

**Arce v Capella**

2016 NY Slip Op 30403(U)

March 4, 2016

Supreme Court, New York County

Docket Number: 805635/2015

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

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

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 LISA ARCE,

Plaintiff,

Index No. 805635/2015

-against-

**Decision, Order  
 and Judgment**

JOSEPH F. CAPELLA, M.D., CAPELLA PLASTIC  
 SURGERY P.A. and SCOTT WOehrLE, PA-C,

Defendants.  
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In this medical malpractice action, plaintiff alleges that she had a body lift on July 31, 2014, performed by Joseph F. Capella, M.D., a plastic surgeon at Capella Plastic Surgery P.A. (Capella P.A.), with the aid of Scott Woehrle, PA-C, a registered physician's assistant. All three are named as defendants in this action. Capella P.A. has offices at 545 Island Road in Ramsey, New Jersey and at 461 Park Avenue South in Manhattan. According to the complaint, Dr. Capella and Mr. Woehrle have licenses to practice their respective jobs in both New York and New Jersey. The complaint alleges that plaintiff treated with Capella P.A. from around July 31, 2014 to around August 14, 2014, that defendants undertook her care and treatment at both offices, and that their negligent treatment caused her to sustain injuries such as sepsis and cellulitis. She alleges damages due to the alleged malpractice and additionally states a claim for lack of informed consent.

On November 13, 2015, defendants answered the complaint. Among other things, the answer asserts affirmative defenses of lack of personal jurisdiction and forum non conveniens. Now, they move to dismiss the complaint in its entirety based on one or both of these affirmative

defenses. Plaintiff opposes the motion. For the reasons below, the Court grants the motion as to Mr. Woehle and denies it as to Dr. Capella and Capella P.A.

Defendants first argue that there is no personal jurisdiction. They state that the New York office of Capella P.A. exists for the sole purpose of consulting with new patients and that all actual treatment takes place in New Jersey. They state that contrary to plaintiff's contention, Mr. Woehle is not licensed in New York, and that although Dr. Capella has a New York license he does not have admitting privileges with any New York hospitals or surgical facilities and renders no medical treatment in this State. Plaintiff's New York residence, they say, is the single tie between New York and this action.

As support, defendants submit the affirmation of Dr. Capella. He alleges that plaintiff's June 10, 2014 and July 16, 2014 consultations took place at the New Jersey office, and plaintiff had additional discussions with him by phone on June 18, 2014, when he was in New Jersey. The procedure itself took place at the Hackensack Medical Center in New Jersey. Following the procedure, plaintiff emailed the office's general account on August with questions, and Mr. Woehle, who does not practice in New York, responded via email. Her follow-up visits to defendants, on August 7, 2014 and August 14, 2014, also were in the Ramsey, New Jersey office. In addition, Mr. Woehle's affidavit indicates that he is not licensed or registered as a physician's assistant in New York, and that his email response to plaintiff and his assistance to Dr. Capella during plaintiff's body lift procedure were all in New Jersey. They argue that the existence of Capella P.A.'s "satellite office" is insufficient to impose jurisdiction. Even if the Court finds

that it has long-arm jurisdiction over defendants, they continue, the Court must reject jurisdiction under a due process analysis.

Second, defendants present forum non conveniens as an alternative basis for dismissal. They allege that all defendants are located in New Jersey, all the medical evidence and documentation is in New Jersey, and New Jersey law applies. In addition, most witnesses are in New Jersey, and New Jersey is a suitable forum. They allege that a New York litigation would result in hardship to all defendants. Further, they contend that there is not a sufficient nexus between the case and the State to burden the New York courts with an out-of-state claim. Thus, they say, the action should be adjudicated in New Jersey.

In opposition, plaintiff points out the fact that she is, and at all relevant times was, a resident of New York. Plaintiff's affidavit, which she submits along with her opposition, indicates that she treated with Dr. Capella because he was listed as one of the top ten plastic surgeons in New York and had an office in New York. She scheduled her appointment with the doctor by calling the New York office. She states that she on August 10, 2014, with a 104.7 degree fever and in considerable pain, she went to the Northern Westchester Hospital emergency room, where she was diagnosed with septic shock and cellulitis. She states that she received treatment at the hospital and then went to an infectious disease specialist in New York for follow-up care. Subsequently, she was treated at Mount Kisco Medical Center and by two doctors in Westchester County. All her subsequent treatment relating to her infection, she states, has been in New York. She contends that defendants have a New York office "for the convenience of New York patients and for the purpose of soliciting New York patients." Arce Aff., at ¶ 18. She concludes in her

affidavit that defendants clearly are in New York on a permanent and continuous basis. Noting that she lacks full knowledge of the workings of the New York office because there has been no discovery, she seeks disclosure on this issue for the limited purpose of evaluating jurisdiction with respect to Mr. Woehrl.

Defendants reply that plaintiff's post-operative treatment with nonparties is not relevant to the issue of jurisdiction. They contend that plaintiff has not satisfied her burden of proving, in the face of their challenge, that jurisdiction is proper in New York. They reject plaintiff's argument that her "personal perception of Defendants' website and her personal requirements to select a surgeon," Reply Aff., at p. 2, should be considered in evaluating jurisdiction. Additionally, they say it is irrelevant to the jurisdictional determination that the New York office may be designed for the convenience of defendants' New York patients because plaintiff treated with defendants in New Jersey. They allege that the website makes it clear that the business is operated solely in New Jersey, and point out that the website states the Dr. Capella performs surgeries at Hackensack University Medical Center, which is in New Jersey and lists his hospital affiliations, which are all in New Jersey. They state it was not rational for plaintiff to choose Dr. Capella based on the location of an office in New York, as it is clear that he does not practice there. They say that plaintiff "concedes" there is no jurisdiction over Mr. Woehrl.

When a defendant moves for dismissal based on lack of personal jurisdiction, the plaintiff bears the burden of showing that such jurisdiction exists. Waggaman v. Arauzo, 117 A.D.3d 724, 725 (2nd Dep't 2014). The plaintiff's burden, however, is simply to make a prima facie showing of personal jurisdiction. Lang v. Wycoff Heights Medical Center, 55 A.D.3d 793,

793 (2nd Dep't 2008). In reviewing the application, the Court must determine whether a finding of personal jurisdiction does not violate due process. Waggaman, 117 A.D.3d at 725.

Here, plaintiff satisfies her burden as to Dr. Capella and Capella P.A. The facts that Dr. Capella is licensed, and that Cappella P.A. has a New York office at which Dr. Capella has initial consultations with New York patients are sufficient by themselves to establish jurisdiction. This is true even if the office is not used for surgery and the doctor does not have privileges at New York hospitals. Compare to Jackson v. Sanchez-Pena, 104 A.D.3d 574 (1st Dep't 2013)(finding no jurisdiction because doctor was not licensed in New York, had no office or place of business in New York, and did not transact business in New York). Moreover, by having initial consultations with other patients in New York, Dr. Capella and Capella P.A. did business and solicited business in the State, thus availing themselves of the forum. Defendants' counter-argument that plaintiff was treated in New Jersey confuses the issue of whether they themselves have sufficient contact with the State to confer jurisdiction. Moreover, in light of the above, there is no due process violation involved in asserting jurisdiction over Dr. Capella and Capella P.A.

Forum non conveniens allows a court to dismiss an action because, even though there is jurisdiction, it would be best to litigate in another forum. Jackam v. Nature's Bounty, Inc., 70 A.D.3d 1000, 1001 (2nd Dep't 2010). In making this determination, the court must consider the various and competing factors, including the plaintiff's residence, the burden on the New York courts, and the potential hardship to the defendants. Thor Gallery at South DeKalb, LLC v. Reliance Mediaworks (USA) Inc., 131 A.D.3d 431, 432 (1st Dep't 2015)(Thor). The plaintiff's residence generally "the most significant factor in the equation." Id. The defendants bear the heavy

burden of establishing forum non conveniens. See id.; Hudson Ins. Co. v. J.J. Oppenheim, 35 A.D.3d 168, (1st Dep't 2006). As courts respect the right of a plaintiff to choose a jurisdictionally sound forum, courts do not disturb the plaintiff's forum choice unless the balance weighs strongly in favor of the defendant. Thor, 131 A.D.3d at 431. The court's determination as to whether dismissal is appropriate is not disturbed unless it "improvidently exercised its discretion or failed to consider the relevant factors." Hong Leong Finance Limited (Singapore) v. Morgan Stanley, 131 A.D.3d 418, 418 (1st Dep't 2015).

The Court has considered the relevant factors and concludes that dismissal based on forum non conveniens is not appropriate. First, plaintiff has chosen New York as a forum, and New York is her place of residence. Second, New Jersey is easily accessible from New York, and does not impose the type of substantial inconvenience on defendants that warrants dismissal of the lawsuit. Third, defendants are incorrect that plaintiff discusses her subsequent treatment in New York in order to assert personal jurisdiction. Instead this discussion relates to forum non conveniens. The evidence of plaintiff's purported injuries and of her damages from the surgery is in New York; these New York doctors and their records are in New York. Based on this, defendants have not carried their substantial burden of showing forum non conveniens.

The Court reaches a different conclusion as to the prong of the motion which seeks dismissal of Mr. Woehrle based on lack of personal jurisdiction. He is not licensed to practice in New York, does not work in New York, assists Capella P.A. in New Jersey only, and responded to plaintiff's emails from New Jersey. The fact that his employer has an office in New York is insufficient to establish jurisdiction over him, as he has no connection to that office. The Court

also rejects plaintiff's request for discovery related to this issue "as plaintiff has failed to make a sufficient start in demonstrating the existence of long-arm jurisdiction over [him]." Minella v. Restifo, 124 A.D.3d 486, 486 (1st Dep't 2015)(citations and internal quotation marks omitted). In addition, plaintiff did not cross-move for this affirmative relief. See CPLR § 2215.

The Court has considered all of the parties' arguments in reaching its decision. Accordingly, it is

ORDERED that the motion is denied as it relates to Dr. Capella and Capella P.A.; and it is further

ORDERED that the motion is granted as to Mr. Woehrle and the claims against him are severed and dismissed for lack of personal jurisdiction.

Dated: *Mar. 4*, 2016

ENTER:



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**JOAN B. LOBIS, J.S.C.**