

Strujan v Head

2013 NY Slip Op 31154(U)

May 24, 2013

Supreme Court, New York County

Docket Number: 800029/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 800029/2012
STRUJAN, ELENA
vs.
HEAD, WILLIAM
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1,2,3
Answering Affidavits — Exhibits _____ | No(s). 4
Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

FILED
MAY 29 2013
NEW YORK
COUNTY CLERKS OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/24/13

 _____, J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

ELENA STRUJAN,

Plaintiff,

- v -

INDEX NO. 800029/12

MOTION DATE _____

WILLIAM HEAD,

Defendant.

MOTION SEQ. NO. 6

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answer — Affidavits — Exhibits	<u>4</u>
Replying Affidavits	<u>5</u>

FILED

MAY 29 2013

Cross-Motion: Yes No

NEW YORK

COUNTY CLERKS OFFICE

Plaintiff Elena Strujan (“Plaintiff”) commenced this action through the filing of a summons and complaint on or about January 20, 2012. Defendant Dr. William Head, M.D. (“Dr. Head”), interposed an answer, and now moves for an Order pursuant to CPLR §3211(a)(5) to dismiss the Complaint as being time barred or precluded by collateral estoppel and pursuant to CPLR §3211(a)(7) for failure to state a claim. Plaintiff opposes.

Plaintiff’s Complaint alleges the following causes of action against Dr. Head: (1) breach of trust; (2) breach of standard of care; (3) economic loss; (4) intentional “mental scars and emotional distress”; (5) medical malpractice; (6) unlawful trade practice under the Consumer Protection Procedure Act; (7) defamation; (8) perjury; (9) civil conspiracy; and (10) obstruction of justice. For each cause of action, Plaintiff seeks compensatory damages in excess of \$10,000 and punitive damages. Plaintiff also brought suit against Mitchell Friedman, Esq., Dr. Stanley Pornow, M.D., and Dr. Drushan Kosovich. All defendants except Dr. Head have moved to dismiss all causes of action as against them. (See this Court’s August 10, 2012, September 25, 2012, and January 18, 2013 Orders). Dr. Head is the only remaining Defendant.

Plaintiff’s Complaint arises out of a Workers’ Compensation claim relating to an incident in September 1997 in which plaintiff alleges she was stuck by a HIV positive needle, while working as a nurse technician at New York University Hospital. Plaintiff’s Complaint alleges that she “lost the [Workers’ Compensation] case for disability and economic loss due to the all [sic] defendants [sic] false affirmation under oath.” As alleged in the Complaint, Dr. Head was a medical examiner who evaluated Plaintiff on behalf of the insurance carrier, prepared a

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

medical report, and provided testimony at her Worker's Compensation appeal. Plaintiff alleges that Dr. Head provided false testimony at her proceeding based on his erroneous medical report, and as a result, an adverse Workers' Compensation determination was rendered against her.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (5) the cause of action may not be maintained because of . . . collateral estoppel, . . . , res judicata, statute of limitations . . . ; or
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 [1999]) (citations omitted).

The doctrine of collateral estoppel

'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500; *see also, Burgos v Hopkins*, *supra*, 14 F3d. at 792). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co.*, *supra*, at 500-01). '[T]he burden rests upon the proponent

* 4]

of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (*id. at 501*). (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

Dr. Head first argues that Plaintiff is precluded from seeking relief in this Court based on *res judicata* or issue preclusion based on her previous Workers' Compensation proceeding. However, these doctrines do not apply as Plaintiff's claims against Dr. Head in her Complaint in this action are distinct from those claims at issue in her Worker's Compensation proceeding and were not litigated.

However, upon a review of the Complaint, the four corners of the Complaint fail to state any claim for relief as against Dr. Head, and dismissal is warranted.

Plaintiff's first cause of action alleges "civil conspiracy to commit humiliation, defamation [sic]" against all defendants, asserting that Dr. Head entered into a conspiracy with other co-defendants in order to "sabotage [her] Worker Compensation case." Civil conspiracy is not recognized in New York as an independent tort, but may be viable if connected with other actionable torts. (see *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968[1986]).

To the extent that Plaintiff is asserting civil conspiracy to commit defamation, the claim is time barred by the one year statute of limitations. (CPLR 215(3)). The alleged defamatory statements were made in 2009, and Plaintiff did not commence this action until January 2012, after the statute of limitations expired. To the extent that Plaintiff's civil conspiracy claim is predicated on a fraud, while Plaintiff alleges fraud in her fourth cause of action against Kosovich and Friedman, she does not assert a fraud claim as against Dr. Head.

While Plaintiff asserts a breach of contract and a breach of implied covenant of good faith and fair dealing against Dr. Head, there is no allegation of the existence of a contract or contractual relationship between Plaintiff and Dr. Head nor any allegation that Dr. Head promised to obtain a specific result and failed to do so. See generally *Forman v. Guardian Life Ins. Co. of America*, 2010 6606, *2 [1st Dept. 2010]); *Fredinand v. Crecca & Blair*, 5 A.D. 3d 538, 539 [2nd Dept 2004]).

Plaintiff's "breach of trust," "breach of standard of care," negligence, gross negligence/recklessness, and medical malpractice claims against Dr. Head also fail to state a claim. There are no allegations that Dr. Head provided treatment to

Plaintiff, nor has Plaintiff served a certificate of merit along with her complaint, as required by CPLR 3012-a. Furthermore, any claim for medical malpractice based on Dr. Head's medical evaluation of Plaintiff in March 2009 would be barred by the 2.5 year statute of limitations that applies to medical malpractice claims, as Plaintiff commenced this action in January 2012, after the statute of limitations had run.

Furthermore, even accepting the allegations as true, the four corners of the Complaint also fail to state claim for economic loss, intentional "mental scars and emotional distress", unlawful trade practice under the Consumer Protection Procedure Act, perjury; and obstruction of justice.

Wherefore, it is hereby

ORDERED that defendant William Head's motion to dismiss is granted; and the Complaint is dismissed in its entirety as against William Head, the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 5/24/13



HON. EILEEN A. RAKOWER ^{J.S.C.}

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

MAY 29 2013

NEW YORK
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