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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN DiNOTO,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

PATRICIA HUERTA,

Plaintiff(s),

INDEX NO. 32620/97

-against-

MOTION DATE: 10/2/00
MOTION SEQ. NO. 005

JARRED M. BARRETTI, ROBERT BARRETTI
and KATHLEEN BARRETTI,

Defendant(s).

The following papers read on this motion for leave to reargue.

- Notice of Motion/Order to Show Cause.....1
- Answering Affidavits.....2
- Replying Affidavits.....3
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

The motion brought by the Plaintiff, in the above captioned action, for leave to reargue her prior motion for leave to amend the complaint to name Richard Kerins, Public Administrator of the Estate of Clara Caru, as a Plaintiff herein and to deem the amended complaint served nunc pro tunc is denied.

The Plaintiff commenced this action to recover damages for injuries she sustained in an accident on July 21, 1997 when she and her mother were attempting to cross Route 27 (Sunrise Highway), east of Rockaway Avenue, Valley Stream, New York, on foot and were hit by an automobile operated by the Defendant Jarred Barretti. Her mother, Clara Caru, was killed in the accident.

Pursuant to the Order of this Court dated June 26, 2000, the Plaintiff's request for leave to amend the complaint to name Richard Kerins, Public Administrator of the Estate of Clara Caru, as a Plaintiff and to deem the amended complaint asserting a cause of action for the wrongful death of decedent Clara Caru served nunc pro tunc was denied. The Court found the relation back rule of CPLR Section 203(f) inapplicable under the facts stating that:

“[a]lthough the original complaint gave notice of the accident which allegedly caused injuries to the Plaintiff, it gave no notice of the allegedly resulting death of Clara Caru, whose personal representative is sought to be named as Plaintiff, and therefore, the proposed claim of wrongful death cannot be deemed interposed at the time of the original pleading. That being so, it would appear that the proposed claim would be subject to the defense of the two year statute of limitations proscribed in EPTL §5-4.1, subd. 1.”

A motion to reargue is addressed to the sound discretion of the Court and may only be granted on a showing that the Court overlooked or misapprehended the facts or law or, for some reason, mistakenly arrived at its earlier decision. It is not designed to afford a disappointed litigant successive opportunities to rehash issues previously decided or to present arguments different from those originally asserted. It is not a vehicle whereby an unsuccessful party may argue for a second time, the very question previously decided or to present arguments different from those originally asserted. (Pahl Equip. Corp. vs. Kassis, 182 AD2d 22, 27, leave to appeal dismissed in part, denied in part, 80 NY2d 1005.)

Under EPTL §5-4.1(1) the duly appointed representative of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death. Such an action must be commenced within two (2) years after the decedent’s death. An action for wrongful death which is not brought within that period is barred. (Collins vs. Jamaica Hospital, 158 AD2d 649, 650, appeal denied 76 NY2d 703; Bonilla vs. Abbott, 113 AD2d 861, 862.)

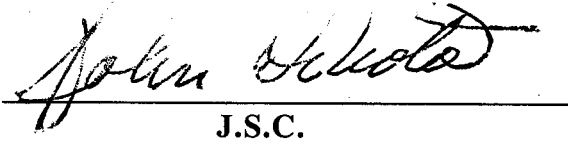
CPLR Section 203(f) deems a cause of action asserted in an amended complaint to have been interposed at the time of the original pleading “unless the original pleading does not give notice of the transactions, occurrences, or series of transactions, or occurrences, to be proved pursuant to the amended pleading”. The rule permitting the claim of a newly joined Plaintiff to relate back to an earlier claim of a pre-existing Plaintiff requires that (a) the original pleading must have given notice of the transaction underlying the new Plaintiff’s claim, (b) the new Plaintiff and the original Plaintiff are closely related or united in interest and (c) the new Plaintiff’s claim is virtually identical to that of the original Plaintiff. (Key Intl Mfg vs. Morse/Diesel, 142 AD2d 448, 458-59.)

Notwithstanding the Plaintiff’s assertions to the contrary, the new causes of action brought on behalf of a new claimant i.e., Clara Caru, by way of a personal representative, beyond the applicable statute of limitations cannot be salvaged through operation of the relation back rule. The original complaint in this action, gave notice of an accident which caused injuries to the Plaintiff, Patricia Huerta. It did not give notice of the death of Clara Caru on July 21, 1997 as a result of that accident. Moreover, the claims of Patricia Huerta are not virtually identical to those of the decedent.

Accordingly, the Plaintiff having failed to demonstrate any manner in which this Court

overlooked or misapprehended the relevant facts or law, the motion to reargue pursuant to Rule 221 of the CPLR is denied.

Dated: December 19, 2000


J.S.C.

ENTERED
DEC 26 2000
KAREN V. MURPHY
COUNTY CLERK OF NASSAU COUNTY