

Wheeler v Kron

2011 NY Slip Op 31864(U)

July 7, 2011

Supreme Court, New York County

Docket Number: 108127/2010

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 108127/2010
WHEELER, ROBERT
VS.
KRON, M.D., LEO
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE 5/3/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for dismiss

PAPERS NUMBERED

1-4
5-13
14

venue of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order

Dated: 7/7/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ROBERT WHEELER,

Plaintiff,

Index No. 108127/10

-against-

Decision and Order

LEO KRON, M.D. and BETSY BORUCHOFF,

Defendants.

FILED

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

JUL 11 2011

Defendant Leo Kron, M.D., brings this motion for an order dismissing plaintiff's "amended verified complaint" on the grounds that the three negligence claims were previously dismissed; that plaintiff failed to state a cause of action on the claim for intentional infliction of emotional distress; and that the intentional tort claim is time-barred under the one-year statute of limitations for intentional torts. Plaintiff Robert Wheeler concedes that the three negligence claims are no longer viable, but contends that defendant waived his opportunity to move to dismiss the intentional tort because he failed to raise the issue in the first motion to dismiss.

NEW YORK COUNTY CLERK'S OFFICE

The facts of this case are more fully set forth in this court's decision and order on Motion Sequence Number 001 dated February 16, 2011 (the "February 2011 Decision"), familiarity with which is presumed. Briefly, Dr. Kron is a psychiatrist who treated plaintiff's young child while plaintiff and his former wife were involved in a custody and visitation dispute. In this action, plaintiff alleges that Dr. Kron conspired with plaintiff's ex-wife to deny plaintiff access to his child, and that Dr. Kron gave false testimony at a hearing to determine custody and visitation. Plaintiff filed his original complaint (the "First Complaint") on June 21, 2010. The First Complaint raised four claims: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional

distress; (3) general negligence; and (4) medical/psychiatric malpractice. On or about July 26, 2010, Dr. Kron moved to dismiss the First Complaint (Motion Sequence Number 001). The parties appeared for oral argument on Motion Sequence Number 001 on September 28, 2010, whereupon the court partially converted the motion to dismiss to a summary judgment motion on the issues of whether a physician-patient relationship had been established between plaintiff and Dr. Kron and whether Dr. Kron had proximately caused plaintiff's damages. After giving the parties time to supplement their papers, the court issued the February 2011 Decision, granting Dr. Kron summary judgment on the medical malpractice claim and dismissing the other causes of action sounding in negligence for failure to state claims. The claim sounding in intentional tort survived because Dr. Kron relied solely on arguments under the standards for negligence and failed to argue that the cause of action for intentional infliction of emotional distress, an intentional tort, should be dismissed.

Meanwhile, on or about August 6, 2010, plaintiff filed and served what he titled an "amended complaint" (the "Second Complaint"). The Second Complaint was identical to the First Complaint except that it omitted the first and last name of the child from the pleadings. Dr. Kron accepted service of the Second Complaint on September 2, 2010. None of the parties raised the existence of the Second Complaint with the court before the court issued the February 2011 Decision. Accordingly, the February 2011 Decision did not address the Second Complaint. To the extent that the action survived, the February 2011 Decision directed Dr. Kron to answer the "complaint" within twenty (20) days of service of a copy of the decision with notice of entry. Dr. Kron has never interposed an answer; instead, approximately six weeks after the court issued the February 2011 Decision, he filed this motion to dismiss the Second Complaint.

The issue here is whether Dr. Kron is entitled to bring a second pre-answer motion to dismiss under C.P.L.R. Rule 3211. Under Rule 3211(e), a party is permitted "no more than one" motion to dismiss. Dr. Kron argues that this motion is proper because the Second Complaint supercedes the First Complaint, entitling him to bring a second motion to dismiss. Dr. Kron urges the court not to scrutinize the Second Complaint because he maintains that regardless of the specific changes made to the First Complaint, New York case law and the C.P.L.R. permit him to bring the present motion. In opposition, amongst other arguments not germane to this decision, plaintiff argues that Dr. Kron's second motion to dismiss under C.P.L.R. Rule 3211 is improper because the Second Complaint contained no substantive changes to the causes of action asserted in the First Complaint. Plaintiff asserts that Dr. Kron had the chance to argue that the cause of action for intentional infliction of emotional distress should be dismissed in his first motion to dismiss and that this second motion to dismiss is merely Dr. Kron's attempt at "two bites at the apple."

The Second Complaint was not truly an amended complaint because plaintiff did not add any new injuries or categories of damages but simply omitted his child's name from the pleadings. While Dr. Kron might have been entitled to bring a second motion to dismiss if plaintiff had substantively amended his complaint, the Second Complaint herein contained nothing that Dr. Kron could not have addressed in his first motion to dismiss. If a plaintiff mislabels a supplemental complaint as an amended complaint, that error does not entitle a defendant to assert new responses or defenses when nothing substantive has changed between the original and the second complaint. Cf. Mendrzycki v. Ciccio, 58 A.D.3d 171, 175 n.1 (2d Dep't 2008) (noting that a plaintiff cannot avoid the rule that an amended complaint supercedes an original complaint and entitles a defendant to bring anew a motion to dismiss by "by simply denominating as a supplemental pleading one that

asserts new injuries and a new category of damages, and which is therefore properly an amended pleading"). Dr. Kron failed to argue that the claim for intentional infliction of emotional distress should be dismissed in his original motion to dismiss. That failure may not be remedied by asking the court to disregard the fact that there are no material differences between the First and Second Complaints and consider the merits of the motion to dismiss. Under the rule that a party may bring only one motion to dismiss, Dr. Kron has waived his right to bring a Rule 3211 motion to dismiss the cause of action for intentional infliction of emotional distress by failing to seek that relief in his first motion to dismiss. Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that Dr. Kron is directed to serve an answer to the Second Complaint (to the extent that the only remaining cause of action is intentional infliction of emotional distress) 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 August 16, 2011, at 10:00 a.m.

Dated: July 7, 2011

FILED

JUL 11 2011

ENTER:


NEW YORK
COUNTY CLERK'S OFFICE
JOAN B. LOBIS, J.S.C.