

Prisco v Schwartz

2015 NY Slip Op 32838(U)

September 29, 2015

Supreme Court, Suffolk County

Docket Number: 604732/15

Judge: Thomas F. Whelan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORDERED that the remaining portions of this motion wherein the defendants seek an order dismissing the complaint against said defendant Kalyvas and defendant St. Jude Medical, Inc., is considered under CPLR 3211(a)(7) and is denied.

The plaintiffs commenced this action to recover damages incurred, directly and derivatively, attributable to the acts of medical malpractice committed by the first four named defendants while treating the plaintiff from May of 2012 through December 10, 2012 for back pain, including surgery performed at the defendant, Huntington Hospital, and with negligence in allowing or permitting defendants, Kalyvas and St. Jude Medical, Inc., to access the spinal cord stimulator, a medical device implanted in the body of plaintiff, Patricia Prisco, during the surgery. Defendant St. Jude Medical Inc., (hereinafter "St. Jude") is the manufacturer of the spinal cord stimulator at issue and its employee salesman, defendant Kalyvas, was a sales representative on site at and/or after the implantation of said spinal cord stimulator. These defendants are charged with negligence due to defendant Kalyvas' affirmative acts of negligence in tampering with and adjusting the stimulator after entering the plaintiff's hospital room without permission and in violation of specific instructions not to do so.

By the instant motion, counsel for defendants Kalyvas and St. Jude move to dismiss the complaint pursuant to "CPLR 3211(a)(7) and 3211(a)(8)" (*see* Notice of Motion dated June 10, 2015) which relief is expanded to include a dismissal pursuant to CPLR 3211(a)(5) due to the bar of an allegedly applicable statute of limitations. The plaintiffs oppose, in response to which, the defendants have replied. For the reasons stated, the motion is granted only to the extent that the claims of negligence asserted in the Fourth cause of action, which is the only cause directed at defendant Kalyvas, is dismissed pursuant to CPLR 3211(a)(8).

The moving defendants' claim that the statute of limitations applicable to medical malpractice claims is applicable to the plaintiffs' claims of negligence against the moving defendants is rejected as wholly lacking in merit. The only claims targeting the moving defendants are those set forth as the Third and Fourth causes of action in the complaint and these claims sound in negligence not malpractice nor lack of informed consent. To the extent that the Fifth cause of action, which sounds in lack of informed consent, may be read as targeting all defendants, including the moving defendants, it has been withdrawn by the plaintiffs in their opposing papers. Accordingly, the three year statute of limitations set forth in CPLR 214 governs the plaintiffs' claims and the action was commenced timely thereunder. Those portions of this motion wherein the moving defendants seek dismissal of the complaint on the grounds that the plaintiffs' claims are barred by the two and one-half year statute of limitations set forth in CPLR 214-a are denied.

Also denied are those portions of this motion wherein the moving defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(7) on grounds of legal insufficiency. Once again the court notes that the only claims in which the moving defendants are charged with liability are the negligence claims advanced against them in the Third and Fourth causes of action set forth in the

Prisco v Schwartz et al
Index No. 604732/15
Page 3

complaint. All claims by the moving defendants as to the legal insufficiency of the other causes of action set forth in the complaint which sound in medical malpractice and lack of informed consent are thus rejected as unmeritorious.

The court rejects the moving defendants' contentions that the Third and Fourth causes of action, in which the moving defendants are charged, separately, with liability due to the affirmative acts of negligence on the part of defendant Kalyvas, are legally insufficient due to the absence of a duty owing from these defendants to the injured plaintiff. Affirmative acts of negligence that are the proximate cause of a foreseeable injury to a plaintiff are indeed actionable under common law tort theories as all persons are under a duty to refrain from engaging in such acts to the extent that they may cause foreseeable harm to others (*see Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 [2d Dept 2014]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168, 159 NE 896 [1928]). Engagement in such acts gives rise to plausible claims for damages against the actor and potentially his or her employer, under principles of *respondeat superior* (*see Hartman v Milbel Enter., Inc.*, 130 AD3d 978, 15 NYS3d 125 [2d Dept 2015]). While there may be defenses available to the employer (*see Luna v Apadafor*, 127 AD3d 933, 7 NYS3d 413 [2d Dept 2015]), the instant motion is not premised upon any such defenses. The allegations of affirmative acts of negligence on the part of defendant Kalyvas which may be imputable to defendant St. Jude, under theories of respondent superior or other principles of agency and independent contractor liability, are sufficient to state claims sounding in common law negligence (*see Tirpack v 125 North 10, LLC*, 130 AD3d 917, 14 NYS2d 110 [2d Dept 2015]).

Defense counsel urges this court to find that the moving defendants cannot be held liable in tort due to an absence of a duty owed to the injured plaintiff and offers several case authorities from other jurisdictions in support of this contention (*see e.g., Smith v. St. Jude Med., Inc.*, 217 Cal. App.4th 313 [2013]; *see also McCartney v United States of Am. and St. Jude Med., Inc.*, 31 F.Supp 1340, 1345 [Dist. Ct. Utah 2014]; *Kennedy v Medtronic, Inc.*, 366 Ill. App3d 298, 851 N.E. 2d 778, ILL. Court of Appeals [1st Dist. 2d Div., 2006]). However, all the case authorities relied upon are inapposite and not controlling, as they involved claims sounding in medical malpractice, negligence due to an assumed duty, strict products liability and/or violations of purported pre-emptory Federal statutes that were not premised upon allegations of independent affirmative acts of negligence by an onsite, sales representative of a medical device manufacturer (*see Reed v Medtronic, Inc.*, 2014 WL 1930221 [Cal. Court of Appeals, Div. 1, 2014]).

The court has considered the remaining contentions of the moving defendants offered in support of their motion to dismiss on the grounds of legal insufficiency and finds them to be without merit. Accordingly, the court denies those portions of the instant motion wherein the moving defendants seek dismissal of the complaint on the grounds of legal insufficiency.

In contrast, those portions of the instant motion wherein defendant Kalyvas seeks dismissal of the complaint pursuant to CPLR 3211(a)(8) due to a lack of service of the summons and complaint is granted. In opposition to the motion, the plaintiffs failed to produce an affidavit of

Prisco v Schwartz et al
Index No. 604732/15
Page 4

service demonstrating due service of process upon defendant Kalyvas. To the extent that the defendants also claim an entitlement to dismissal of the complaint as to defendant St. Jude, such claim is rejected as unmeritorious as due proof of service of the summons and complaint upon St. Jude in a jurisdictionally proficient manner is before the court (*see* CPLR 302; CPLR 313).

In view of the foregoing, the instant motion (#001) by defendants Kalyvas and St. Jude Medical, Inc., for an order dismissing the plaintiff's complaint is granted only to the extent that the claim asserted by the plaintiff against defendant Kalyvas is dismissed pursuant to CPLR 3211(a)(8).

DATED: 9/29/15



THOMAS F. WHELAN, J.S.C.