

Zegelstein v Faust

2015 NY Slip Op 30712(U)

April 27, 2015

Supreme Court, New York County

Docket Number: 651198/14

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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RICKY ZEGELSTEIN, M.D., CUSTOM
ANESTHESIA SERVICES, P.C., and INNOVATIVE
ANESTHESIA SOLUTIONS, P.C.,

DECISION AND
ORDER

Plaintiffs,

Index Number
651198/14

-against-

MICHAEL J. FAUST, M.D., MICHAEL P. KRUMHOLZ, M.D.,
JED KAMINETSKY, M.D., ALAN RAYMOND, M.D.,
HAROON CHAUDHRY, and VCARE, LLC d/b/a
M.D. MANAGE, INC.,

Defendants.

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HON. ANIL C. SINGH, J.:

Motion sequence numbers 001, 002, 003, 004, 005, and 006 are
consolidated for disposition.

Defendants move for an order: a) dismissing the complaint pursuant to
CPLR 3211(a)(1), (5), (7), (8) and (10), contending, inter alia, that this Court lacks
personal jurisdiction due to the fact that none of the defendants were ever served
with a summons; and b) imposing sanctions, including attorneys' fees, against
plaintiffs and their counsel pursuant to 22 NYCRR 130-1.1, contending that the
lawsuit is frivolous. Plaintiffs oppose the motion and cross-move pursuant to

CPLR 306-b, 3211(e), and 3025 for leave to extend the time of service and to amend the verified complaint.

Plaintiffs commenced the instant action by filing a Summons with Notice on April 17, 2014. Subsequently, plaintiffs filed a verified complaint on August 13, 2014.

Plaintiff Ricky Zegelstein, M.D., is a board-certified anesthesiologist and the owner of Custom Anesthesia Services, P.C. ("CAS") and Innovative Anesthesia Solutions, P.C. ("IAS"). Dr. Zegelstein, CAS, and IAS provide out-patient anesthesia services at other doctors' offices or at ambulatory surgical centers.

Defendants Michael J. Faust, M.D., Michael P. Krumholz, M.D., Jed Kamintesky, M.D., Alan Raymond, M.D., and Haroon Chaudhry, M.D., are physicians. There does not appear to be any affiliation whatsoever between the defendants, and each of the defendants asserts that he does not work with or know the other defendants.

Defendant V Care LLC d/b/a M.D. Manage, Inc., is a company that provides medical billing processing services to physician practices.

Beginning in 2002, plaintiffs entered into separate agreements with the defendant physicians individually. Under the agreements, plaintiffs would

perform anesthesia services to the patients of the individual defendants, and the defendants would compensate plaintiffs for the services rendered.

The verified complaint alleges that defendants failed to compensate plaintiffs for services rendered. The complaint asserts causes of action for conversion, breach of contract, fraud, negligence, moneys had and received, unjust enrichment, an accounting, and breach of fiduciary duty. Plaintiffs seek damages exceeding \$5,000,000.

E-Courts reflects that on September 2, 2014, five affidavits of service were e-filed. In each affidavit, the process server states that he served copies of the Verified Complaint and Notice of Commencement of Action Subject to Mandatory Electronic Filing. On their face, the affidavits of service do not state that any of the defendants were served with a copy of the Summons With Notice.

Discussion

While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiff in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendants were subject to the personal jurisdiction of the Court (Danile B. Katz & Associates Corp. v. Midland Rushmore, LLC, 90 A.D.3d 977 [2d Dept., 2011]).

Defendants exhibit sworn affidavits executed by defendants' principals,

who state that plaintiffs failed to serve any of the defendants with a copy of a Summons with Notice.

In response, plaintiffs' counsel concedes that none of the defendants were ever served with the Summons with Notice.

“The failure to serve a summons with the complaint in this matter is a jurisdictional defect requiring the dismissal of the action” (Cuccia v. Weiner & Assoc., 234 A.D.2d 26, 26 [1st Dept., 1996]).

Accordingly, we find that defendants have demonstrated conclusively that this Court does not have personal jurisdiction over the defendants due to the failure to serve a summons with the complaint. We find further that plaintiffs have not made a prima facie showing that the defendants are subject to the personal jurisdiction of the Court.

In light of the foregoing, it is not necessary for the Court to reach plaintiffs' remaining contentions. However, the Court notes parenthetically that the complaint appears to lump together unrelated claims against unrelated physicians who have nothing in common. The complaint could be subject to dismissal, therefore, based on misjoinder of parties. Filing separate lawsuits against the defendants individually would be better practice.

The Court in its discretion declines to award sanctions.

Based on our finding that the Court lacks jurisdiction, we cannot address plaintiffs' cross-motion.

Accordingly, it is

ORDERED that defendants' motions are granted to the extent that the complaint is dismissed without prejudice; and it is further

ORDERED that the cross-motions are denied.

The foregoing constitutes the decision and order of the court.

Date: April 27, 15
New York, New York



Anil C. Singh