

**Serna v Swainson**

2017 NY Slip Op 31842(U)

August 31, 2017

Supreme Court, New York County

Docket Number: 805315/14

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
GLORIA STELLA SERNA,

Plaintiff,

INDEX NO. 805315/14

-against-

RAYMOND SWAINSON, D.D.S. and AMERICAN  
DENTAL OFFICES, PLLC,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this action for dental malpractice, defendant American Dental Offices, PLLC (“American Dental”), moves for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims arising from its treatment of the plaintiff, and the entry of judgment in its favor. In the alternative, American Dental moves for an order pursuant to 3212 granting partial summary judgment dismissing all claims pertaining to alleged independent acts of dental malpractice on the part of American Dental, and an order directing the entry of judgment in its favor. In the alternative, American Dental moves for an order pursuant to CPLR 3025(b) granting leave to serve an Amended Verified Answer asserting a new cross-claim for contractual indemnification against defendant Swainson; an order directing that service of the Proposed Amended Verified Answer as attached to the instant motion be deemed sufficient service of the Amended Verified Answer on all parties and that no further service is necessary; and an order granting American Dental summary judgment on its cross-claim for contractual indemnification against co-defendant Swainson.

Both plaintiff and co-defendant Swainson submitted partial opposition to the motion. Plaintiff opposed only the portion of the motion seeking summary judgment on her claim against American Dental for vicarious liability for the malpractice committed by co-defendant Swainson. Defendant Swainson opposed only the portion of the motion seeking summary judgment on American Dental's cross-claim against him for contractual indemnification. After the parties appeared for oral argument on April 20, 2017, they executed a Stipulation dated April 24, 2017 in which they agreed to most but not all of the relief sought in motion. Specifically, the stipulation states that the parties agree that: 1) "any and all of plaintiff's claims against American Dental Offices, PLLC with the sole exception of vicarious liability claims for the acts of co-defendant Raymond Swainson, D.D.S., are dismissed"; 2) "plaintiff's lack of informed consent cause of action against Defendant American Dental Offices, PLLC is dismissed"; 3) "Defendant American Dental Offices, PLLC is entitled to leave to serve an Amended Verified Answer"; and 4) "the Proposed Amended Verified Answer attached as Exhibit 'M' to Defendant American Dental Offices, PLLC's motion for summary judgment is deemed served on all parties, and that no further service is necessary."

Based on the Stipulation as quoted above, the parties have stipulated and agreed to all the unopposed relief sought in American Dental's motion. The Stipulation also addresses plaintiff's objection to the dismissal of his vicarious liability claim by excepting that claim from the dismissal. The only issue not resolved in the Stipulation is whether American Dental is entitled to summary judgment on its cross-claim against co-defendant Swainson for contractual indemnification.

It is undisputed that paragraph 6 of the contract between American Dental and Swainson contains the following indemnification clause: “Dentist [Dr. Swainson] agrees to indemnify and hold PLLC [American Dental Offices, PLLC] harmless from any all causes of action, claims, debts, demands and expenses, including attorney fees, resulting in whole in part from any and all actions or inactions of the Dentist [Dr. Swainson] as well as of his (her) assistants for any violations of this agreement or while performing the professional services as agreed to herein.” Based on this provision, Swainson is obligated to indemnify American Dental only if American Dental is found vicariously liable for any “actions or inactions” of Swainson and his assistants “while performing the personal services” agreed to under the contract. Since American Dental’s right to contractual indemnification is dependent upon a determination of its vicarious liability which must await trial, summary judgment on its indemnification claim, at this juncture, is premature. In reply, American Dental argues that it is entitled to a conditional order of indemnification. The Court finds, however, that under the circumstances presented in this action, a conditional order of indemnification is not warranted, as evidentiary issues exist with respect to the alleged missing “routing slip” which can only be determined at trial. The Court makes no determination as to whether the alleged missing “routing slip” has any impact on the indemnification issue.

Thus, the portion of American Dental’s motion for summary judgment on its cross-claim against Swainson for contractual indemnification is denied.

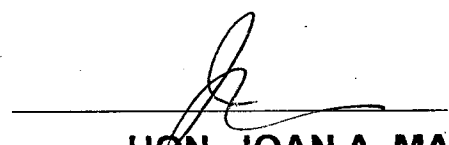
Accordingly, it is hereby

ORDERED that the motion is granted on consent to the extent of the annexed so-ordered Stipulation dated April 24, 2017; and it is further

ORDERED that the branch of the motion for summary judgment on American Dental's cross-claim for contractual indemnification against co-defendant Swainson, is denied.

DATED: August 31, 2017

ENTER:



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

*Judith*  
8-05315/2014