

**Roberts v Gillen**

2001 NY Slip Op 30072(U)

October 20, 2001

Supreme Court, New York County

Docket Number: 124607/00

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Stanley T. Sklar  
Justice

PART 29

Roberts JSP

INDEX NO. 124607-2000

MOTION DATE \_\_\_\_\_

Dr. Miller Francis et al

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>1 2 4</u>	PAPERS NUMBERED <u>1-7</u> <u>8-15</u>
Answering Affidavits <u>2</u> Exhibits _____	
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

MOTION/CASE IS REFERRED TO JUSTICE

Dated: 10/20/01

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
ROBERTS, et ano

Index No. 124607/00

-against-

GILLEN, et al

-----X  
Sklar, J.:

In this medical malpractice action arising out of breast augmentation surgery performed by Dr. Francis Gillen on Janene Roberts, codefendants MHN Cosmetic Design and The Center for Cosmetic Design move to dismiss the action on the grounds that they never rendered any medical treatment to Roberts nor did they employ codefendant Dr. Gillen who failed to answer the complaint and against whom I directed that an inquest be held as to liability and damages at the trial amongst plaintiffs and the remaining defendants. The movants further seek to have this action stayed as to them on the ground that plaintiffs must submit their malpractice claims to arbitration.

Movants claim through the affidavit of their President, Michelle Cipriano, that MHN Cosmetic Design's true name is MHN of New York, Inc. and that it is a corporation which did not practice medicine, did not provide medical services to plaintiff, did not employ Dr. Gillen, simply existed to provide non-medical services for the hair and skin, a service which was not sought by plaintiff; and that it merely shared office space with Dr. Gillen. Cipriano asserts that The Center for Cosmetic Design's true name is Cosmetic Restoration Marketing, Inc., that it share office space with Dr. Gillen, did not employ him, did not provide any medical services to the plaintiff, and that it merely

provided non-medical management services, billing services including office management, marketing and advertising to doctors including Dr. Gillen. Accordingly the movants assert that the complaint which asserts, inter alia, that the movants and Dr. Gillen departed from accepted standards of medical care in the treatment rendered to the plaintiff and failed to obtain the plaintiffs informed consent to the surgery, must be dismissed as to them.

The movants further point to a form entitled “AUTHORIZATION FOR MEDICAL TREATMENT, ADMINISTRATION OF ANESTHESIA AND THE PERFORMANCE OF OPERATIONS AND/OR PROCEDURES”, which while essentially a consent form provided that the plaintiff released, inter alia, The Center for Cosmetic Design, its affiliates and employees from all liability resulting from the procedure’, mandated that any controversy or claim arising out of that agreement or breach of it had to be settled by arbitration and provided that in case there was a dispute “between” the doctor, The Center for Cosmetic Design and plaintiff as to their rights, obligations and duties, such dispute had to be resolved solely by binding arbitration. This form was signed by the plaintiff, witnessed by a “KM Weaver” and was according to the form allegedly reviewed with the patient by Dr. Gillen. The movants assert that in light of this signed agreement plaintiff must arbitrate her malpractice claims, and thus seek to stay the action.

In response plaintiff asserts that the two movants were Dr. Gillen’s actual or de facto employer. In particular Janene Roberts provides her affidavit in which she states

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<sup>1</sup> At oral argument movants’ counsel conceded that the release was not valid with respect to the plaintiffs’ malpractice claims. See: *Gross v Sweet*, 49 NY2d 102 (1979); *Ciofalo v Vic Tanney Gyms*, 10 NY2d 294 (1961); *Ash v NYU Dental Center*, 164 AD2d 366 (1<sup>st</sup> Dept, 1990).

that she never met Dr. Gillen until the morning of July 25, 1998, shortly before the surgery was performed, that before that date she had seen newspaper advertisements similar to the flyers attached to her motion papers which ads allegedly identified MHN Cosmetic Design and The Center for Cosmetic Design as a medical facility at which she could have her planned surgery. She then visited the Center with a friend as part of an initial inquiry and returned once she decided to have the surgery performed. Plaintiff claims that she believed the center to have been a medical facility run by Dr. Gillen. The first attached flyer captioned "The Center for Cosmetic Design" which solicits business asserts that the reader is a "**valued patient of The Center for Cosmetic Design**" and states that it would be happy to schedule an "evaluation with one of our . . . . surgeons". In the second flyer The Center for Cosmetic Design also refers to "our" plastic surgeons.

Plaintiffs' counsel also points to an August 1997 letter employment agreement which was offered to Dr. Gillen by Michelle Cipriano and others on behalf of two entities Physician Cosmetic Design and Physicians Reconstructive P.C. both located at the same address as movants. That copy of the agreement was unexecuted by Dr. Gillen who, as stated by plaintiffs' counsel at oral argument, gave that copy of the agreement to plaintiffs' counsel when he appeared one day in court. That agreement indicated that Dr. Gillen would be employed by those two entities, which would provide facilities, equipment, supplies and billing and collection functions for Dr. Gillen. That agreement contained a confidentiality agreement which referred to "patients of" the two entities. Plaintiffs' counsel maintains that the plaintiffs affidavit, the two flyers and this letter

agreement raise issues of fact as to whether the two movants were Dr. Gillen's actual employer or his employer via holding him out as such, i.e. an employer by estoppel.

Plaintiffs' counsel notes that in any event a preliminary conference has not yet been held, that discovery has not proceeded and that the relationship between Gillen and the two movants are solely within their knowledge, thus mandating that plaintiffs be afforded discovery before the issue of whether the movants can be subject to any liability is resolved.

On the issue of the arbitrability of the malpractice claims plaintiff offers her affidavit in which she asserts that on the morning of the surgery after the initial prep for the surgery and shortly before being taken to the operating room she was given a form which was "explained to be a 'consent' for the surgery", that at no time were any of the particulars of the form explained or discussed, that no one discussed arbitration with her, that she never intended to give away her legal rights and that at the time she signed the form she was in no condition to read or digest the form which seemed like a "formality necessary for surgery".


The branch of the motion which seeks to stay the action and to compel **arbitration is denied. Initially it should be noted that Dr. Gillen** waived any right he had to arbitration by failing to answer the complaint. In addition the arbitration agreement even if it were valid does not purport to benefit movant MHN of New York Inc.. Finally the arbitration agreement is invalid since it did not apprise the plaintiff that she was giving **up** her right to a trial by jury or judge. See: Wolfman v Herbstritt, 114AD2d 955 (2d Dept, 1985); Sanchez v Sirmons, 121 Misc2d 249 (Sup Ct, Bx Cty 1983); See generally: O'Keefe v South Shore Internal Medicine Associates, P.C., 102 Misc2d 59

(Sup Ct, Nassau Cty, 1979).

The branch of the motion which seeks to dismiss the action because the movants allegedly did not employ Dr. Gillen and/or render any medical care to the plaintiff is denied without prejudice to renewal following discovery. The evidence raises the possibility that at least one of the movants was Dr. Gillen's actual or apparent employer. Plaintiffs should be given a chance to explore during discovery Dr. Gillen's relationship with each of the movants and to ascertain whether the movants provided medical support personnel to assist Dr. Gillen in rendering his treatment to the plaintiff (See: complaint ¶¶ 7,8,9).

In conclusion the motion is denied. The foregoing constitutes the order and decision of the court.

Dated:

  
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J.S.C.