

Diraffaele v Mir

2016 NY Slip Op 32898(U)

September 27, 2016

Supreme Court, Suffolk County

Docket Number: 15-604419

Judge: Peter H. Mayer

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-14-15 (007 & 008)
MOTION DATE 10-20-15 (009)
MOTION DATE 11-4-15 (010 & 011)
MOTION DATE 1-26-16 (012, 013, 014 & 015)
ADJ. DATE 2-9-16
Mot. Seq. # 007 - MD Mot. Seq. # 012 - MotD
Mot. Seq. # 008 - MD Mot. Seq. # 013 - MotD
Mot. Seq. # 009 - MotD Mot. Seq. # 014 - MotD
Mot. Seq. # 010 - MD Mot. Seq. # 015 - MotD
Mot. Seq. # 011 - MotD

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Plaintiff,

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-against-

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YASSER MIR, M.D., JASON L. HODGES,
M.D., JEREMY W. SIMONSEN, M.D., JASJIT
KOCHAR, M.D., MANUEL GRINBERG, M.D.,
QUEENS-LONG ISLAND MEDICAL GROUP,
P.C., ADVANCED UROLOGY CENTERS OF
NEW YORK, BROOKHAVEN MEMORIAL
HOSPITAL MEDICAL CENTER and JOHN T.
MATHER MEMORIAL HOSPITAL,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Brookhaven Memorial Hospital Medical Center, dated September 11, 2015, and supporting papers; (2) Notice of Motion by defendant Jeremy W. Simonsen, M.D., dated September 14, 2015, and supporting papers; (3) Notice of Motion by the plaintiff, dated September 30, 2015, and supporting papers; (4) Notice of Motion by defendants Yasser Mir, M.D. and Jason L. Hodges, dated

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October 13, 2015, and supporting papers; (5) Notice of Cross Motion by defendant Brookhaven Memorial Hospital Medical Center, dated October 22, 2015, and supporting papers; (6) Notice of Cross Motion by defendant Jeremy W. Simonsen, M.D., dated January 14, 2016, and supporting papers; (7) Notice of Cross Motion by defendants Yasser Mir, M.D. and Jason L. Hodges, dated January 15, 2016, and supporting papers; (8) Notice of Cross Motion by defendant John T. Mather Memorial Hospital, dated January 19, 2016, and supporting papers; (9) Notice of Cross Motion by defendants Manuel Grinberg, M.D. and Advanced Urology Centers of New York, dated January 19, 2016, and supporting papers; (10) Affirmation in Opposition by the plaintiff, dated January 15, 2016, and supporting papers (Mot. Seq. #007); (11) Affirmation in Opposition by the plaintiff, dated January 15, 2016, and supporting papers (Mot. Seq. #011); (12) Reply Affirmation by defendant Brookhaven Memorial Hospital Medical Center, dated February 8, 2016 (Mot. Seq. #007); and (13) Reply Affirmation by defendant Brookhaven Memorial Hospital Medical Center, dated February 8, 2016 (Mot. Seq. #011); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Brookhaven Memorial Hospital Medical Center for an order pursuant to CPLR 3211 (a) (8), dismissing the complaint against it for lack of personal jurisdiction, is denied; and it is further

ORDERED that the motion by defendant Jeremy W. Simonsen, M.D. for an order (i) pursuant to CPLR 3211 (a) (8), dismissing the complaint against him for lack of personal jurisdiction, (ii) pursuant to CPLR 306-b, dismissing the complaint against him for failure to serve the summons and complaint within 120 days after the commencement of the action, and (iii) pursuant to CPLR 214-a and 3211 (a) (5), dismissing the complaint against him as untimely, is denied; and it is further

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 2004 and 3406, extending his time to file a notice of medical malpractice action, or, in the alternative, deeming such notice to have been timely served *nunc pro tunc*, is granted, as unopposed, to the extent of directing that the plaintiff file notice of this medical malpractice action and its attendant proof no later than 10 days after the entry date of this order and extending his time to file accordingly, and is otherwise denied (*see* CPLR 3406 [a]; *Tewari v Tsoutsouras*, 75 NY2d 1, 550 NYS2d 572 [1989]); and it is further

ORDERED that the motion by defendants Yasser Mir, M.D. and Jason L. Hodges, M.D. for an order, *inter alia*, pursuant to CPLR 214-a, 320 (a), and 3211 (a) (5), dismissing the complaint against them as untimely, is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant Brookhaven Memorial Hospital Medical Center for an order pursuant to CPLR 214-a and 3211 (a) (5), dismissing the complaint against it as untimely, is granted to the extent of converting the motion to one for summary judgment and adjourning it in accordance with the following, and is otherwise denied; and it is further

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ORDERED that the motion (incorrectly denominated as a cross motion) by defendant Jeremy W. Simonsen, M.D. for an order pursuant to CPLR 3217 (b), *inter alia*, “so ordering” a stipulation of discontinuance as to him, is granted to the extent indicated below, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendants Yasser Mir, M.D. and Jason L. Hodges, M.D. for an order pursuant to CPLR 3217 (b), *inter alia*, “so ordering” a stipulation of discontinuance as to them, is granted to the extent indicated below, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant John T. Mather Memorial Hospital for an order pursuant to CPLR 3217 (b), *inter alia*, “so ordering” a stipulation of discontinuance as to it, is granted to the extent indicated below, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendants Manuel Grinberg, M.D. and Advanced Urology Centers of New York for an order pursuant to CPLR 3217 (b), “so ordering” a stipulation of discontinuance as to them, is granted to the extent indicated below, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of medical malpractice. The plaintiff alleges, in part, that the defendants failed to timely diagnose a cancerous tumor in his left kidney. Issue has been joined by all defendants.

Now before the court for determination are nine motions, including a series of motions by the defendants to dismiss the complaint or to discontinue the action against them.

Defendant Brookhaven Memorial Hospital Medical Center (“BMHMC”) moves to dismiss the complaint on the ground that it was not properly served (*see* CPLR 3211 [a] [8]) and, separately, on the ground that the action is barred by the applicable statute of limitations (CPLR 214-a, 3211 [a] [5]).

To the extent BMHMC seeks relief under CPLR 3211 (a) (8), its motion is untimely. A defendant who has available an objection based on lack of personal jurisdiction must raise the objection either by way of defense in the answer or by motion under CPLR 3211 before answering; if, as here, a defendant raises in its answer a jurisdictional defense based on improper service, it must “move for judgment on that ground” within 60 days after serving its answer (CPLR 3211 [e]). Here, BMHMC did not move prior to interposing its answer, and while it did raise the jurisdictional defense in its answer and did move within the prescribed 60-day period, it did not move, as required, under CPLR 3212 (*see* Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:59, at 90; *compare* CPLR 3212 [a] *with* CPLR 3211 [e]).

In any event, BMHMC failed, as an evidentiary matter, to demonstrate its entitlement to the requested relief. “Ordinarily, a process server’s affidavit of service establishes a *prima facie* case as to

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the method of service and, therefore, gives rise to a presumption of proper service” (*Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589, 884 NYS2d 254, 255 [2009]). “Although a defendant’s sworn denial of receipt of a copy of the summons and complaint generally rebuts the presumption of proper service established by the process server’s affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server’s affidavits” (*Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 820-821, 954 NYS2d 577, 578 [2012] [citations omitted]). Based on the process server’s affidavit, it appears that service of the summons on BMHMC was effected pursuant to CPLR 311 (a) (1) by personal delivery to Carol Oakley, an “agent authorized to accept” service on BMHMC’s behalf. In response, BMHMC submits the affirmation of Thomas Gibbons, Esq., BMHMC’s director of risk management. While acknowledging that Carol Oakley “is the designated agent of BMHMC authorized to accept service of legal papers,” he claims only to have been advised by her “that she never accepted service of a Summons and Complaint in this matter.” Even assuming that his affirmation may be properly considered under CPLR 2106 (*but see Samuel & Weinger v Belovin & Franzblau*, 5 AD3d 466, 772 NYS2d 600 [2004]; *Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent*, 148 AD2d 408, 538 NYS2d 824, *lv denied* 75 NY2d 702, 551 NYS2d 906 [1989]), the court finds it insufficient to rebut the plaintiff’s prima facie showing, as he does not allege any personal knowledge regarding BMHMC’s receipt of the summons and complaint (*see State of New York v Mappa*, 78 AD3d 926, 911 NYS2d 426 [2010]; *see also Sanders v Newman & Leventhal*, 115 AD2d 360, 495 NYS2d 400 [1985]).

BMHMC’s separate request for relief under CPLR 3211 (a) (5) is untimely as well. Since issue has been joined, and the statute of limitations defense is not one of the permissible grounds for a post-answer motion to dismiss (*see CPLR 3211[e]*), the motion should have been brought under CPLR 3212. However, given the extensive proof adduced in support of and in opposition to the motion, the court deems it appropriate to treat the motion as one for summary judgment, and the parties are hereby advised of the court’s intention to do so (*see CPLR 3211 [c]*; *Rich v Lefkovits*, 56 NY2d 276, 452 NYS2d 1 [1982]). The parties shall have an opportunity to make an appropriate record by the service and filing of additional affidavits and other supporting papers no later than three weeks from the date of this order. Upon the expiration of the three-week period, BMHMC may re-notice the motion for hearing on five days’ notice. Upon the service and filing of such notice, BMHMC shall also serve upon the clerk of the special term a copy of this order, and the clerk, upon receipt, shall assign the motion a new sequence number.

Defendants Jeremy W. Simonsen, M.D., Yasser Mir, M.D., and Jason L. Hodges, M.D. move to dismiss the complaint on various grounds and, separately, for orders of discontinuance under CPLR 3217 (b). Defendants John T. Mather Memorial Hospital, Manuel Grinberg, M.D., and Advanced Urology Centers of New York also move for orders of discontinuance under CPLR 3217 (b).

As to each motion for an order of discontinuance, each defendant seeking such relief claims that the plaintiff’s attorney has executed a stipulation of discontinuance in his (or its) favor but that certain co-defendants have refused to sign, thereby preventing the filing of the stipulation (*see CPLR 3217 [a] [2]*) and necessitating the motion. The court notes that no defendant has pleaded a cross claim and that no papers have been submitted in opposition to any motion for an order of discontinuance.

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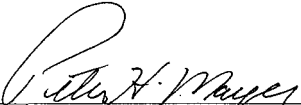
The court, as a matter of discretion, has the authority under CPLR 3217 (b) to grant or deny a motion by "a party asserting a claim" to voluntarily discontinue an action (*accord Leites v Leites*, 104 AD2d 342, 479 NYS2d 344 [1984]). While a defendant's motion to discontinue the action is technically inappropriate, it may be heard if the plaintiff consents and joins in the motion (*Shamley v ITT Corp.*, 67 NY2d 910, 501 NYS2d 810 [1986]). In the absence of special circumstances, such as prejudice to a defendant or other improper consequences, a motion for a voluntary discontinuance should be granted (*Tucker v Tucker*, 55 NY2d 378, 449 NYS2d 683 [1982]).

Here, as it appears that the plaintiff's attorney executed a stipulation of discontinuance in favor of each of the moving defendants and that no party has submitted opposition, the court concludes that all parties consent to the discontinuance of this action against those defendants. Accordingly, absent special circumstances, the court deems it appropriate to grant each of the motions by Jeremy W. Simonsen, M.D., by Yasser Mir, M.D. and Jason L. Hodges, M.D., by John T. Mather Memorial Hospital, and by Manuel Grinberg, M.D. and Advanced Urology Centers of New York to the extent it is for an order discontinuing the action against that defendant or defendants, with prejudice, and deleting the names of those defendants from the caption of the action.

Since the foregoing disposition renders academic the separate motions by Jeremy W. Simonsen, M.D., Yasser Mir, M.D., and Jason L. Hodges, M.D. to dismiss the complaint against them, each of those motions is denied as moot.

The remaining parties to this action are reminded to appear, as previously scheduled, for a conference on October 18, 2016 at 9:30 a.m. at Part 17 of the Supreme Court, One Court Street, Riverhead, New York.

Dated: September 27, 2016



 PETER H. MAYER, J.S.C.

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