

Morales v Weisenthal
2008 NY Slip Op 31740(U)
June 10, 2008
Supreme Court, Nassau County
Docket Number: 2162-06/
Judge: Daniel Martin
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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

NELSON MORALES and YUJAN MORALES.

Plaintiffs.

Sequence No.: 001 & 002
Index No.: 012162/06

- against -

IRA WEISENTHAL, ROBERT KIRREL, and
FOOTECH, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants Robert Kirrel and Footech, Inc.'s motion for an order 1) dismissing the complaint as asserted against defendant Footech, Inc. pursuant to CPLR 3211(a)(7); and 2) granting defendant Kirrel summary judgment dismissing the complaint as asserted against this defendant is granted in part and denied in part as set forth below. Plaintiff's cross-motion for an order granting plaintiff leave to serve an amended complaint adding Footech Podiatry, P.C. as a party defendant or substituting Footech Podiatry, P.C. as a party defendant for defendant Footech, Inc. is granted.

The following facts are undisputed. The instant matter is based upon personal injuries plaintiff Nelson Morales allegedly suffered as a result of podiatric surgery performed by defendants Ira Weisenthal and Robert Kirrel, podiatrists, on August 2, 2004 at their office which is located at 146 Manetto Hill Road, Plainview, New York. Plaintiffs commenced the instant action, alleging 1) medical malpractice on the part of defendants Weisenthal and Kirrel (first and third causes of action); 2) that "the treatment rendered by [defendants Weisenthal and Kirrel] was not performed to treat plaintiff, but was deceptively performed solely for financial gain for [themselves] and [their] corporation, Footech, Inc." for which plaintiff Nelson Morales claims to be entitled to punitive damages (second and fourth causes of action); 3) a separate cause of action for punitive damages against Footech, Inc. (fifth cause of action); 4) a derivative claim on behalf of plaintiff Yujan Morales, Mr. Morales' wife (sixth cause of action); and 5) a separate cause of

action for punitive damages against all defendants on behalf of Mrs. Morales (seventh cause of action). Defendants Kirrel and Footech, Inc. move and plaintiff cross-moves for the relief set forth above.

Defendant Footech, Inc.'s Motion to Dismiss/Plaintiff's Cross-Motion for Leave to Serve an Amended Complaint

Defendant Footech, Inc. moves to dismiss the complaint as asserted against this defendant pursuant to CPLR 3211(a)(7) on the grounds that plaintiffs fail to state a cause of action against this defendant. In her affidavit, non-party Meryl Weisenthal, Footech, Inc.'s CEO, avers that Footech, Inc. is a corporation that manages podiatry practices. The defendant's function include "billing and collection service, making appointments, office administration, bookkeeping services, public relations, computer services." Said defendant, avers Ms. Weisenthal, does not render care or treatment to patients and defendants Weisenthal and Kirrel were never employees, officers, principals or stockholders in Footech, Inc. Plaintiffs' complaint as asserted against defendant Footech, Inc. is based upon Footech, Inc.'s being in the business of podiatry and its (and the other defendants') treatment of plaintiff. Defendant Footech, Inc. contends that as it did not engage in the practice of podiatry and rendering treatment to patients, and further, that the two doctor defendants are not in any way affiliated with Footech, Inc., that plaintiffs fail to state a cause of action against this defendant.

In opposition to this branch of the motion and in support of their cross-motion plaintiffs seek leave to serve an amended complaint which either adds Footech Podiatry, P.C. as a party defendant or substitutes same for defendant Footech, Inc. because although plaintiffs were mistaken as to the identity of the correct entity, defendants cannot claim prejudice as 1) the complaint was brought against the individual defendants and their business; and 2) the defendants used the names of the two Footech entities interchangeably as reflected in Dr. Kirrel's business card which reflects him as being employed by Footech, Inc. Plaintiffs further claim that although the statute of limitations has expired, they are still entitled to the relief sought in the motion pursuant to the relation back doctrine. Annexed to plaintiffs' cross-motion as an exhibit is a print-out from the Secretary of State's Office which reflects that defendant Kirrel is the "chairman or chief executive officer" of Footech Podiatry, P.C., the proposed new defendant.

In opposition to the cross-motion defendants Kirrel and Footech, Inc. assert that the relation back doctrine is inapplicable to the instant matter because Footech, Inc. and Footech Podiatry, P.C. are separate entities who are not united in interest. The entities perform different functions, have different management, operate out of different addresses and are distinct and different forms of entities.

Where, as here, it is undisputed that the applicable statute of limitations has run and plaintiff seeks leave to serve an amended complaint which adds a new party defendant, the court will grant said motion pursuant to the relation-back doctrine where the new party is united in interest with the original parties to the action. See, Thomeson v. Suffolk County Police Department, __ N.Y.S.2d __, 2008 N.Y. Slip Op. 03632, 2008 WL 1820814 (2nd Dep't 2008); DeLuca v. Baybridge at Bayside Condominium I, 5 A.D.3d 533 (2nd Dep't 2004); Schiavone v.

Victory Memorial Hospital, 292 A.D.2d 365 (2nd Dep't 2002). In order for such claims against one defendant to relate back to claims against another, plaintiffs must demonstrate that 1) both claims arose out of the same set of conduct, transactions or occurrences; 2) the new party is united in interest with the original party such that the new party can be charged with notice of the institution of the action and the new party will not be prejudiced in defending same on the merits; and 3) the new party knew or should have known that but for plaintiffs' mistake as to the identity of the proper parties, the action would have been commenced against the new defendant. *Id.*

Defendants' position that Footech Podiatry, P.C. and Footech, Inc. are not united in interest is of no moment. It is undisputed by defendant Kirrel that he is the chairman or chief executive officer of the professional corporation. Plaintiff's burden was not to demonstrate that the proposed new defendant was united in interest with defendant Footech, Inc., but with any of the original defendants, i.e., defendant Kirrel. This plaintiffs have accomplished. See, e.g., Rivera v. Fishkin, 48 A.D.3d 663 (2nd Dep't 2008).

Thus, based upon the foregoing, plaintiffs are granted leave to serve an amended complaint which names Footech Podiatry, P.C. as a defendant herein as shall be more fully discussed below. That branch of the motion which seeks an order dismissing the complaint as against Footech, Inc. is granted, plaintiffs having admitted to erroneously naming said defendant as a party herein.

Defendant Kirrel's Motion for Summary Judgment

Defendant Kirrel moves for summary judgment dismissing the second, fourth, fifth and seventh causes of action, in each of which plaintiffs seek punitive damages. Defendant Kirrel seeks this relief on the bases that a claim for punitive damages based upon tort claims may not constitute a separate cause of action and there is no evidence herein that defendant Kirrel willfully or intentionally committed any wrongdoing or acted with reckless indifference. The court views this branch of the motion as more properly labeled as one to dismiss these claims for plaintiffs' failure to state a cause of action pursuant to CPLR 3211(a)(7). First, the fifth and seventh causes of action assert that plaintiffs are entitled to punitive damages. Where punitive damages are sought in connection with a tort, a separate claim for such damages may not be maintained. See, Goodman v. Garofalo, 59 A.D.2d 933 (2nd Dep't 1977). Accordingly, the fifth and seventh causes of action are dismissed.

Having reviewed the second and fourth causes of action in both of which plaintiffs seek punitive damages, the court notes that plaintiffs have failed to adequately plead a claim for which punitive damages may be recovered. Each cause of action alleges that "the treatment by [defendants Weisenthal and Kirrel] was not performed to treat plaintiff, but was deceptively performed solely for financial gain for [themselves] and [their] corporation, Footech, Inc." (See, complaint, paragraphs 11 and 18). Such to this court appears to amount to an attempt at alleging fraud on defendants' part. Where, as here, plaintiffs fail to specifically allege the facts which constitute the alleged fraud as required by CPLR 3016(b), the court will dismiss the cause of action. See, Mastro Jewelry Corp. v. St. Paul Fire and Marine Insurance Company, 70 A.D.2d 854 (1st Dep't 1979). The court therefore grants this branch of defendant Kirrel's motion to the

extent that the second, fourth, fifth and seventh causes of action shall be dismissed in their entirety.

Defendant Kirrel also moves for summary judgment dismissing the third cause of action in the complaint as asserted against this defendant for medical malpractice on the ground that this defendant did not perform the surgical procedure upon which plaintiffs' claims are based. In moving for summary judgment defendant Kirrel must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing the motion plaintiffs must demonstrate a triable issue of fact through admissible evidence. *Id.*

In support of his motion defendant Kirrel points to Mr. Morales' deposition testimony at which he testified that Dr. Weisenthal performed the surgery and Kirrel assisted him by making sure Mr. Morales did not move his foot, giving injections and placing "some kind of material" so that the patient would not see the procedure. Further, Mr. Morales testified that he did not observe defendant Kirrel cut his foot at all. (See, deposition transcript of Nelson Morales, pp.). Defendant Kirrel testified that he did not perform any of the surgery on Mr. Morales and had no input into the choice of procedure. (See, deposition transcript of Robert Kirrel, pp. 45-46, 51). Defendant Kirrel contends that as plaintiffs' allegation in the third cause of action is that this defendant performed the surgery, the cause of action should be dismissed because there is no issue of fact that Dr. Kirrel did not perform the surgery.

Where, as here, defendant Kirrel makes a *prima facie* demonstration of entitlement to summary judgment, the burden shifts to plaintiffs to demonstrate a triable issue of fact. Zuckerman v. City of New York, *supra*.

In opposition plaintiffs assert in relevant part that the records herein all reveal that defendant Kirrel handled and oversaw Mr. Morales' treatment and, most importantly, that he signed two separate post operative reports. Where, as here, a defendant doctor claims to have not participated in the surgery upon which the malpractice claim is based and there is documentary evidence signed by the doctor which contradicts his assertion, the court will find that an issue of fact exists which precludes summary judgment. See, Brown v. LaFontaine-Rish Medical Associates, 295 A.D.2d 167 (1st Dep't 2002). Defendant Kirrel's position set forth in reply that Brown is inapplicable to the matter at hand because in the instant matter plaintiff admitted that Dr. Kirrel did not perform the surgery is unavailing. At his deposition plaintiff described certain activities that Dr. Kirrel performed in assisting defendant Weisenthal. Nowhere do the parties point to any testimony as to whether the doctors consulted during the surgery as to the course of action to take. It has been held that where a treating physician who refers his patient to another doctor to perform the surgery makes the diagnosis and participates in the surgery by assisting therein, an issue of fact exists as to his liability in connection with the surgery. See, e.g., Arshansky v. Royal Concourse, 28 A.D.2d 986 (1st Dep't 1967). The court's role in deciding a motion for summary judgment is issue identification and not issue determination. Sillman v. Twentieth Century Fox, 3 N.Y.2d 395 (1957).

Accordingly, based upon the foregoing, defendant Kirrel's motion for summary judgment

dismissing the third cause of action is denied.

Based upon the foregoing it is directed that:

1) the second, fourth, fifth and seventh causes of action are all dismissed in their entirety;
and

2) plaintiffs are directed to serve an amended complaint in the form annexed to their motion as an exhibit except that the second, fourth, fifth and seventh causes of action contained therein are to be deleted.

So Ordered.


A.J.S.C.

Dated: June 10, 2008

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**