

Megibow v Troncale

2010 NY Slip Op 32813(U)

October 4, 2010

Sup Ct, NY County

Docket Number: 100858/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 100858/2008

MEGIBOW, ALEC J., M.D.

vs

TRONCALE, JOSEPH A., M.D.

Sequence Number : 003

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied as stated

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

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/10

EJG

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
ALEC J. MEGIBOW, M.D.,

Plaintiff,

-against-

Index No.: 100858/08

JOSEPH A. TRONCALE, M.D., SUSAN BLANK, M.D.
SCOTT PALST, M.D., AND CARON ADDICTIONS
HOSPITAL, FORMERLY THE CARON FOUNDATION
d/b/a CARON NEW YORK,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
OCT 12 2010
NEW YORK
COUNTY CLERKS OFFICE

On the ground of fraud, plaintiff moves for an order vacating a settlement agreement and re-opening the case he filed in this court under the index number above (the Supreme Court case).¹ Plaintiff also moves for an order removing his currently pending case from the Civil Court of the City of New York (Civil Court) to this court, on the basis that he seeks damages exceeding the jurisdictional limits of the Civil Court (CPLR 325 [b]). In addition, plaintiff seeks an order setting this case down for a conference to pursue, with the court's aid, global settlement of this action. Defendants oppose the motion and move, pursuant to CPLR 8303-a and 22 NYCRR 130.1-1, for legal fees and costs.

In this motion, plaintiff, a medical doctor, claims that he was defrauded in entering into a settlement agreement with defendants Joseph A. Troncale, M.D., Susan Blank, M.D., Scott Palst, M.D. and the Caron Addictions Hospital. The court's electronic records do not reveal that a

¹Plaintiff moves pursuant to CPLR 2104, which is not applicable here.

complaint was ever filed in the Supreme Court case, and no complaint has been submitted here. Defendants have submitted a copy of a stipulation of discontinuance, that was filed on March 31, 2009, which terminated the Supreme Court case, with prejudice.

In March 2010, plaintiff commenced the Civil Court case by summons and notice. Through his attorney's affidavit, plaintiff claims that he paid the defendants \$45,000 for the care and treatment of a non-party patient (the Patient) and, in 2007, was informed by defendants that the Patient's insurance carrier had rejected the Patient's claim for payment for her treatment (Bently Aff., ¶ 6). Plaintiff further claims that after filing the stipulation of discontinuance in the Supreme Court case in 2009, he learned that the insurer had made a payment on the Patient's claim in 2008.

It appears that there is no dispute that plaintiff paid for the care provided by defendants to the Patient. In addition, defendants do not here deny that they accepted plaintiff's money as payment for services provided to the Patient, and then later received payment for that same care from the insurer/third-party payer. Defendants also do not deny that after having informed plaintiff that the Patient's claim had been rejected, they did not thereafter inform him a payment had been made. What they do state is that plaintiff did not ask.

In order to obtain removal of the plaintiff's Civil Court case to this court, plaintiff is required to show the merits of the case, the reasons for the delay, and further, that the increase in damages is warranted by reason of facts which only recently came to the plaintiff's attention (*Barsoum v Wilson*, 255 AD2d 537, 537-538 [2d Dept 1998]; *Gambino v Swan*, 152 AD2d 620, 621 [2d Dept 1989]). There has been no significant delay. Therefore, there is no reason to address that issue.

Defendants argue that plaintiff's claim is frivolous. Specifically, defendants contend that plaintiff's request should be denied because he executed a broad release for any claims whether suspected, known or unknown. In addition, defendants contend that, assuming as true plaintiff's assertion that they told plaintiff, in 2007, that the Patient's insurance claim had not been paid, such statement was made, well before the 2009 settlement of the Supreme Court case, was not false when made and thereafter could not be reasonably relied upon.² Defendants contend that plaintiff's statement through counsel, that he eventually obtained the information about the insurance payment, demonstrates that he could have obtained this information through the use of ordinary intelligence and that defendants did not have knowledge which was not readily available to plaintiff, thus negating any claim of reliance. Defendants also note that there is no confidential or fiduciary relationship between the parties.

Plaintiff states that his case is based on defendants' failure to inform him of the insurance payment, and thus appears to sound in fraudulent concealment, which is predicated on the concealment of a material fact, not readily available to the plaintiff, scienter, justifiable reliance, and injury (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). Despite the "[s]trong policy considerations" supporting the enforcement of settlement agreements (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]), and that "[s]tipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230

²Defendants state that the insurance claim related to the Patient's treatment had nothing to do with the Supreme Court case, is not material, and that plaintiff did not inquire about the insurance claim in connection with the settlement of that case, but provides nothing to support these assertions. Neither party has submitted a complaint from the Supreme Court case, and the court's electronic records do not show that a complaint was filed therein. In any event, as discussed below, this action cannot be re-opened.

[1984]), “where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident . . . a party [may] be relieved from the consequences of a stipulation made during litigation” (*id.*; see *Booth v 3669 Delaware, Inc.*, 92 NY2d 934, 935 [1998]; see also *Mangini v McClurg*, 24 NY2d 556 [1969] [fraud is a ground for setting aside a release]; see *Anger v Ford Motor Co., Dealer Dev.*, 80 AD2d 736 [4th Dept 1981] [motion to dismiss, based on a release, should be denied where the complaint alleges fraud in the procurement of a release]).

While generally, mere silence does not constitute fraudulent concealment, and is not actionable absent a duty to speak or disclose, a duty to disclose may be found when there is a fiduciary or confidential relationship between the parties (*Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692 [1978]). Defendants state that there was no fiduciary or confidential relationship between the parties. Plaintiff does not appear to claim otherwise, and the basis for finding that such a duty exists is not apparent.

A duty to disclose may also arise in other circumstances, however, such as where one party has superior knowledge that is not readily available to the other party, and the party with the superior knowledge knows that the other party is acting on the basis of mistaken knowledge (*id.*; *Sterling Natl. Bank v Israel Discount Bank of New York*, 305 AD2d 184 [1st Dept 2003]; *Young v Keith*, 112 AD2d 625 [3d Dept 1985]). A duty to speak or disclose may also be found where a party is dependent on the defendant for relevant facts, and the defendant has made a misleading partial disclosure left unremedied (*Juman v Louise Wise Services*, 254 AD2d 72 [1st Dept 1998]).

As to defendants’ argument that plaintiff’s claim fails because his reliance was not

reasonable, the First Department has indeed stated that “[o]ne to whom an allegedly false representation is made may not rely thereon if the means of obtaining the truth are available by the exercise of ordinary intelligence” (*Matter of Jack Kent Cooke Inc. [Saatchi & Saatchi North America]*, 222 AD2d 334, 335 [1st Dept 1995]). However, the question of whether or not a party could have obtained facts through the exercise of ordinary diligence is generally a jury question (*Gizzi v Hall*, 300 AD2d 879, 882 [3d Dept 2002]). Moreover, while the court is working with somewhat sketchy facts, defendants’ argument is based on the assumption that because plaintiff independently, and after the 2009 settlement was entered into, found out that the insurance made payments on the claim, this information was available thorough the exercise of ordinary diligence or intelligence *before* the time of the settlement. Whether or not plaintiff had access to such information, or whether this is an issue that may be determined as a matter of law in this case, is not ascertainable on this record.

Further, plaintiff has not met the requirement to demonstrate the increased damages required to remove his case to this court (*see Barsoum*, 255 AD2d at 537-538 [discussing CPLR 325 (b)]). The plaintiff’s Civil Court summons and notice demands damages of \$24,000, and plaintiff does not demonstrate the basis for claiming an increase in damages above that amount. While plaintiff might have done this by, for example, providing more information about additional knowledge he received as to the amount of the insurance payment, thereby demonstrating that he would have been entitled to the return of all or a portion of the \$45,000 paid, he did not do so.³ As plaintiff has not made this showing, his motion to transfer is denied

³In an affidavit submitted by plaintiff to the Civil Court, plaintiff’s counsel asserted that the court does not have jurisdiction because he intends to request discovery tantamount to that

without prejudice to seek leave upon proper papers in a separate plenary action, if so advised by counsel.

As previously discussed, the Supreme Court case, originally filed under the index number on this decision and order, was terminated by plaintiff's filing of the stipulation of discontinuance with prejudice. Thus, there is no action at this court, such that the relief that plaintiff seeks may be provided on this motion (*see Teitelbaum Holdings v Gold*, 48 NY2d 51 [1979]; *see also Hotel Prince George Affiliates v Grimbilas*, 241 AD2d 302, 303 [1st Dept 1997] [stipulation of discontinuance had been filed, the actions were terminated and the stipulation could only be set aside in a separate plenary action]; *see Thompson Med. Co. v Benjamin Pharms.*, 4 AD2d 504, 505 [1st Dept 1957], discussing *Yonkers Fur Dressing Co. v Royal Insurance Co.*, 247 NY 435 [1928]). There is also no judgment to be vacated (*see CPLR 5015*). Thus, the relief plaintiff seeks, the setting aside or vacatur of the settlement documents, may be sought only through the commencement of a plenary suit (*see Hotel Prince George Affiliates*, 241 AD2d at 303; *see also Yonkers Fur Dressing Co.*, 247 NY at 446; *Thompson Medical Co.*, 4 AD2d at 505), which plaintiff claims to have done at the Civil Court.

As plaintiff's motion to remove his case to this court has been denied, and the Supreme Court case may not be re-opened, plaintiff's request that this case be set down for a conference and for the court's assistance in settling the case is denied, as there is no pending action before this court. The parties are, of course, always free to engage in settlement efforts of their own.

Defendants' motion for costs and attorneys' fees is also denied. Pursuant to 22 NYCRR

which would be demanded in an accounting. While the basis for entitlement to such discovery is not made clear, this is not the reason plaintiff states is the basis for his request for a transfer.

130-1.1 (c), conduct is deemed frivolous where, among other things, "it is completely without merit in law" or "asserts material factual statements that are false" or occasions unnecessary delay (22 NYCRR 130-1.1 [c] [1], [3]). In determining whether conduct is frivolous, courts must consider all of the relevant circumstances under which the conduct took place. Defendants have not demonstrated that plaintiff continued with his case when the lack of a legal or factual basis was or should have been apparent to him, made false assertions, or that there was unnecessary delay, or another other basis for attorneys' fees. Defendants also cite to CPLR 8303-a, but that provision requires a demonstration of bad faith. Defendants have not demonstrated plaintiff's bad faith.

Accordingly, it is

ORDERED that plaintiff's motion to vacate the stipulation of discontinuance in this case and to remove his case from the Civil Court of the City of New York to this court is denied without prejudice to moving to transfer the case, upon submission of proper papers in a separate plenary action; and it is further

ORDERED that defendants' motion for costs and sanctions pursuant to 22 NYCRR 130-1.1 and CPLR 8303-a is denied.

This Constitutes the Decision and Order of the Court.

Dated: October 4, 2010

ENTER:

FILED
OCT 12 2010
 NEW YORK
 COUNTY CLERK'S OFFICE
 J.S.C.
EMILY JANE GOODMAN