

<b>Weisbrod v Estate of Burzon</b>
2013 NY Slip Op 30873(U)
April 15, 2013
Supreme Court, Suffolk County
Docket Number: 12-1974
Judge: Joseph C. Pastoressa
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Weisbrod v Estate of Scott Burzon  
Index No. 12-1974  
Page No. 2

Burzon and the plaintiff is alleged to have continued through the summer of 2011. The plaintiff alleges that Burzon assured her that his “practice partner”, Steiner, would be consulted and involved in Weisbrod’s care and treatment.

The complaint asserts that a psychotherapist-patient relationship existed between herself and Burzon from April 2002 through August 2011. The complaint interposes a first cause of action for negligence in Burzon’s care and treatment of the plaintiff; a second cause of action for lack of informed consent; a third cause of action for the negligent infliction of emotional distress; a fourth cause of action premised upon the alleged violation of Education Law § 6509 (9); and Penal Law §§ 130.05 (H) and 130.25; and a fifth cause of action premised upon an alleged breach of fiduciary duty. The plaintiff further alleges that the defendants are jointly and severally liable as to each cause of action.

Pursuant to CPLR §3211(a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (Leon v Martinez, 84 NY2d 83). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (Guggenheimer v Ginzburg, 43 NY2d 268). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v State Educ. Dept., 116 AD2d 939). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (Rovello v Orofino Realty Co., 40 NY2d 633). On such a motion, the Court’s sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (Leon v Martinez, 84 NY2d 83; Thomas McGee v City of Rensselaer, 663 NYS2d 949). “In assessing a motion under NY CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. Such a motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. Accordingly, if in opposing the motion the defendant adduces documentary proof which disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted” (McGuire v Sterling Doubleday Enterprises, LP et al. 19 AD3d 660 [2<sup>nd</sup> Dept 2005]).

Pursuant to CPLR 3211 (c), evidence is permitted and the court may treat the motion as a motion for summary judgment and either party may submit any evidence that could properly be considered on a motion for summary judgment. Here, the notice of motion clearly sets forth that relief is sought pursuant to CPLR 3211 (a) and 3211 (c), clearly giving plaintiff notice as to the statute upon which such relief is sought. Bare legal conclusions and factual claims, which are flatly contradicted by the evidence, are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one (Meyer v Guinta, 262 AD2d 463 [2<sup>nd</sup> Dept 1999]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he states one. This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (Doria v Masucci, 230 AD2d 764, [2<sup>nd</sup> Dept 1996]). On a motion to dismiss pursuant to CPLR 3211 (a) (1), a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that a plaintiff’s claims fail as a matter of law. While a complaint is to be liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, a court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts (Robinson v Robinson, 303 AD2d 234, [1<sup>st</sup> Dept 2003]). The court is not required to accept at face value every conclusory, patently unsupported assertion of fact found in the complaint, but could consider documentary evidence, proved or

conceded to be authentic (Erich Fuchs Enterprises v American Civil Liberties Union Foundation, Inc., 95 AD3d 558 [1<sup>st</sup> Dept 2012]).

Here, upon review of the complaint, it is determined that the plaintiff failed to state a cause of action against defendant Steiner. The complaint does not allege that the plaintiff, Denise Weisbrod, came under the care and treatment of defendant Steiner, or that a therapist-patient relationship was ever established with Steiner. The complaint is devoid of any allegations that the plaintiff and Steiner were at any time involved in counseling sessions, conversations, or contact evincing any type of therapeutic relationship between them. The plaintiff bases her claims for liability as to defendant Steiner upon her assertions that defendant Steiner was a “practice partner” with decedent Burzon at Suffolk Behavioral Consultation and Counseling, owned by Burzon, and that Burzon was the sole proprietor of said business registered with the Clerk of Suffolk County under file # 8577, with its place of business at 1050 Hallock Avenue, Port Jefferson Station, New York. Plaintiff asserts that Burzon, throughout her treatment, assured her that defendant Steiner was his partner, and that she relied upon that representation. The plaintiff also alleges that Steiner is vicariously liable for the acts of Burzon.

In her supporting affidavit, defendant Steiner avers that she has been a licensed clinical social worker in the State of New York since September 2004, and was originally licensed as a certified social worker in August 1991. In October 2004, she filed a business certificate with the Suffolk County Clerk’s Office, file # 8577, d/b/a Suffolk Behavioral Consultation and Counseling, and is, and always has been, the sole proprietor of her business. Since she started her own practice, she has rented office space at 1050 Hallock Avenue, Port Jefferson Station, which building has various offices, many of which are rented by mental health professionals. She rents her office by the hour and shares the space with other professionals, but maintains her own appointment book. Steiner continued that Scott Burzon filed his own business certificate with the Suffolk County Clerk under file #8577, however, she was not an owner, officer, director, shareholder or employee of Burzon’s business. They maintained their own individual practices, had their own patients, and maintained separate records for their patients. They did not share profits or fees. They worked collaboratively in limited contexts with couples and family counseling, but never worked together in the treatment of individual patients and did not discuss individual patients or provide advice or recommendations. Steiner avers that she exercised no supervision or control over Burzon in the manner or method by which he treated his patients.

Steiner further avers that although the plaintiff originally sought treatment with her to discuss the possibility of receiving treatment as a rape victim, she had no space in her schedule to accommodate her. Thus, the plaintiff was referred to defendant Burzon. She stated that the plaintiff never became her patient. Other than casually meeting her on one occasion in the shared waiting room, she never had any contact with the plaintiff, never treated her, never participated in the treatment rendered to the plaintiff by decedent Burzon, never reviewed Burzon’s records pertaining to his treatment of the plaintiff, and never spoke with Burzon to offer advice or recommendations regarding his treatment of the plaintiff. Steiner continued that although she lived with Burzon, they never married. She and Burzon had bookshelves in their residence where they stored books, and she made handwritten notes to herself in many of her books. She has no specific knowledge as to whether Burzon gave the plaintiff any of her books. She further avers that she was not aware of any alleged inappropriate conduct by Scott Burzon in his treatment of the plaintiff prior to the allegations giving rise to this law suit, and had no reason to believe or suspect that any such conduct was taking place.

In opposing this application, the plaintiff avers that she has stated a valid cause of action against Steiner who is directly and vicariously liable for the conduct of Burzon. At no time does the plaintiff assert that any therapist-patient relationship was ever established between her and Steiner. The plaintiff stated that Burzon represented that Steiner would be involved in her treatment, although she does not aver that she ever consulted with Steiner or that she was ever treated by Steiner. She does not aver that Steiner made any representations to her that she would become involved in her care and treatment. She set forth that she became emotionally dependent upon Burzon, and that he negligently manipulated her emotions, and engaged in sexual activity with her. It is determined, however, that none of the plaintiff's allegations set forth any departures or actions by defendant Steiner that proximately caused the injuries she claims to have sustained.

The plaintiff has further submitted the affirmation of Joel Schonfeld, Esq. who affirmed that defendant Steiner does not, and did not ever operate under the name of Suffolk Behavioral Consultation and Counseling, but instead operated under Suffolk Behavioral Consultation and Counseling II and that Scott Burzon operated under the name of Suffolk Behavioral Consultation and Counseling I. The plaintiff asserts that defendant Steiner is vicariously liable for the acts of defendant Burzon, and thus liability attaches to Steiner on that basis.

Liability in a negligence action is generally premised upon a defendant's own fault, not the wrongdoing of another person. The doctrine of vicarious liability, which imputes liability to a defendant for another person's fault, rests in part on the theory that because of an opportunity for control of the wrongdoer, or simply as a matter of public policy loss distribution, certain relationships may give rise to a duty of care, the breach of which can indeed be viewed as the defendant's own fault (*see, Feliberty v Damon*, 72 NY2d 112 [1988]). The imputation of liability to a defendant for another person's fault, based upon a defendant's relationship with the wrongdoer, is the notion of control. The person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences. In the absence of some recognized traditional legal relationship such as partnership, master and servant, or agency, between physicians in the treatment of patients, the imposition of liability on one for the negligence of the other has been largely limited to situations of joint action in the diagnosis or treatment or some control of the course of treatment of one by the other. Vicarious liability ought not be extended to a situation where there is neither a legal nor an actual control of the treating physician by the other physician and the relationship between them, upon which responsibility is sought to be imputed, turns upon a shared office and an agreement to service each other's patients for a shared fee (*see, Kavanaugh v Nussbaum*, 71 NY2d 535 [1988]).

It is determined as a matter of law that although the plaintiff alleges that the defendants were partners, the evidentiary proof establishes merely that the defendants were doing business as separate entities in separate office space in the same building, and that there was no agreement between Steiner and Burzon to service each other's patients for a shared fee. Defendant Steiner has demonstrated that she did not exercise any control over the involvement or treatment of the plaintiff by defendant Burzon, and that she did not treat the plaintiff at any time. Thus, the elements of control and traditional legal relationship are not present, and vicarious liability cannot be imputed to defendant Steiner for the acts of defendant Burzon in his treatment of the plaintiff. Without vicarious liability being imputed to defendant Steiner for the acts of Burzon, none of the causes of action can be maintained against her.

The first cause of action for negligence concerns Burzon's care and treatment of the plaintiff. In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing

Weisbrod v Estate of Scott Burzon

Index No. 12-1974

Page No. 5

about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (Spiegel v Fine Paint Co., 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see, Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, [2002]; Darby v Compagnie Natl. Air France, 96 NY2d 343, 347, [2001]). Here, it is determined as a matter of law that no duty of care was owed to the plaintiff by defendant Steiner as no therapist-patient relationship has been demonstrated to have existed between them. Additionally, there has been no breach of any duty by Steiner which proximately caused plaintiff's injuries.

Accordingly, the first cause of action is dismissed as asserted against defendant Steiner.

The second cause of action pleaded is lack of informed consent. A cause of action for lack of informed consent, incorporates the following principles: (1) In general, every person has a right to accept or reject any proposed therapy. (2) Each patient has a right to receive and each therapist (directly or through an agent) has a concomitant duty to present, in a form comprehensible to a layman of average intelligence, such information as is or should be known to the therapist, which a reasonable person would require to form a judgment as to whether to accept or reject the proposed therapy. The information communicated to the patient should include a diagnosis, prognosis without the proposed therapy; significant risks and significant side effects of the proposed therapy, and alternatives available, if any (see, Laskowitz v CIBA Vision Corporation, 215 AD2d 25 [2d Dept 1995]). There has been no therapist-patient relationship established between the plaintiff and defendant Steiner, and the plaintiff has not asserted that any treatment was provided by Steiner. The plaintiff has not asserted that any information concerning her care and treatment options for therapy was provided by Steiner, who is not vicariously liable for the treatment provided by defendant Burzon. Without a therapist-patient relationship having been established with Steiner, who was not involved in the plaintiff's care and treatment, there is no duty by Steiner to provide informed consent. Such obligation lies with the treating therapist to provide treatment options and appropriately provide informed consent.

Accordingly, the second cause of action is dismissed as asserted against defendant Steiner.

The third cause of action is premised upon the alleged negligent infliction of emotional distress. One to whom a duty of care is owed may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma but with ensuing psychic harm with residual physical manifestations (Johnson v State of New York, 37 NY2d 378 [1975]). A breach of a duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness (DiGeronimo v Lichtenstein, P.C., 101 AD3d 933 [2<sup>nd</sup> Dept]; Ornstein v New York City Health and Hospitals Corporation, 10 NY3d 1[2008]; Garcia v Lawrence Hospital, 5 AD3d 227[1<sup>st</sup> Dept 2004]). Again, no therapist-patient relationship has been established between Steiner and the plaintiff, and no psychological trauma has been attributed to any acts by defendant Steiner. No basis for the negligent infliction of emotional distress has been pleaded or demonstrated by the plaintiff as to defendant Steiner.

Accordingly, the third cause of action is dismissed as asserted against defendant Steiner.

The fourth cause of action is premised upon an alleged violation of Education Law § 6509 (9); and Penal Law §§ 130.05(h) and 130.25.

Weisbrod v Estate of Scott Burzon

Index No. 12-1974

Page No. 6

Education Law § 6509 (9), defines professional misconduct as “committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.” Penal Law § 130.05(h) pertains to sexual offenses; lack of consent in that there is: “a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree as defined in section 130.25, criminal sexual act in the third degree as defined in section 130.40, aggravated sexual abuse in the fourth degree as defined in section 130.65, or sexual abuse in the third degree as defined in section 130.55, and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination.” Penal Law § 130.25 provides that a person is guilty of rape in the third degree when (3) “he or she engages in sexual intercourse with another person without such person’s consent where such lack of consent is by reason of some factor other than incapacity to consent.”

In the instant action, the plaintiff does not allege that she was raped or sexually molested by defendant Steiner, or that there was any type of relationship, professional or otherwise, between them. There is no claim that Steiner was even aware of the alleged sexual misconduct. It has been additionally determined as a matter of law that Steiner is not vicariously liable for the alleged acts of Burzon.


Accordingly, the fourth cause of action is dismissed as asserted against defendant Steiner.

The fifth cause of action is premised upon the defendants’ alleged breach of fiduciary duty. In order to establish a cause of action for breach of fiduciary duty, the plaintiff must plead and prove the existence of a fiduciary relationship, misconduct or breach of that duty by the defendant, and damages directly caused by the defendant’s misconduct (Monaghan v Ford Motor Company, 71 AD3d 848 [2<sup>nd</sup> Dept 2010]). The plaintiff has not pleaded or demonstrated that there was any relationship, let alone a fiduciary relationship, which defendant Steiner breached, or that any of the plaintiff’s damages are attributable to defendant Steiner based upon a duty owed by Steiner to the plaintiff.

Accordingly, the fifth cause of action is dismissed as asserted against defendant Steiner.

Based upon the foregoing, the complaint and any cross claims as asserted against defendant Steiner are dismissed.

Dated: April 15, 2013

  
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 HON. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION