Wheeleer v Kron
2011 NY Slip Op 30530(U)
February 16, 2011
Supreme Court, New York County
Docket Number: 108127/10
Judge: Joan B. Lobis
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SCANNED ON 2/17/2011
[* 1]

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

PRESENT: Joan B. Lobis PART 6

Index Number : 108127/2010
WHEELER, ROBERT
vs.
KRON, M.D., LEO
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE 8/31/10
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

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supp. opposition: 10-14
supp. reply: 15-17

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

decided in accordance with accompanying decision and order.

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

FILED
FEB 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/16/11

[signature] 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
NEW YORK COUNTY: IAS PART 6
--X
ROBERT WHEELER,

Plaintiff,

-against-

LEO KRON, M.D. and BETSY BORUCHOFF,

Defendants.
--X

Index No. 108127/10

Decision and Order

FILED

FEB 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.:

On or about July 26, 2010, defendant Leo Kron, M.D., moved this court for an order dismissing plaintiff Robert Wheeler's action against him, under C.P.L.R. Rule 3211(a)(7), on the ground that the complaint fails to state a cause of action, as Dr. Kron and Mr. Wheeler never established a physician-patient relationship. Mr. Wheeler opposed the motion. At oral argument on September 28, 2010, I notified the parties, pursuant to C.P.L.R. Rule 3211(c), that I would convert Dr. Kron's motion to dismiss to a motion for summary judgment on the issues of physician-patient relationship and proximate cause as related to the medical malpractice claim, and I gave the parties time to supplement their papers. Accordingly, I will evaluate that branch of Dr. Kron's motion regarding the medical/psychiatric malpractice claim under the standard for summary judgment under Rule 3212, and I will evaluate the remainder of the causes of action under the standard for dismissal under Rule 3211(a)(7).

Dr. Kron is a psychiatrist. Mr. Wheeler's young daughter was Dr. Kron's patient while Mr. Wheeler and his former wife were involved in a custody/visitation dispute. On May 1, 2008, Dr. Kron e-mailed Mr. Wheeler and his ex-wife to express his concerns about plaintiff's visitation with his daughter. In the e-mail (hereinafter, the "May 1, 2008 E-mail"), Dr. Kron wrote:

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> I am writing this to express my great concern about [your daughter's] psychological welfare. As you know, your separation has been a great strain on her and has raised persistent anxieties undermining her sense of safety, security and trust. The usual play in her sessions contains repeated stories of loss, danger and mistrust. However, I was especially alarmed during the Wednesday session of last week. She appeared emotionally traumatized, disorganized and grim in a way I had not seen before. She communicated great fear, that she was not safe, could be harmed, and needed to protect herself against overwhelming dangers.
>
> I learned later that she had had an unsupervised visit with her father the night before, during which she was surprised to be unexpectedly taken to his home. The presence of the supervising person serves to reassure her. For the present, in order to minimize further psychological trauma, I strongly recommend that unsupervised visits be brief and restricted to public places. Also it would diminish her anxiety if [she] were told in advance what the plan for each visit will be.

In plaintiff's complaint, he alleges that Dr. Kron and his ex-wife conspired to deny him access to his daughter. He claims that his ex-wife used the May 1, 2008 E-mail at a custody hearing to move for a reduction in his visitation with his daughter, which plaintiff asserts was granted. Plaintiff then claims that he asked Dr. Kron to stop treating his daughter, which he did not do. The complaint further alleges that in February 2009, Dr. Kron admitted to Mr. Wheeler that he had made a "mistake" in writing the May 1, 2008 E-mail. The complaint also alleges that Dr. Kron gave false testimony at a custody hearing in October 2009

The complaint asserts four causes of action against Dr. Kron: (1) intentional infliction of emotional distress;[1] (2) negligent infliction of emotional distress; (3) general negligence; and (4)

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[1] Dr. Kron's motion papers only address the fact that he owed no legal duty to plaintiff. Duty is an element of negligence, negligent infliction of emotional distress, and medical malpractice, but

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medical/psychiatric malpractice. In particular, the complaint alleges that Dr. Kron was negligent, and/or departed from generally accepted medical standards, in

> failing to afford the plaintiff that degree of care customarily afforded to patients under the same or similar circumstances; in ignoring and/or failing to provide for or to attend to the needs of the plaintiff; in lying under oath; in making and relying upon false claims against plaintiff; in conspiring to deny plaintiff access to his daughter; in engaging in a conflict of interest; [and] in subjecting plaintiff to humiliation and ridicule[.]

In initially moving to dismiss the claims sounding in negligence, Dr. Kron maintained that he never treated plaintiff, so he owed him no duty. He submitted a statement that he never provided any medical care, treatment, diagnosis, or prescription medication to Mr. Wheeler; that he treated Mr. Wheeler's daughter and testified in court with respect to a divorce proceeding between Mr. Wheeler and his ex-wife; and that he never established a physician-patient relationship with Mr. Wheeler.

In his initial opposition, Mr. Wheeler asserted that his claim for general negligence against Dr. Kron was not made against Dr. Kron in his capacity as a physician, so in that respect, Dr. Kron's duty to Mr. Wheeler is to act as a generally prudent, reasonable person, not as a physician. Nevertheless, as to the medical malpractice claim, Mr. Wheeler asserted that a physician-patient

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not intentional infliction of emotional distress. Dr. Kron's motion fails to address why the claim for intentional infliction of emotional distress should be dismissed. To make out a cause of action for intentional infliction of emotional distress, plaintiff must allege acts "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Hernandez v. Central Parking System of New York, Inc., 63 A.D.3d 411 (2009) (citation omitted). This decision does not address whether the claim for intentional infliction of emotional distress is pled sufficiently to withstand a motion to dismiss under Rule 3211(a)(7). For now, this claim survives against Dr. Kron.

relationship did exist between himself and Dr. Kron. In his affidavit, plaintiff claimed that in 2009, he had "several telephone conversations" with Dr. Kron in which Dr. Kron counseled him regarding his relationship to his daughter. Mr. Wheeler stated that at the time these conversations took place, he considered himself Dr. Kron's patient and he felt that Dr. Kron was providing him with "counseling and other services . . . in his professional capacity." He also claimed that Dr. Kron billed him for those services. Annexed to plaintiff's initial opposition papers are copies of invoices on Dr. Kron's letterhead, sent to Mr. Wheeler, purportedly for "Professional Services Rendered for: Robert Wheeler." The invoices are for about a dozen dates of treatment from April 2008 through October 2009.

In his initial reply papers, Dr. Kron argued that the invoices referenced in Mr. Wheeler's papers were for the daughter's therapy and not for any treatment for Mr. Wheeler. Dr. Kron maintained that he did speak to Mr. Wheeler, but that the conversations were merely to inform Mr. Wheeler about the treatment he was providing to his daughter, and that he in no way counseled Mr. Wheeler. Dr. Kron asserted that these conversations did not establish a physician-patient relationship. He asserted that no medical records or counseling records exist for Mr. Wheeler because there was no physician-patient relationship between the two of them. Accordingly, Dr. Kron argued, he owed no legal duty to Mr. Wheeler.

After oral argument on the initial submissions, the parties supplemented their papers on the issues of physician-patient relationship and proximate cause as related to the medical malpractice claim. In his supplemental opposition, Mr. Wheeler submits a second affidavit in which he states that he had eleven sessions with Dr. Kron. At these sessions, Mr. Wheeler asserts that he

was alone with Dr. Kron and that his daughter did not attend the sessions. He also states that he continued to treat with Dr. Kron after his daughter stopped treating with him. Mr. Wheeler states that he paid for his own distinct treatment sessions with Dr. Kron, while his ex-wife paid the bills for his daughter's treatment. He also claims that Dr. Kron diagnosed him with depression and a personality disorder. Mr. Wheeler states that he not only discussed his father-daughter relationship with Dr. Kron, but also his divorce, insomnia, nightmares, worries, and problems at work. He believed that Dr. Kron was his therapist and was treating him confidentially. Mr. Wheeler claims that as a result of Dr. Kron's malpractice and negligence in writing the May 1, 2008 E-mail, his visitation with his daughter was decreased. Additionally, he claims that he suffered nightmares, sleeplessness, anxiety, night terrors, and other psychological damage as a result of the May 1, 2008 E-mail, unrelated to the decreased visitation. Mr. Wheeler states that he "had to show" his employer the May 1, 2008 E-mail in the "event of publicity." He claims that he suffered anxiety over whether he might lose his job. He also states that he suffered, and continues to suffer, severe anxiety over whether Dr. Kron would report that he had molested his daughter, and that his friends, family, and employer would believe that he molested his daughter; the court finds this peculiar because the May 1, 2008 E-mail does not mention sexual abuse in any way whatsoever. Regardless, Mr. Wheeler states that once he stopped treating with Dr. Kron, he started treating with Dr. Gary Collins, and that he is still treating with Dr. Collins "to deal with emotional trauma experienced as a result of Dr. Kron's actions." Mr. Wheeler annexes what are purportedly his treatment records from Dr. Collins, which indicate that he started treating with Dr. Collins as of April 14, 2009.

In further support of his opposition to dismissal, Mr. Wheeler annexes an affidavit from Roy Lubit, M.D., Ph.D., who sets forth that he board certified in psychiatry, neurology, child

and adolescent psychiatry, and forensic psychiatry. He states that his opinion is based on an interview with Mr. Wheeler and his review of the May 1, 2008 E-mail, the invoices from Dr. Kron, the pleadings, the motion papers, and "landmark psychiatry cases." Dr. Lubit opines that a physician-patient relationship existed between Mr. Wheeler and Dr. Kron. Dr. Lubit sets forth that children's therapists treat both the child and the parents; when parents take a child to see a psychiatrist and they meet with the psychiatrist and speak about their own issues, the psychiatrist is treating the parents and the child, and a doctor-patient relationship exists between the psychiatrist and the parents. Dr. Lubit opines that "in the case at hand, there are additional factors, which if true, indicate that a doctor patient relationship existed between Dr. Kron and Mr. Wheeler." (Emphasis added). Those factors are: that plaintiff says he met with Dr. Kron for entire sessions without the daughter being present; that Mr. Wheeler says he spoke to Dr. Kron about his own issues and not simply about the daughter; that Mr. Wheeler says that he continued to see Dr. Kron after the daughter ceased treatment with Dr. Kron; that Dr. Kron's bills list Mr. Wheeler as the patient; and that Mr. Wheeler says that Dr. Kron diagnosed him as having a personality disorder. Dr. Lubit opines that Dr. Kron knew or should have known that the May 1, 2008 E-mail would likely lead to Mr. Wheeler's visitation being curtailed, and that the curtailment of visitation would cause harm to Mr. Wheeler and his daughter. He opines that Dr. Kron performed a "markedly inadequate evaluation" prior to making a visitation recommendation that risked harming Mr. Wheeler and his daughter, that this constituted a departure from generally accepted medical standards, and that the departure harmed Mr. Wheeler. Dr. Lubit also opines that Dr. Kron should have stopped treating plaintiff's daughter once Mr. Wheeler asked him to stop treating her. He further states that "it was reported" to him that Dr. Kron was refusing to turn over Mr. Wheeler's treatment records, which he states that Mr. Wheeler is entitled to have.

Based on the above affidavits, counsel for plaintiff argues that a physician-patient relationship exited between Dr. Kron and Mr. Wheeler. Counsel also argues that Dr. Kron committed malpractice in failing to conduct a proper investigation before making the visitation recommendation in the May 1, 2008 E-mail. Counsel claims that Dr. Kron wrote the May 1, 2008 E-mail before he had ever seen or spoken to Mr. Wheeler. Counsel maintains that Dr. Kron's malpractice proximately caused plaintiff's damages, including his reduced visitation with his daughter, the severe emotional trauma the reduced visitation caused him, and the psychiatric injuries he suffered separate and distinct from the emotional trauma from the reduced visitation. Counsel further maintains that Dr. Kron owed plaintiff a duty to exercise reasonable care and prevent harm, based on his duty as a practicing physician towards the public at large. She argues that Dr. Kron's inadequate evaluation of plaintiff, as set forth in Dr. Lubit's affidavit, shows how Dr. Kron violated generally accepted medical standards. For these reasons, plaintiff argues that triable issues of fact exist, precluding summary judgment.

In the supplemental reply, Dr. Kron again asserts that there was no physician-patient relationship, that any meetings were in furtherance of Dr. Kron's treatment of plaintiff's daughter, and that Dr. Kron possesses no separate medical chart for Mr. Wheeler. Counsel asserts that Dr. Kron did not turn over the records of the daughter's treatment because it was unclear whether Mr. Wheeler had the authority to sign off on the authorizations to release his daughter's records. Nevertheless, Dr. Kron argues that even if the court finds that a physician-patient relationship existed between Dr. Kron and Mr. Wheeler, his injuries did not stem from that relationship. Counsel points out that plaintiff argues that the May 1, 2008 E-mail was sent before Dr. Kron had ever seen or spoken to Mr. Wheeler. Therefore, any alleged injuries related to the May 1, 2008 E-mail did not

arise in the context of a physician-patient relationship with Mr. Wheeler. Further, counsel for Dr. Kron argues that Mr. Wheeler has not articulated any deviation from the standard of care arising out of the treatment that Dr. Kron allegedly provided to him. Rather, defendant argues, plaintiff's entire complaint rests on allegations that Dr. Kron failed to adequately assess his daughter before writing the May 1, 2008 E-mail, an alleged deviation from the standard of care as to his daughter. Counsel argues that Dr. Lubit's affidavit fails to establish a physician-patient relationship because expert testimony can only be used to establish breach and causation, not duty.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). As to a claim of medical malpractice,

> [t]he threshold question in determining liability is whether the defendant doctor owed the plaintiff a duty of care. This is a question for the court, and generally not an appropriate subject for expert opinion. However, a doctor who actually treats a patient has 'a duty of care' toward that patient.

Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 307 (1st Dep't 2007) (internal citations omitted).

Dr. Kron's affirmation in support of his initial motion is sufficient to make out a prima facie showing that he never treated plaintiff and that no physician-patient relationship existed between them. Further, Dr. Kron has demonstrated that even assuming, arguendo, that there was a

physician-patient relationship at some point between Dr. Kron and plaintiff, the departure plaintiff complains of arose solely out of Dr. Kron's treatment of plaintiff's daughter, and not plaintiff. If Dr. Kron had never spoken or seen plaintiff prior to the May 1, 2008 E-mail, as plaintiff alleges, it would be impossible for a physician-patient relationship between them to have been formed prior to that date.

In rebutting Dr. Kron's prima facie showing that he owed no duty to plaintiff, plaintiff must show that an issue of fact exits as to whether Dr. Kron was treating him. To this end, contradictions abound in Mr. Wheeler's papers. In his first sworn affidavit, Mr. Wheeler described the physician-patient relationship as "several telephone conversations" that he had with Dr. Kron in 2009. This statement supports Dr. Kron's assertion that there was no physician-patient relationship between the two, at least at the time of the alleged malpractice in May 2008. In his second sworn affidavit, plaintiff changes his story and insists that he had eleven private therapy sessions alone with Dr. Kron starting on April 9, 2008. The statement in the second sworn affidavit is blatantly contradicted by plaintiff's allegation that Dr. Kron committed malpractice by sending the May 1, 2008 E-mail without ever having seen or spoken to Mr. Wheeler. On a motion for summary judgment, "'[a] party's affidavit that contradicts [his] prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment[.]'" Amaya v. Denihan Ownership Co., LLC, 30 A.D.3d 327, 327-28 (1st Dep't 2006), quoting Harty v. Lenci, 294 A.D.2d 296, 298 (1st Dep't 2002). Mr. Wheeler has failed to rebut Dr. Kron's prima facie showing that no physician-patient relationship—and therefore no duty—existed at the time of the alleged malpractice in May 2008. Accordingly, the claim for medical malpractice shall be dismissed.

The remainder of the motion deals with whether plaintiff's other claim should be dismissed under C.P.L.R. Rule 3211. On a Rule 3211 motion to dismiss, "the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994), citing C.P.L.R. § 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Id., at 87-88 (citations omitted). However, if the complaint, on its face, fails to plead facts establishing all of the essential elements of a particular cause of action, that cause of action must be dismissed.

Duty is an element of a claim for general negligence and must be pled in a complaint asserting such. Aside from the physician-patient relationship (discussed, supra), plaintiff's complaint has alleged no special relationship or legal duty between Dr. Kron and Mr. Wheeler with respect to the cause of action for general negligence. In general, physicians do not have a duty to a person other than the person he or she is treating. Plaintiff argues that Dr. Kron, as a physician, owes a "general duty" to the public at large to exercise reasonable care and prevent harm. Neither of the cases plaintiff cites supports this contention as to these facts here. In Tenuto v. Lederle Laboratories, 90 N.Y.2d 606 (1997), the Court of Appeals found that a doctor owed duty of care to warn a patient's family of the risk of incurring polio, an infectious and highly contagious disease, from the patient. The circumstances in Tenuto are readily distinguishable from this case, which does not involve a fatal or debilitating disease for which a heightened or special duty of care to third parties might be appropriate. In Caryl S. v. Child & Adolescent Treatment Svcs. Inc., 161 Misc. 2d 563 (Sup. Ct. Erie Co. 1994), a case that is neither controlling nor persuasive here, the trial court determined that

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> where the determination of sexual abuse is made by a professional treating a child, with subsequent actions taken based upon that determination and aimed, whether in whole or in part, at shaping not only the conduct and well-being of the child but also the conduct of the suspected abuser, or the relationship between them, a duty of care is owed not only to the child but also to the alleged abuser.

Again, the facts of Caryl S. are readily distinguishable; here, there was no accusation or determination of sexual abuse here, for which a heightened or special duty of care to third parties might be appropriate. There being no special or legal duty pled in the complaint (beyond the physician-patient relationship alleged and discussed, supra), plaintiff has failed to plead all of the elements required to state a cause of action general negligence. Accordingly, this claim shall be dismissed.

The fact that plaintiff's complaint has alleged no special relationship or legal duty between Dr. Kron and Mr. Wheeler is also reason to dismiss plaintiff's claim sounding in negligent infliction of emotional distress for failure plead all of the elements required to state a cause of action. "A cause of action for negligent infliction of emotional distress, . . . , generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dep't 2004) (citations omitted). The court has determined that Dr. Kron owed no duty to Mr. Wheeler. Moreover, plaintiff's complaint does not allege that plaintiff was physically injured nor put in fear of physical injury, nor is there any claim that any act by Dr. Kron exposed plaintiff to unreasonable risk of bodily injury or death. The complaint does not sufficiently state facts making out all of the elements required to state a cause of action for negligent infliction of emotional distress. Accordingly, this claim shall be dismissed.

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The court agrees with the contention in Dr. Kron's papers that Mr. Wheeler is dissatisfied with another court's decision, for which he blames Dr. Kron. Mr. Wheeler's attorney admits this in her initial affirmation in opposition, wherein she states that plaintiff brings this case against Dr. Kron for "making unsupported accusations against Plaintiff and lying about Plaintiff under oath during Plaintiff's divorce proceeding." Plaintiff is clearly angry about a determination allegedly made almost three years ago regarding his access to his daughter. This lawsuit appears to be an impermissible and inappropriate collateral attack on that determination. If plaintiff believed that false testimony was presented in another matter or is dissatisfied with a decision in another matter, his remedy was to appeal that decision, not to bring these separate tort claims against Dr. Kron.

The claims against Dr. Kron are dismissed, save for the claim for intentional infliction of emotional distress, dismissal of which was not properly argued herein. Consistent with proper practice, plaintiff must discontinue this claim if he knows he cannot state facts establishing all of the elements required to assert a claim of this nature. Nevertheless, at this point, the claim continues. Accordingly, it is hereby

ORDERED that the motion to dismiss is partially granted, and the claims for negligence and negligent infliction of emotional distress as against Dr. Kron are dismissed; and it is further

ORDERED that Dr. Kron is granted summary judgment on the claim for medical malpractice, and that claim is dismissed as against him; and it is further

ORDERED that the case continues in its entirety against Betsy Boruchoff and as to the claim of intentional infliction of emotional distress against Dr. Kron; and it is further

ORDERED that, if he has not done so already, defendant Dr. Kron is directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 26, 2011, at 10:00 a.m.

Dated: February 16, 2011

ENTER:

JOAN B. LOBIS, J.S.C.

FILED

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