Robins v Procure Treatment Centers, Inc.
2017 NY Slip Op 30802(U)
April 18, 2017
Supreme Court, New York County
Docket Number: 805644-2015
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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BARBARA ROBINS,

Plaintiff,

-against-

PROCURE TREATMENT CENTERS, INC., PRINCETON PROCURE MANAGEMENT LLC, PROCURE PROTON THERAPY CENTER, PRINCETON RADIATION ONCOLOGY, OREN CAHLON, MD, HENRY K. TSAI, MD, EUGEN B. HUG, MD, BRIAN H. CHON, MD, ROBERT M. CARDINALE, MD, DOUGLAS A. FEIN, MD, DENNIS MAH, AVRIL BLAIR a/k/a AVRIL O'RYAN-BLAIR, RAMONE PERALTA, JACQUELYN COLLINS, LISA "DOE" (JANE DOE #1), JOSE "DOE" (JOHN DOE #1), RAJ SHRIVASTAVA, MD, THE MOUNT SINAI HOSPITAL AND IBI PROTON THERAPY, INC. a/k/a IBI PROTON EQUIPMENT,

Defendants.

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Index No. 805644-2015

DECISION/ORDER

Motion Sequence 002

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Defendants' Notice of Motion, Memorandum in Support, Affirmations & Collective Exhibits Annexed	1, 2, 3, 4
Plaintiff's Notice of Cross Motion, Memorandum in Support and in Opposition to Defendant's Motion, Answering Affirmation & Exhibits Annexed	5, 6, 7, 8
Defendants' Reply Affirmation	9
Willner Affirmation in Partial Opposition	10
Singer Affirmation	11

In an underlying action for medical malpractice and negligence, plaintiff Barbara Robins ("Plaintiff") alleges defendants Princeton Procure Management, LLC ("PPM"), doing business as, and sued herein as Procure Proton Therapy Center ("PPTC"), Princeton Radiation Oncology, LLC., sued herein as Princeton Radiation Oncology ("PRO"), Procure Treatment Centers, Inc. ("PTC"), The Mount Sinai Hospital ("Mt. Sinai"), IBI Proton Therapy ("IBI", collectively, "Corporate Defendants"), along with Oren Cahlon, M.D. ("Cahlon"), Henry K. Tsai, M.D. ("Tsai"), Eugen B. Hug, M.D. ("Hug"), Brian H. Chon, M.D. ("Chon"), Robert M. Cardinale, M.D. ("Cardinale"), Douglas A. Fein, M.D. ("Fein"), Raj Shrivastava, M.D. ("Shrivastava"), Dennis Mah ("Mah"), Avril Blair ("Blair"), Ramone Peralta ("Peralta"), Jacquelyn Collins ("Collins", collectively "Individual Defendants") committed medical malpractice and negligence in the providing, planning, and administrating proton beam radiation which caused radiation toxicity of both of Plaintiff's optic nerves, resulting in bilateral blindness (Danzi Aff. at ¶ 2).

Plaintiff commenced the underlying action by filing of Summons and Verified Complaint on September 15, 2015 (Danzi Aff. at ¶ 15). PTC and IBA interposed answers on October 19, 2015 and October 21, 2015 (*Id.* at ¶ 16). PPM, Mah, Blair, Peralta, and Collins made a pre-answer motion to dismiss on October 19, 2015 (*Id.*). Moving defendants PRO, Tsai, Chon, Cardinale, and Fein answered on October 26, 2015, preserving the affirmative defense of personal jurisdiction and filed the present motion on December 11, 2015 (*Id.*). Shrivastava and Mt. Sinai answered on November 20, 2015 (*Id.*).

Presently, Defendants PRO, Tsai, Chon, Cardinale, and Fein (collectively, "Defendants") move for an order, pursuant to CPLR § 3211(a)(8), dismissing the complaint in its entirety for lack of personal jurisdiction. Specifically, Defendants challenge Plaintiff's assertion that this Court has jurisdiction over Defendants pursuant to CPLR § 302(a)(1) and 302(a)(3). Plaintiff opposes the motion and cross-moves for an order, pursuant to CPLR § 3211(b), dismissing Defendants' affirmative defense of lack of personal jurisdiction, awarding costs and sanctions, pursuant to CPLR § 8106, and to compel compliance with outstanding discovery, pursuant to CPLR § 3124. Defendants oppose the cross-motion. Defendants PPM, Mah, Blair, Peralta, and Collins submit an affirmation in partial opposition to Plaintiff's cross-motion, and further move to dismiss the claims against them for lack of personal jurisdiction in a separate motion, sequence 001. Defendant Mt. Sinai similarly submit an affirmation in partial opposition to Plaintiff's cross-motion. Defendants PTC, Mt. Sinai, IBI, and Shrivastava do not challenge the Court's jurisdiction over them.

Plaintiff is a retired New York City school psychologist who resides in Manhattan (Danzi Aff. at ¶ 6). In the months preceding February 2013, Plaintiff began to experience double vision, and was diagnosed with a clival chordoma (non-malignant tumor) (*Id.*). In February of 2013, Plaintiff underwent a successful resection of a benign brain tumor performed at Mt. Sinai in New York City (*Id.*). After the surgery, Plaintiff's vision returned to nearly normal, and she was able to resume her ordinary affairs (*Id.*). After a review by the Mt. Sinai tumor board, Dr. Cheryl Greene ("Greene") of Mt. Sinai recommended that Plaintiff undergo a course of proton radiation treatments with Cahlon and PRO at PPTC, the proton radiation treatment facility owned by PPM,

and operated by PPM in conjunction with PRO in Somerset, New Jersey (*Id.* at ¶ 7). According to Plaintiff's affidavit, Greene sent Plaintiff directly to defendant Cahlon (Robins' Aff. at ¶ 5).

Plaintiff met with Cahlon at PPTC in March 2013, and from April 10, 2013 to June 12, 2013, underwent at least 42 sessions of proton beam therapy at PPTC (Danzi Aff. at ¶ 8). In November 2013, Plaintiff experienced a bilateral loss of vision and sought treatment at Mt. Sinai on an emergency basis (*Id.* at ¶ 13). Plaintiff was treated with steroids, without success, to restore her sight (*Id.*). Thereafter, MRIs confirmed the diagnosis of bilateral blindness caused by radiation toxicity of both optic nerves (*Id.*). On September 15, 2015, Plaintiff commenced the present action by the filing of Summons and Verified Complaint. Thereafter, defendants PPM, Mah, Blair, Peralta, and Collins filed the present motion challenging this Court's jurisdiction over them. Plaintiff alleges moving defendants' connections to New York are as follows:

First, it is undisputed that PRO is a limited liability company incorporated in New Jersey, with its principal place of business in Kendall Park, New Jersey (Def. Mem. Supp. at 2). PRO is a physician group of approximately 12 to 14 radiation oncologists who partnered with PPM to operate PPTC, the facility in Somerset, New Jersey, owned by PPM, where Plaintiff received treatment (Danzi Aff. at Ex. K). Plaintiff alleges that PRO, in conjunction with PPM, entered into an agreement with a consortium of hospitals in New York City, including Mt. Sinai, whereby the hospitals in the consortium would send New York City patients to PPM's Somerset, New Jersey facility for proton therapy, and in exchange, doctors from the New York hospitals would be given treating privileges at PPTC (*Id.* at ¶ 18-19). Additionally, Plaintiff alleges that PRO co-managed tumor cases with New York City treating physicians from the consortium of hospitals in New York City, and would bill patients for the co-management services of the New York physicians (Danzi Aff. at Ex. P; Plaintiff's Mem. Supp. at 3-4). Plaintiff further alleges, and submits evidence in support, that each of the moving defendants billed Plaintiff for "co-managing her proton therapy with Shrivastava, and for Shrivastava's services ... including for services rendered by Shrivastava in New York City" (*Id.* at 4). Further, in accordance with this agreement, Plaintiff alleges that Cahlon, PRO's medical director at the time and a New York resident, served "as the feeder liaison between PRO and Mt. Sinai" (*Id.* at 3).

Tsai, Chon, Cardinale, and Fein are all employed as doctors for PRO who treated Plaintiff at the New Jersey facility PPTC (Robins Aff. at ¶ 11). Further, Plaintiff alleges Tsai and Chon engaged in systematic advertising and solicitation in New York City, including making promotional spots featured on New York City radio station WABC (Danzi Aff. at ¶ 24).

Defendants move to dismiss the action for lack of personal jurisdiction. In reply, Plaintiff asserts that this Court has personal jurisdiction over moving Defendants under New York's long-arm statute, CPLR § 302(a)(1) and (3).

As an initial matter, the Court did not consider Plaintiff's Affirmation in Reply dated February 3, 2016. Defendants rightfully point out that neither the portion that is an improper reply to the cross-motion (Danzi Aff. Rep. ¶¶ 1-3), nor the portion that is a sur-reply submitted to

this court after the submission of the motion in the Motion Submission Part (Id. at ¶¶ 4-11) are permitted by the CPLR (CPLR § 2214).

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be construed liberally (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference" (*Amaro ex rel. Almazan v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Further, personal jurisdiction must be authorized under the CPLR and consistent with the Due Process Clause of the United States Constitution (*Walden v Fiore*, 134 S. Ct. 1115, 1121 [2014]). In order to defeat a motion to dismiss for lack of personal jurisdiction, "the opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion" (*Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 466 [1974]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; CPLR § 3211[d]). A prima facie showing of jurisdiction "simply is not required" (*Peterson*, 33 NY2d at 467). Further, where a plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d), the plaintiff need only set forth a "sufficient start" and show that its position is "not frivolous" (*Peterson*, 33 NY2d at 467).

Under constitutional due process principles, a court must have a jurisdictional basis before exercising its powers over a party (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 [1988]). In general, New York courts may obtain personal jurisdiction over a party based on (1) consent to jurisdiction in New York, (2) domicile in New York (CPLR § 301), (3) general jurisdiction (CPLR § 301), (4) or specific jurisdiction by means of the long arm statute as to a non-domiciliary (CPLR § 302). Consent exists when a party voluntarily agrees to submit to the jurisdiction of this Court. (*Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc 3d 1217[A], 7 N.Y.S.3d 245 [NY Sup Ct, NY County 2014]).

Under CPLR § 302(a)(1), New York's long-arm statute, a court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business. (CPLR § 302 [a][1]; *Lebel v Tello*, 272 AD2d 103, 103-04 [1st Dept 2000]). Additionally, courts must ensure that traditional notions of due process are not offended by the exercise of jurisdiction (*Walden v Fiore*, 134 S Ct at 1121). As such, under the "transacts any business" provision, the Court must focus on: (1) whether the defendant transacted business within the forum state; (2) whether the cause of action arose from that transaction of business, and lastly; (3) whether the exercise of jurisdiction is consistent with due process (*see Copp v Ramirez*, 62 AD3d 23 [1st Dept 2009]; *Lebel*, 272 AD2d 103).

Further, the connection between the transaction of business and the state must be purposeful (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Alternatively, cumulative minor activities may provide sufficient grounds for "transaction of business"

jurisdiction pursuant to CPLR § 302(a)(1), so long as the cumulative effect creates a "significant presence" in the state *(O'Brien*, 305 AD2d at 200; CPLR § 302 [a][1]). In either event, "it is the quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg*, 9 NY3d at 380). The "test is whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy" (*Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apartments*, 147 AD2d 327, 331 [1st Dept 1989]). However, contacts after the date of injury cannot be the basis for establishing defendant's relationship with New York because they do not serve as the basis for the underlying medical malpractice claim" (*see Harlow v Children's Hosp.*, 432 F3d 50, 62 [1st Cir 2005]). Further, CPLR § 302(a)(1) is a "single act statute", and "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as the requisite purposeful activities and the connection between the activities and the transaction are shown" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 93-94 [1st Dept 2005]).

Next, the "arising from" prong of § 302(a)(1) "does not require a causal link between the defendant's New York business activity and a plaintiff's injury," (*Cohen v BMW Invs. L.P.*, 2015 US Dist LEXIS 147557, *9 [SDNY Oct 30, 2015] quoting *Licci ex rel. Licci v Lebanese Canadian Bank, SAL*, 732 F3d 161, 168 [2d Cir 2013]) and "the inquiry under the statute is relatively permissive"(*Licci v Lebanese Canadian Bank*, 20 NY3d 327, 339 [2012]). What is required, at a minium, is some relation between the transaction and the legal claim, "such that the latter is not completely unmoored from the former" (*Id.* at 339).

Lastly, under the Due Process Clause, a nonresident generally must have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v Washington*, 326 US 310, 316, [1945]). In order for a state to exercise specific jurisdiction over a non-resident defendant consistent with due process, the non-resident defendant's "suit-related conduct" must create a "substantial connection" with the forum state (*Walden*, 134 S Ct at 1121). This connection must arise from contacts that the "defendant himself creates with the forum state" (*Id.* at 1122, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 475 [1985]). The "minimum contacts" analysis examines the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there (*Walden*, 134 S Ct at 1122). Further, while the mere solicitation of business within the forum state does not constitute the "transaction of business" under CPLR § 302(a)(1), solicitation supplemented by business transactions occurring in the state, or solicitation accompanied by a fair measure of the defendant's permanence and continuity in New York would establish a New York presence for the purposes of CPLR § 302(a)(1) (*O'Brien*, 305 AD2d at 201).

Here, Plaintiff has successfully made a "sufficient start" in demonstrating that this Court has personal jurisdiction over Defendant PRO, pursuant to CPLR § 302(a)(1) (*see Milletich v Behavior Research Inst., Inc.*, No. CV-86-1204, 1986 WL 14606, at *2 [EDNY Nov 5, 1986] [finding personal jurisdiction where nondomiciliary defendant had an ongoing contractual relationship with a New York domiciliary, under which plaintiff, a New York resident, received

treatment at defendant's out-of-state facility]). Plaintiff alleges PRO, along with co-Defendant PPM, entered into an exclusive agreement with a consortium of five New York City hospitals whereby the hospitals would send New York City patients to PPTC to be treated by PRO physicians. In exchange, doctors at the New York City hospitals would be granted treating privileges at PPTC, and would co-manage their patient's care along with PRO physicians. In support, Plaintiff submits an announcement by PRO, from their website, promoting an agreement similar to the one Plaintiff alleges. Further, Plaintiff argues that additional discovery is needed to demonstrate this agreement. An allegation of this nature constitutes a sufficient start, as Plaintiff does not have to make a prima facie showing that this Court has jurisdiction at this stage (*Peterson*, 33 NY2d at 467). Accordingly, Plaintiff has made a sufficient start and the motion is denied with respect to Defendant PRO.

Further, Plaintiff has successfully made a "sufficient start" in demonstrating that this Court has personal jurisdiction over Defendants Tsai and Chon (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201 [1st Dept 2003]). Although the "mere solicitation of business within the state does not constitute the transaction of business within the state," where a defendant supplements that solicitation with business transactions occurring in the state, "or the solicitation is accompanied by a fair measure of the defendant's permanence and continuity in New York which establishes a New York presence," jurisdiction is appropriate (*Id.* [internal citations omitted]). Here, Plaintiff alleges Defendants Tsai and Chon solicited business in New York State through targeted radio advertisements on New York City radio stations, sufficient to project themselves into New York in such a manner as to purposefully avail themselves of the benefits and protections of New York law (*cf. Paterno v Laser Spine Inst.*, 112 AD3d 34, 40-41 [2d Dept 2013], *aff'd*, 24 NY3d 370 [2014] [finding defendant medical provider did not project itself into New York where it operated a passive website and further contacted plaintiff via email and telephone]). Further, Plaintiff alleges Defendants supplemented that solicitation through, in Defendant Chon's case, being at one time "a partner in a New York based Procure defendant," which would have benefitted from the alleged contractual agreement with the New York-based hospitals. Further, Plaintiff alleges that both Tsai and Chon supplemented their New York radio solicitations with business transactions in New York by billing Plaintiff for co-managing her proton therapy with her New York City-based, Mt. Sinai physician, co-defendant Dr. Shrivastava, per their exclusive contractual agreement or "feeder partnership," including billing Plaintiff for services rendered in New York City by Dr. Shrivastava. Accordingly, Plaintiff has made a sufficient start as dismissal is not appropriate pending further discovery of the nature and scope of the alleged contractual relationship (*see Sorezza v Scheuch*, 19 Misc 3d 1138[A]2008 NY Slip Op 51055[U] [Sup Ct, Kings County 2008]). Therefore, the motion is denied with respect to Defendants Tsai and Chon.

However, Plaintiff has failed to meet her burden under CPLR § 302(a)(1) as it pertains to Defendants Cardinale and Fein. The only relevant contact the individual defendants have with the State of New York are via Plaintiff's connections to New York. This is exactly what the *Walden* Court cautioned against when it noted, the connection "must arise from contacts that the 'defendant himself' creates with the forum state," and not the defendant's contacts with persons

who reside in the forum state (*Walden*, 134 S Ct at 1122 quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 475 [1985]). As such, the Court does not have personal jurisdiction over Defendants Cardinale and Fein pursuant to CPLR § 302(a)(1), and that portion of Defendants' motion is granted.

Defendants next challenge Plaintiff's assertion that this Court has personal jurisdiction over Defendants under CPLR § 302(a)(3). Under CPLR § 302(a)(3), the exercise of jurisdiction rests on five elements: (1) The defendant committed a tortious act outside the state, and; (2) the cause of action arose from that act, and; (3) the act caused injury to a person or property within the state, and either; (4) the defendant expected or should reasonably have expected the act to have consequences in the state, or; (5) the defendant derives substantial revenue from interstate or international commerce (*LaMarca v Pak–Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Further, in a medical malpractice case, "the injury occurs where the malpractice took place" (*Jackson v Sanchez-Pena*, 104 AD3d 574, 575 [1st Dept 2013] citing *O'Brien*, 305 AD2d at 202). Accordingly, the injury here occurred in New Jersey, not in New York, and personal jurisdiction cannot exist pursuant to CPLR § 302(a)(3) (*Minella v Restifo*, 124 AD3d 486, 486-87 [1st Dept 2015]).

Plaintiff cross-moves for an order, dismissing Defendants' affirmative defenses of personal jurisdiction, pursuant to CPLR § 3211(b), compelling discovery responses, pursuant to CPLR § 3124, and for costs and sanctions against movants. First, "when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010] citing *Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]). "In reviewing a motion to dismiss an affirmative defense, this Court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Greco*, 70 AD3d at 771). Here, Plaintiff has failed to demonstrate that the affirmative defense is without merit as a matter of law and this portion of Plaintiff's cross-motion is denied.

Further, Plaintiff cross-moves for an order, pursuant to CPLR § 3124, compelling responses to Notices for Discovery and Inspection ("D&I") dated November 25, 2015. Under CPLR § 3124, a party moving to compel discovery is required to submit an affirmation that counsel for the moving party has made "a good faith effort to resolve the issues raised by the motion" with opposing party's counsel (Uniform Rules for Trial Cts [22 NYCRR] 202.7). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to resolve the issue with opposing counsel (22 NYCRR 202.7[c] ["The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held."]; see *Mironer v City of New York*, 79 AD3d 1106, 1107-1108 [2d Dept 2010]). Here, no such affirmation was attached to the cross-motion, and this portion of the cross-motion must therefore be denied.

Lastly, Plaintiff moves for costs associated with the present motion and for sanctions against movants because Plaintiff alleges the present motion is frivolous. "Motion costs are entirely within the discretion of the court" *(Kavares v Motor Vehicle Acc. Indemnification Corp.*, 29 A.2d 68, 72, [1st Dept 1967], aff'd, 28 N.Y.2d 939, 271 N.E.2d 915 [1971]). Similarly, the court has discretion to impose sanctions to prevent wasteful use of judicial resources (*see People v I.L.*, 143 Misc 2d 1061, 1066 [Sup Ct, Bronx County 1989]). However, after fully considering Plaintiff's arguments the Court finds them unavailing. Plaintiff has failed to establish that costs and sanctions are appropriate here and Plaintiff's cross-motion is denied and it is hereby

ORDERED that the motion to dismiss the complaint is granted to the extent that the complaint is dismissed as against Defendants Cardinale and Fein, and the Clerk is directed to enter judgment accordingly in favor of said defendants' and it is further

ORDERED that the motion to dismiss the complaint is denied as to Defendants PRO, Tsai, and Chon; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is to be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Plaintiff's cross-motion is denied; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining parties are to appear for a preliminary conference on June 21, 2017 at 2:00 p.m. at Part 10, Room 422 60 Centre St. New York, NY 10007; and it is further

ORDERED that Defendant PRO is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: April 18, 2017
New York County