| **Brooks v Sumerset Surgical Assoc. & Dr. Norman Sohn** |
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| 2011 NY Slip Op 32726(U) |
| September 13, 2011 |
| Supreme Court, New York County |
| Docket Number: 116753/2009 |
| Judge: Alice Schlesinger |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 116753/2009

BROOKS, ELLEN

VS

SUMERSET SURGICAL ASSOCIATES

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

FILED

SEP 15 2011

COUNTY CLERK'S OFFICE
NEW YORK

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is by defendant is denied and plaintiff's cross-motion is granted to the extent provided herein and is otherwise denied. A preliminary conference is scheduled for November 2, 2011 at 9:30 a.m.

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

Dated: _____

Alice Schlesinger J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☒ GRANTED IN PART (cross-motion) ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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ELLEN BROOKS,

Plaintiff,

Index No. 116753/09
Motion Seq. No. 001

-against-

SUMERSET SURGICAL ASSOCIATES &
DR. NORMAN SOHN,

Defendants.

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SCHLESINGER, J.:

On December 7, 2006, Ellen Brooks, upon referral by her physician Dr. Erica Basillico, went to see Dr. Norman Sohn to consult with him regarding recent symptoms she had been experiencing in her gastrointestinal tract. Dr. Sohn's office was on the premises of his professional corporation, Somerset Surgical Associates, P.C., at 475 East 72nd Street. After the consultation with Dr. Sohn, at 10:45 a.m. on that date, Ms. Brooks signed a consent form for Dr. Sohn to perform a colonoscopy and an esophageal gastroduodenoscopy "EGD" (see May 10, 2011 affidavit of Ms. Brooks and the consent form at Appendix 1). She was brought to an examination room for the procedures and while there she was given anesthesia, which totally sedated her. The next thing she recalls is waking up with a cut on her forehead, later requiring thirteen stitches. Dr. Sohn apologized for the cut and arranged for Ms. Brooks to have a CT scan of the orbits of her head, which was normal. (See Appendix 3, the December 8, 2006 report addressed to Dr. Sohn from Manhattan Radiology).

It was on these facts that Ms. Brooks commenced an action against Dr. Sohn and the Somerset P.C. by filing on November 30, 2009. The complaint was personally served on the defendants on December 9, 2009. However, only Dr. Sohn answered, on

January 4, 2010, wherein he made various discovery demands that were responded to by counsel for the plaintiff on February 12, 2010. Somerset never answered and it is unclear precisely why.

Defense counsel argues in the motion now before the Court that Somerset was not properly served because its name was misspelled on the summons and complaint, and that is presumably why it did not answer. The misspelling consisted of plaintiff substituting a "u" for the "o", as in "Sumerset". Also the designation "P.C." was omitted. On the other hand, service was made vis-a-vis both defendants at the same time, 2:35 p.m., at the same place, 475 East 72nd Street, Suite 102, where both entities had their office. The papers were delivered to the same person, Patricia Gushire, identified as "Office Manager" of the P.C. and "co-worker" to Dr. Sohn. Therefore, other than these minor mistakes, it is difficult to understand why defense counsel characterizes service as improper.

Also, counsel never moved to dismiss based on improper service Rather, she moved to dismiss the claim against Somerset pursuant to §3215(c) of the CPLR. She is also moving to dismiss the complaint against Dr. Sohn under two CPLR Sections, §3211(a)(5) based on the statute of limitations and §3212 for summary judgment. No serious discovery has occurred and defendants have provided none.

Dr. Sohn's statute of limitations motion is based on his counsel's depiction of the action against him as one sounding in medical malpractice. That kind of action requires commencement within two and one-half years of the events giving rise to it. Here, as noted earlier, the events giving rise to the complaint occurred on December 7, 2006, and the action was commenced on November 30, 2009, more than the two and one-half years later.

This argument is made despite that no Notice of Medical Malpractice was ever filed and no allegations of medical malpractice were ever made. Rather, as is asserted in opposition by plaintiff's counsel, the claims asserted in both the complaint and the Bill of Particulars sound in general or common law negligence. (See, e.g., ¶ ¶40 and 41 of the complaint and response 1 to the Bill). But an action sounding in negligence provides for a three-year statute of limitations. Therefore, since it is clear here that the action is one sounding in simple negligence, it is timely and the 3211(a)(5) aspect of the motion is denied.

With regard to Dr. Sohn's motion for summary judgment, he includes his own affidavit dated March 22, 2011. In it, he relates that the plaintiff was seen in his office on December 7, 2006 having various complaints. He says that based on these complaints, Ms. Brooks "was scheduled to undergo a colonoscopy to be performed by me, along with an esophagogastroduodenoscopy ("EGD") to be performed by Dr. Michael Ammirati, a gastroenterologist." He states that he discussed the risks and complications with the patient, who signed a consent form. The EGD was to be performed first, to be directly followed by the colonoscopy (¶3).

As to the plaintiff's sustaining an injury, Dr. Sohn says that at approximately 11:15 a.m. as he was about to begin his procedure, he "was advised that the plaintiff had fallen off the examining table and had sustained a laceration of her forehead" ( ¶ 4). He then tells the Court that when this occurred, "the plaintiff was not yet under my care" and that tasks such as the preparing and placing and handling of Ms. Brooks were taken care of entirely by other parties (¶5). He does not say who these individuals were, but he does say that "the persons caring for her at the time of her fall were not employed or supervised

by me, although we were working in the same facility." (¶8). However, he does not explain what their relationship with Somerset was.

Dr. Sohn's attorney then makes the argument in both the moving papers and in reply, that the plaintiff on these facts would be unable to establish a prima facie case against Dr. Sohn. She points, even with no discovery, to the "uncontroverted ... evidence" that Dr. Sohn was not present in the procedure room at the time of the accident, as well as the limited role Dr. Sohn describes that he had, which is mere performance of the colonoscopy.

In Reply, counsel also argues that Dr. Sohn had no responsibility regarding any action by Somerset's personnel. Here she cites to New York Business Corporation Law (BCL) §1505(a) relating to professional corporations. There it states that a shareholder, employee or agent (presumably someone in Dr. Sohn's position) shall only be liable and accountable for negligence committed "by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation."

In this regard, counsel cites to a First Department case, *Yaniv v. Taub*, 256 AD2d 273 (1998). This case does in fact stand for the principle that a physician, there Dr. Noah Weg whose P.C. was Noah Weg, M.D., P.C., cannot be vicariously liable for the separate acts of a doctor/employee of the P.C., there Dr. Mark Goldman, a radiologist. But the opinion also states (at p 274) that "as sole shareholder and principal of the professional services corporation, Dr. Weg is responsible for the supervision of his staff" and that "under the doctrine of respondeat superior, a corporation, including a professional services corporation is liable for a tort committed by its employee."

In opposition, Ms. Brooks' affidavit does differ with certain statements made by Dr. Sohn. She says that to her knowledge it was exclusively Dr. Sohn who functioned as her doctor. She consulted with him and believed, as set out in the consent form, that he would be performing both procedures. She said she has no idea how she was injured as she was sedated, but that when she awoke, Dr. Sohn apologized for the cut and he was the one who referred her to Manhattan Diagnostic Radiology.

Her counsel argues that it was both Dr. Sohn and the P.C. who ran the practice and that both had a duty to supervise the practice to make sure patients who came to it were reasonably safe. He emphasizes the need for discovery so as to obtain evidence, now in the sole possession and knowledge of the defendants, that they were in fact one and the same entity and that Dr. Sohn and his P.C. are responsible for the acts and omissions of the people working there. Further, counsel points to the well-known case *Noseworthy v. City of New York*, 298 NY 76 (1948) which he says lessens the burden of someone like Ellen Brooks, who was sedated at the time of her injury and thus is disadvantaged in relating how the accident occurred.

I find that plaintiff makes the better arguments here as to Dr. Sohn's liability for the acts or omissions of his staff. BCL §1505(a) does not alter the common law rule that a supervisor, arguably someone in Dr. Sohn's position here, is liable if he directs or permits tortuous conduct by those under his supervision or fails to exercise proper control over them. See, e.g., *Connell v. Hayden*, 83 AD2d 30 (2nd Dep't 1981).

Counsel is wrong if she believes Dr. Sohn's self-serving statements as to his limited role in the events of December 7, 2006 should go unchallenged in the circumstances here. What are those? They include Ms. Brooks' recitation that she sought out Dr. Sohn and that

he alone provided all her medical care, the fact that Ms. Brooks has no recollection of the events due to her being sedated at the time of her fall, the fact that the consent form lists only Dr. Sohn, the fact that the P.C. is owned by Dr. Sohn and presumably the individuals who were with Ms. Brooks had an employment relationship with Dr. Sohn and/or his P.C. that probably entailed his assuming a supervisory role.

Defense counsel takes an extremely narrow view of liability. A physician/employer/supervisor does not have to be present and give directions at the precise time an accident occurs. Arguably, he is the one who established procedures to be followed and also provided and was responsible for the equipment used. Therefore, here at this time it would be premature to absolve Dr. Sohn of any and all responsibility. Though plaintiff's counsel states he has requested discovery, to date he says he has received none. The motion by Dr. Sohn for summary judgment is denied without prejudice to renew, if warranted, at the completion of discovery.

Finally, the Court turns to defendant's motion to dismiss as to Somerset P.C. pursuant to CPLR 3215(c). Related to this request is plaintiff's cross-motion to amend the caption and pleadings so that they reflect the correct spelling of Somerset, replacing the "u" with an "o" and adding a P.C. Counsel is also asking the Court to direct entry of a judgment upon default in favor of plaintiff against Somerset and set the matter down for an inquest.

CPLR §3215(c) states in relevant part that: "If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown why the complaint should not be dismissed." Under such circumstances, to avoid

dismissal of the complaint as abandoned, the plaintiff must offer a reasonable excuse for the delay and must demonstrate that her complaint is meritorious *Ingenito v. Grumman Corp.*, 192 AD2d 509 (2nd Dep't 1993).

Here Ms. Brooks has submitted an affidavit, which is corroborated by Dr. Sohn, as to the injury sustained by her and some of the circumstances surrounding it. It does appear to have merit, perhaps even under principles of *res ipsa loquitur*. Clearly, Ms. Brooks was under the exclusive control of at least defendant Somerset, clearly she bears no responsibility for the fall and laceration, and clearly this is not the kind of occurrence that should occur while one is undergoing an investigative procedure of the esophagus or colon, without some kind of carelessness.

With regard to merit, vis-a-vis Dr. Sohn himself, for reasons stated earlier, it is too early now in the absence of discovery to know the extent, if any, of his liability. But also as stated earlier, the people working in Dr. Sohn's office clearly had some kind of employment relationship with him, which probably entailed some level of supervision by him.

In addition to showing merit, a plaintiff must also provide a reasonable excuse for her delay. In other words, she must show the action was not abandoned and that the delay has not prejudiced the defendant.

Here, Somerset was in default after December 29, 2009, after not answering the complaint served personally on it on December 9 of that year. Therefore, by the last day of December 2010, the plaintiff had the right to move for a default judgment against it. But she did not. Instead, according to her counsel Frederick Altschuler, on January 7, 2010, within a month after service, counsel spoke by telephone to a Liz Arcana, a claims

representative of MLMIC (the insurance company) who he believed was assigned to handle the defense of Dr. Sohn and Somerset. In that call, he made a settlement demand and Ms. Arcana informed him she was still reviewing the file. Mr. Altschuler called her again on January 22 and gave her an increased demand based upon plaintiff's scars as shown in photographs. Also on that date he wrote a letter to Ms. Arcana memorializing the conversation. A copy of that letter is included in the opposition. Then on February 8, 2010, he again spoke to Ms. Arcana, who said she needed a "month plus" to continue her review. It should also be noted that on March 30, 2010, in plaintiff's Notice of Discovery and Inspection served on defendants in response to its demands, counsel for plaintiff always referred to both defendants.

Therefore, plaintiff argues that they were, at all times, proceeding with the action against both Dr. Sohn and Somerset as they believed their service against both was good. This belief was based on the fact that defense counsel never rejected that service or pointed out the minimal mistakes in the PC's name, or that counsel was only answering for Dr. Sohn, although the answer does say that.

Justice would not be served here by dismissing the action against Somerset, particularly because Dr. Sohn, in distancing himself from the events of the accident, is implying in his affidavit that someone from Somerset may well be the responsible party. Perhaps plaintiff's counsel should have been more careful in spelling Somerset correctly and including P.C., as well as noting that the Answer was only on behalf of Dr. Sohn. Also, of course, if that had been noted, a default judgment could have been requested.

However, three things are clear to me. One, no abandonment of the action against Somerset has been shown. Two, no prejudice has been suffered by Somerset due to the

plaintiff's failure to move for a default at the end of 2010. And three, the claim itself vis-a-vis Somerset appears to have merit.

Therefore, in my discretion, I am denying the §3215(c) motion. But also, in the interests of justice so that the action can be resolved on the merits, I am denying the cross-motion by the plaintiff now for a default judgment, although it is noted that Somerset has still not answered.

Since the mistakes in the name were minimal, I am allowing the plaintiff's amendment to correct the pleadings. The opposition contains the amended complaint. Therefore, I am deeming it served on counsel for Somerset, who has announced such status in her papers. I am then giving Somerset 30 days from the date of this decision to answer. If they do not and remain in default, plaintiff will be permitted to move again for a judgment in default against that entity.

Accordingly, it is hereby

ORDERED that the motion by defendant Norman Sohn, M.D., to dismiss pursuant to CPLR §§ 3211(a)5 and 3212 is denied; and it is further

ORDERED that the motion by defendant Somerset Surgical Associates, P.C., to dismiss pursuant to CPLR §3215(c) is denied; and it is further

ORDERED that the cross-motion by plaintiff to amend the caption is granted and the name of "Somerset Surgical Associates, P.C." shall be substituted in place of "Sumerset Surgical Associates" upon plaintiff's filing of a copy of this decision with the Clerk of Trial Support; and it is further

ORDERED that the cross-motion by plaintiff for a default judgment is denied; and it is further

ORDERED that defendants shall serve an Answer on behalf of Somerset and respond to all outstanding discovery demands pursuant to the terms of this decision; and it is further

ORDERED that counsel shall appear in Room 222 for a preliminary conference on November 2, 2011 at 9:30 a.m.

September 13, 2011

SEP 13 2011

Alice Schlesinger

J.S.C.

ALICE SCHLESINGER

FILED

SEP 15 2011

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