

**Pearlman v Employee Assistance Resource Serv.
Inc.**

2010 NY Slip Op 31758(U)

July 1, 2010

Supreme Court, Suffolk County

Docket Number: 04607/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

 STEPHEN E. PEARLMAN

Plaintiff(s),

-against-

EMPLOYEE ASSISTANCE RESOURCE
 SERVICES INC., SIMON ZYSMAN,
 WARREN SYSMAN, CENTEREACH
 MANAGEMENT GROUP, INC.

Defendant(s).

ORIG. RETURN DATE: July 30, 2008
FINAL RETURN DATE: September 23, 2008
MTN. SEQ. #: 001-MotD
CROSS MTN. SEQ.#. 002-MotD

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**DEFT'S ATTORNEY for Employee
 Assistance Resource Services Inc., and
 Simon Zysman and Warren Zysman :**
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Upon the following papers numbered 1 to 31 read on this motion and cross motion to dismiss: Notice of Motion and supporting papers 1 - 6; Notice of Cross Motion 7 - 14; Affirmation in Opposition to Motion and Cross Motion and supporting papers 15 - 24; First Reply Affirmation 25 - 28; Second Reply Affirmation and supporting papers 29 - 31; it is,

ORDERED that the pre-answer motion (001) on behalf of the defendants Employee Assistance Resources Services Inc., Simon Zysman and Warren Zysman, and the pre-answer cross motion (002) on behalf of the defendant Centereach Management Group, Inc. for orders dismissing the complaint pursuant to CPLR 3211(a)(7) and CPLR 3013 are decided as follows; it is

ORDERED and ADJUDGED as to all defendants that the following causes of action are dismissed: the First Cause of Action (which alleged no cause of action at all); the Second Cause of Action only insofar as it alleges a claim for malpractice; the Third Cause of Action which alleges a claim for breach of contract; the Fourth Cause of Action which alleges a claim for breach of professional duty; and, the Fifth Cause of Action which alleges a claim for punitive damages; and it is further

ORDERED that this action shall continue only as to the Second Cause of Action insofar as it alleges a claim for negligence; and it is further

ORDERED that the defendants are directed to serve a copy of this decision and order upon the plaintiff in accordance with CPLR 2103 within 45 days of the date of entry and to file proof of such service with the County Clerk in her capacity as the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on July 29, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.; said date allowing for the service of an answer in accordance with CPLR 3211(f).

This action arises from a two and a half month period in 2005 in which the plaintiff Stephen E. Pearlman (hereinafter Pearlman) was receiving outpatient care from the defendant Employee Assistance Resources Services Inc. which was allegedly owned and managed by the defendants Simon Zysman and Warren Zysman (hereinafter, collectively, EARS). During that time, Pearlman was residing in a 24-hour sober residence managed by the defendant Centereach Management Group, Inc. (hereinafter CMG).

According to the complaint, Pearlman was receiving care and treatment from EARS for his cocaine abuse and depression. CMG was the facility where he was required to reside during the time of treatment. Pearlman paid a daily fee to CMG was also covered his treatment and care from EARS. CMG also provided transportation to and from EARS.

Pearlman further alleges that a Resident Manager at CMG named "Joe," drove Pearlman in a vehicle owned by CMG "and/or" EARS (Complaint, ¶ 28) from the CMG residence to purchase drugs for their use on more than one occasion during Pearlman's stay there (Complaint, ¶¶ 30,31).

Pearlman alleges that EARS and/or CMG employed "Joe" (Complaint, ¶ 27) and had knowledge of "Joe's" actions in this regard (Complaint, ¶¶ 32, 33).

The Complaint purportedly contains five causes of action but, in actuality, only contains four as the so-called first cause of action merely contains factual allegations for the claims in the ensuing causes of action. Accordingly, since the delineated first cause of action literally states no cause of action whatsoever, it is insufficient on its face and is dismissed. This dismissal, however, does not eliminate the factual allegations contained therein.

The second cause of action sounds in negligence and malpractice. The malpractice cannot be medical because not only does it make no such claim but there is no physician or provider of medical services named as a party to this action. Moreover, the allegations in the complaint do not regard the providing of medical services. Accordingly, the malpractice can only be for non-medical, professional malpractice.

The third cause of action is for breach of contract; the fourth cause of action is for breach of professional duty; the fifth cause of action is for punitive damages.

In a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

In addition, affidavits submitted by the moving party (as contrasted to affidavits by the opposing party plaintiff) in support of such a motion which,

"Do no more than assert the inaccuracy of plaintiff's allegations, **may not be considered**, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint [*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314], and do not otherwise conclusively establish a defense to the asserted claims as a matter of law [*see Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 (1994)]" (*Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]) (emphasis provided).

Both the motion (001) and cross motion (002) seek dismissals of the complaint for failure to state a cause of action (*see* CPLR 3211[a][7]) and for failure to be sufficiently particular to give the court and the parties notice of factual averments pertaining to the causes of action (*see* CPLR 3013). In addition, CMG's cross motion asks for dismissal on the basis of not being properly served with the summons and complaint. This latter contention is based upon CMG's claim that EARS was served on its behalf and that EARS is a separate entity with no authority to accept service for CMG. This contention, however, is clearly refuted in Pearlman's opposition in which he includes an affidavit of service upon CMG by service upon the Secretary of State. This affidavit, which is presumptive of proper service, is not contested in CMG's reply papers on the cross motion. Accordingly, on the record before the Court, service is proper and not a basis for dismissal. This leaves only the CPLR 3211(a)(7) and CPLR 3013 issues for the Court to consider on both the motion and cross motion.

In support of this motion and cross motion, the defendants all contend that the complaint on its face is insufficient to support the causes of action contained therein. In addition, the defendant EARS submits affidavits in support of its motion (001) from the defendants Simon Zysman and Warren Zysman in which, as a practical matter, they do more than assert the inaccuracies of the allegations in the complaint. As such, these affidavits submitted by the defendants "may not be considered" on this motion (*see Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]).

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On the cross motion (002), CMG submits an affidavit from its president, Noah Klat. While Mr. Klat's affidavit, like the Zysmans' affidavits, contains factual allegations contrary to the allegations in the complaint and Pearlman's affidavit, nevertheless, on a motion for dismissal pursuant to CPLR 3211(a)(7), such assertions as to the inaccuracies stated in the complaint, rather than those which "conclusively" establish a defense, are not to be considered on such a motion (*id.*). In short, the defendants affidavits support a defense to the complaint's causes of action but, in light of the complaint taken as a whole along with the plaintiff Pearlman's affidavit, all of which are to be considered liberally and accepted as true (*see Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]), the defendants' affidavits cannot be said to conclusively establish a defense at this early, pre-answer stage of the proceedings.

Nevertheless, despite the non-applicability of the defendants' affidavits, after a review of the complaint in its entirety and consideration of the plaintiff's affidavit, all but one of the claims stated in the complaint fail to state a cause of action.

The purported first cause of action - which states no actual cause of action at all - has already been addressed herein and must be dismissed.

The second cause of action, in so much as it sounds in malpractice based upon the alleged professional conduct of the defendants and the fourth cause of action which claims breach of professional duty both fail to state causes of action.

Not only are these causes of action devoid of any factual allegations pertaining to the practices of professionals and their duties to this plaintiff but, in any event, the defendants do not qualify as professionals under New York law. The law is well-settled that in order to support a claim for professional malpractice (which encompasses any alleged breach of a professional duty), the defendant in question must be a "professional" (*see Pension Comm. of the Univ. Of Montreal Pension Plan v Banc of America Securities, LLC*, 592 F Supp 2d 608 [SDNY 2009]). And a "professional" is defined as one with extensive formal training and learning, where there is licensure and regulation indicating a qualification to practice, in which there is a code of standards beyond those accepted in the common market place and which has in place a system of discipline for any violation of those standards (*Id. at 625*, citing *Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 29, 725 NYS2d 592 [2001]; *see also Castle Oil Corp. v Thompson Pension Employee Plans, Inc.*, 299 AD2d 513, 514, 750 NYS2d 629 [2d Dept 2002]). In this case, there are no such allegations supporting that the defendants are "professionals" subject to "professional" standards with "professional" obligations and duties. Moreover, the plaintiff provides no authority to the contrary.

Accordingly, insofar as the second cause of action claims professional misconduct and the fourth cause of action claims a breach of professional duty, such claims fail to state a cause of action and must be dismissed.

However, insofar as the second cause of action claims common law negligence on the parts of the defendants, such a claim is sufficiently pleaded when taking into consideration the complaint as a whole and the plaintiff's affidavit in opposition to this motion and cross motion. The complaint itself, sufficiently describes events in which "Joe," the employee of EARS "and/or" CMG facilitated the plaintiff's leaving the

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facility for the purposes of purchasing and using illegal drugs, that EARS and CMG knew of these activities and that, as a result, the plaintiff failed a drug test, had his treatment terminated, was found in violation of a Court order and was incarcerated (*see* Complaint, ¶¶ 35-37). These allegations are pleaded with sufficient particularity and further supported by the plaintiff's affidavit to give the Court and the parties notice of transactions and occurrences intended to be proved and supply the material elements for a cause of action sounding in negligence (*see* CPLR 3013). Indeed, Pearlman's affidavit provides further facts as to the involvement of EARS in the operation of CMG.

Accordingly, the second cause of action insofar as it claims common law negligence against the defendants is sufficiently pleaded and supported. The respective requests for dismissal with regard to same (001 and 002), thus, are denied.

The third cause of action claims a breach of contract but fails to allege any contract or agreement upon which to base a breach of contract claim. The only reference in this third cause of action to a contract is the mere conclusory allegation that the defendants "had a contractual duty to provide treatment for chemical dependency and depression to the Plaintiff in a safe and acceptable manner" (Complaint, ¶ 45). The complaint must provide some support for the existence of an actual contract or agreement. There is no such support here. The mere paying to or on behalf of the defendants a daily fee, while it may support some common law duty, does not rise to the level of a formal contract. Accordingly, the third cause of action sounding in breach of contract is dismissed.

Lastly, the fifth cause of action states a claim for punitive damages. To support such a claim, it must be alleged and supported that the defendants' conduct was "gross, wanton, or willful, or of such high moral culpability" to justify the award of punitive damages (*779 E.N.Y. Ave. Assoc., LLC v Gurary*, 31 AD3d 627, 627, 819 NYS2d 921 [2d Dept 2006], *citing Borkowski v Borkowski*, 39 NY2d 982, 983, 387 NYS2d 233 [1976]).

While the complaint describes the conduct of the defendants as "reprehensible," it does not contain any factual allegations or averments of any conduct which was "gross, wanton, . . . willful, or of . . . high moral culpability" (*id.*). Accordingly, the fifth cause of action claiming punitive damages must be dismissed.

In conclusion, the only remaining cause of action in the complaint is the second cause of action but only to the extent that it alleges common law negligence.

This constitutes the decision and order of the court.

Dated:

July 1, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.