

Sydnor v Trahan

2013 NY Slip Op 33211(U)

January 10, 2013

Sup Ct, NY County

Docket Number: 805004/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS Justice

PART 6

Index Number : 805004/2012
SYDNOR, TISHA
vs.
RUSSELL F. TRAHAN, P.C.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 10/16/12
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 4-7
Answering Affidavits — Exhibits No(s) x-mot 10-20
Replying Affidavits No(s) 22-23
x-mot reply 24

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/10/13

JOAN B. LOBIS J.S.C.

- 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
NEW YORK COUNTY: IAS PART 6**

-----X
TISHA SYDNOR,

Plaintiff,

Index Nos. 805004/12;
805094/12

-against-

Decision and Order

RUSSELL F. TRAHAN, DPM, and RUSSELL F.
TRAHAN, P.C.,

Defendants.

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

These podiatric malpractice cases arise out of surgeries performed on Plaintiff Tisha Sydnor. Defendants Russell F. Trahan, DPM, and Russell F. Trahan, P.C., move to dismiss pursuant to Rule 3211(a)(8) of the Civil Practice Law and Rules. Plaintiff cross moved pursuant to C.P.L.R. § 3124 to compel disclosure, but subsequently withdrew that motion. Additionally, St. Barnabas Hospital, which Sydnor separately sued in Index No. 805094/12, moves pursuant to C.P.L.R. § 602(a) to consolidate that action with this one, since these actions arise out of the same facts and treatment of Plaintiff. Lastly St. Barnabas Hospital moves to dismiss if this Court consolidates these actions and grants the Defendants' motion to dismiss now before this Court. For the following reasons the motion to consolidate, which is unopposed, is granted; the motion to dismiss is denied, and, based on these determinations St. Barnabas' contingent motion is withdrawn.¹

Plaintiff, Tisha Sydnor, sought treatment from Defendant Russell F. Trahan, DPM, for foot pain. Treatment took place at St. Barnabas Hospital. Plaintiff underwent several surgeries beginning in the fall of 2009 continuing in 2010.

¹This Court further notes that motions that are filed based on possible future events are an improper form of motion.

In March 2012, Plaintiff sued Trahan. At the time of the suit Plaintiff had requested but had not received her medical records. In May 2012 Plaintiff filed her complaint along with the Certificate of Merit and also separately sued the Hospital. Plaintiff continued to pursue obtaining her medical records from Dr. Trahan.

The answer filed in this case included several affirmative defenses. The Eighth affirmative defense alleged that this Court lacked personal jurisdiction over Defendants to the extent service did not comply with the Civil Practice Law and Rules. Defendants now move to dismiss under C.P.L.R. Rule 3211(a)(8). They allege that under C.P.L.R. § 305(b), the Amended Summons is fatally defective because it characterized the action as medical rather than podiatric malpractice by the Defendants. They further allege that the Certificate of Merit filed pursuant to C.P.L.R. § 3012-a is defective because it was filed without Plaintiff having obtained her medical records from Dr. Trahan. They further challenge the Certificate's reference to a mere "physician" rather than a podiatrist.

Plaintiff opposes the motion to dismiss. She claims that the Amended Summons' reference to medical malpractice by the Defendants sufficiently described the nature of the action and relief sought by Plaintiff from Defendants as they themselves have personal knowledge of the podiatric nature of their services. She further claims that the Certificate of Merit is adequate. Plaintiff's counsel affirms that it was prepared following consultation with a licensed podiatrist who the attorney reasonably believes is knowledgeable in the issues relevant in this case. Even if the Certificate were insufficient, moreover, Plaintiff avers that the sanction of dismissal would be

excessive as Defendants have failed to show any prejudice.

This Court finds no dismissal is warranted. The record shows that the Amended Summons referred to Plaintiff's claims of malpractice by Defendants based on their treatment of Plaintiff. Therefore, Defendants had adequate notice of the nature of the claims against them for purposes of C.P.L.R. § 305(b). Nor does the Certificate of Merit filed in this case warrant dismissal. The Certificate shows Plaintiff consulted a knowledgeable physician and avers there was a reasonable basis to commence the action. Accordingly, it is

ORDERED that St. Barnabas Hospital's unopposed motion to consolidate Index Nos. 805004/12 and 805094/12 is granted; the above-captioned action is consolidated in this Court with Tisha Sydnor vs. St. Barnabas Hospital, Index No. 805094/12, under Index No. 805094/12, and the consolidated action shall bear the following caption:

TISHA SYDNOR,

Plaintiff,

-against-

ST. BARNABAS HOSPITAL, RUSSELL F. TRAHAN, DPM,

and RUSSELL F. TRAHAN, P.C.,

Defendants,

And it is further

ORDERED that the pleadings in the actions being consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant St. Barnabas Hospital is directed to serve a copy of this order with notice of entry on the County Clerk in Room 141B, who shall consolidate the papers in these actions and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant St. Barnabas Hospital is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office, Room 158, who is directed to mark the Court's records to reflect the consolidation; and it is further

ORDERED that Defendants' motion to dismiss the action is denied; the Clerk is directed to reflect that Motion Seq. No. 3 of 805094/12 is deemed withdrawn; and it is further

ORDERED that counsel appear for a preliminary conference on January 29, 2013, at 2:15 p.m.

Dated: January /0 , 2013

ENTER:



JOAN B. LOBIS, J.S.C.