

Smith v Subbaiah

2013 NY Slip Op 31657(U)

July 18, 2013

Supreme Court, New York County

Docket Number: 805332/2012

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 805332/2012
SMITH, CAROL
vs.
SUBBAIAH, M.D., SATHISH
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 805 332/12
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to dismiss
Notice of Motion/Order to Show Cause - Affidavits - Exhibits A-
Answering Affidavits - Exhibits A-C
Replying Affidavits - Exhibit A

No(s). 1
No(s). 2
No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: July 18, 2013

MARTIN SHULMAN J.S.C.

- 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
COUNTY OF NEW YORK

-----X

CAROL SMITH,
Plaintiff,

-against-

Index No. 805332/12

Decision & Order

SATHISH SUBBAIAH, M.D., NOMAAN ASHRAF, M.D.,
ARTHUR SCHWARTZ, M.D., JESSE BRALLIER, M.D.
and THE MOUNT SINAI HOSPITAL,

Defendants.

-----X

Martin Shulman, J.:

Motion sequences 001, 002, 003 and 004 are consolidated for disposition. In each motion, one or more of the defendants¹ in this medical malpractice action moves to dismiss the action pursuant to CPLR 305 (b) claiming that the summons with notice failed to provide sufficient notice of the nature of the action and the relief sought. Plaintiff opposes the motions.

Plaintiff Carol Smith commenced this action on November 15, 2012 by filing a summons with notice stating in relevant part as follows: "NOTICE: The nature of this action is medical malpractice." Thereafter, plaintiff served the summons with notice upon defendants and ultimately filed a complaint on March 1, 2013.

Defendants argue the summons with notice is jurisdictionally defective because it lacks any supporting facts, such as the date and type of treatment plaintiff received, thus giving no indication of plaintiff's allegations plaintiff against them. Defendant

¹ Defendant Ashraf brings motion sequence 001; defendants Subbaiah, Brallier and Mount Sinai Hospital bring motion sequence 002; defendant Subbaiah, by separate counsel retained by Medical Liability Mutual Insurance Company (Dr. Subbaiah's insurance carrier providing coverage after June 2011), brings motion sequence 003; and defendant Schwartz brings motion sequence 004.

Subbaiah further alleges that he has treated at least two (2) patients having the common name of Carol Smith and, due to that fact, plaintiff's failure to include more detailed allegations in the summons with notice was particularly insufficient to place him on notice of plaintiff's claims.

As plaintiff's last date of treatment with defendants Subbaiah, Brallier, Schwartz and Mount Sinai was May 26, 2010,² these moving defendants argue that, in light of the two and a half year statute of limitations (CPLR §214-a), the last date for plaintiff to commence this action was November 26, 2012. However, because the summons with notice plaintiff filed on November 15, 2012 was allegedly deficient, the action was not commenced until plaintiff filed the complaint on March 1, 2013, after the statute of limitations expired.

CPLR 305 (b) provides in relevant part:

Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought . . .

The absence of such notice or a defective or inadequate description of the nature of the action which fails to apprise the defendant of the essence of the claim is fatal because it fails to confer jurisdiction over the defendant and must be treated as a nullity.

Scaringi v Broome Realty Corp., 154 Misc2d 786, 789, 586 NYS2d 472 (Sup Ct, NY County 1991), *affd* 191 AD2d 223 (1st Dept 1993).

² In reply, it appears counsel for defendant Ashraf agrees with his co-defendants' proffered time line (see Patel Reply Aff. at ¶ 13). Counsel's reply affirmation also argues that plaintiff's summons with notice is defective because it fails to include plaintiff's address and a date of filing. This court declines to address new arguments improperly raised for the first time in reply.

Defendants' motions are denied. "The purpose of the CPLR 305 (b) notice is to provide the defendant with 'at least basic information concerning the nature of [the] plaintiff's claim and the relief sought'". *Bullis v American Motors Corp.*, 175 AD2d 535, 536 (3d Dept 1991), citing *Parker v Mack*, 61 NY2d 114, 117 (1984). "A liberal construction of the statutory requirement of the contents of the notice accompanying a summons served without a complaint is consistent with the general policy of the CPLR". *Id.* A plaintiff is not required to specifically state her theory of recovery since "absolute precision is not necessary". *Id.*

Here, although plaintiff's characterization of her claim is broad and she offers no specific factual details, this court cannot say that her summons with notice is inadequate at this stage of the litigation. Medical malpractice is the essence of plaintiff's claim and a recognizable cause of action. *Scaringi*, 191 AD2d at 223. As the lower court noted in *Scaringi* (154 Misc2d at 789), broadly descriptive words such as "automobile negligence", "negligence", "libel" and "legal services" have been held sufficient to describe an action's nature. Indeed, in *Pilla v La Flor De Mayo Express, Inc.*, 191 AD2d 224, 224 (1st Dept 1993), the First Department held that CPLR 305 (b)'s requirements were met by the mere statement "personal injury" (*compare Roth v State Univ. of New York*, 61 AD3d 476 [1st Dept], *lv den* 13 NY3d 711 [2009] [no compliance with CPLR 305 (b) where summons described the action's nature as "violations of federal, New York State, and New York City human rights laws, including but not limited to" various named statutes, since numerous potential causes of action could be brought under such statutes]).

Finally, with respect to plaintiff's common name, none of the defendants denies having treated a patient named Carol Smith. As to defendant Subbaiah, who avers that he has had two (2) patients with plaintiff's name "over the years" and "may have had contact with" a third Carol Smith who was treated by another physician affiliated with his practice, this court can discern no basis in the above-cited case law for imposing a heightened pleading burden on litigants with common names. The details of this plaintiff's treatment can be gleaned early on in this case through the complaint (now served), a bill of particulars and discovery. Simply put, in this case the summons with notice's sparse allegations do not deprive this court of jurisdiction over the defendants. For all of the foregoing reasons, it is hereby

ORDERED that defendants' motions to dismiss are denied.

Counsel for the parties are directed to appear for a conference in the Medical Malpractice Settlement Part on November 20, 2013 at 9:30 a.m. at 60 Centre St., Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
July 18, 2013



HON. MARTIN SHULMAN, J.S.C.