

Love v City of New York
2014 NY Slip Op 31572(U)
June 17, 2014
Sup Ct, New York County
Docket Number: 100061/2013
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 100061/2013
LOVE, EBONY S.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS
Cal. # 48

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

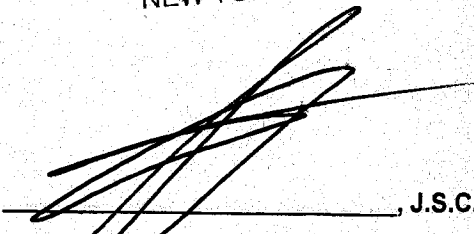
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/17/14
JUN 17 2014


_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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 5

-----X
EBONY S. LOVE,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 100061/2013
Seq. No.: 001

THE CITY OF NEW YORK, MYRNA BROWN,
STACEY STEWART, CATHOLIC GUARDIAN
SOCIETY, ST. LUKE'S HOSPITAL, DRAGOS
SERSENI and THE ATTORNEY GENERAL,

Defendants.

FILED

JUN 23 2014

-----X
HON. KATHRYN E. FREED:

COUNTY CLERK'S OFFICE
NEW YORK

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	...1,2.(Ex. A)..
NOTICE OF CROSS-MOTION AND AFFIDAVIT ATTACHED...	3,4(Exs. A-K).
ANSWERING AFFIDAVITS.....5.....
REPLYING AFFIDAVITS.....6,7.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants Stacey Stewart and the Catholic Guardian Society and Home Bureau i/s/h/a Catholic Guardian Society ("CGS") move, pursuant to CPLR 3211(a)(7), to dismiss the complaint against them for failure to state a cause of action. Defendant St. Luke's -Roosevelt Hospital Center i/s/h/a St. Luke's Hospital ("St. Luke's") cross-moves, pursuant to CPLR 3211(a)(5) for dismissal based on the statute of limitations and pursuant to CPLR 3211(a)(7) for failure to state a cause of action. After a review of the instant motion and all relevant statutes and case law, this Court grants

the motion and cross-motion.

Factual and Procedural Background:

In brief, plaintiff Ebony Love alleges, inter alia, that as a result of wrongdoing by the defendants, one of her children was removed from her custody.

This action was commenced by the filing of a summons with notice on or about January 9, 2013. Ex. A.¹ The summons with notice named as defendants The City of New York (“the City”), Myrna Brown, Stacey Ann Stewart, Jacqueline & Miguel Santos, Jane Pearl, Dragos Sergeni, St. Luke’s Hospital, Hani Ransing, Diane Demitri, Jody Adams, Michelle Rogers, Administration of Children’s Services, Beth Israel Hospital, and Ms. Grubel, whom plaintiff alleged violated her constitutional rights and committed negligence and “medical abuse.” Ex. A.

The plaintiff thereafter served a complaint naming as defendants the City, ACS, Myrna Brown, Michelle Rogers, Diane Demitri, Jacqueline Santos/Miguel [Santos], St. Luke’s Hospital, Dragos Serseni, Hani Ransing, the NYPD, Allen King and Stacey Stewart. Ex. B. In her complaint, plaintiff alleged, inter alia, that certain defendants committed medical malpractice and violated her constitutional and civil rights by disclosing confidential and false information regarding her medical and mental condition to St. Luke’s and Dr. Serseni, which prescribed and forcibly administered medication to her without verifying her true condition. Ex. B, at par. 3. Plaintiff further alleged that St. Luke’s and Dr. Serseni slandered her and violated her civil rights by recording false information about her in its medical records. Ex. B, at par. 4. In addition, plaintiff alleged that Stewart

¹Unless otherwise noted, all references are to the exhibits submitted by defendant St. Luke’s in support of its cross motion.

committed “Enterprise Corruption” for harassing plaintiff and for conspiring with other defendants to “cause physical or intentional vexation.” Ex. B, at par. 7.

St. Luke’s joined issue by service of its answer on April 9, 2013. Ex. C. In its answer, St. Luke’s alleged as affirmative defenses, inter alia, the statute of limitations and failure to state a cause of action. Ex. C.

On October 3, 2013, plaintiff filed a separate complaint in this action under the same Index Number noted above. Ex. D. The October 3, 2013 complaint was not referred to as an amended complaint and there is no indication in any of the motion papers that plaintiff sought leave of court before filing it. The October 3, 2013 complaint named as defendants the City, Myrna Brown, Stacey Stewart, Catholic Guardian Society, St. Luke’s Hospital, Dragos Sersen, and the Attorney General. Ex. D.

In the October 3, 2013 complaint, plaintiff reiterated her claim that St. Luke’s defamed her, committed medical malpractice, and violated her civil rights by forcibly administering medication to her and by storing false information about her in the hospital records. Ex. D. She further asserted that “Stewart worked relentlessly to force the plaintiff to lose her child.” and that she lied under oath to conspire against plaintiff. Ex. D, at par. 8. Further, plaintiff alleged that, by “omitting files from business records”, CGS “caused physical or intentional vexation.” Ex. D, at par. 8.

Defendants Stewart and CGS now move, pursuant to CPLR 3211(a)(7), to dismiss the complaint on the ground that it fails to state a cause of action against them. St. Luke’s cross- moves to dismiss the complaint pursuant to CPLR 3211(a)(5) on the ground that plaintiff’s claims are barred by the statute of limitations, and pursuant to CPLR 3211(a)(7) on the ground that the complaint fails to state a cause of action against it.

Contentions of the Parties:

Stewart and CGS argue that plaintiff has failed to state a cause of action against them for civil remedies based on enterprise corruption. They further assert that plaintiff has failed to state a claim for perjury, defamation, and violation of her civil rights. Further, Stewart and CGS argue that they are not liable under a theory of negligent or intentional infliction of emotional distress.

St. Luke's argues that the claims against it for defamation and medical malpractice are time barred since plaintiff's treatment at St. Luke's, which began on April 18, 2009, ended on June 23, 2010. Exs. E - K. In any event, urges St. Luke's, plaintiff failed to state a claim for defamation or medical malpractice. Further, St. Luke's asserts that plaintiff's October 3, 2013 complaint must be disregarded since it was filed without court leave.

Plaintiff opposes St. Luke's cross-motion by asserting that its motion papers were untimely. She further asserts that her defamation and medical malpractice claims are timely and that, in any event, she had six years to sue St. Luke's because it committed fraud.

In a reply affirmation in further support of their motion, Stewart and CGS reiterate that plaintiff has failed to state any viable claim against them.

In a reply affirmation in further support of its cross-motion, St. Luke's asserts that its cross-motion was timely and reiterates its arguments that plaintiff's claims against it are time-barred and otherwise without merit.

This Court notes that plaintiff purports to bring a motion for a default judgment against the City, Myrna Brown, Michelle Rogers, ACS, Dr. Serseni, St. Luke's, Stewart, and CGS. Specifically, she filed a document entitled "Counterclaim-Default Judgment/Motion Response dated November 15, 2013. However, since she has not moved by notice of motion, this purported motion cannot be

considered by this Court. *See* CPLR 2214. Importantly, in a sworn statement submitted in support of the purported default motion, plaintiff stated that “she did not intend to state she was suing for Enterprise Corruption and instead intended on having the defendant investigated for corruption.”

Conclusions of Law:

The Motion By Stewart and CGS to Dismiss

It is well settled that “[o]n a motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *see also Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Viewing the complaint pursuant to this standard, this Court dismisses the same as against Stewart and CGS.

As noted above, plaintiff filed her summons with notice on January 9, 2013. Ex. A. She then served an initial complaint on defendants The City of New York, ACS, Myrna Brown, Michelle Rogers, Diane Demitri, Jacqueline Santos/Miguel [Santos], St. Luke’s Hospital, Dragos Serseni, Hani Ransing, NYPD, Allen King and Stacey Stewart on or about March 10, 2013. Ex. B. However, it was not until October 3, 2013 that she served a complaint naming the City, Myrna Brown, Stacey Stewart, the Catholic Guardian Society, St. Luke’s Hospital, Dragos Serseni, and the Attorney General. Ex. D. Since plaintiff never obtained leave of court to serve CGS, the complaint against it was a nullity. *See* CPLR 3025(b); *Public Adm’r v McBride*, 15 AD3d 558 (2d Dept 2005). Further, the initial complaint must be dismissed as against CGS since there were no allegations of

its wrongdoing therein. *See Phillips v Trommel Constr.*, 101 AD3d 1097 (2d Dept 2012).

Indeed, since the October 3, 2013 complaint was served without court leave, the allegations contained in that complaint were a nullity as against each of the parties named therein. *See Khedouri v Equinox*, 73 AD3d 532 (1st Dept 2010). Thus, this Court need only address the allegation against Stewart in plaintiff's initial complaint, which is that she committed "Enterprise Corruption" by harassing plaintiff and co-conspiring to violate her civil rights by "physical or intentional vexation."

First, plaintiff does not allege that Stewart has been convicted of enterprise corruption pursuant to Penal Law § 460.30. Therefore, none of the potentially applicable civil penalties set forth in that statute can apply herein. Moreover, as noted above, plaintiff stated in a sworn "Counterclaim-Default Judgement /Motion Response" dated November 15, 2013 that "she did not intend to state she was suing for Enterprise Corruption and instead intended on having the defendant investigated for corruption." This Court interprets this statement as tantamount to a concession by plaintiff that her claim for enterprise corruption lacks merit.

In addition, plaintiff's allegations regarding a conspiracy are "vague and unsupported by [a] description of particular overt acts." *Sommer v Dixon*, 709 F2d 173, 175 (2d Cir 1983). "A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." *Id.*, at 175; *see Leung v City of New York*, 216 AD2d 10 (1st Dept 1995).

To the extent plaintiff asserts claims for intentional and negligent infliction of emotional distress against Stewart, such claims are also without merit. "A claim for intentional infliction of emotional distress has not been stated as there is no allegation of extreme and outrageous conduct (*See Howell v New York Post Co.*, 81 NY2d 115 (1993))." *Ferreyr v Soros*, 116 AD3d 407 (1st Dept

2014). Nor is there a valid claim of negligent infliction of emotional distress since there is no allegation of a “breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for her own safety (*citation omitted*.” *Id.*, at 407.

In light of the foregoing, the complaint must be dismissed as against defendants CGS and Stewart.

The Motion By St. Luke’s to Dismiss

Plaintiff asserts claims against St. Luke’s for defamation and medical malpractice. As noted above, plaintiff’s treatment at St. Luke’s began on April 18, 2009 and ended on June 23, 2010. Exs. E - K. Thus, any claim plaintiff had against St. Luke’s for defamation would have expired on June 23, 2011, one year after the treatment ended. *See* CPLR 215(3). However, since the summons with notice was not filed until February 15, 2013, this claim is clearly time barred.

Similarly, any claim which plaintiff had for medical malpractice against St. Luke’s would have expired two and one-half years after June 23, 2010. *See* CPLR 214-A. Since the complaint was not filed until after the expiration of this two and one-half year period, plaintiff’s claim of medical malpractice is untimely.

Although plaintiff attempts to circumvent the statute of limitations for medical malpractice by claiming that she had six years to sue due to fraud by St. Luke’s, this contention is without merit. “To plead a viable cause of action for fraud in connection with charges of medical malpractice, the allegations must include ‘knowledge on the part of the physician of the fact of his malpractice and of his patient’s injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by him to his patient known by him to be false at the time it was made, and on

which the patient relied to his damage' (*see Simcuski v Sacli*, 44 NY2d 442, 451 [1978]; *Spinosa v Weinstein*, 168 AD2d 32, 42 [2d Dept 1991]; *Harkin v Culleton*, 156 AD2d 19 [1st Dept 1990], *lv dismissed* 76 NY2d 936 [1990])." *Atton v Bier*, 12 AD3d 240, 241 (1st Dept 2004). Further, the damages resulting from the alleged fraud must be "separate and distinct from those generated by the alleged malpractice (*citation omitted*)." *Atton v Bier, supra* at 241. Since plaintiff has failed to meet the foregoing criteria, she cannot invoke the six-year statute of limitations for fraud.

In light of the above, plaintiff's claims against St. Luke's must be dismissed pursuant to CPLR 3211(a)(5).

In any event, as St. Luke's asserts, plaintiff failed to state a claim for defamation with sufficient particularity. Pursuant to CPLR 3016(a), a plaintiff in a defamation action is required to set forth the particular words complained of in the complaint. The plaintiff is also required to allege the "time, place and manner of the false statement and to specify to whom it was made." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Since plaintiff failed to meet these requirements, her claim must be dismissed pursuant to CPLR 3211(a)(7).

Additionally, plaintiff's medical malpractice claim, even if not time barred, would also be subject to dismissal, since her allegations of medical malpractice are vague and conclusory. *See Phillips v Trommel Constr.*, 101 AD3d *supra*, at 1098.

Finally, contrary to plaintiff's contention, St. Luke's cross-motion was timely, having been personally served on plaintiff five days prior to the return date.

Therefore, in accordance with the foregoing, it is:

ORDERED that the motion by defendants Stacey Stewart and Catholic Guardian Society and Home Bureau i/s/h/a Catholic Guardian Society is granted to the extent that the complaint is

dismissed in its entirety as against the said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the said defendants; and it is further,

ORDERED that the cross-motion by defendant St. Luke's-Roosevelt Hospital Center i/s/h/a St. Luke's Hospital is granted to the extent that the complaint is dismissed in its entirety as against the said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the said defendant; and it is further,

ORDERED that the action is severed and continued against the remaining defendants; and it is further,

ORDERED that the caption be amended to reflect the dismissals and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that this constitutes the decision and order of the Court.

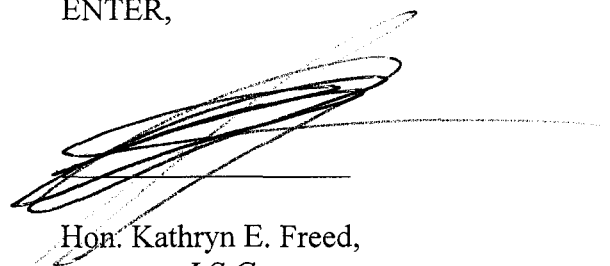
DATED: June 17, 2014

ENTER,

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed,
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**