

Vulpone v Rose

2009 NY Slip Op 33381(U)

May 21, 2009

Sup Ct, New York County

Docket Number: 116281/2006

Judge: Jane S. Solomon

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This opinion is uncorrected and not selected for official publication.

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

-----X

VIVIAN VULPONE,

Plaintiff,

-against-

HOWARD ANTHONY ROSE, ELLEN GUTSCHKE
ROSE, and HOSPITAL FOR SPECIAL SURGERY

Defendants.

-----X

JANE S. SOLOMON, J.:

Index No. 116281/2006

Decision and Order

FILED

MAY 26 2009

INTRODUCTION

COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of a sexual relationship between plaintiff Vivian Vulpone ("Vulpone") and her doctor, defendant Howard Anthony Rose ("Rose"). Vulpone sues for, among other things, medical malpractice and emotional distress. She names Rose, his wife, and his hospital as defendants. The Roses move: (1) to dismiss the complaint for failure to serve process; (2) to dismiss the first and second causes of action as untimely under the applicable statute of limitations; and (3) to dismiss the fifth cause of action for failure to state a claim. Vulpone opposes the motion and cross-moves for an extension of time to serve process. The hospital also cross-moves to dismiss.

FACTUAL BACKGROUND

Rose treated Vulpone for a knee injury from December 12, 2002 to late 2003.¹ Vulpone alleges that a sexual relationship began on or about October 28, 2003 and lasted until June 19, 2006. Vulpone became pregnant as a result of the relationship and gave birth to a daughter in September 2006. She alleges that Mrs. Rose accessed her confidential medical records and, while she was pregnant, called and threatened her.

This case was commenced for Vulpone by Lenore Kramer, Esq., of Kramer & Dunleavy, LLP. Ms. Kramer signed a summons with notice that was filed with the New York County Clerk on October 31, 2006 and apparently drafted a complaint that was verified by Vulpone on November 6, 2006, but was not filed at that time. In January 2007, she filed an RJI with a motion to be relieved, which was granted by Justice Acosta on February 1, 2007 after an appearance by both counsel and client. In his decision, Justice Acosta stayed the action until April 2, 2007 to give Vulpone time to retain new counsel. Notably, in Ms. Kramer's moving papers, she stated that service of process had not yet been made.

¹ The date that plaintiff's medical treatment ended is disputed by the parties. Plaintiff alleges in her complaint that the final date of treatment was October 28, 2003, but Rose states that it was September 25, 2003.

Vulpone states that she searched for counsel until August 2008, when she decided to represent herself with the assistance of this Court's pro se office. She then hired a process server to serve defendants. She submits copies of affidavits of service, which state that defendants were served in September 2008. On October 6, 2008, she filed copies of the affidavits along with her earlier verified complaint with the New York County Clerk.

Although no new attorney appeared, nor did Vulpone appear of record pro se prior to Justice Acosta's appointment to the Appellate Division, a preliminary conference seems to have been calendared and then adjourned. When the matter was transferred to my inventory, I marked it off because a conference could not have been had without an appearing plaintiff and an adversary. On November 19, 2008, I restored the action, and the instant motion and cross-motions then followed.

DISCUSSION

The complaint alleges six causes of action: (1) medical malpractice; (2) breach of fiduciary duty; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) breach of medical confidentiality laws; and (6) negligent retention. Rose claims that the action should be dismissed because he and his wife were never served and

Vulpone's time to do so has expired.

If service is not made within 120 days of commencement, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

CPLR § 306-b. In opposing the motion, Vulpone claims that, on May 23, 2007, Rose and his wife were given a copy of the verified complaint by her attorney in a related family court action. Service was not effectuated that day: The complaint was not filed and it is not alleged that a copy of the summons was delivered. Moreover, 120 days from October 31, 2006 had passed, as it surely had in September 2008.

Granting the cross-motion for an extension is not warranted. Vulpone was not diligent in serving defendants or seeking an extension of time to do so, and she has not demonstrated that her claims have merit.

Vulpone's claim for medical malpractice was not timely made. The statute of limitations for medical malpractice is two and a half years. Her treatment with Rose ended, at the latest, on October 28, 2003, and the action was not commenced until October 31, 2006. Further, there is not a sufficient nexus between the sexual relationship and the medical treatment to give rise to such a cause of action. The statute of limitations on the breach of fiduciary duty claim expired no later than three

years from the last date of treatment, making this claim untimely. Moreover, the complaint does not adequately plead facts to support the required elements for this claim.

There is no merit to the intentional infliction of emotional distress cause of action because the alleged conduct is not extreme, outrageous, and beyond the limits of decency. In addition, plaintiff does not have a cause of action for negligent infliction of emotional distress because she did not experience an unreasonable risk of bodily injury or death.

The cause of action against Mrs. Rose for breach of medical confidentiality is without merit because there is no private right of action under the Health Insurance Portability and Accountability Act of 1996. See *Pecou v. Forensic Committee Personnel*, No. 06-CV-3714 (SJF), 2007 WL 1774693, at *1 (E.D.N.Y. 2007). Plaintiff does not point to any other confidentiality statutes that she may enforce in a private cause of action against defendants. Finally, the negligent retention claim asserted against the hospital is barred by the applicable three year statute of limitations and is not factually supported.

The foundation for plaintiff's claims is her romance with Rose. Plaintiff cannot recover for a consensual sexual relationship; nor can she sue for the emotional upset that she felt when the relationship ended, or when Mrs. Rose became involved. New York provides no legal remedy for seduction or

heart balm.

CONCLUSION

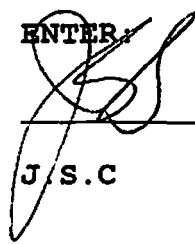
Accordingly, it hereby is

ORDERED that the motion to dismiss by defendants Howard Anthony Rose and Ellen Gutschke Rose and the cross-motion by defendant Hospital for Special Surgery are both granted to the extent that plaintiff's complaint is dismissed; and it further is

ORDERED that the cross-motion by plaintiff to extend the time for service is denied; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: May 21, 2009

ENTER:


J.S.C

JANE S. SOLOMON

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK