

Pagan v Lynn

2013 NY Slip Op 30400(U)

February 25, 2013

Supreme Court, New York County

Docket Number: 102898/2009

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____
Justice

PART 16

Index Number : 102898/2009
PAGAN, WILLIAM
vs.
LYNN, JERRY, D.D.S.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied in accordance with the accompanying memorandum decision.*

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

FILED
FEB 27 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 25 2013

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 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

-----X
WILLIAM PAGAN

Plaintiff,

-against-

Index No. 102898/09
Motion Seq. Nos. 004 & 005

JERRY LYNN, D.D.S., JERRY LYNN, D.D.S., P.C.,
JERRY LYNN D.D.S. - MARTIN FELDMAN, D.D.S., P.C.,
ROBERT WINEGARDEN, D.D.S., ROBERT
WINEGARDEN, D.M.D., R.F. WINEGARDEN, D.M.D.,
P.C., R.F. WINEGARDEN, D.M.D., TOOTHSAVERS
DENTAL SERVICES, P.C., TOOTHSAVERS, INC.,
TOOTHSAVERS DENTAL MANAGEMENT, INC.,
TOOTHSAVERS DENTAL LABORATORY, INC.,
and TOOTHSAVERS DENTAL CARE, INC.,
DANIEL SULLIVAN, D.D.S., NAYNESH SAVALIA,
D.D.S., TATYANA BERMAN, D.D.S., JAYANTHI
KONDAMANI, D.D.S., KI-SUNG SUNG, D.D.S.,
KAYHAN CIVELEK, D.D.S., JENNIFER PARKER,
D.D.S., and SOL S. STOLZENBERG, D.M.D., P.C.
d/b/a TOOTHSAVERS,

Defendants.

FILED
FEB 27 2013
NEW YORK
COUNTY CLERK'S OFFICE
-----X

SCHLESINGER, J.:

The motions now before this Court concern a dental malpractice action. They are made pursuant to §3212 and §3211(a)(5) of the CPLR. The Jerry Lynn defendants and the ToothSavers defendants are making the first motion, which is supported by affidavits supplied by Jerry Lynn and Sol S. Stolzenberg.

The action was commenced on March 26, 2009 and alleges various claims of malpractice by these defendants from the commencement of treatment "on or about June 26, 2001 and continuing to on or about August 2007" (¶46 of complaint). In a decision dated June 13, 2012, this Court granted leave to the plaintiff to amend his

complaint to add various dental treaters, all allegedly connected to the ToothSavers defendants at the practice on West 57th Street in New York City.

Only the plaintiff William Pagan has been deposed. This occurred before the additional defendants were brought in. Therefore, there is no allegation by movants that all discovery has taken place. In fact, there has been very little discovery. None of the defendants have been deposed or even had their depositions scheduled. This motion preceded such scheduling.

The thrust of the motion, attested to by Lynn and Stolzenberg, is that defendant Lynn, as the sole shareholder of defendant ToothSavers Dental Services, P.C., sold the practice to Stolzenberg on January 1, 2002. Therefore, this was the last possible date of treatment of Pagan by Lynn and the ToothSavers Entity he ran. Lynn also swears that on that date, he retired from the practice of dentistry. He acknowledges remaining at the premises, 57 West 57th Street, after the 2002 date, but only in his capacity as President of ToothSavers Dental Laboratory, Inc. (another named defendant), "a separate corporation that performed only dental lab services in a separate office down the hall" (§16 of attorney Mutz Affirmation). Finally, in addition to the affidavits referred to above, movants also submitted a Sales Agreement dated December 26, 2001 between ToothSavers Dental Services, P.C. as seller and Sol S. Stolzenberg, D.M.D. as buyer. Allegedly for privacy reasons, all business details, including the purchase price, are omitted.

Counsel for the movants argues that pursuant to the Sales Agreement and affidavits of Lynn and Stolzenberg, the action against them is barred by the two-and one-half year statute of limitations. While it is recognized that various dentists

continued to provide dental treatment to Mr. Pagan at 57 West 57th Street and that Lynn acknowledges that he provided dental treatment from June 2001 until his "retirement" on January 1, 2002, he argues that all claims regarding services after that, as against these defendants are time-barred.

Two circumstances pointed out by the opposing plaintiff dictate a denial of this motion; a denial without prejudice to raise again if the defendants believe they conscientiously can. The first is the factual averments by plaintiff William Pagan. He states that he recalls Lynn providing treatment to him into the year 2003. Further, he recalls Lynn examining him in 2006 and 2007. Finally, Pagan states that Lynn directed defendant Robert Winegarden, D.D.S. in regard to his treatment. These assertions raise issues of credibility as they specifically refute Lynn's statements that he actually retired from the practice of dentistry at the end of 2001.

The second circumstance dictating a denial at this time is the fact that virtually no discovery respecting these defendants has occurred. However, Pagan in his opposition attaches as exhibits "D" and "E" copies of the New York Department of State's web site as to ToothSavers. The "Selected Entity Name" is "ToothSavers Dental Services, P.C." and the document indicates that as of the date October 11, 2012 it is an active corporation located at 57 West 57th Street with a "Chairman or Chief Executive Jerry Lynn." Thus, even without discovery provided by Lynn, official New York State records show a current connection of Lynn to "ToothSavers Dental Services P.C."

Pursuant to CPLR §3212(f), when facts are unavailable to the opposing party because they must be obtained from the moving party, a denial is in order so that the opposing party has an opportunity to obtain those facts. As stated earlier, no defendant

has yet been deposed. Most importantly, this includes Lynn and Stolzenberg. Self-serving affidavits together with a document omitting significant aspects of the purchase and sale do not equate with examinations before trial and complete documents.

If Lynn still maintained an interest in ToothSavers Dental Services or control of it after January 2002, or if he still continued to practice dentistry at 57 W 57 Street and specifically provided treatment to Pagan after that date, then it would be critical to determine how long those activities continued and if they continued up to 2007.

Therefore, depositions and other discovery must occur. At the conclusion of discovery, after the Note of Issue has been filed, if these moving defendants still believe in good faith that they can make out an unchallenged prima facie case, they can so move once more.

On June 15, 2012, this Court granted a motion by plaintiff William Pagan to amend his complaint to add a number of defendants. These were all dentists who had been named by the original defendant Jerry Lynn as those individuals who had provided treatment to plaintiff on behalf of ToothSavers during the times alleged in the complaint. Among those eight names were three, Dr. Tatyana Berman, Dr. Kayhan Civelik, and Dr. Sol S. Stolzenberg who are now moving in a pre-answer motion to dismiss the complaint pursuant to CPLR §3211(a)(5). The three assert that claims for dental malpractice vis-a-vis them are now time-barred.

In William Pagan's opposition, he makes no mention of Drs. Berman or Civelek. In other words, he does not oppose their motions. Therefore, as regard to those two and the fact that the services provided by each to Pagan were more than two and one-half years before he commenced his action against them, their motions are granted and

the action vis-a-vis Drs. Berman and Civelek are dismissed.

However, the same determination cannot at this time be made with regard to Dr. Sol S. Stolzenberg. Dr. Stolzenberg, in an affidavit supporting a motion to dismiss made by the original defendants Jerry Lynn and "his" ToothSavers entities, states that on December 26, 2001, he purchased the dental practice of ToothSavers Dental Services for an undisclosed amount. He also states that from January 1, 2002 on, he was the sole shareholder/owner of Sol Stolzenberg, D.M.D., P.C. d/b/a ToothSavers. Further, he states that he personally never treated Pagan or consulted in his care.

However, most of the claims against ToothSavers, allegedly by his own "d/b/a" occurred, pursuant to his affidavit, under his watch. Therefore, that entity may well be responsible for the alleged malpractice that occurred between January 2002 and 2007, when the services ended.

Dr. Stolzenberg has not yet been deposed. He is in possession of documents and testimony that would shed light on who truly owned and controlled ToothSavers and arguably who, if anyone, was vicariously responsible for the alleged acts of dental malpractice provided by their "agents". As to the assertion that the claims against Stolzenberg are time-barred, that cannot yet be determined. The original complaint was filed in 2009 for services performed up to August 2007. Therefore, on its face it was not untimely with respect to those originally named defendants.

In order for the complaint to be viable as to timeliness, pursuant to CPLR §203(b) a plaintiff has the burden of establishing three criteria. The first is that the new defendants are involved in the same claims as were the original defendants. Second, the new defendant is united in interest with the original defendant and thus can be

charged with notice. The third, similar to the second, is that the new defendant knew or should have known that but for the plaintiff's mistake in omitting him, he would have been named. Here, the first criteria is met as the complaint is precisely the same. As to the second and third conditions, now based on Stolzenberg's own affidavits, he has been the sole owner of ToothSavers since January 2002. Therefore, when service was made here on ToothSavers in 2009, he had to have been put on notice of the action. However, discovery is needed to see if he, in fact, truly took over ownership and control of ToothSavers and to determine if he personally controlled any of the actions of the providers working for ToothSavers. Finally, since Dr. Stolzenberg is a new defendant, he will, if desired, have an opportunity by his counsel to depose the plaintiff William Pagan.

Accordingly, it is hereby

ORDERED that the motion by defendants Kayhan Civelek, D.D.S. and Tatyana Berman, D.D.S., is granted and the Clerk is directed to sever and dismiss all claims against those defendants; and it is further

ORDERED that the motions by the remaining defendants to dismiss are denied; and it is further

ORDERED that all parties shall promptly comply with outstanding discovery orders and appear for a status conference on Wednesday, April 17, 2013 at 11:00 a.m.

Dated: February 25, 2013

FEB 25 2013

FILED
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Alice Schlesinger
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