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BLUME, GOLDFADEN, BERKOWITZ,
DONNELLY, FRIED & FORTE
A Professional Corporation
One Main Street
Chatham, New Jersey 07928
(973) 635-5400
Attorneys for Plaintiff

MAURICE J. GALIPOLLA, J.S.C.

ESTATE OF RAMONA CORDERO, BY : SUPERIOR COURT OF NEW JERSEY
GABINA CORDERO, *Administra* : LAW DIVISION: HUDSON COUNTY
trix ad prosequendum, and : DOCKET NO.: HUD-L-1568-05
NICOLAS CORDERO, *individ.*, :

Plaintiffs,

vs.

Civil Action

CHRIST HOSPITAL, SELVIA G.
ZAKLAMA, M.D., PATRICK
McGOVERN, M.D., HUDSON
ANESTHESIA GROUP, JOHN
DOES (fictitious), DOE
PHYSICIAN GROUP, P.A.
(fictitious), DOE PHYSICIAN
GROUP, P.C. (fictitious),
DOE MANAGED CARE COMPANY
(fictitious),

ORDER

Defendants.

This matter having been opened to the Court by Hardin, Kundla, McKeon & Poletto, P.C., attorneys for defendant Christ Hospital, on two applications (1) to amend answering pleadings to include a cross-claim, and (2) to dismiss plaintiffs' claims, and the applications having been opposed by Blume, Goldfaden, Berkowitz, Donnelly, Fried & Forte, P.C., attorneys for plaintiffs, and the Court having considered the papers and arguments of counsel, and for good cause shown,

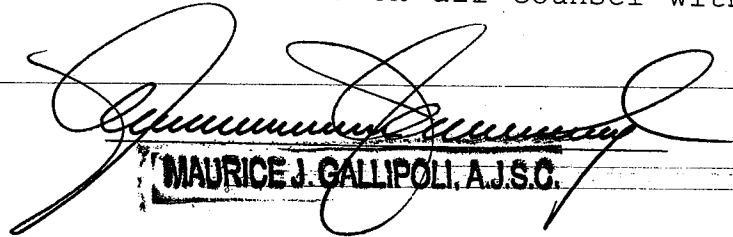
It is on this ^{1st} Day of ~~February~~ ^{May} 2009,

ORDERED that:

1. Defendant Christ Hospital's motion for leave to file an Amended Answer including a Cross-claim for contractual indemnity be and is hereby ~~denied~~ *granted* *;

2. Defendant Christ Hospital's motion to dismiss plaintiffs' Amended Complaint be and is hereby denied.

A copy of this order shall be served on all counsel within seven (7) days.


MAURICE J. GALLIPOLI, A.J.S.C.

See reasons attached.

** The Amended Answer is to be filed and served within 15 days.*

Trial date is September 8, 2009

PROVIDED THAT GRANTING OF THIS ORDER
SHALL NOT DELAY TRIAL NOR BE USED AS A
BASIS TO APPLY FOR ADJOURNMENT

FILED

Estate of Ramona Cordero, et al. v. Christ Hospital, et al.
HUD-L-1568-05
Decision on Motion

MAY 01 2009

MAURICE J. GALLIPOLI, J.S.C.

Introduction

This matter came before the court on March 19, 2009 on motion by Defendant Christ Hospital seeking an order dismissing Plaintiffs' Complaint¹ with prejudice, or alternatively seeking leave to file an Amended Answer to Plaintiffs' Complaint so as to now assert a cross-claim for contractual indemnification against Hudson Anesthesiology Services, LLC (hereinafter "HAS").

Statement of the Facts and Procedural History

The relevant facts necessary to understanding the pending motions are contained in the decision of the Appellate Division and need not be reiterated here. Estate of Cordero v. Christ Hosp., 403 N.J. Super. 306 (App. Div. 2008). The Appellate Division reversed my previous grant of summary judgment to Christ Hospital² and remanded Plaintiffs' claims against the hospital for trial on the theory of "imputation of liability based on apparent authority." The Appellate Division held that "when a hospital provides a doctor for its patient and the totality of the circumstances created by the hospital's action and inaction would lead a patient to reasonably believe that the doctor's care is rendered on behalf of the hospital, the hospital has held out that doctor as its agent," id. at 317, and that when viewing the facts in the light most favorable to the Plaintiffs under the circumstances of this case, the evidence was sufficient to permit a

¹ Plaintiffs' presently operative pleading is a Second Amended Complaint. Count Three contains the only remaining claim against Christ Hospital, i.e., the claim that Christ Hospital is vicariously liable for the negligence of Dr. Zaklama. Thus, in this opinion, "Plaintiffs' Complaint" has reference to the Third Count of Plaintiffs' Second Amended Complaint.

² Summary Judgment was granted to Defendant Christ Hospital by order dated October 20, 2006.

jury to find that the hospital by its conduct held out co-defendant Selvia G. Zaklama, M.D. ("Zaklama") as its agent.

Plaintiffs' claims against Zaklama and HAS were settled and dismissed. Plaintiffs' settlement with Zaklama was memorialized by a Confidential Settlement Agreement and Release executed on March 15, 2007, and Plaintiffs' settlement with HAS was memorialized by a RELEASE executed on November 16, 2007. Each releasee paid \$975,000 in settlement.

The Confidential Settlement Agreement and Release given to Zaklama contained the following language: "However, Ramona Cordero expressly does not release any of her claims against the employer of Selvia Zaklama, M.D., including Hudson Anesthesia Associates, L.L.C.³ and/or Christ Hospital." Zaklama was an insured of Professional Mutual Insurance Company, d/b/a ProMutual.

The RELEASE given to HAS did not contain language preserving Plaintiffs' claims against Christ Hospital. Both HAS and Christ Hospital were insureds of Princeton Insurance Company. The RELEASE, in pertinent part, reads as follows: "This Release, dated November 16, 2007...is given to...Hudson Anesthesiology Services, LLC, ...**and Princeton Insurance Company and any and all of its insureds, employees, agents, servants and assigns, and any and all employers, partners, co-workers or employees of the above-named physician(s) or organization(s) (referred to as "You" or "Releasee")**).

³ The employer of Dr. Zaklama is variously referred to as Hudson Anesthesia Group, LLC, Hudson Anesthesia Associates, LLC, or Hudson Anesthesia Services, LLC. For the sake of consistency, the reference to the employer of Dr. Zaklama in this opinion will be to Hudson Anesthesia Services, LLC ("HAS").

Defendant Christ Hospital moves to dismiss the remanded claims now pending against it, arguing that those claims were “released” by way of the RELEASE given to “**any and all insureds**” of Princeton Insurance Company. Parenthetically, it is not disputed by Plaintiffs that, from almost the inception of the litigation and certainly at the time they entered into the settlement with HAS, Plaintiffs were aware that Christ Hospital was a Princeton Insurance Company insured.

Statement of the Issues

The issues before the court are: (1) whether there was a release by Plaintiffs of their claims against Defendant Christ Hospital so that a dismissal of Plaintiffs’ Complaint against Christ Hospital is now warranted and (2) if the court were to deny Defendant’s Motion to Dismiss Plaintiffs’ Complaint, whether Christ Hospital should be granted leave in this action to file an Amended Answer so as to include a cross-claim for contractual indemnity against HAS.

Discussion

ISSUE ONE: DID THE RELEASE GIVEN TO “HAS” ALSO RELEASE ALL OF PLAINTIFFS’ CLAIMS AGAINST DEFENDANT CHRIST HOSPITAL?

The legal effect of a release on **other** parties should be determined by the intent of the parties to the release, with due consideration being given to whether the compensation paid was fully adequate. See Breen v. Peck, 28 N.J. 351 (1958). The scope of the release is determined by the intention of the parties as expressed through the release’s terms considering all facts and circumstances but where the prime determining factor in construing a release is the effect of the parties’ intentions. 66 Am. Jur. 2d Release § 31. This rule stems from the proposition that a release comes about from a meeting of the minds. Id.

In McFadden v. Turner, Judge Pressler wrote:

The general rule in this jurisdiction is that a release of one tortfeasor will not release others who may also be liable to plaintiff for his harm unless the release is so intended or the plaintiff receives as a result thereof either full satisfaction or satisfaction intended as such. While that departure from the common law was formulated in the context of multiple acts of negligence committed by concurrent tortfeasors, each of whom was himself actually rather than merely vicariously liable, we see no reason why the rule should not apply as well to the single act of negligence for which both the actual wrongdoer and his master or principal are each independently liable. The rationale of the rule is equally apposite whether the liability is actual or vicarious namely, that plaintiff is entitled to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained.

McFadden, 159 N.J. Super. 360, 366-367 (App. Div. 1978)(internal citations omitted); see also Breen, *supra*, and Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 559-560 (1980). Therefore, to determine whether a particular claim has been discharged, the primary rule of construction is that the intention of the parties shall govern, and this intention is to be determined with a consideration of what was within the contemplation of the parties when the release was executed, which in turn is to be resolved in the light of all of the surrounding facts and circumstances under which the parties acted. 66 Am. Jur. 2d Release § 31 (2008).

As the party claiming the benefit of the release, Christ Hospital has the burden of establishing the intent behind the release and the adequacy of the compensation received.

Daily v. Somberg, 28 N.J. 372, 384-385 (1958). The court in Daily clearly articulated that:

...[T]he person who advanced the release as a bar could fairly be expected to carry the burden of his defense within the controlling legal principles...[W]here the release

disclosed on its face that it was given to the named releasees who had denied liability and had made payment by way of compromise and settlement, the alleged wrongdoers, who were not parties to the release and had made no payment towards satisfaction of the plaintiff's injuries, may fairly be called upon to show that the release was intended to discharge them or that the plaintiff had received full compensation.

Id. at 385.

Contrary to Christ Hospital's argument, I find no expressed or implied intent embodied within the release to settle or dismiss the pending claims between Plaintiffs and Christ Hospital. Defendant Christ Hospital's argument that the terms in the release⁴ mandate dismissal of the Plaintiffs' Complaint against Christ Hospital is unconvincing given the clear lack of intent on the part of the scrivener to release Christ Hospital directly. In fact, the contrary intent of the release is clear on its face – the intent of only HAS to extend a monetary offer of settlement to Plaintiff and her family. I find that the “insureds” referenced and incorporated in the release between the Plaintiffs and HAS can only be sensibly construed as a reference to the insureds under the Princeton Insurance Policy **which provided coverage to HAS**, and does not have reference to all “insureds” of Princeton Insurance Company for all time, past and/or future. Moreover, if Princeton Insurance Company had intended that the HAS release provide a benefit to its other “insured,” namely Christ Hospital, it simply could have expressly stated so by specifically including “Christ Hospital” by name in the release to resolve any ambiguity. Since the settlement between Plaintiffs and HAS clearly represents a compromise settlement solely between Plaintiffs and HAS and given the lack of intent on the part of the parties to also release Christ Hospital, it is my determination that Christ Hospital has failed to sustain its burden and therefore its motion should be and is denied.

⁴ “...This Release...is given to...Princeton Insurance Company and any and all of its insureds...”

Additionally, when determining whether other parties were intended to be released, due consideration should also be given to whether the compensation paid was fully adequate. Cartel Capital Corp., 81 N.J. at 559. “When the release shows it was in compromise of the liability of the party to whom given, with no reference to a full satisfaction as against others, we can see no just presumption that they had in mind a release of others in whom the released party had no interest.” Daily, 28 N.J. at 384. Christ Hospital did not confer any consideration to Plaintiffs, either directly or by Princeton Insurance Company by way of the policy of insurance actually issued to Christ Hospital. The lack of evidence that any such consideration was exchanged for the giving of a release to Christ Hospital is further justification for the denial of the pending motion.

Further, Plaintiffs persuasively argue and I so find that Defendant Christ Hospital should be barred from now asserting the “RELEASE” as a defense based on equitable principles. “Release,” “Payment,” and “Accord and Satisfaction” are affirmative defenses which are required to be pleaded. Rule 4:5-4 states:

A responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense such as accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.

These affirmative defenses are not self executing. “[A]n affirmative defense that is not pleaded or otherwise **timely** raised is deemed to have been waived.” Pressler, Current N.J. Court Rules, R. 4:5-1, Comment 1.2.1 (emphasis added). If such defenses are not timely invoked, they can be barred by equitable doctrines.

Estoppel is an equitable doctrine founded in the fundamental duty of fair dealing imposed by law. Knorr v. Smeal, 178 N.J. 169, 178 (2003). The doctrine is invoked in “the interests of justice, morality and common fairness.” Id. To establish equitable estoppel, Plaintiffs must show that Defendant engaged in conduct, either intentionally or under circumstances that induced reliance, or that Plaintiffs acted or changed their position to their detriment. Ibid.

Similarly, the doctrine of laches is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. Id. at 180-181 (citing In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000)). Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. Id. at 181 (citing Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 172 (Law Div.1994)). While the key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the changing conditions of either or both parties during the delay, the core equitable concern in applying laches is whether a party has been harmed by the delay. Id. at 152-153.

Turning to the particular facts of this case, at no time during the lengthy appeal to the Appellate Division did Christ Hospital argue that it was released by virtue of Plaintiffs’ November 16, 2007 release of HAS. As Plaintiffs point out, instead of timely asserting the release as a defense at the onset of the appeal, Christ Hospital waited nearly a year for the appeal to be disposed of and then another three months after the matter was remanded to the Law Division for trial before it filed its motion on short notice to dismiss

