

Harley v Berman

2015 NY Slip Op 32172(U)

October 19, 2015

Supreme Court, Bronx County

Docket Number: 301835/12

Judge: Stanley Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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THOMAS HARLEY,
Plaintiff(s),

INDEX №.301835/12

-against-

DR. TATYIANA BERMAN, DR. ROBERT
WINEGARTEN, DR. LAWRENCE DANZIGER,
DR. HARRISON RUBENSTEIN, DR. WEISS,
DR. JERRY H. LYNN, RAYMOND PEREZ,
SOL STOLZENBERG, D.M.D. d/b/a
TOOTHSAVERS, AND UNIVERSAL DENTAL,
Defendant(s).

DECISION

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HON. STANLEY GREEN:

The motion for summary judgment by defendants Winegarten and Berman is consolidated for decision with the motions by defendant Danziger, defendant Weiss, defendant Lynn, and defendant Sol Stolzenberg, D.M.D. d/b/a Toothsaunders and upon consolidated the motions are granted and the complaint is dismissed as to all moving defendants.

Plaintiff first went to Toothsaunders in January, 2006 where he first met with Lynn, who looked in his mouth and told him he needed dental work. Over the next three years, the defendants Winegarten, Berman, Danziger and Weiss performed dental work on plaintiff's upper and lower teeth at the Toothsaunders facility. Plaintiff claims that various treatments departed from good and accepted practice and caused injury to him. He asserts that Toothsaunders is vicariously liable for the treatment provided by the moving defendants and others at the facility.

Movants seek summary judgment dismissing the claims against them. They variously claim either that they did not treat the plaintiff, that the treatment they provided was within the standard of care or that the treatment they provided was beyond the Statute of Limitations.

There is no evidence that Lynn ever treated the plaintiff. In fact, the plaintiff testified, in

conversation with Lynn about treatment and on other unspecified occasions when he complained to Lynn about other dentists. Plaintiff never testified that Lynn actually treated him and there is no written record of treatment by Lynn. Therefore, there can be no departure from good and accepted practice by Lynn. In fact, plaintiff's expert in opposition does not set forth any medical departure by Lynn. Clearly, all work on Plaintiff's mouth was done by others and there is no evidence that Lynn directed or supervised their work or is otherwise vicariously liable for them. Accordingly, the claim against Lynn is dismissed.

The treatment by Winegarten terminated on June 11, 2009. The Summons and Complaint were filed on February 24, 2012. The Statute of Limitations is two and one-half years. Thus, any treatment prior to August 24, 2009 is beyond the Statute of Limitations, unless the plaintiff can establish continuous treatment by Winegarten, which he has failed to do so. The fact that plaintiff continued to treat with other dentists at Toothsavers after Winegarten stopped treating him does not constitute continuous treatment by Winegarten. Accordingly, there is no need to address the merits of the claim against Winegarten and the case is dismissed as to him.

Defendant Berman treated the plaintiff on several occasions from January 31, 2006 through August 23, 2007 and then once on December 16, 2010. All but the last visit were more than two and one-half years prior to the filing of this lawsuit and are thus beyond the Statute of Limitations unless plaintiff can demonstrate continuous treatment by Berman. Berman did not see the plaintiff after August 23, 2007 until the one visit on December 16, 2010, at which time she cemented partial lower bridges prepared by other dentists. Thus, there was no continuous treatment by Berman which would toll the Statute of Limitations and all claims except regarding December 16, 2010 must be dismissed based on the Statute of Limitations. With respect to this last visit, plaintiff claims that the section of the bridge that she cemented on the 16th placed torque and pressure on tooth #26, causing pain, but his expert fails to explain how Berman's

action in cementing the bridges to the tooth was a departure from good practice. The fact that plaintiff claims he suffers from pain is not evidence of a departure or even that the cementing caused the pain. Plaintiff's expert does not say what else, if anything, Berman should have done on the 16th. Accordingly, the complaint against Berman is dismissed.

The motion by Danziger is granted. Plaintiff has not submitted any opposition to his motion. All claims against Danziger are dismissed.

Defendant Weiss treated the plaintiff on six occasions from June 27, 2008 to October 10, 2008. All claims against Weiss are precluded by the Statute of Limitations. Accordingly, there is no need to address the merits of the claims against him and the complaint against him is dismissed.

Plaintiff named "Sol Stolzenberg, D.M.D., d/b/a Toothsavrs" as a defendant. Said defendant answered as "Sol S. Stolzenberg, D.M.D., P.C., d/b/a Toothsavrs." Initially, it is noted that there is no claim that Stolzenberg ever personally treated the plaintiff and, thus, any claims against him as an individual are dismissed.

The issue regarding Toothsavrs is whether it was properly sued in this case. Plaintiff sued "Sol Stolzenberg, D.M.D., d/b/a Toothsavrs." Defendant answered as "Sol S. Stolzenberg, D.M.D., P.C. d/b/a Toothsavrs." There is no evidence that "Toothsavrs" existed as anything but a trade name of a professional corporation (P.C.) of which Stolzenberg was the sole shareholder. Plaintiff never sued the P.C., which was the correct entity to be sued. In fact, even after an answer was served indicating the existence of the P.C., plaintiff did not move to amend the complaint, even though the answer contained an affirmative defense that "Sol Stolzenberg, D.M.D., d/b/a Toothsavrs" was an improper party. Further, while Sol Stolzenberg had notice of the lawsuit, such notice is not sufficient to subject the P.C. to the jurisdiction of the Court in the absence of proper service on it. Thus, plaintiff did not sue the correct entity and any claims

regarding Toothsavvers for vicarious liability for any of the defendants must be, and are, dismissed.

While the complaint against the moving defendants is dismissed on other grounds, it is noted that the plaintiff has failed to create issues of fact with respect to each moving defendant. The two affidavits of plaintiff's expert, Michael Chesner, D.D.S., are vague and conclusive. Chesner makes broad statements about the treatment herein, often failing to distinguish between the treatment by the various defendants, the alleged departures by them and the issues of causation. His references to the record are inadequate, incomplete, misleading and ambiguous. He fails to establish what treatment by which dentist caused what quantum of pain.

His affidavits, in effect, lump together all the treatment by all the defendants and make it impossible to determine what alleged departures caused what injury and pain. This type of affidavit is typical of the multitude of cases brought by this attorney against these defendants.

The Clerk of the Court is directed to enter judgment dismissing all claims against defendants Winegarten, Berman, Danziger, Weiss, Lynn and Sol Stolzenberg, D.M.D. d/b/a Toothsavvers.

This Constitutes the decision and order of the Court.

Dated: October 19, 2015


STANLEY GREEN, J.S.C.