

Kovago-Feher v Toothsavers Dental Servs., P.C.
2017 NY Slip Op 31024(U)
May 12, 2017
Supreme Court, New York County
Docket Number: 805266/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARGIT KOVAGO-FEHER,

Plaintiff,

INDEX NO. 805266/13

-against-

TOOTHTSAVERS DENTAL SERVICES, P.C., SOL S.
STOLZENBERG, D.M.D., SOL S. STOLZENBERG,
D.M.D., DENTAL SERVICES, P.C., SOL S. STOLZENBERG,
D.M.D., P.C., JOHN JUNGIAN CHOI, D.D.S., LI YAN, D.D.S.,
DAVID COHEN, AS EXECUTOR OF THE ESTATE OF
MORTON COHEN, D.D.S., MITCHELL LYNN, UNIVERSAL
DENTAL CENTER a/k/a UNIVERSAL DENTAL AND
IMPLANT CENTER, LAURENCE R. DANZIGER, D.M.D.,
LAURENCE R. DANZIGER, D.M.D., P.C., LAURENCE R.
DANZIGER, D.M.D. d/b/a UNIVERSAL DENTAL AND
IMPLANT CENTER, ROBERT F. WEINGARDEN, D.D.S.,
ROBERT F. WEINGARDEN, D.D.S., P.C., JERRY LYNN,
JERRY LYNN, D.D.S., P.C. JERRY LYNN, D.D.S.,
MARTIN FELDMAN, D.D.S., P.C.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for dental malpractice, defendant David Cohen as Executor of the Estate of Morton Cohen, DDS ("Cohen"), moves for summary judgment dismissing the complaint and any cross-claims in their entirety; or alternatively partial summary judgment dismissing the dental malpractice/negligence claims, or the lack of informed consent claim, or the consumer fraud claim, or the various co-defendants' cross-claims. Defendant Cohen also moves for an order pursuant to CPLR 8303-a imposing sanctions against plaintiff, including reasonable attorney's fee, on the grounds that the action against him is frivolous.

Plaintiff submits partial opposition to the motion, stating she would be willing to withdraw her claims against Dr. Cohen, provided co-defendants Dr. Stolzenberg, Toothsavers and Dr. Li also agree to withdraw their cross-claims against Cohen. Plaintiff states she does not want to be left in the position at trial where co-defendants seek to blame the “empty chair” of Dr. Cohen, “while plaintiff is left hamstrung because she voluntarily discontinued her claims against him.” Plaintiff explains that to resolve this issue expeditiously, a stipulation was sent to all parties to discontinue the direct action and all cross-claims against Cohen, which would render the instant motion moot, but it was never signed. Plaintiff requests that if Dr. Cohen is dismissed from the action, the Court issue an order precluding co-defendants from limiting their liability pursuant to CPLR Article 16 with respect to any acts or omissions of Dr. Cohen, and that co-defendants be collaterally estopped from blaming the “empty chair” of Dr. Cohen at trial. Plaintiff also argues that sanctions should not be imposed against her, since co-defendants would not agree to withdraw their cross-claims and she brought the action in good faith as the \$10,000 charges for dental work were attributed to Morton Cohen, D.D.S.

The Toothsavers and Stolzenberg defendants (collectively the “Toothsavers defendants”) do not oppose Cohen’s motion to dismiss the complaint and all cross-claims against him. They only oppose plaintiff’s partial opposition requesting an order of preclusion, on the grounds that it is procedurally improper in the absence of a formal cross-motion for such relief, and that plaintiff fails to make out a prima facie case for what they characterize as a request for a “protective order.”

Defendant Cohen’s motion for summary judgment is granted in the absence of opposition, and the complaint and all cross-claims asserted against Cohen are dismissed. Neither

plaintiff nor Toothsavers oppose awarding Cohen summary judgment dismissing the complaint and all cross-claims asserted against him.

In the exercise of the court's discretion, plaintiff's request for an order of preclusion is granted. Contrary to the Toothsavers defendants' objection, the absence of a formal cross-motion is not fatal to the request, as the relief was clearly set forth in plaintiff's opposition papers, and the Toothsavers defendants were fully aware of the request, expressly opposed it and were therefore not surprised or otherwise prejudiced by plaintiff's failure to move by notice of cross-motion. See Pokoik v. Pokoik, 146 AD3d 474 (1st Dept 2017); Rappel v. Wincoma Homeowners Ass'n, 125 AD3d 833 (2nd Dept 2015); Fried v. Jacob Holding, Inc., 110 AD3d 56 (2nd Dept 2013); National Union Fire Insurance Co v. Mirman, 269 AD2d 174 (1st Dept 2000); Marx v. Marx, 258 AD2d 366 (1st Dept 1999). Notably, one of the cases cited by the Toothsavers defendants, Guggenheim v. Guggenheim, 109 AD2d 1012 (3rd Dept 1985), provides direct support for the foregoing conclusion, as it holds that "the absence of a separate notice of motion is not necessarily fatal where the element of surprise is removed by a clear recitation in the answering affidavit of a party's intention to seek separate relief on the return date of the movant's motion." Id at 1012-1013.

The Toothsavers defendants mischaracterize the nature of plaintiff's request as a request for a "protective order." Plaintiff simply seeks an order of preclusion which is appropriate under the circumstances presented. Where as here, summary judgment is being awarded to defendant Cohen and the complaint and all cross-claims are being dismissed as against him, the co-defendants will be precluded from limiting their liability pursuant to CPLR

Article 16 based on the acts or omissions of defendant Cohen. See Carmona v. Mathisson, 92 AD3d 492 (1st Dept 2012); Sellino v. Kirtane, 73 AD3d 728 (2nd Dept 2010); Johnson v. Peloro, 62 AD3d 955 (2nd Dept 2009). In Carmona v. Mathisson, supra, the Appellate Division First Department reversed where the trial court permitted defendants to elicit testimony that a machine manufactured by co-defendant Alcon malfunctioned or contained a design defect and included Alcon on the verdict sheet, and the First Department previously granted summary judgment to Alcon dismissing plaintiff's claims for strict liability and negligent design and manufacture. In Sellino v. Kirtane, supra, the Appellate Division Second Department reversed, holding that the Supreme Court should have granted plaintiff's cross-motion to preclude defendants from limiting their liability pursuant to CPLR Article 16 based on the acts or omissions of the defendants who were awarded summary judgment dismissing the complaint as against them.

Finally, the branch of defendant Cohen's motion for an order imposing sanctions against plaintiff for frivolous litigation, is denied.

Accordingly, it is

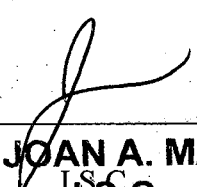
ORDERED that the motion by defendant David Cohen as Executor of the Estate of Morton Cohen, D.D.S. for summary judgment dismissing the complaint and all cross-claims asserted against said defendant is granted, the complaint and all cross-claims asserted against defendant David Cohen as Executor of the Estate of Morton Cohen, D.D.S. are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendant's motion for the imposition of sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff's request for an order of preclusion is granted and the remaining defendants shall be precluded from limiting their liability pursuant to Article 16 of the CPLR based on the acts or omissions of defendant David Cohen as Executor of the Estate of Morton Cohen, D.D.S.

DATED: MAY 18, 2017

ENTER:


HON. JOAN A. MADDEN
J.S.C.