

Chanko v American Broadcasting Co., Inc.

2014 NY Slip Op 30116(U)

January 15, 2014

Sup Ct, New York County

Docket Number: 152552/13

Judge: Manuel J. Mendez

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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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

ANITA CHANKO, as Executor of the Estate of MARK S. CHANKO, deceased, ANITA CHANKO, Individually, KENNETH CHANKO BARBARA CHANKO, PAMELA CHANKO and ERIC CHANKO,

INDEX NO. 152552/13
MOTION DATE 12-04-2013
MOTION SEQ. NO. 001
MOTION CAL. NO.

Plaintiffs,

-against-

AMERICAN BROADCASTING COMPANIES, INC., THE NEW YORK AND PRESBYTERIAN HOSPITAL, SEBASTIAN SCHUBL, M.D., ANIL S. RANAWAT, M.D., and TRAVIS MAAK, M.D.,

Defendants .

The following papers, numbered 1 to 14 were read on this motion to dismiss the second amended complaint pursuant to CPLR §3211[a][1], [7]:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that AMERICAN BROADCASTING COMPANIES, INC.'s (hereinafter referred to as "ABC") motion pursuant to CPLR §3211[a][1],[7], to dismiss the second amended complaint, is granted, only to the extent that the first, second, third and fourth causes of action are severed and dismissed against ABC. ANIL S. RANAWAT, M.D. and TRAVIS MAAK, M.D.'s motion filed under Motion Sequence 002, pursuant to CPLR §3211[a][7] to dismiss the second supplemental summons and second amended complaint against them and deleting their names from the caption, is granted. The NEW YORK and PRESBYTERIAN HOSPITAL and SEBASTIAN SCHUBL, M.D.'s motion filed under Motion Sequence 003, pursuant to CPLR §3211[a][1],[7], to dismiss the second amended complaint as against them, is granted, only to the extent that the first, second and third causes of action asserted against them are severed and dismissed.

ABC seeks an Order pursuant to CPLR §3211[a][1],[7] dismissing the second amended complaint based on a defense founded on documentary evidence and for the plaintiffs' failure to state a cause of action.

Anil S. Ranawat, M.D. and Travis Maak, M.D.'s motion filed under Motion Sequence 002, seeks to dismiss the causes of action asserted against them and delete their names from the caption in the second supplemental summons and second amended complaint, based on failure to state a cause of action.

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

The New York and Presbyterian Hospital (hereinafter referred to as "Presbyterian Hospital") and Sebastian Schubl, M.D.'s motion filed under Motion Sequence 003, seeks to dismiss the second amended complaint based on a defense founded on documentary evidence and for the plaintiffs' failure to state a cause of action.

Defendants were involved with a television series titled, "NY Med" which was produced and aired on ABC television and follows the medical staff and patients at Presbyterian Hospital in New York City. The broadcast that formed the basis for the complaint aired on August 21, 2012, and included a series of segments about various patients. Mark S. Chanko was brought into the emergency room in critical condition and was the subject of one of the segments while undergoing emergency treatment. Mr. Chanko had suffered severe injuries to his abdominal and pelvic region, became unstable and went into cardiac arrest three times before he was declared dead in the hospital while in the process of undergoing treatment for his injuries. The details including the type of vehicle involved, location and time of the accident, as well as, the patient and his family members identities are not provided in the segment.

Sebastian Schubl, M.D. was the chief surgical resident, he narrates the segment and is shown as being responsible for the initial diagnosis of Mr. Chanko's condition in the emergency room, organizing a team to treat the injuries, taking Mr. Chanko to another suite for surgical treatment, providing treatment, calling the time of death and accompanied by a social worker, advising Mr. Chanko's family of the death.

Mr. Chanko is heard early in the segment asking "Did you speak to my wife?" and complaining of pain. Mrs. Chanko and family members that were present in the hospital, are not identified by name or image and are not heard speaking in the segment. Sebastian Schubl, M.D. is filmed entering the room to advise the family of the death, only his voice is heard, and afterwards Dr. Schubl is interviewed alone.

Anil S. Ranawat, M.D. and Travis Maak, M.D. were called in as orthopedic consultants, they were both called in as part of the emergency treatment team of approximately five doctors. They were present, but the segment does not identify or specifically refer to them.

Mr. Chanko's surviving family members, including his wife and children recognized that he was the subject of an "NY Med" segment, months after his death by viewing a recorded episode. ABC released a second version of the episode which deleted the segment involving Mr. Chanko, and that is the only version of the episode currently available to the public. The show is currently broadcast "on demand" and is sold by ABC in DVD format.

The second amended complaint asserts five causes of action. The first and second causes of action are for violation of Mr. Chanko's estate and the remaining plaintiffs' right of privacy in violation of the New York Civil Rights Law §§ 50 and 51. The second amended complaint asserts a third cause of action for common law invasion of privacy based on intrusion upon private conversations of the surviving family members which were recorded. A fourth cause of action for violation of physician patient confidentiality pursuant to State and Federal Statutes and paragraph 13 of the New York State Patients' Bill of rights, and a fifth cause of action claiming the defendants recklessly, deliberately and maliciously caused mental and emotional distress.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1], does not require that the plaintiff establish the ultimate success of the allegations (African Diaspora Maritime Corp. v. Golden Gate Yacht Club, 968 N.Y.S. 2d 459 [N.Y.A.D. 1st Dept., 2013]). Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, supra).

Claims for invasion of privacy are governed by the New York Civil Rights Law §§50 and 51, which makes, “... the use of one’s name, portrait or picture for advertising or trade purposes without securing the person’s consent...” actionable (Freihofer v. Hearst Corp., 65 N.Y. 2d 135, 480 N.E. 2d 3490, 490 N.Y.S. 2d 735 [1985]). New York does not recognize a cause of action for the common law tort of right of privacy (Thomas v. Northeast Theatre Corp., 51 A.D. 3d 588, 859 N.Y.S. 2d 415 [N.Y.A.D. 1st Dept., 2008]).

A cause of action based on privacy cannot be sustained against defendants that are not physicians or staff of a facility that provides health related services (Romanello v. Intesa San Paolo, S.p.A., 97 A.D. 3d 449, 949 N.Y.S. 2d 345 [N.Y.A.D. 1st Dept., 2012]). The duty not to disclose confidential information is based on the implied covenant of trust and confidence inherent in the doctor-patient relationship, breach of that duty is actionable as a tort (Doe v. Community Health Plan- Kaiser Corp., 268 A.D. 2d 183, 709 N.Y.S. 2d 215 [N.Y.A.D. 3rd Dept., 2000]).

A cause of action for emotional distress requires the establishment of four elements, “ (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and injury and ; (4) severe emotional distress.” (Howell v. N.Y. Post Co., Inc., 81 N.Y. 2d 115, 612 N.E. 2d 699, 596 N.Y.S. 2d 350 [1993]). A hospital will be held vicariously liable for the conduct of its employees when it, “authorized, participated in, consented to, or ratified the conduct giving rise to such damages...such that it is complicit in that conduct.” (Melfi v. Mount Sinai Hospital, 64 A.D. 3d 26, 877 N.Y.S. 2d 300 [N.Y.A.D. 1st Dept., 2009]).

Plaintiffs concede that there is no basis to sustain the first and second causes of action against any of the named defendants. Plaintiffs contend that the third, fourth and fifth causes of action in the second amended complaint have been properly stated, are potentially meritorious as against all the named defendants, and should not be dismissed.

ABC claims that there is no basis to maintain the third, fourth or fifth causes of action against it. ABC contends that the third cause of action is stated as the common law privacy tort of intrusion which is not recognized in New York. ABC also contends that the physician confidentiality asserted in the fourth cause of action does not apply to ABC and the segment is protected by the First Amendment of the United States Constitution. ABC claims that the program was a documentary and plaintiffs cannot establish that their conduct was so outrageous as to result in emotional distress.

Anil S. Ranawat, M.D. and Travis Maak, M.D. contend that there is no basis to maintain any of the causes of action, which are vaguely asserted against them, in the second amended complaint. They also contend that they did not voluntarily or constructively disclose any information about Mark S. Chanko, including his identity, treatment or their prognosis. They were employed by The Hospital for Special Surgery and claim they were only paged to assist at Presbyterian Hospital based on the severe injuries sustained by the decedent, Mark S. Chanko. They also claim that they cannot be found liable for the fifth cause of action asserted against them in the second amended complaint for infliction of emotional distress because all they did was treat Mark S. Chanko.

Presbyterian Hospital and Sebastian Schubl, M.D. seek to dismiss the second amended complaint against them contending that there is no basis to maintain any causes of action against them. They contend that the third and fourth causes of action cannot be sustained because they are not recognized under New York Law. They claim that the "Patient's Bill of Rights" is not a binding contract and cannot be enforced under New York Law. They also claim that plaintiffs cannot establish that their actions were extreme and outrageous for purposes of establishing infliction of emotional distress.

This Court reviewed both the DVD available for the public and the segment that was originally broadcast. Mr. Chanko's wife and family are not seen at any time, nor are they heard in the originally broadcast segment. Only Sebastian Schubl, M.D. is heard in the broadcasted segment, including when he advises the family of the death. Plaintiffs conceded that there is no basis to sustain the first and second causes and they will be dismissed as to all of the defendants. Plaintiffs have not stated a basis to sustain the third cause of action for the common law invasion of privacy asserted in the second amended complaint against all of the defendants.

The fourth cause of action cannot be maintained against ABC because it does not provide health related services and there is no doctor-patient relationship. Plaintiffs have stated a potentially meritorious cause of action for the infliction of emotional distress against ABC.

Plaintiffs have not asserted a basis to sustain any of the causes of action asserted in the second amended complaint against Anil S. Ranawat, M.D. and Travis Maak, M.D.. These two doctors were paged as part of a team treating Mark S. Chanko and plaintiffs have provided no basis for singling them out. Plaintiffs did not speak to Anil S. Ranawat, M.D. and Travis Maak, M.D., and there is no proof the doctors were aware they were being filmed, since they were not affiliated with Presbyterian Hospital.

Against Sebastian Schubl, M.D. and The New York and Presbyterian Hospital, plaintiffs have stated a potentially meritorious fourth cause of action for violation of physician patient confidentiality and a fifth cause of action for emotional distress. Sebastian Schubl, M.D. and The New York and Presbyterian Hospital, have not established that they would not be liable in tort for breach of duty based on physician-patient relations, outside of the contractual obligations of the patient bill of rights.

Accordingly, it is ORDERED that AMERICAN BROADCASTING COMPANIES, INC.'s motion pursuant to CPLR §3211[a][1],[7], to dismiss the second amended complaint, is granted, only to the extent that the first, second, third and fourth causes of

action are severed and dismissed against it, the remainder of the relief sought is denied, and it is further,

ORDERED that the action shall continue against AMERICAN BROADCASTING COMPANIES, INC., as to the fifth cause of action, and it is further,

ORDERED that ANIL S. RANAWAT, M.D. and TRAVIS MAAK, M.D.'s motion filed under Motion Sequence 002, seeking to dismiss the causes of action asserted against them and delete their names from the caption in the second supplemental summons and second amended complaint, is granted, and it is further,

ORDERED that the causes of action in the second supplemental summons and second amended complaint against ANIL S. RANAWAT, M.D. and TRAVIS MAAK, M.D., are severed and dismissed with prejudice, and it is further,

ORDERED that the clerk is directed to enter judgment accordingly and it is further,

ORDERED that the clerk is directed to remove the names of ANIL S. RANAWAT, M.D. and TRAVIS MAAK, M.D., from the caption of the second supplemental summons and second amended complaint upon service of a copy of this Order with Notice of Entry on the Clerk of the Trial Support Office (Room 158), and the Clerk of the Court, and it is further,

ORDERED that the clerk is directed to amend the caption to read as follows:

ANITA CHANKO, as Executor of the Estate of
MARK S. CHANKO, deceased, ANITA CHANKO,
Individually, KENNETH CHANKO, BARBARA CHANKO,
PAMELA CHANKO and ERIC CHANKO,

Plaintiffs,

-against-

AMERICAN BROADCASTING COMPANIES, INC.,
THE NEW YORK AND PRESBYTERIAN HOSPITAL,
and SEBASTIAN SCHUBL, M.D.,

Defendants .

and it is further,

ORDERED that The NEW YORK and PRESBYTERIAN HOSPITAL and SEBASTIAN SCHUBL, M.D.'s motion filed under Motion Sequence 003, pursuant to CPLR §3211[a][1],[7], to dismiss the second amended complaint as against them, is granted, only to the extent that the first, second and third causes of action asserted against them are severed and dismissed, and it is further,

ORDERED that the action shall continue against The NEW YORK and PRESBYTERIAN HOSPITAL and SEBASTIAN SCHUBL, M.D. as to the fourth and fifth causes of action, and it is further,

ORDERED that AMERICAN BROADCASTING COMPANIES, INC., The NEW YORK and PRESBYTERIAN HOSPITAL and SEBASTIAN SCHUBL, M.D., are directed to serve an answer to the second supplemental summons and second amended complaint within 20 days after service of a copy of this Order with Notice of Entry; and it is further,

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 13, Room 210 at 71 Thomas Street, on March 12, 2014 at 9:30a.m..

ENTER:



MANUEL J. MENDEZ,

Dated: January 15, 2014

J.S.C. **MANUEL J. MENDEZ**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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