

Davis v McDougall

2007 NY Slip Op 33893(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0113882/2006

Judge: Eileen Bransten

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

Eileen Bransten

PR

Index Number : 113882/2006

PART 6

DAVIS, MAURICE

vs

MCDUGALL, CARL M.D.

EX NO.

113882/06

FILED DATE

10/2/07

FILED SEQ. NO.

02

FILED CAL. NO.

02

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits

2

Replying Affidavits

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

NOV 30 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11-20-07

Eileen Bransten

J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if necessary: DO NOT POST

NOTICE OF APPEARANCE

Case Name: *Davis v. McDougall*

Index Number: 113882/06

Nature of Appearance: preliminary conference

Date & Time: December 4, 2007, at 11:00 a.m.

Notes: Plaintiff is to provide responses to any outstanding demands for a bill of particulars no later than November 30, 2007.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
MAURICE DAVIS,

Plaintiff,

-against-

Index No. 113882/06
Motion Date: 10/2/07
Motion Seq. No.: 02

CARL MCDUGALL, M.D., CARL MCDUGALL,
M.D., P.C., MANHATTAN GI ASSOCIATES, INC.,
JOEL BRUCE FIELDMAN, M.D., JOEL BRUCE
FIELDMAN, M.D., P.C., JANE DOE #1 and JANE
DOE #2, said names being fictitious and unknown
to plaintiff,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

FILED
NOV 30 2007
NEW YORK
COUNTY CLERKS OFFICE

Pursuant to, among other provisions, CPLR 3212, defendants Joel Bruce Fieldman, M.D. (“Dr. Fieldman”) and Joel Bruce Fieldman M.D., P.C. (“Fieldman P.C.”) (collectively “Movants”), move for summary judgment dismissal of the complaint. Plaintiff Maurice Davis (“Ms. Davis”) opposes the motion.

Background

On September 26, 2006, Ms. Davis commenced this action. She alleges that a year earlier, on September 26, 2005, she went to Carl McDougall, M.D. P.C. for a colonoscopy and that “during the course of this examination, defendants Joel Bruce Fieldman, M.D., Jane Doe #1 and Jane Doe #2 began beating [her], including punches to her jaw and head.” Affirmation in Support of Movants’ Motion for Summary Judgment (“Supp.”), Ex. A, at ¶

11 (emphasis added). The complaint sets forth that Jane Doe #1 and Jane Doe #2 were employed by Carl McDougall, M.D. P.C., which is no longer a defendant in the action. Supp., Ex. A., at ¶¶ 7-8.

The complaint also contains the allegation that “Defendants Carl McDougall, M.D., Carl McDougall, M.D.P.C., and Joel Bruce Fieldman, M.D. P.C. “were negligent in failing to properly supervise their employees and/or other parties acting on their behalf in failing to prevent the battery upon plaintiff.” *Id.*, at ¶ 22.

On March 30, 2007, 10 days after initially serving their answer, Movants served an Amended Verified Answer, which asserted the defense of “lack of jurisdiction * * * due to untimely, incomplete and/or improper service of process.” Supp., Ex. D., at ¶ 9.

On July 23, 2007--well over 60 days from service of the amended Answer--Movants made this motion for summary judgment, urging that Dr. Fieldman “was not present at the time and location of the alleged incident” and Fieldman P.C. is “not liable for the alleged acts of its independent contractor.” Supp., at ¶ 2(a) and (b). Movants further seek summary judgment based on passage of the one-year statute of limitations for an intentional tort and based on failure to serve them within 120 days of filing the summons and complaint. *Id.*, at ¶ 2(d).

Ms. Davis opposes the motion.

Analysis

Movants argue that there is no triable issue of fact here. In support of their motion for summary judgment dismissal, they rely on an affidavit from Dr. Fieldman. Dr. Fieldman swears that:

“I was not present at the time and location of the alleged incident set forth in the Complaint. I was not in the medical office in Manhattan where the colonoscopy of plaintiff took place, nor was I anywhere in Manhattan. It is physically impossible that I committed such alleged violent and intentional acts and a battery upon plaintiff, punching her in the jaw and head, as set forth in the complaint. No criminal action was commenced. Simply put, I was not there.”

Dr. Fieldman’s Affidavit in Support (“Fieldman Aff.”), at ¶ 2.

Dr. Fieldman asserts that Dr. Anthony Randazzo, an independent contractor, was the anesthesiologist at Ms. Davis’ procedure, not him. Fieldman Aff., at ¶ 3. Dr. Fieldman asserts that he “knows of no prior complaints or problems regarding Dr. Randazzo and his performance of professional medical services.” Fieldman Aff., at ¶ 4.

Movants further argue that they cannot be vicariously liable for an intentional tort allegedly committed by an independent contractor. They point out that even assuming that Dr. Randazzo was an employee of Fieldman, P.C. (and there is no such allegation in the complaint) there can be no liability for an intentional tort since it is wholly outside the scope

of employment. Movants make plain that they have no connection to any of the “Jane Does” who were co-employees of defendant Carl McDougall, M.D., P.C. Supp., at ¶ 14.

In opposition, Ms. Davis does not contest that Dr. Fieldman was not present and could not have assaulted her. Rather, she contends that she “is unable to submit factual opposition” since she has not been afforded an opportunity for disclosure. She maintains that she needs “the depositions of both defendant [Dr. Fieldman] and Dr. Randazzo on the nature of this claimed independent contractor status, particularly the degree of control by [Movants] over Dr. Randazzo.” Plaintiff’s Affirmation in Opposition (“Opp.”), at ¶ 4. Ms. Davis further asserts that “depositions are required on defendants’ self serving claims that they were unaware of the incident and had no notice of any of Dr. Randazzo’s prior assaults.” *Id.*

Summary judgment must be granted to the Movants because Ms. Davis’ complaint does not contain any allegations against them that could serve as a basis for liability.

Analysis

Summary judgment is a “drastic remedy” that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also, Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted where an issue of fact is even “arguable.” *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991). Further, “on a defendant’s motion for summary judgment, opposed by

plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion at the outset has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.*

Dr. Fieldman has established through his affidavit that he was not present when Ms. Davis was allegedly assaulted. Ms. Davis does not offer any evidence demonstrating a question of fact as to whether Dr. Fieldman was there. Thus, Dr. Fieldman cannot be liable for battery. The complaint, moreover, is devoid of any allegation that an employee of Fieldman, P.C. other than Dr. Fieldman himself committed any wrongdoing. The only individuals, according to Ms. Davis' complaint, who committed torts are Dr. McDougall, Dr. Fieldman and two Jane Does, both of whom were employed by McDougall, P.C. and not Fieldman, P.C. It has been definitively established that Dr. Fieldman was not involved in the assault and there are no allegations in Ms. Davis' pleading that a different employee of Fieldman, P.C. even existed, much less did anything wrong.

Accordingly, the action against Movants must be dismissed pursuant to CPLR 3212, Ms. Davis having failed to demonstrate that her complaint sets forth any viable causes of action against them. *See, Jones v. Surrey Cooperative Apartments, Inc.*, 263 A.D.2d 33, 35-37 (1st Dept. 1999) (complaint made no “specific allegation of fraud, bad faith or self dealing” therefore it was not incumbent on the movant to establish the non-existence of those elements).

Because summary judgment is granted, there is no occasion to address Movants’ statute of limitations and belated improper service arguments.

Accordingly, it is

ORDERED that Movants’ motion for summary judgment dismissing the case against them is GRANTED and the Clerk of the Court is directed to enter judgment in their favor.

This constitutes the Decision and Order of the court.

Dated: New York, New York
November 20, 2007

ENTER


Hon. Eileen Bransten

FILED
NOV 30 2007
NEW YORK
COUNTY CLERKS OFFICE