

Rossello v Ahmad

2022 NY Slip Op 33515(U)

October 13, 2022

Supreme Court, New York County

Docket Number: Index No. 805081/2020

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHY J. KING PART 06

Justice

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KATHLEEN MARIE ROSSELLO, as Administrator of the
Estate of MICHAEL SALVATORE ROSSELLO, and
KATHLEEN MARIE ROSSELLO, individually,

Plaintiff,

- v -

ARIF AHMAD, M.D., LONG ISLAND LAPAROSCOPIC
SURGERY, PLLC, ADVANCED LAPAROSCOPIC
GENERAL & BARIATRIC SURGERY P.C., JOHN T.
MATHER MEMORIAL HOSPITAL OF PORT JEFFERSON,
NEW YORK, INC., JULIO A. TEIXEIRA, M.D., LENOX HILL
HOSPITAL, "JOHN DOE #1-#10", "JANE DOE#1-#10",
names being fictitious, the parties intended being the
physicians, nurses, aides and staff members of the
respective Defendants herein who rendered treatment
to the Decedent.,

Defendants.

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INDEX NO. 805081/2020
MOTION DATE 01/31/2022
MOTION SEQ. NO. 001

**AMENDED DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32,
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing papers, plaintiffs move for an Order seeking leave to serve and file a
supplemental summons and amended verified complaint adding Ashish Agarwala, D.O.
("Agarwala") and Jason Arellano, M.D. ("Arellano") as defendants in this action, pursuant to
CPLR § 3025(b), and amendment of the caption accordingly.

Defendants, Arif Ahmad, M.D. ("Ahmad") and Long Island Laparoscopic Surgery,
PLLC ("LILS"), oppose the motion.

Plaintiff Kathleen Marie Rossello, commences the within action in her individual
capacity, and as Administrator of the Estate of Michael Salvatore Rossello. The complaint

asserts causes of action which include medical malpractice, lack of informed consent, a derivative claim on behalf of the decedent and wrongful death. The named defendants include Ahmad, LILS, Advanced Laparoscopic General & Bariatric Surgery, P.C. (“Advanced”), John T. Mather Memorial Hospital of Port Jefferson, New York, Inc. (“Mather”), Julio A. Teixeira, M.D., and Lennox Hill Hospital, together with certain defendants.

Plaintiffs assert that the alleged medical malpractice of defendants resulted in the death of the decedent, Michael Salvatore Rossello, on February 3, 2019, following a gastric bypass weight-loss procedure performed by defendant Ahmad on January 14, 2019. It is undisputed that Dr. Ahmad, the sole owner of LILS, was assisted by Agarwala and Arellano during the surgery, and that Agarwala and Arellano were employees of LILS at that time. The surgery took place at Mather, and thereafter the decedent was transferred to Lenox Hill Hospital, and came under the care of Dr. Julio A. Teixeira until the time of his death.

According to the affirmation of plaintiffs’ counsel, up until early December, 2021, he had been informed by defense counsel that no additional insurance coverage existed for Agarwala and Arellano beyond the coverage provided to LILS and Ahmad, for the shared sum of 2.3 million dollars per occurrence. However, on or about December 30, 2021, plaintiff’s counsel was informed by defense counsel that additional coverage did in fact exist for Ahmad and Agarwala, respectively, in the amount of 2.3 million dollars. Further, plaintiffs’ counsel was informed that Arellano was covered under the same insurance policy as an employee of Ahmad and/or LILS, and that he may have also had his own independent coverage for the treatment dates at issue. Plaintiffs’ counsel asserts that based on the erroneous information concerning the available insurance coverage, he did not previously seek permission to amend the complaint to individually name Agarwala and Arellano as defendants.

Plaintiffs now seek an amendment to add Agarwala and Arellano, as to the medical malpractice and wrongful death cause of actions. Defendants oppose the requested relief based on the expiration of the statute of limitations. In this regard, the Court notes that the statute of limitations governing medical malpractice actions, two years and six months, was tolled pursuant to Executive Order 202.8 during the Covid-19 pandemic, and did not expire until March 19, 2022. Plaintiffs filed the instant motion on January 19, 2022, therefore, the medical malpractice action is timely (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

While the wrongful death statute of limitations expired on September 19, 2021, plaintiffs assert that the relation back doctrine applies, which allows claims asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where the two defendants are “united in interest” (CPLR § 203[b] and [f]; *see Ramirez v Elias Tejada*, 168 AD3d 401 [1st Dept 2019]).

To establish the applicability of the relation back doctrine the plaintiffs must demonstrate that 1) the causes of action arose out of the same conduct, transaction, or occurrence; 2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his or her 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 commenced against him or her as well (*see Buran v Coupal*, 87 NY2d 173 [1995]).

In the instant action, the plaintiffs have demonstrated a prima facie basis for the applicability of the relation back doctrine to permit the amendment adding Agarwala and Arellano as defendants, pursuant to CPLR 3025(b). Firstly, it is undisputed that the medical

malpractice and wrongful death claims arise from the treatment of the decedent by defendants LILS and Ahmad. Plaintiffs met the second prong of CPLR 3025(b) through the sworn deposition testimony of defendants Ahmad, Agarwala and Arellano, which established that they were employees of LILS at the time of decedent's surgery which shows that Agarwala and Arellano are united in interest with LILS and Ahmad (*see Brown v Midtown Medical Care Center*, 96 AD3d 641 (1st Dept 2012)). Plaintiffs have also met the third prong of the statute by demonstrating that based on Agarwala and Arellano's employment relationship with defendants LILS and Ahmad, they should have known that, but for plaintiffs' mistake, Agarwala and Arellano would have been timely named in the action. Finally, there is no showing that the plaintiffs acted in bad faith in failing to join Agarwala and Arellano earlier in this action, or that LILS or Ahmad are prejudiced (*see Brown v Midtown Medical Care Center*, 96 AD3d 641).

[L]eave to amend a pleading should be "freely given" pursuant to CPLR § 3025(b) "absent prejudice or surprise resulting directly from the delay" (*O'Halloran v Metropolitan Transp. Authority*, 154 AD3d 83, 86 [1st Dept 2017], quoting *Anoun v City of New York*, 85 A3d 694, 694 [1st Dept 2011] [internal quotation marks omitted]). Based on the Court's finding, defendants' contentions, in opposition, are without merit. A party opposing a motion for leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (*O'Halloran v Metropolitan Transp. Authority*, 154 AD3d 83, 86 [1st Dept 2017], quoting *McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks omitted]).

Based on the foregoing, the plaintiffs have made a prima facie showing that the wrongful death claims asserted against Agarwala and Arellano relate back to the original complaint against LILS and Ahmad, and plaintiffs are granted leave to amend the complaint to add Agarwala and Arellano as party defendants.

Accordingly, it is hereby,

ORDERED, that plaintiffs’ motion for leave to amend the summons and complaint to add Ashish Agarwala, D.O. and Jason Arellano, M.D. as party defendants is granted; and it is further

ORDERED, that the supplemental summons and amended verified complaint attached to the instant motion and e-filed as Document No. 33, shall be deemed served on the previously appearing parties, upon service of a copy of this decision and order with notice of entry, and said parties shall respond within 10 days from said service; and it is further

ORDERED, that the plaintiffs shall serve the supplemental summons and amended verified complaint on the new defendants, Ashish Agarwala, D.O. and Jason Arellano, M.D. within 15 days of the date of this order, and said defendants shall have 20 days from said service to interpose an answer; and it is further

ORDERED, that the caption as amended shall read as follows:

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

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KATHLEEN MARIE ROSSELLO, as Administrator of the
Estate of MICHAEL SALVATORE ROSSELLO, and
KATHLEEN MARIE ROSSELLO, individually,

Plaintiffs,

-against-

ARIF AHMAD, M.D., ASHISH AGARWALA, D.O.,
JASON ARELLANO, M.D., LONG ISLAND LAPAROSCOPIC
SURGERY, PLLC, JOHN T. MATHER MEMORIAL
HOSPITAL OF PORT JEFFERSON, NEW YORK, INC.,
JULIO A. TEIXEIRA, M.D., LENOX HILL HOSPITAL,
“JOHN DOE #1-#10” and “JANE DOE #1-#10”, names being
fictitious the parties intended being the physicians, nurses,
aides and staff members of the respective Defendants herein
who rendered treatment to the Decedent.,

Defendants.

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ORDERED, that plaintiff is directed to serve a copy of this order with notice of entry on the General Clerks Office, who is hereby directed to amend the caption as stated above; and it is further

ORDERED, that such service upon the General Clerk shall be made at the following address: genclerk-ords-non-mot@nycourts.gov; and it is further

This constitutes the Decision and Order of the Court.

10/13/2022			<i>Kathy J. King</i>
DATE			KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>
			DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			NON-FINAL DISPOSITION
			<input type="checkbox"/>
			GRANTED IN PART
			<input type="checkbox"/>
			OTHER
			<input type="checkbox"/>
			SUBMIT ORDER
			<input type="checkbox"/>
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/>
			REFERENCE