

**Garcia v Krinick**

2015 NY Slip Op 32652(U)

September 30, 2015

Supreme Court, Westchester County

Docket Number: 54980/2014

Judge: Sam D. Walker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
ANTONIO A. GARCIA.,

Plaintiff

**DECISION AND ORDER**  
Index No. 54980/2014  
Motion Sequence 1 & 2

-against-

NOLAN V. KRINICK, D.D.S., individually and d/b/a  
WESTCHESTER DENTAL IMPLANT INSTITUTE, INC.,  
HEE JOO PYON, D.D.S., and UNITED NATION PLAZA  
DENTAL, P.C.,

Defendant.

-----X

The following papers were considered on the defendant's motion seeking an order dismissing the action pursuant to CPLR § 3211§ (a)(5) and 214-a, due to the plaintiff's failure to commence the action within the applicable statute of limitations or pursuant to CPLR § 3211§ (a)(5), 306, and 306-b, due to the plaintiff's failure to properly serve the Supplemental Summons and Amended Complaint within 120 days of filing the Summons and Complaint; and on the plaintiff's cross-motion seeking an Order assessing costs and

sanctions as against the defendant Hee Joo Pyon, D.D.S. ("Dr. Pyon"), pursuant to Part 130.1 of the Rules of the Chief Administrator of the Court:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-B	1-4
Notice of Cross-Motion/Affirmation/Exhibits A-K	5-17
Reply Affirmation/Exhibits A(defendant)	18-19
Reply Affirmation/Exhibits A (plaintiff)	20-21

This is an action for dental malpractice, whereby the plaintiff, Antonio A. Garcia alleges that he was a patient under the care and treatment of the defendant Dr. Pyon, Nolan V. Krinick ("Dr. Krinick"), and United Nations Plaza Dental, P.C. ("Plaza Dental") and that between October 15, 2011 and November 29, 2011, he underwent various dental procedures performed by Dr. Pyon and Plaza Dental, which the plaintiff alleges was unskillful, improper, incorrect and constituted dental malpractice, in that the care and treatment failed to follow good and accepted custom and proper dental practice and procedures of the dental profession in the community where the care and treatment was rendered. The Complaint alleges that Dr. Krinick was doing business under the name and style of Westchester Dental Implant Institute, Inc. ("Westchester Dental") and Plaza Dental and that Dr. Krinick and Dr. Pyon were shareholders, officers, agents, servants and/or employees of Plaza Dental.

The plaintiff filed a Summons and Complaint on April 2, 2014, naming "Jane Doe" as a defendant, instead of Dr. Pyon. The defendant, Dr. Krinick filed a Verified Answer on April 16, 2014. The plaintiff then filed an Supplemental Summons and Amended Complaint on April 21, 2015, naming Dr. Pyon as a defendant and the defendant Dr. Pyon

subsequently filed the instant motion to dismiss. The plaintiff filed a cross-motion opposing Dr. Pyon's motion and seeking costs and sanctions.

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

((5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds"

N.Y. Civ. Prac. L. & R. 3211(a)(5).

Dr. Pyon seeks dismissal, pursuant to CPLR 3211(a)(5) based on the statute of limitations for dental malpractice. CPLR § 214-a provides, in relevant part: that

An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure....N.Y. Civ. Prac. L. & R. CPLR § 214-a.

Dr. Pyon argues that the Amended Complaint alleges that the plaintiff underwent treatment by Dr. Pyon, from October 15, 2011 through November 29, 2011. Therefore, the time to commence the action expired on or about May 29, 2014, two and a half years after the last date of treatment of November 29, 2011. Dr. Pyon argues that service of the Supplemental Summons and Amended Complaint was not effectuated until May 4, 2015, almost a year after the expiration of the statute of limitations and therefore, the action as against Dr. Pyon, is untimely and should be dismissed.

Dr. Pyon further seeks dismissal of the action, pursuant to CPLR 3211(a)(5) due to the plaintiff's failure to properly serve Dr. Pyon within 120 days of the filing of the Summons and Complaint.

CPLR § 306-b provides, in relevant part that:

Service of the summons and complaint, summons with notice,...shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding,...where the applicable statute of limitations is four months or less, service shall be made no later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time period provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. N.Y. Civ. Prac. L. & R. CPLR § 306-b.

Dr. Pyon contends that the plaintiff filed an affidavit of service showing service of the Supplemental Summons and Amended Complaint upon Dr. Pyon on May 4, 2015. Dr. Pyon argues that according to the Supplemental Summons and Affidavit of Service, the plaintiff filed the Summons and Complaint on April 2, 2014 and therefore, pursuant to CPLR § 306-b, the plaintiff's deadline to properly serve the Summons and Complaint upon Dr. Pyon, was July 31, 2014.

The plaintiff opposes the motion and further seeks sanctions. The plaintiff contends that when the action was commenced on April 4, 2014, the name of the female dentist, who treated the plaintiff at Dr. Krinick's office was unknown to the plaintiff, that the plaintiff's attorney engaged in numerous diligent search efforts and investigations, and that due to the dental office's non-compliance with requests for information, the plaintiff was forced to name Dr. Pyon as "JANE DOE, D.D.S.", the name being fictitious but intended to be the Dentist who rendered services to plaintiff between Oct. 2011 and Dec. 2011'. The plaintiff states that the Summons and Complaint were filed prior to the

expiration of the statute of limitations and in so doing, the plaintiff was acting in accordance with CPLR § 1024, which states in pertinent part that:

A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly. N.Y. Civ. Prac. L. & R. CPLR § 1024.

“To be effective, a summons and complaint must describe the unknown party in such a manner that the “Jane Doe” would understand that she is the intended defendant by a reading of the papers” *Bumpus v. New York City Transit Authority*, 66, A.d.3d 26, 31, 883 N.Y.S.2d 99, 103 (2d Dept. 2009). The use of CPLR 1024 requires the plaintiff to exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and also to describe the “Jane Doe” party, as to fairly apprise the party that he or she is the intended defendant. *Id.*

The plaintiff argues that the name of Dr. Pyon was not disclosed to the plaintiff until after the two and one half year statute of limitations had expired, in spite of the plaintiff’s numerous and diligent attempts to learn of the name and identity of Dr. Pyon. The plaintiff’s attorney states that the plaintiff retained the office on January 30, 2014, at which time he did not know the name of the female dentist who performed some of the dental work on him. The attorney states that the same day, the office sent a letter to Krinick’s office requesting the plaintiff’s treatment records. The attorney further avers that the plaintiff additionally requested records from a subsequent treatment provider in hopes that those records would contain the name of the female dentist within the chart, but the name

was not included in these records. The attorney sent another request to Krinick's office on February 10, 2014 and emails to an employee of the dental office regarding the records. The plaintiff's attorney also states that the office attempted to learn Dr. Pyon's name by searching the web site. The plaintiff's attorney states that Dr. Pyon's name was revealed by Dr. Krinick's attorneys on December 4, 2014, after the suit was commenced,.

The plaintiff further states that he complied with the second prong of the requirement, by describing Dr. Pyon in the Complaint, as the Dentist who rendered services to plaintiff between Oct. 2011 and Dec. 2011 and serving the Complaint upon Westchester Dental, which papers were accepted on behalf of all defendants by a duly-authorized agent of Westchester Dental, which was the last known place of employment of Dr. Pyon and the place where she treated the plaintiff.

While the plaintiff seems to have satisfied the second prong of the requirement of CPLR 1024 by describing the party in the Complaint, to apprise her that she is the intended defendant, it is this Court's opinion that, the plaintiff failed to exercise due diligence to discover the identity of the Jane Doe defendant prior to the expiration of the statute of limitations. *Temple v. New York Community Hosp.*, 89 A.D.3d 926, 927, 933 N.Y.S.2d 321, 323 (2d Dept. 2011). The two to three letters sent by the plaintiff's attorney and an email, do not constitute diligence attempts. There is no indication that the plaintiff engaged in any pre-action discovery and even after the action was commenced, the plaintiff did not engage in discovery or seek the assistance of the Court to attempt to discover the identity of the Jane Doe. Therefore, since the Complaint was not amended nor Dr. Pyon served, within the statute of limitations, Dr. Pyon's motion to dismiss is

granted. Since, the Court is dismissing the plaintiff's action as against Dr. Pyon, the plaintiff's motion for costs and sanctions for filing a frivolous motion, is therefore denied.

Accordingly, it is

ORDERED that Dr. Pyon's motion to dismiss the action as against her, is GRANTED; and it is further

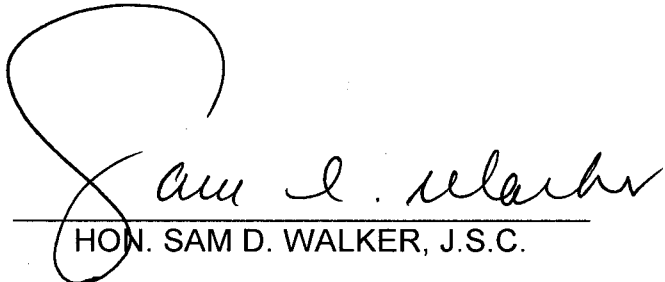
ORDERED that the action is dismissed as against Dr. Pyon; and it is further

ORDERED that the plaintiff's cross-motion seeking costs and sanctions, is DENIED.

The remaining parties are directed to appear before Court Attorney/Referee Millner on October 30, 2015 at 9:30am. To the extent any relief requested in Motion Sequence 1 was not addressed by the court, it is hereby deemed denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
September 30, 2015



HON. SAM D. WALKER, J.S.C.