State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 25, 2020 530886

JOHN FASCE, as Administrator of the Estate of ANN T. FASCE, Deceased,
Respondent,
v

MEMORANDUM AND ORDER

DENISE SMITHEM et al.,
Defendants,
and

CRYSTAL RUN HEALTHCARE et al.,
Appellants.

Calendar Date: October 22, 2020

Before: Garry, P.J., Clark, Devine, Aarons and Reynolds Fitzgerald, JJ.

Feldman, Kleidman, Coffey & Sappe LLP, Fishkill (Terry D. Horner of counsel), for appellants.

Landers & Cernigliaro, PC, Carle Place (Stanley A. Landers of counsel), for respondent.

Reynolds Fitzgerald, J.

Appeal from that part of an order of the Supreme Court (Schick, J.), entered January 20, 2020 in Sullivan County, which granted plaintiff's motion for leave to amend the complaint to add Crystal Run Healthcare and Crystal Run Healthcare Physicians, LLP as defendants.

In September 2018, plaintiff, as the administrator of the estate of Ann T. Fasce (hereinafter decedent), commenced this action against defendants Denise Smithem, a nurse practitioner, Rajan Dey, a physician, and Catskill Regional Medical Center, alleging medical malpractice and wrongful death for medical treatment that decedent allegedly received from Smithem and Dey between September 18, 2016 through her death on September 22, 2016. Plaintiff attempted to serve Smithem and Dey through defendant Crystal Run Healthcare. Crystal Run Healthcare accepted service on behalf of Smithem, but refused with regard to Dey, as he was no longer employed by Crystal Run Healthcare.

While preparing for depositions, plaintiff's attorney realized that he had named the wrong individual health care providers as defendants. Thereafter, in July 2019, after the expiration of the applicable statutes of limitations, plaintiff moved for leave to amend the complaint, seeking to discontinue the action against Smithem and Dey, and, through the use of the relation back doctrine, add Crystal Run Healthcare and Crystal Run Healthcare Physicians, LLP (hereinafter collectively referred to as Crystal Run) as defendants. Crystal Run opposed that part of the motion that sought to add them as defendants. Supreme Court granted the motion in its entirety. Crystal Run appeals from that part of the order that allowed plaintiff to amend the complaint to add Crystal Run.

As the two-year statute of limitations for wrongful death expired on September 22, 2018 (see EPTL 5-4.1 [1]), and the 2½-year statute of limitations for medical malpractice expired on March 22, 2019 (see CPLR 214-a), plaintiff bore the burden of "show[ing] that the action was permitted to continue under the relation back doctrine" (Branch v Community Coll. of the County of Sullivan, 148 AD3d 1410, 1410 [2017], lv denied 29 NY3d 911 [2017]; see NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc., 167 AD3d 1305, 1307 [2018]). The relation back doctrine allows a plaintiff to amend the complaint to add a party even though the statute of limitations has expired if the plaintiff satisfies three conditions: (1) both claims must arise out of the same occurrence; (2) the proposed defendant must be united in interest with the original defendants; and (3) the proposed

defendant must have known or should have known that, but for a mistake by the plaintiff as to the proposed defendant's identity, the action would have been also brought against it (see Buran v Coupal, 87 NY2d 173, 178 [1995]; Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd., 179 AD3d 1270, 1271 [2020]). Here, plaintiff has failed to establish the second and third prongs of the test.

With respect to the second prong, parties are united in interest when "[t]he interests of the parties in the subject-matter of the action are such that they [will] stand or fall together and judgment against one will similarly affect the other" (Prudential Ins. Co. v Stone, 270 NY 154, 161 [1936]; accord Mondello v New York Blood Ctr.–Greater N.Y. Blood Program, 80 NY2d 219, 226 [1992]). Supreme Court found that Crystal Run was united in interest with both Smithen and Dey by virtue of an employer-employee relationship and principles of vicarious liability. Although such circumstances can lead to a finding of unity in interest (see e.g. De Sanna v Rockefeller Ctr., Inc., 9 AD3d 596, 598-599 [2004]), plaintiff has candidly admitted that Smithen and Dey are free from any and all liability because they never performed the conduct that is the basis of the complaint. As such, plaintiff has vitiated any claim of vicarious liability.

Plaintiff also failed to establish the third prong of the test in that his failure to timely commence an action against Crystal Run "was not the result of a mistake or an inability to identify the correct defendant within the applicable limitations period" (Contos v Mahoney, 36 AD3d 646, 647 [2007]; accord Branch v Community Coll. of the County of Sullivan, 148 AD3d at 1411). Although plaintiff alleged that Smithen and Dey were employed by Catskill Regional Medical Center in the complaint, the answers of both the hospital and Smithem denied said allegation. Additionally, plaintiff served Smithem (and attempted to serve Dey) at Crystal Run. Plaintiff's failure to act on this knowledge prior to the expiration of the statute of limitations is not the type of mistake contemplated under the relation back doctrine (see Branch v Community Coll. of the

County of Sullivan, 148 AD3d at 1411; Contos v Mahoney, 36 AD3d at 648). Accordingly, as plaintiff cannot demonstrate the applicability of the relation back doctrine, that part of plaintiff's motion seeking to add Crystal Run as defendants should have been denied.

Garry, P.J., Clark, Devine and Aarons, JJ., concur.

ORDERED that the order is modified, on the law, with costs to defendants Crystal Run Healthcare and Crystal Run Healthcare Physicians, LLP, by reversing so much thereof as granted that part of plaintiff's motion seeking to add Crystal Run Healthcare and Crystal Run Healthcare Physicians, LLP as defendants; motion denied to said extent; and, as so modified, affirmed.

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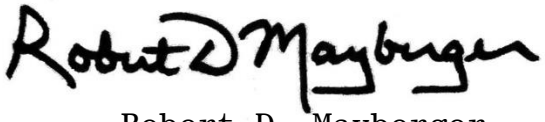

Robert D. Mayberger
Clerk of the Court