

Franzese v City of New York

2014 NY Slip Op 32558(U)

September 24, 2014

Supreme Court, New York County

Docket Number: 805229/2013

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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ANTHONY FRANZESE a/k/a JOHN DOE and
JACQUELINE COLETTA,
Plaintiffs,

Index No. 805229/2013

-against-

**Decision, Order, and
Judgment**

THE CITY OF NEW YORK, THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,
ROOSEVELT HOSPITAL CENTER a/k/a ST. LUKE’S
ROOSEVELT HOSPITAL, DOCTOR A, DOCTOR B,
NURSE 1, NURSE 2, and SECURITY at ST. LUKE’S
ROOSEVELT,

Defendants.

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

Plaintiffs by their attorney, Stuart Shaw, brought this medical malpractice action on June 17, 2013, alleging *inter alia* a wrongful patient discharge from Defendant St. Luke’s – Roosevelt Hospital Center¹ on April 24, 2012. St. Luke’s – Roosevelt Hospital Center, Doctor A, Doctor B, Nurse 1, Nurse 2, and Security at St. Luke’s-Roosevelt (hereinafter “Roosevelt”) move to dismiss. Plaintiffs move to appoint a guardian for Anthony Franzese. The motions are consolidated for the purposes of this decision, order, and judgment. Voluntary discontinuances have been entered as to the City of New York and the New York Health and Hospitals Corporation (“NYHHC”).

A Request for Judicial Intervention was filed in July 2013. At that time both NYHHC and Roosevelt moved to dismiss. After the motions were submitted to Part 6 in September 2013, the case was transferred to Part 38, which handled all medical malpractice cases

¹ Sued here as “Roosevelt Hospital Center a/k/a St. Luke’s Roosevelt Hospital.”

involving NYHHC. After the matter was discontinued as to NYHHC, the case was transferred back to Part 6 in October 2013. Unfortunately, the case was not placed on any active calendars and the motion to dismiss by Roosevelt was not submitted to the Part until Plaintiffs' attorney moved in June 2014 for the appointment of Jacqueline Coletta as guardian ad litem for Mr. Franzese. To fully understand the context of this request, a somewhat extensive history of events leading up to the motions is required.

On September 28, 2010, Mr. Franzese was standing in front of his apartment building when he was struck by an air conditioner that fell from a sixth floor window. The air conditioner struck him on the head after bouncing off an awning. As a result he was hospitalized. He sued the owner of the premises and others alleging negligence in Anthony Franzese v. Zear LLC, Zenon Chernyk, Areta Podhorodecki, Futterman & Lobaccaro Claims a/k/a F&L Claims Service and Rick Futterman, Index No. 114680/2010 ("Zear") and was represented by Mr. Shaw. That proceeding was discontinued by stipulation dated July 21, 2014. The discontinuance as to Zear LLC was without prejudice and allowed renewal of the claim until April 25, 2015.

According to the verified complaint² in the action, Mr. Franzese was admitted to Roosevelt after being found incoherent and unable to care for himself in a city park located at 57th Street and 10th Avenue. He was taken by emergency medical services to Roosevelt and admitted as a John Doe on April 20, 2012. He was discharged four days later. Coincidentally, on April 27, 2012, an article appeared in the New York Post that reported that Mr. Franzese had disappeared and that his disappearance had placed his lawsuit seeking to recover for injuries from the air

² In the verification, Mr. Franzese's attorney affirmed that Mr. Franzese was not within the County of New York.

conditioner accident in jeopardy. The New York Post published a photograph along with the article.

Mr. Shaw had not been in contact with Mr. Franzese since his release from a Veteran's hospital earlier that year. According to Mr. Shaw's affirmation, a detective from the New York City Police Department had tried to identify the John Doe admission at Roosevelt. After seeing the Post article, he connected Mr. Franzese with the John Doe and notified Mr. Shaw. Approximately two months later, on June 18, 2013, Mr. Shaw filed this lawsuit. It is undisputed that Mr. Franzese's whereabouts were unknown at the time the lawsuit was filed.

The motion to dismiss by Roosevelt asserts that there is no valid plaintiff. Jacqueline Coletta has no legal capacity to sue, and Mr. Shaw has no basis to say he represents Mr. Franzese because he represented him in the air conditioner case. Moreover, without Mr. Franzese to assert how the care and discharge by Roosevelt harmed him, there is no claim for damages.

The motion also raises reasons why each of the separate causes of action fail to state claims as a matter of law. Defendant argues that the negligence action is duplicative of the medical malpractice claim and must be dismissed. The gross negligence claim fails to allege sufficient facts that can support such a finding. Likewise, the facts cited fail to involve conduct intended to injure or fail to support a claim that the sole motive of the conduct was to injure Mr. Franzese, allegations that must be made in asserting a prima facie tort, the third cause of action. As to the fourth cause of action, which is for medical malpractice, Roosevelt argues that there is no certificate of merit and no claim of damages that rises above the level of pure speculation. The fifth cause of action for intentional infliction of mental and emotional distress is unsupported by

sufficient facts. The sixth cause of action seeks redress under Section 1983 of Title 42 of the United States Code but is unavailable since the remaining defendants are not public actors, acting under color of state law; nor are constitutional rights violations alleged. Finally, the seventh and eighth causes of action for compensatory and punitive damages are not separate claims under New York law.

In opposition to the motion, Plaintiffs cross-move to stay this proceeding pursuant to Section 205(a) of the Civil Practice Law and Rules. That section allows a litigant to commence a new action upon the same occurrence as a terminated action within six months after the termination, if the first action had been timely commenced. The first action cannot have been terminated by a voluntary discontinuance, failure to obtain personal jurisdiction over the defendant, neglect to prosecute or as final judgment on the merits, however. Plaintiffs asks that Plaintiff Coletta have the right to obtain a guardian ad litem for Mr. Franzese. In addition, the cross-motion asks for a finding that the Plaintiffs' action be determined to be meritorious and for the case to be transferred to Justice Braun, who presided over the tort case under Index No. 114680/2010. The papers in opposition to the motion to dismiss do not address the substantive arguments raised by Roosevelt. Rather, the attorney argues, the motion to dismiss should be deferred until the appointment of a guardian.

In a separate motion, Ms. Coletta is seeking to be appointed Mr. Franzese's guardian ad litem in this proceeding under Section 1202 of the Civil Practice Law and Rules and to have the guardianship extended to the earlier tort case. She submits an affidavit restating the circumstances surrounding Mr. Franzese's disappearance. She relies on her own familiarity with her brother's condition and the medical records that had been gathered for the air conditioner case in support of her motion to be appointed her brother's guardian ad litem. She admits, however,

that she was unaware of Mr. Franzese's disappearance until contacted by Mr. Shaw. It was Ms. Coletta and her two children who retained Mr. Shaw to institute this lawsuit.

Roosevelt opposes the cross-motion and reasserts its arguments for lack of capacity to sue and the fatal defect of seeking damages in light of the absence of a complainant. Roosevelt argues that Section 205(a) is not applicable until a dismissal of the action occurs. It argues that the provision does not and cannot be used to stay the dismissal so that a guardian is appointed. Roosevelt opposes the separate motion for appointment of a guardian under Section 1202 of the Civil Practice Law and Rules based on Ms. Coletta's lack of capacity and lack of standing. In addition, it argues that the Plaintiffs have not made a showing about Mr. Franzese's current physical or mental condition, a requirement for an appointment of a guardian ad litem. This infirmity will also doom any application for a guardian under Article 81 of the Mental Hygiene Law, the proper procedure for seeking an appointment of a guardian that would have the powers to commence litigation. Roosevelt opposes the request to transfer this proceeding to Justice Braun or to Justice York.³

The defendants in the air conditioner accident case submitted opposition papers to the motion for the appointment of a guardian as well. They further argue improper service and cite to the inability to locate Mr. Franzese as a legal impediment to such an appointment. They argue that the motion to appoint a guardian in this action would have no bearing on the matter before Justice Braun, which issue they allege was the subject of a conference before Justice Braun. They seek sanctions⁴ since they allege Justice Braun told Mr. Shaw that this application could not

³ The lawsuit before Justice York, Index No. 100979/2011, involved a nurse who sued Roosevelt for wrongful termination. She alleged that she was fired because she was a whistleblower about the hospital's discharge procedures. It is a disposed case.

⁴ Since the Zear defendants have not moved separately for affirmative relief, the sanctions request cannot be considered.

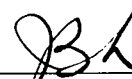
result in a guardian in the air conditioner case. They reiterate the arguments of Roosevelt that without proof of Mr. Franzese's current condition this motion cannot be considered as satisfying the requirements of Article 81.

The motion to dismiss is granted. The cross-motions for a stay and the appointment of a guardian ad litem are denied without prejudice to any future proceeding. There is absolutely no basis for an attorney to commence a lawsuit for a party without the party's knowledge and agreement to participate in the proceedings. The authority to do so can be established by an explicit delegation of authority, such as a valid power of attorney or retention by a guardian appointed pursuant to an Article 81 proceeding who has that express power. No such authority has been established here.⁵ Therefore the lawsuit must be dismissed and not stayed. The proper procedure to appoint a guardian would be to comply with the procedure established by Article 81 of the Mental Hygiene Law. Whether Section 205 of the Civil Practice Law and Rules would be applicable to a new action is left for another day.

This constitutes the decision, order, and judgment of this Court.

Dated: *Sept. 24*, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

⁵ The papers submitted by Mr. Shaw and Ms. Coletta say certain authorizations were signed by Mr. Franzese but the only powers of attorney attached as an exhibits were unsigned (NYSCEF DOC 56 & 57).