

ORDER
SUPREME COURT OF THE STATE OF NEW YORK
Present: HON. TAMMY S. ROBBINS, Acting Justice

TRIAL/IAS, PART 47

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KATHLEEN FERRANDINO,

Plaintiff,

- against -

Index No. 014384/04
Motion Seq. 001
Motion submission: 1/22/06

PERSONAL TRAINING INSTITUTE, RICHARD
OBEDIAN, M.D., SALVATORE V. FIORENTI, M.D.,
SALVATORE CORSO, M.D., ORTHOPEDIC & SPORTS
ASSOCIATES OF LONG ISLAND, P.C., and NORTH
SHORE UNIVERSITY HOSPITAL at PLAINVIEW,

Defendants,

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Plaintiff has moved this court for an order pursuant to Civil Practice Law and Rules (CPLR) § 203 (c) granting her leave to serve a supplemental summons and amended complaint naming John Leppard, M.D. as a defendant in this action. Defendants Fiorenti, Corso, Orthopedic & Sports Associates of Long Island, P.C. (OSA), and North Shore University Hospital at Plainview (Hospital) have submitted an Affirmation in Opposition to plaintiff's motion. This opinion references documents and exhibits attached to the affirmation of Kerry A. McManus (herein Pl. Aff.) and the affirmation of Deborah A. Gray (herein Def. Aff.).

The incident giving rise to this action occurred when the plaintiff was a patient at OSA and was seen by defendant Richard Obedian, M.D. on April 16, 2002 for lower back complaints (*see* Pl. Aff. Exhibit D, *see* Def. Aff.). Dr. Obedian diagnosed the plaintiff with lumbar

radiculopathy and prescribed steroids and physical therapy and instructed the patient to return in six weeks (*Id.*). In early May of 2002 the plaintiff's condition got progressively worse and she went to the emergency room at defendant Hospital and was subsequently admitted by Dr. Corso (*see* Pl. Aff. Exhibit E). Dr. Obedian was notified by the nursing staff at the hospital that the plaintiff was admitted and that she had urinary retention (*see* Pl. Aff. Exhibit F). Dr. Obedian ordered a Foley catheter (*see* Pl. Aff. Exhibit E, F). Dr. Obedian spoke with Dr. Leppard, who was at the hospital, and asked him to evaluate the plaintiff (*see* Pl. Aff. Exhibit F). Dr. Leppard saw the plaintiff and ordered an MRI and a neurological consult (*see* Pl. Aff. Exhibit E, F). The plaintiff was seen by Dr. Keleman, a neurologist, and was diagnosed with Cauda Equina Syndrome (*see* Pl. Aff. Exhibit E). The plaintiff underwent an operation for decompressive laminectomy with discectomy at L4-L5 (*see* Pl. Aff. Exhibit E, F). Plaintiff claims that the delay in diagnosing and treating the Cauda Equina Syndrome caused her to sustain permanent neurological deficits affecting her lower extremities (*see* Pl. Aff. Exhibit C).

Plaintiff filed the instant complaint on October 19, 2004. In that complaint and in her proposed amended complaint, plaintiff claims that she was under the care and treatment of the named defendants from April 16, 2002 through December 2, 2002 (*see* Pl. Aff., Exhibit A). The statute of limitations for a medical malpractice claim is two years and six months from the date of the alleged act or omission or failure complained of or the last date of treatment (CPLR §214-a). It is uncontested that the statute of limitations for any claims arising out of the conduct or omissions of Dr. Leppard has already expired. Plaintiff now moves this court for an order allowing her to amend her complaint to name Dr. Leppard as a defendant. Plaintiff states that the instant action was commenced based on information recorded in the plaintiff's medical records

maintained by North Shore University Hospital at Plainview (*see* Pl. Aff.). Plaintiff claims that she was not aware of any conversations which took place between Dr. Obedian, a named defendant, and Dr. Leppard during the afternoon and evening of May 3, 2002 (*see* Pl. Aff.).

Plaintiff's counsel alleges that,

[i]t was not until plaintiff deposed both Dr. Obedian and Dr. Leppard that plaintiff learned for the first time that Dr. Obedian spoke with Dr. Leppard soon after learning the patient had urinary retention and he requested that Dr. Leppard, who was already at the hospital, evaluate the plaintiff. As such, had plaintiff been aware of such communications before the institution of suit, plaintiff would have named Dr. Leppard as a defendant in this action. As such, plaintiff's mistake in not originally naming Dr. Leppard as a defendant is excusable (*see* Pl. Aff.).

The records from the defendant Hospital contain an admitting note signed by Dr. Leppard which specifically states “[d]iscuss plans for treatment with Dr. Obedian and neurology” (*see* Pl. Aff Exhibit E, *see also* Def. Aff. Exhibit A). The hospital records also contain physicians' notes for the date of May 3, 2002, which state “discussed with Dr. Obedian” and the notes for that date are signed by Dr. Leppard (*Id*). Defendants argue that the plaintiff named all of the individuals who were involved with her care and thus made an intentional decision not to include Dr. Leppard as an original defendant. Defendants state that the mistake claimed by plaintiff (namely, the failure to learn of the communication between Dr. Obedian and Dr. Leppard until the time of their respective depositions) was not excusable as the hospital records clearly state Dr. Leppard's plan to communicate with Dr. Obedian.

The rule of law “commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted

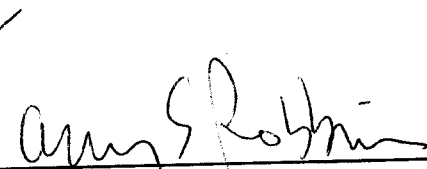
against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (see *Buran v Coupal*, 87 NY2d 73 [citations omitted]). The doctrine “gives courts the ‘sound judicial discretion’ to identify cases ‘that justify relaxation of limitations strictures ... to facilitate decisions on the merits’ if the correction will not cause undue prejudice to the plaintiff’s adversary” (*Id.*, citing *Duffy v Horton Mem. Hosp.*, 66 NY2d 473; Lewis, *The Excessive History of Federal Rule 15 © and Its Lessons for Civil Rules Revision*, 85 Mich L Rev 1507, 1512 [1987]). In order to amend pleadings to add new parties after the statutory limitations period has expired, a plaintiff must establish that: “(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party 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 that party as well” (see *Papas v. 31-08 Café Concerto, Inc.*, 5 AD3d 452 [citations omitted]).

In this case, the first two conditions have been satisfied. As to the third condition, New York law requires a mistake by the plaintiff seeking to relate his claims back to the original complaint and not, an excusable mistake (see *Buran v Coupal, supra*). The Court of Appeals has found that the “excuse” requirement shifted the focus away from the primary question of whether the new party had actual notice of the claim (*Id.*). In the case before this court it does appear that Dr. Leppard had actual notice of the claim. However, equally apparent to this court is the fact that the plaintiff had access to the hospital records prior to the filing of her claim and that the

plaintiff has stated that she commenced this action against the named defendants based on the information recorded in those medical records. The records not only reflect a communication between Dr. Leppard and Dr. Obedian but, they unequivocally establish that Dr. Leppard treated the plaintiff during the period of time giving rise to this action. "The plaintiff's own evidence belie[s] [her] assertion that the failure to name [Dr. Leppard] as a defendant within the statute of limitations was the result of mistake or the inability of the plaintiff to properly identify him" (see *Papas v. 31-08 Café Concerto, Inc., supra*). Where "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 limitation period has expired" (see *Buran v Coupal, supra* citing Note, *The Relation Back of Claims Against Third-Party Defendant*, 7 Cardozo L Rev 281, 304 [1985]).

Accordingly, the plaintiff's application to amend her complaint and add Dr. Leppard as a defendant in this action is hereby denied.

Dated: February 28, 2006



Honorable Tammy S. Robbins

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE