2010]). In opposition, plaintiff failed to raise a material question of fact as to whether Comprehensive Medical owned, operated, maintained, or derived a special use from 1 Village Plaza.

Plaintiff also contends that Comprehensive Medical and UTR were “alter egos of one another,” and that Reichman “intermingl[ed]” the entities by being the sole owner of both, maintaining the same office for both, communicating with the tenants of both entities, procuring a single insurance policy for both, and removing snow from both properties. Although plaintiff does not specifically mention piercing the corporate veil, to the extent that plaintiff’s argument can be construed as attempting to pierce the corporate veil and hold Comprehensive Medical responsible for UTR’s acts or omissions, that argument fails too. “Generally, a plaintiff seeking to pierce the corporate veil must show that complete domination was exercised over a corporation with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff [that] resulted in plaintiff’s injury” (*Williams v Lovell Safety Mgt. Co., LLC*, 71 AD3d 671, 671, 896 NYS2d 150, 151 [2d Dept 2010] [quotation marks and citations omitted], *lv denied* 14 NY3d 713, 904 NYS2d 768 [2010]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95 [2018]; *TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d

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102 [2d Dept 2019]). In addition, “the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter ego” (*Williams v Lovell Safety Mgt. Co., LLC*, *supra* [quotation marks, citations, and alterations omitted]; *see Olivieri Constr. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 41 NYS3d 59 [2d Dept 2016]; *Fernbach, LLC v Calleo*, 92 AD3d 831, 939 NYS2d 501 [2d Dept 2012]). “The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances” (*Weinstein v Willow Lake Corp.*, 262 AD2d 634, 635, 692 NYS2d 667, 669 [2d Dept 1999]). “New York law disfavors disregard of the corporate form” (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40, 944 NYS2d 30, 33 [1st Dept 2012]; *see Baccash v Sayegh*, 53 AD3d 636, 862 NYS2d 564 [2d Dept 2008]).

Contrary to plaintiff’s argument, defendants have shown that UTR was not an alter ego of Comprehensive Medical (or vice versa), and plaintiff has not raised a material question of fact in opposition thereto. The mere fact that both Comprehensive Medical and UTR were insured under the same insurance policy does not mean that they were alter egos of each other (*Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 954 NYS2d 27 [1st Dept 2012]; *Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 909 NYS2d 826 [3d Dept 2010]). Although Comprehensive Medical and UTR “had common owners[]” and “shared the same office space, addresses[,] and telephone numbers,” that would not make them alter egos of each other (*Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1270, 77 NYS3d 171, 180 [3d Dept 2018]; *see Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 953 NYS2d 574 [1st Dept 2012]). Indeed, the mere fact that Reichman was the sole owner of both Comprehensive Medical and UTR does not, in and of itself, warrant disregarding their separate corporate forms (*Matter of Total Care Health Indus. v Department of Social Servs.*, 144 AD2d 678, 535 NYS2d 15 [2d Dept 1988]). Reichman demonstrated that he maintained separate bank accounts for Comprehensive Medical and UTR, and each entity hired its own contractors when needed (*Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 889 NYS2d 28 [1st Dept 2009]; *Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 759 NYS2d 768 [3d Dept 2003]; *Symbax, Inc. v Bingaman*, 219 AD2d 552, 631 NYS2d 829 [1st Dept 1995]). The evidence shows that Comprehensive Medical and UTR were incorporated at different times for different purposes, that is, Comprehensive Medical was to own 12 Renwick Avenue, UTR was to own 1 Village Plaza. As shown by the admissible evidence, Reichman treated the two entities as separate and distinct (*Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 909 NYS2d 826 [3d Dept 2010]; *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, *supra*; *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204 [3d Dept 2003]). In opposition, plaintiff failed to raise a material question of fact as to whether there was any intermingling between the separate corporate entities or whether one dominated the other. Accordingly, so much of defendants’ motion as seeks summary judgment on behalf of Comprehensive Medical is granted.

Plaintiff admits that the last defendant, UTR, was added as a defendant after the three-year statute of limitations expired (*see* CPLR 214). Therefore, the action as against UTR is time-barred unless the relation back doctrine applies (*see* CPLR 203). “[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted

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against a codefendant for [s]tatute of [l]imitations purposes where the two defendants are united in interest” (*Buran v Coupal*, 87 NY2d 173, 177, 638 NYS2d 405, 408 [1995] [quotation marks and citation omitted]). The relation back doctrine applies when the plaintiff shows 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 commencement of the action such that it will not be prejudiced in maintaining its defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against it as well”

(*Montalvo v Madjek, Inc.*, 131 AD3d 678, 679, 15 NYS3d 471, 472 [2d Dept 2015]; see *Buran v Coupal*, *supra*; *Weckbecker v Skanska USA Civ. Northeast, Inc.*, 173 AD3d 936, 103 NYS3d 475 [2d Dept 2019]). “Defendants are united in interest only when 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” (*Montalvo v Madjek, Inc.*, *supra* [quotation marks, alterations, and citations omitted]; see *Matter of 130-10 Food Corp. v New York State Div. of Human Rights*, 166 AD3d 962, 89 NYS3d 215 [2d Dept 2018]). If there is a mere “possibility that the new party could have a different defense than the original party,” then the parties are not united in interest (*Mileski v MSC Indus. Direct Co., Inc.*, 138 AD3d 797, 800, 30 NYS3d 159, 162 [2d Dept 2016] [quotation marks and citation omitted]; see *LeBlanc v Skinner*, 103 AD3d 202, 955 NYS2d 391 [2d Dept 2012]). “In a negligence action, the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other” (*Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679, 846 NYS2d 227, 229 [2d Dept 2007] [quotation marks and citations omitted]; see *Mileski v MSC Indus. Direct Co., Inc.*, *supra*; *Berkeley v 89th Jamaica Realty Co., L.P.*, 138 AD3d 656, 29 NYS3d 470 [2d Dept 2016]). Whether two parties are united in interest is generally a legal question for the Court (*LeBlanc v Skinner*, *supra*; see *Raschel v Rish*, 69 NY2d 694, 512 NYS2d 22 [1986]).

This Court finds that UTR and Comprehensive Medical are not united in interest. Comprehensive Medical has a defense that UTR does not, that being Comprehensive Medical can argue that it is not liable because it does not own, operate, or maintain 1 Village Plaza. Indeed, the relation back doctrine does not apply where, as here, one party, Comprehensive Medical, will seek to show that it was not at fault and place blame on another party, UTR (*LeBlanc v Skinner*, *supra*; *Zehnick v Meadowbrook II Assoc.*, 20 AD3d 793, 799 NYS2d 604 [3d Dept 2005], *lv dismissed in part & denied in part* 5 NY3d 873, 808 NYS2d 136 [2005]; *Connell v Hayden*, 83 AD2d 30, 443 NYS3d 383 [2d Dept 1981]). There is no evidence that Comprehensive Medical is vicariously liable for UTR (or vice versa) or that a judgment against one would affect the other (*Kammerzell v Clean Burn, Inc.*, 165 AD3d 768, 85 NYS3d 518 [2d Dept 2018]; *Berkeley v 89th Jamaica Realty Co., L.P.*, *supra*). There is also no evidence that Reichman ever “blurred the distinction between” the entities (*Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1400, 1401, 83 NYS3d 602, 605 [2d Dept 2018] [quotation marks and citations omitted]). The mere fact that Comprehensive Medical and UTR are

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both owned by Reichman does not mean that they are united in interest (*Berkeley v 89th Jamaica Realty Co., L.P., supra*; *Montalvo v Madjek, Inc., supra*; *Desiderio v Rubin*, 234 AD2d 581, 652 NYS2d 68 [2d Dept 1996]). Sharing some resources, such as office space, does not make two separate entities united in interest (*Berkeley v 89th Jamaica Realty Co., L.P., supra*; *Mileski v MSC Indus. Direct Co., Inc., supra*; *Xavier v RY Mgt. Co., Inc., supra*; *Zehnick v Meadowbrook II Assoc., supra*). That Comprehensive Medical and UTR were both insured under the same insurance policy also does not mean that they are united in interest (*see Zehnick v Meadowbrook II Assoc., supra*). As noted above, Comprehensive Medical and UTR were separate corporate entities with no relationship to each other, had separate bank accounts, and paid for expenses separately (*see Rinzier v Jafco Assoc.*, 21 AD3d 360, 800 NYS2d 719 [2d Dept 2005]). Plaintiff has not raised a material question of fact in opposition to plaintiff's showing. Because Comprehensive Medical and UTR are not united in interest, plaintiff cannot avail herself of the relation back doctrine, and her claim against UTR is time-barred. Thus, so much of defendants' motion as seeks summary judgment on behalf of UTR is granted.

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted in its entirety.

Dated: April 16, 2020

/s/ electronically signed (Covid-19 pandemic)

HON. WILLIAM B. REBOLINI, J.S.C.

    X     FINAL DISPOSITION            NON-FINAL DISPOSITION