

Allen v Institute for Family Health
2016 NY Slip Op 32400(U)
December 6, 2016
Supreme Court, New York County
Docket Number: 450327/16
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 16

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SHARLENE ALLEN,

Plaintiff,

-against-

THE INSTITUTE FOR FAMILY HEALTH,
WALTER WOODLEY, DARYL D. MCCLENDON,
MADISON AVENUE RADIOLOGY, P.C.,
BARTLEY LARSON, SATISH CHANDRA, and
RALPH DAUITO,

Defendants.

-----X
ALICE SCHLESINGER, J.S.C.:

In determining whether defendant Dr. Ralph Dauito is entitled to the relief he seeks -- dismissal of all claims as against him in this medical malpractice action -- the court must apply jurisdictional principles to a reality of modern medical practice that was not contemplated when those principles were initially developed.

BACKGROUND

The gravamen of the claims against Dr. Dauito is that he failed to properly read diagnostic tests sent to him by defendant Madison Avenue Radiology, P.C. (Madison Avenue Radiology) and that, as a result, plaintiff Sharlene Allen's breast cancer was not timely diagnosed and treated. Dr. Dauito argues that the Court does not have personal jurisdiction over him. While he is licensed to practice medicine in New York and has a business relationship with Madison Avenue Radiology, a New York professional corporation, Dr. Dauito argues that his contacts with New York are minimal, as "I am an independent contractor to Madison Avenue Radiology and I review films in New Jersey regarding some of their New York patients" (Dauito aff, ¶ 10).

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Dr. Dauito also states in his affidavit that: "I never transacted any business within New York State or contracted anywhere to supply goods or services in New York State, that had anything to do with plaintiff's treatment" (*id.*, ¶ 11). It is clear that Dr. Dauito is parsing his language to conform to principles of personal jurisdiction, but the statement causes some dissonance. That is, technology allows Dr. Dauito to remain in New Jersey where he reads diagnostic tests of New York patients for a New York radiology corporation, while still maintaining that he does not do business in New York.

From the point of view of plaintiff, and patients similarly situated, Dr. Dauito's position would mean that a New York resident could seek treatment for a medical condition in New York, and if some of that treatment is performed in another state without their knowledge, that patient would have no recourse in New York courts against those out of state providers who perform their work negligently. Plaintiff argues that this cannot be the case and that the court has jurisdiction over Dr. Dauito through CPLR 302 (a) (1) and CPLR 302 (a) (3).

DISCUSSION

"When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]). As to personal jurisdiction, courts use a two-part analysis to determine whether a non-domiciliary may be subjected to suit in New York: first, a determination must be made as to whether New York's long-arm statute, CPLR 302, confers jurisdiction in light of the non-domiciliary's contacts with this State; second, if the defendant's relationship with New York falls

within the terms of CPLR 302, courts must determine whether the exercise of jurisdiction comports with due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

CPLR 302 (a) (1)

Under CPLR 302 (a) (1), a court may exercise jurisdiction over a non-domiciliary who, in person, or through an agent, “transacts any business within the state or contracts anywhere to supply goods or services in the state.” CPLR 302 (a) (1) is a single transaction statute, meaning “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006] [holding that jurisdiction was appropriate over a non-domiciliary institutional investor who called, from out of state, a New York securities firm to make a trade and the suit arose from that trade]).

Purposeful activities in this context are “volitional acts” with which a defendant “avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]). While not all purposeful activity constitutes a transaction of business, and it is impossible to precisely fix those acts which do so, the Court of Appeals has held that “it is the quality of the defendants’ New York contacts that is the primary consideration” (*Fischbarg v Doucet*, 9 N.Y.3d 375, 380 [2007] [finding purposeful activity constituting a transaction of business where defendants’ attempted to establish an attorney-client relationship in New York, and directly participated in that relationship through calls, faxes and e-mails that they projected into the state over an extended period]).

Here, Dr. Dauito has availed himself of the privilege of conducting business in New York, even if he did so remotely. This is apparent from the fact that he has a New York medical license and a business relationship with a New York radiology practice through which he commonly provides medical care to New York patients who do not travel to see him in New Jersey. Also, it can be presumed that Dr. Dauito earns income through his relationship with Madison Avenue Radiology. Therefore, even though Dr. Dauito is a non-domiciliary, he may still be subject to New York's jurisdiction under CPLR 302 (a) (1), as he has contracted to provide medical services to a radiology practice within the state (*see Fischbarg*, 9 NY3d at 382 [holding that jurisdiction is appropriate where a non-domiciliary "on his (or her) own initiative . . . project[s] himself [or herself] into this state to engage in a sustained and substantial transaction of business] [internal quotation marks and citation omitted]).

In order to escape this result, Dr. Dauito relies, primarily, on *Paterno v Laser Spine Inst.* (24 NY3d 370 [2014]). However, the Court in *Paterno* acknowledged that "[t]he lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York" and that New York courts "'have in the past recognized CPLR 302 (a) (1) long-arm jurisdiction over commercial actors . . . using electronic and telephonic means to project themselves into New York to conduct business transactions'" (*id.* at 376, quoting *Deutsche Bank Sec.*, 7 NY3d at 71). While the Court of Appeals did not find that jurisdiction over the Florida surgeons in *Paterno*, the case is readily distinguishable.

The most important distinction between this action and *Paterno* is that in *Paterno* the claims arose from two back surgeries that took place in Florida (24 NY3d at 379). Here, the claims against Dr. Dauito arise from his business relationship with a New York radiology firm, through which he provides care to New York patients. While Dr. Dauito did his work in New

Jersey, plaintiff never went to New Jersey to see him. Nor does it appear that she had any knowledge that the films were being read in New Jersey. Here, unlike *Paterno*, the claims are intimately linked with the non-domiciliary's contacts with New York, as plaintiff's claims against Dr. Dauito arise from his relationship with Madison Avenue Radiology, by which he sends medical services into New York.

In further contrast to *Paterno*, where the plaintiff "admit[ted] that he was the party who sought out and initiated contact with defendants," plaintiff here never initiated contact with Dr. Dauito, or even knew that he would be reviewing her diagnostic tests in New Jersey (*id.* at 377). As far as plaintiff knew, she went to a New York radiology firm to receive care in New York. Indeed, it was Dr. Dauito, through his voluntary relationship with Madison Avenue Radiology, who initiated contact with plaintiff's diagnostic tests. The fact that he physically reviewed those tests in New Jersey and then sent his findings back into New York should not absolve him of the responsibilities that go along with the privilege of providing medical services to patients in New York.

Another case that Dr. Dauito relies on, *Minella v Restifo* (124 AD3d 486 [1st Dept 2015]), is similarly distinguishable. In *Minella*, the First Department held that New York did not have jurisdiction over a Connecticut doctor under CPLR 302 (a) (1), as the doctor practiced in Connecticut and "it [was] uncontroverted that defendant is licensed to practice medicine in Connecticut, not in New York" (*id.* at 486). In contrast to *Minella*, a doctor, such as Dr. Dauito, who is licensed to practice medicine in New York is subject to New York jurisdiction for claims arising from his treatment of New York patients who never travelled to see him in New Jersey. Thus, as plaintiff's claims arise from Dr. Dauito's provision of medical services to patients in New York, this court has jurisdiction over him through CPLR 302 (a) (1).

CPLR 302 (a) (3)

CPLR 302 (a) (3) provides that New York courts have jurisdiction over a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state.” This provision of the long-arm statute, as opposed to 302 (a) (1), where the statute’s application is more clear cut, shows the tension between old principles of jurisdiction and newer realities of medical treatment. That is, “the situs of the injury in medical malpractice cases is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury” (*Paterno*, 24 NY3d at 381). This principle was developed at a time when it was not possible for the original event that caused the injury to be in a state that the plaintiff never travelled to for treatment. In any event, it is not necessary for the court to reach a determination as to the applicability of CPLR 302 (a) (3), as the applicability of CPLR 302 (a) (1) is straightforward and sufficient to sustain jurisdiction over Dr. Dauito.

Due Process

As for due process, the U.S. Constitution is not satisfied in this context unless a non-domiciliary has “minimum contacts” with the forum state (*see International Shoe Co. v State of Wash.*, 326 US 310, 316 [1945]). The test for minimum contacts rests on whether the defendant’s “conduct and connection with the forum state” are such that the defendant “should reasonably anticipate being haled into court there” (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]). A defendant can reasonably expect such when it “purposefully avails itself of the privilege of conducting activities within the forum state” (*id.* [internal quotation marks and citations omitted]). If minimum contacts are found, the court must determine if the

prospect of defending the suit in the forum state comports with traditional notions of “fair play and substantial justice” (*Burger King v Rudzewicz*, 471 US 462, 477 [1985] [quoting *International Shoe Co.*, 326 US at 320 [1945]]).

Here, Dr. Dauito could reasonably have expected to be haled into court in New York, as he is licensed in New York, and has purposefully availed himself to privilege of treating New York patients.¹

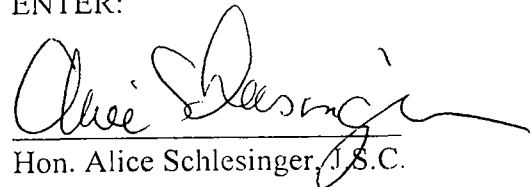
CONCLUSION

Accordingly, it is

ORDERED defendant Ralph Dauito’s motion to dismiss in denied.

Dated: 12/6/16

ENTER:


Hon. Alice Schlesinger, J.S.C.

¹ Due process concerns normally are judged vis-a-vis a potential defendant and his right to be fairly treated. Here, where Ms. Allen appears to have had no knowledge of the arrangement between Madison Avenue Radiology and Dr. Dauito, as well as no knowledge that an out-of-state radiologist was reading her films, it could be argued that her due process rights could be compromised if she could not obtain jurisdiction and sue all relevant parties in New York.