

Benson v United States Athletic Training Ctr., Inc.

2013 NY Slip Op 32719(U)

October 28, 2013

Supreme Court, New York County

Docket Number: 100933/2011

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Armen Benson
United States Athletic Training
Centers et al.

INDEX NO. 120933/11
MOTION DATE _____
MOTION SEQ. NO. 006

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 *decided in accordance*
with the accompanying decision and order.

FILED

OCT 31 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/08/13

[Signature], J.S.C.

LOUIS B. YORK
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 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 : PART 2**

ARMEN BENSON,
Plaintiff,

-against-

UNITED STATES ATHLETIC TRAINING
CENTER, INC., GARY GUERRIERO P.T.P.C.,
GARY GUERRIERO P.T., MARY LEONARD
a/k/a MARY GUERRIERO, and OLIVIA J.
WEBSTER a/k/a OLIVIA J. SADELER,
Defendants.

INDEX NO. 100933/2011
Motion Sequence 006
DECISION & ORDER
FILED
OCT 31 2013
**NEW YORK
COUNTY CLERKS OFFICE**

LOUIS B. YORK, J.:

In this personal injury action, defendants United States Athletic Training Center, Inc. (USATC), Gary Guerriero P.T.P.C. (the Guerriero Company), Gary Guerriero P.T. (Guerriero), Mary Leonard a/k/a Mary Guerriero (Leonard) (Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them. Plaintiff Armen Benson cross-moves for leave to reargue the court’s decision and order, dated May 1, 2013, dismissing the complaint as against defendant Olivia J. Webster a/k/a Olivia J. Sadeler (Webster), and for other relief.

Background¹

Plaintiff visited USATC on at least 11 occasions, during a period of five to six weeks commencing November 11, 2009, for physical therapy. Leonard, Guerriero’s wife, gave plaintiff an initial tour of the facility, and recommended Webster as plaintiff’s physical therapist. Plaintiff claims that he was injured by Webster “during her initial examination when she suddenly and

¹For a more complete account of the background of this action, see the court’s decision and order, dated December 16, 2012. Warren affirmation, exhibit J.

forcefully pushed down with a hammer-fist blow on Plaintiff ARMEN B. BENSON's forearms." Warren affirmation, exhibit A (Amended Complaint), ¶ 42. Plaintiff allegedly felt "a 'POP' sound from his arm," and experienced "extreme pain in his left bicep, causing him to scream out in pain." *Id.* In spite of this, plaintiff returned to USATC for physical therapy sessions with Webster. Although he regularly complained of pain, plaintiff said that Webster told him that "the therapy is working and that he would feel better." *Id.*

On December 22, 2009, plaintiff had an MRI, which revealed, in his words, that he had "a complete rupture of the biceps tendon in the left arm." Amended Complaint, ¶ 29. Another MRI, taken on January 20, 2010, led to a similar conclusion. Surgery followed on February 11, 2010.

The action commenced on January 24, 2011. On December 16, 2012, the court granted Defendants leave to reargue its decision and order of July 13, 2012, which granted plaintiff leave to amend his complaint (Mot. Seq. 004). Upon reargument, the court granted plaintiff leave to amend his complaint to the extent of including eight of the 23 proposed causes of action. In the Amended Complaint, causes of action one through four now allege fraud by USATC, the Guerriero Company, Guerriero and Leonard respectively; the sixteenth cause of action alleges professional malpractice by USATC, the Guerriero Company, Guerriero and Webster; the seventeenth cause of action alleges negligent supervision by USATC and the Guerriero Company; the eighteenth cause of action alleges lack of informed consent against USATC, the Guerriero Company and Webster; and the nineteenth cause of action alleges negligence against all defendants.

On May 1, 2013, the court granted defendant Webster's motion to dismiss the Amended Complaint as against her for lack of personal jurisdiction (Mot. Seq. 005). However, the gray

sheet for that decision and order was incorrectly marked, and the entire action was dismissed by the Clerk. Defendants concede that this was a scrivener's error, and do not oppose that part of plaintiff's cross motion to restore the action to active status, which is so-ordered herein.

Discussion

Defendants' Summary Judgment Motion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Defendants argue that plaintiff cannot demonstrate the required elements of a cause of action for fraud, that is, (1) a misrepresentation of a material fact; (2) that was known to be false at the time the representation was made; (3) the representation was made for the purpose of inducing the plaintiff to rely on it; (4) justifiable reliance on the misrepresentation; (5) causation; and (6) actual injury. See *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996). A claim of fraud must contain "a particularized factual assertion which supports the inference of scienter." *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97 (1st Dept 2003).

The Amended Complaint charges that USATC "operates an unlicensed physical therapy

facility[, and] . . . made material representations to Plaintiff ARMEN B. BENSON that it was a licensed physical therapy facility.” Amended Complaint ¶¶ 51, 53. These misrepresentations were made to plaintiff “with the intent to induce the Plaintiff to contract with the defendants for physical therapy services.” *Id.*, ¶ 61. This is the extent of the fraud claim asserted against USATC.

Guerriero states that USATC owned the gym where Guerriero Company’s employees administered physical therapy (attached to Warren affirmation). Leonard, USATC’s president, says the same. Leonard further states that USATC had no employees at the time of the incident. Webster was a Guerriero Company employee, fully licensed. A copy of her New York State license was attached to defendants’ papers. Plaintiff testified that Leonard showed him around the facility and, after his insurance company approved the prospective treatment, she recommended Webster to him. Plaintiff never suggests that anyone but Webster treated him at USATC.

Webster was in a lawful position to provide physical therapy to plaintiff, and, therefore, in Defendants’ view, there was no false representation of a material fact. At the time of the incident, New York Business Corporation Law § 1504 (a) provides that “[n]o professional service corporation may render professional services except through individuals authorized by law to render such professional services as individuals.” Even if USATC were licensed to plaintiff’s satisfaction, its individual practitioners would have to be properly licensed, as Webster apparently was, in order to treat plaintiff.

Plaintiff admits that he learned of USATC at his doctor’s office, and then looked them up on line. While he looked at other facilities, he said that he chose USATC because “[t]hey seemed

to have a lot of employees, physical therapists and trainers and had a large space, a lot of equipment so it presents itself as a place you would want to – it's attractive as a physical therapy facility." *Id.* at 59. He testified that Leonard told him that USATC was "a very good facility and I should come to them for physical therapy." *Id.* at 58.

Nothing in plaintiff's allegations indicate that the licensing status of USATC was a factor in his decision to enroll, nor does he cite any factual misrepresentations by any of the Defendants. It was the seemingly professional, active appearance of the facility and its staff that appealed to him, and, in any case, only a licensed physical therapist was assigned to him. Under these circumstances, the four causes of action for fraud as against the Defendants shall be dismissed. There are no material facts in dispute to be weighed by a jury in this regard.

The sixteenth cause of action alleges professional malpractice by USATC, the Guerriero Company, Guerriero and Webster (now dismissed from the action). "In order to establish liability for professional malpractice, a plaintiff must prove that the defendants deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries." *Archer v Haeri*, 91 AD3d 685, 685 (2d Dept 2012). "An allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional malpractice." *Travelers Indem. Co. v Zeff Design*, 60 AD3d 453, 455 (1st Dept 2009).

USATC was the Guerriero Company's landlord. USATC did not employ Webster, the only party alleged to have had physical contact with plaintiff. USATC and plaintiff had no privity, and USATC cannot be charged with professional malpractice in this action. That cause of action shall be dismissed as against USATC.

Defendants argue that Webster's treatment of plaintiff entailed no deviation from

accepted standards. Webster, using her married name Olivia Jean Sadeler, submits an affidavit in support of Defendants' motion, stating that she "performed the same initial examination [of plaintiff] that I have provided to numerous other patients." Sadeler aff, ¶ 7. She also claims that she has "never known – or even heard – through my education, training and experience of a biceps tendon tearing during an initial physical therapy examination." *Id.*, ¶ 12. Defendants submit an affidavit from Daniel Rich, M.D., a board-certified orthopedic surgeon, who conducted an independent medical examination (IME) of plaintiff on March 28, 2013. Dr. Rich states that "I have never witnessed a distal biceps tendon rupture caused by a physical therapy examination in my experience practicing medicine [since 1977]." Rich aff, ¶ 6. His IME report is attached separately. Warren affirmation, exhibit L. Joseph Weisberg, Ph.D, a licensed physical therapist, also submits an affidavit in support of Defendants. He has never examined plaintiff, but claims to have reviewed the discovery exchanged by the parties. Weisberg states that "I have never known of a patient to suffer a torn distal biceps as a result of a manual muscle test. I have researched this issue and have been unable to locate a single mention of a patient receiving a torn distal biceps tendon during manual muscle testing." Weisberg aff, ¶¶ 6-7. Defendants contend that these expert opinions demonstrate that Webster did not deviate from accepted standards of physical therapy.

Defendants also suggest that Webster's examination was not the proximate cause of plaintiff's injury. Dr. Rich's IME report includes his opinion that

the distal biceps tendon was torn by [plaintiff's] own musculature. This is indicative of a pre-existing degeneration of the tendon. Given this degeneration, and the activities Mr. Benson did before the injury e.g. lifting heavy objects and upper body weight training (see Activities of Daily living above, page 13), more likely than not, he would have injured this tendon in the course of his normal activities.

“A [professional] malpractice defendant moving for summary judgment meets his initial burden by establishing that he did not deviate from accepted [professional] practice or proximately cause injury.” *Bacani v Rosenberg*, 74 AD3d 500, 501 (1st Dept 2010). That shifts the burden to plaintiff, which is initially not met here until and unless plaintiff’s cross motion to extend the time to serve his expert disclosure is granted, as discussed below. *Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243, 243 (1st Dept 2005) (“Defendants’ expert submission was sufficient to meet their burden that they did not depart from the applicable standard of care. Since plaintiffs failed to offer expert testimony on the subject they failed to raise an issue of fact and partial summary judgment was properly granted defendants” [citation omitted]).

One prong of plaintiff’s cross motion, discussed further below, is his application to extend the time to serve his expert disclosure, pursuant to CPLR 2004 and CPLR 3101 (d) (1). CPLR 2004 permits the court to “extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” CPLR 3101 (d) (1) provides that “[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial” Plaintiff has been ordered by this court to serve his expert disclosure no less than five times. *See* conference orders, dated December 21, 2011, September 19, 2012, December 5, 2012, February 6, 2013, and February 13, 2013, Warren affirmation, exhibit K. All of these orders required plaintiff, as demanded, to serve his CPLR 3101 (d) (1) disclosure on or before filing of the note of issue. Plaintiff filed the note of issue on March 14, 2013, without having served his expert disclosure.

Now, plaintiff claims that he has arranged for an expert to testify, and that he served

proper notice on June 11, 2013, the same day that he reached this agreement. He contends that this delay was not willful, nor prejudicial to Defendants. Plaintiff cites several cases holding that “[p]reclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101 (d) (1) (i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion.” *Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 (1st Dept 2010); *Nathel v Nathel*, 55 AD3d 434 (1st Dept 2008). The factual background of these cases is not always clear from the appellate decisions, so it cannot be determined whether instant plaintiff’s disregard of five court orders is more or less typical. However, the thrust of these decisions, and others like them, is to afford the litigants the greatest opportunity to present their best case in court. Therefore, plaintiff’s cross motion is granted to the extent of permitting him to extend the time to serve his expert disclosure, pursuant to CPLR 2004 and CPLR 3101 (d) (1). For now, plaintiff’s expert’s affirmation, that of Ira Mehlman, M.D., as submitted, shall be deemed served.

Dr. Mehlman is board certified in both internal medicine and emergency medicine. He claims “many years of extensive knowledge and experience related to the diagnosis, treatment, and prognosis of traumatic musculoskeletal injuries,” including the type suffered by plaintiff. Mehlman aff, ¶ 2. The opinions he expresses “are based upon my review of the medical records and depositions,” without any physical examination of plaintiff. *Id.*, ¶ 3. He summarizes the findings of several doctors who examined plaintiff prior to the incident and found no evidence of, or complaints about, injury to his distal biceps tendon. He repeats plaintiff’s version of how the injury occurred during the initial physical examination by Webster. He reads Webster’s notes from that session, on November 17, 2009, as stating that plaintiff has “weak & (p) [painful] left biceps,” which he attributes to the examination itself.

Dr. Mehlman also quotes or paraphrases the reports of physicians who treated plaintiff after the incident. He opines that the “main cause of a distal biceps tendon rupture is a sudden injury.” Mehlman aff, ¶ 10. He concludes “that Ms. Webster’s use of excessive force during the physical exam was a substantial factor in causing Mr. Benson’s distal biceps tendon tear.” *Id.*, ¶ 15. Her “negligent acts and omissions . . . departed from good and accepted standards of care in providing treatment to plaintiff Armand Benson.” *Id.*, ¶ 4. This opinion, while bordering on conclusory, contrasts with those of Defendants’ experts, and leaves in dispute a material issue of fact. Under these circumstances, summary judgment on the professional malpractice cause of action as against the Guerriero Company and Guerriero is unwarranted, and that prong of Defendants’ motion is denied.

The seventeenth cause of action alleges negligent supervision by USATC and the Guerriero Company. As discussed above, USATC had no operative connection to Webster or the work she performed on its premises. She was not its employee and had no contractual connection to it. USATC had no reason or duty to supervise Webster. The cause of action for negligent supervision as against USATC is, therefore, dismissed.

The Amended Complaint, ¶ 210, charges that the Guerriero Company “was negligent in hiring and supervising medical personnel who were careless, unskillful, negligent, and who did not possess the requisite knowledge and skill of medical professionals in the community.” Except for the incident itself, there is no evidence that Webster lacked the requisite knowledge and skill to perform her services. She was properly licensed at the time. Also, this cause of action only reiterates the allegations of professional malpractice as against the Guerriero Company, and is dismissed as duplicative. *Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837, 839 (2d Dept 2013) (Where a cause of action for negligent supervision arose “from

the same facts as the causes of action alleging legal malpractice and do not allege distinct damages . . . [it is] duplicative of the causes of action alleging legal malpractice”).

The eighteenth cause of action alleges lack of informed consent against USATC, the Guerriero Company and Webster. Amended Complaint, ¶¶ 213-218. The claim is that they “failed to inform Plaintiff of the reasonably foreseeable risks and benefits of, and alternatives to, the treatment proposed and rendered.” *Id.*, ¶ 214. As found above, USATC had no duty to plaintiff regarding the treatments that he received from Webster. This cause of action is dismissed as against USATC.

Defendants’ experts state that they have never encountered a distal biceps tendon rupture as a result of a physical examination. Accepting for the moment that the injury occurred as plaintiff claims, his expert, Dr. Mehlman, does not maintain that it was a reasonably foreseeable risk of the treatment itself. Additionally, plaintiff does not offer any arguments in opposition to the dismissal of this cause of action for lack of informed consent as against the Guerriero Company, the only defendant to which it might be applicable. It is dismissed in its entirety, therefore, as requested by Defendants.

The nineteenth cause of action alleges negligence against all defendants. Amended Complaint, ¶¶ 219-224. As discussed above, there are no factual allegations that Leonard and/or USATC had a duty to plaintiff, and dismissal of the negligence cause of action as against them is appropriate. Webster has been dismissed from the action, and plaintiff does not address the issue of negligence, as distinct from the issue of professional malpractice, in its opposition to Defendants’ motion. The cause of action for negligence, therefore, is dismissed in its entirety.

Plaintiff’s Cross Motion

Plaintiff cross-moves to resettle the court’s decision and order of May 1, 2013, and

restore the action as against all the defendants except Webster.² This request is granted on consent. Another prong of plaintiff's cross motion requests an extension of time to serve his expert disclosure, pursuant to CPLR 2004 and CPLR 3101 (d) (1). This matter was dealt with above, and plaintiff's expert's affidavit, that of Ira Mehlman, M.D., is deemed served.

Finally, plaintiff cross-moves, pursuant to CPLR 3108, for the court to issue an open commission for the taking of Webster's deposition. CPLR 3108 provides that a "commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." The court twice extended the time to serve Webster, who had moved to California before the action commenced, to no avail. On May 1, 2013, the court dismissed the complaint as against Webster and denied plaintiff's request for another extension of time to serve Webster.

Plaintiff argues that Webster's testimony is "material and necessary" to his case. Paglinawan aff, ¶ 36; *see* CPLR 3101 (a). Defendants take no position on plaintiff's application for an open commission, and it shall be granted.

Accordingly, it is

ORDERED that that part of plaintiff Armen Benson's cross motion for leave to resettle the court's decision and order, dated May 1, 2013, dismissing the complaint in its entirety, is granted on consent, and the action shall be restored by the Clerk upon service by plaintiff's counsel of a copy of this order, with notice of entry, upon the Trial Support Office (Rm. 158M); and it is further

²Plaintiff makes a weak attempt in passing to reargue the original motion to dismiss the complaint as against Webster. However, it is undisputed that Webster was never served the summons and complaint, which was the ground for dismissal. Plaintiff, accordingly, recognizes the futility of challenging the decision to dismiss Webster, and drops the request.

ORDERED that, upon the action being restored, the complaint is dismissed as against Olivia J. Webster a/k/a Olivia J. Sadeler; and it is further

ORDERED that that part of plaintiff Armen Benson's cross motion for leave to extend the time to serve his expert disclosure, pursuant to CPLR 2004 and CPLR 3101 (d) (1), is granted, and the affidavit of Ira Mehlman, M.D., is deemed served; and it is further

ORDERED that defendants United States Athletic Training Center, Inc., Gary Guerriero P.T.P.C., Gary Guerriero P.T., and Mary Leonard a/k/a Mary Guerriero's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted to the following extent:

- The first through fourth causes of action for fraud are dismissed in their entirety;
- The sixteenth cause of action for professional malpractice is dismissed as against USATC alone;
- The seventeenth cause of action for negligent supervision is dismissed in its entirety;
- The eighteenth cause of action for lack of informed consent is dismissed in its entirety;
- The nineteenth cause of action for negligence is dismissed in its entirety;

and it is further

ORDERED that the action is severed and continued against defendants Gary Guerriero P.T.P.C. and Gary Guerriero P.T. on the sixteenth cause of action for professional malpractice only; and it is further

ORDERED that that part of plaintiff Armen Benson's cross motion, pursuant to CPLR 3108, for the issuance for an open commission for the taking of the testimony of Olivia J. Webster a/k/a Olivia J. Sadeler is granted; and it is further

ORDERED that plaintiff shall submit to the undersigned Justice the Commission with notice to all other parties active in this action, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: October 28, 2013

ENTER:



J.S.C.

LOUIS B. YORK
J.S.C.

FILED
OCT 31 2013
NEW YORK
COUNTY CLERK'S OFFICE