

Perez v Abulencia

2015 NY Slip Op 32991(U)

November 2, 2015

Supreme Court, New York County

Docket Number: Index No. 805075/2014

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____ LOBIS
Justice

PART 6

Index Number : 805075/2014
PEREZ, JOSE
vs.
ABULENCIA, M.D., ARMAND
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). 16-20, 22

Answering Affidavits — Exhibits _____

No(s). 23

Replying Affidavits _____

No(s). 28, 27

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
ORDER

Dated: Nov. 2, 2015

JB, J.S.C.

JOAN B. LOBIS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
JOSE PEREZ and RAMONITA PEREZ,

Plaintiffs,

-against-

Index No. 805075/2014

Decision and Order

ARMAND ABULENCIA, M.D. and
EMPIRE STAT GROUP, LLC d/b/a EMPIRE STAT,

Defendant.

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

On February 12, 2014, plaintiff Jose Perez underwent an independent medical examination (IME) in connection with a no-fault claim. Allegedly, defendant Armand Abulencia, M.D. injured Mr. Perez during the course of the examination. In particular, plaintiffs allege, Dr. Abulencia forcefully manipulated Mr. Perez's left arm, shoulder and elbow. As a result of this, plaintiffs contend, Mr. Perez continues to suffer severe pain and he may require additional surgery.

Currently, Dr. Abulencia moves for an order of dismissal of all claims against him under either CPLR § 3211(a)(7) or CPLR § 3212. He argues that an action does not lie against a doctor who conducts an IME on behalf of an insurer. Applying this principle, he states, an order either dismissing the complaint against him for failure to state a claim or granting summary judgment dismissing the claims as a matter of law. In opposition, plaintiffs point to Bazakos v. Lewis, 12 N.Y.3d 631 (2009), in which the Court of Appeals allowed the plaintiff to sue the doctor who conducted an IME during which the doctor allegedly injured the plaintiff. Based on Bazakos, plaintiffs assert that the lawsuit states a valid claim. Dr. Abulencia's reply distinguishes Bazakos on the grounds that this case involves a no-fault IME as opposed to one arising pursuant to a

lawsuit, and he did not conduct the examination on behalf of an adverse defendant. He cites several cases which he claims are dispositive and favorable to him.

Upon consideration, the Court denies the motion to dismiss. Dr. Abulencia is correct that there is no action for damages for medical malpractice unless a physician-patient relationship exists, Schrumpf v. Meinhard, 57 A.D.3d 510, 511 (2nd Dep't 2008), and that this principle normally applies when doctors conduct IMEs. Exceptions arise in certain circumstances, however. E.g., Lawliss v. Quellman, 38 A.D.3d 1123, 1124 (3rd Dep't 2007)(summary judgment precluded where, according to plaintiff, doctor affirmatively advised plaintiff to have surgery). In Bazakos, the plaintiff underwent an IME pursuant to his existing lawsuit for injuries he allegedly sustained during a motor vehicle accident. According to the plaintiff, in the course of the IME the doctor injured the plaintiff's hand. The court found that a cause of action existed because the lawsuit was based on the doctor's "manipulation of a body part of a person who came to his office for a physical examination," and this constituted "medical treatment by a licensed professional, and the negligent performance of that act is not ordinary negligence, but a prototypical act of medical malpractice." Bazakos, 12 N.Y.3d at 633 (citations and internal quotation marks omitted).

The Court concludes that Bazakos relies on sound legal principals and, moreover, is controlling precedent. The distinctions Dr. Abulencia makes between this case and Bazakos are not persuasive. There is no reason to distinguish between the doctor-patient relationship that exists in an IME for a no-fault claim and an IME for a litigation. Moreover, the additional cases to which he cites are distinguishable as the plaintiffs did not claim they sustained physical injuries as a direct result of the examinations at issue. E.g., Green v. Combined Life Ins. Co. of New York, Index No.

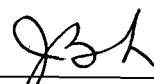
570750/12 (1st Dep't 2013)(avail at 2013 WL 2249197)(plaintiff alleged her medical benefits were wrongfully terminated due to IME doctor's failure to properly evaluate her); Savarese v. Allstate Ins. Co., 287 A.D.2d 492 (2nd Dep't 2001)(same); Lee v. City of New York, 162 A.D.2d 34 (2nd Dep't 1990)(claim did not exist based on doctor's failure to diagnose heart problems during pre-employment screening IME).

Accordingly, it is

ORDERED that the motion is denied.

Dated: *Nov. 2*, 2015

ENTER:



JOAN B. LOBIS, J.S.C.