

Beker v Glasberg
2017 NY Slip Op 31871(U)
September 5, 2017
Supreme Court, New York County
Docket Number: 805001/2017
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Sylvie Beker,

Index No.
805001/2017

Plaintiffs,

**DECISION
and ORDER**

- v -

Mot. Seq. 001

Scot Bradley Glasberg, M.D.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Sylvie Beker (“Beker”) commenced this medical malpractice action by summons and complaint on January 3, 2017. Beker alleges that on July 24, 2014, she underwent a bilateral capsulectomy and bilateral mastopexy performed by Defendant Scot Bradley Glasberg, M.D. (“Dr. Glasberg”). Beker claims that Dr. Glasberg departed from accepted standards of medical practice and failed to procure her informed consent. Dr. Glasberg now moves for an order pursuant to CPLR 3211 (a) (5) dismissing this action because the parties allegedly executed a settlement and release agreement (the “agreement”) on January 30, 2016.

Dr. Glasberg contends that Beker threatened to negatively review his treatment in the media unless he reimbursed her for the costs of the bilateral capsulectomy and bilateral mastopexy. (affirmation of Schulman at 3) Accordingly Dr. Glasberg sent Beker the agreement dated March 25, 2015. (affirmation of Schulman at 4) This agreement provides that Dr. Glasberg would pay Beker \$5,000 within 15 days of Beker’s execution and delivery of the agreement to Dr. Glasberg. On January 30, 2016, within 15 days of receiving the executed agreement from Beker, Dr. Glasberg allegedly signed and delivered the agreement to Beker. (affirmation of Schulman 4) Although Dr. Glasberg allegedly included a personal check for \$5,000, he claims that Beker “never cashed” the check. (affirmation of Schulman 4) He appends a ledger representing that a “6/30/2016” check marked as “Sylvie Becker Settlement” is “VOID.” (Glasberg’s exhibit G)

Dr. Glasberg claims that the agreement mutually releases and discharges the parties from any and all liability pertaining to Dr. Glasberg's medical treatment. (affirmation of Schulman at 4) Dr. Glasberg contends that the parties considered the agreement to act as a full settlement of all claims or losses. (affirmation of Schulman at 4)

In support, Dr. Glasberg submits the agreement that provides in relevant part,

"This Confidential Settlement Agreement and Release . . . is entered into as of March 25, 2015 by and between (a) Scot Glasberg, M.D. and (b) Sylvie Beker . . .

3. Mutual Release. The Parties, on behalf of themselves, hereby release and discharge the other Party, from all known or unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, wages, medical costs, pain and suffering, mental anguish, emotional distress, expenses (including attorneys' fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has, or may have had, against the other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions related to or arising from:

- a. the medical treatment rendered by Scot Glasberg, M.D.;
- b. the dispute;
- c. litigation;
- d. an agreement between the Parties;
- e. any other matter between the Parties; and/or
- f. any claims under federal, state, or local law, rule or regulation.

This agreement resolves any claim for relief that could have been alleged, no matter how characterized, including, without limitation, compensatory damages, damages for breach of contract, bad faith damages, reliance damages, liquidated damages, damages for humiliation and embarrassment, punitive damages,

costs and attorneys' fees related to or arising from the medical procedure performed by Scot Glasberg, M.D. in July 2014 . . .

5. Acknowledgement of Settlement. The Parties, as broadly described in paragraph 3 above, Acknowledge that (i) the consideration set forth in this Agreement, which includes, but is not limited to, the Settlement Payment, is in full settlement of all claims or losses of whatsoever kind or character that they have, or may ever have had, against the other Party, as broadly described in paragraph 3 above and (ii) by signing this Agreement and accepting the consideration provided herein and the benefits of it, they are giving up forever any right to seek further monetary or other relief from the other Party, as broadly described in paragraph 3 above, for any acts or omissions up to and including the Effective Date." (Glasberg's exhibit D at 2-3)

The signature page bears the following, the signature of Dr. Glasberg dated January 30, 2016, the signature of Beker dated January 11, 2016, the signature of the witness Christopher W. Barry, the signature of another witness and the seal of Notary Public Anwar Keeys dated January 11, 2016. (Glasberg's exhibit D at 6)

In opposition, Beker alleges that Dr. Glasberg mailed her three different settlement agreements. The first bore the date "March 25, 2015." (the "March 25, 2015 agreement"). (affirmation of Wertenteil at 2) Upon receiving the March 25, 2015 agreement, Beker "added in her own handwriting . . . a complaint about Dr. Glasberg's negligent care . . ." (affirmation of Wertenteil at 2) She signed the March 25, 2015 agreement in April or May of 2015 in the presence of two witnesses, "Susan and Helen." (affirmation of Wertenteil at 2) Beker claims that the two witnesses also signed the March 25, 2015 agreement. (affirmation of Wertenteil at 2) In June or July of 2014, Dr. Glasberg's office contacted Beker and informed her that the handwritten addition to the March 25, 2015 agreement was unacceptable. (affirmation of Wertenteil at 2) Instead of sending the \$5,000 check, Dr. Glasberg sent a second agreement (the "January 2016 agreement").

Beker claims that she signed the January 2016 agreement on January 11, 2016 before two witnesses, "Zineb . . . and . . . Christopher Barry." (affirmation of Wertenteil at 3) Afterwards Dr. Glasberg informed Beker that the January 2016

agreement was invalid because Beker “signed it in the wrong place.” (affirmation of Wertenteil at 3) “Apparently, she had signed it above Dr. Glasberg’s name.” (affirmation of Wertenteil at 3) Accordingly, Dr. Glasberg did not send Beker a \$5,000 check but a third settlement agreement (the “June 1, 2017 agreement”). Beker claims that she did not sign this June 1, 2017 agreement. (affirmation of Wertenteil at 4) However she appends it to her opposition. (Beker’s exhibit B) Beker maintains that she never received a \$5,000 check from Dr. Glasberg. (affirmation of Wertenteil at 5)

Beker contends that the agreement attached to Dr. Glasberg’s motion is fraudulent because Dr. Glasberg represents that it is the March 25, 2015 agreement. However it does not reflect the complaint Beker added in her own handwriting. Neither does the agreement bear the witness signatures of Susan and Helen. Instead the signatures undersigned are those of the witnesses Zineb and Christopher Barry who Beker alleges witnessed the January 2016 agreement. Thus, Beker’s argument is that the agreement that Dr. Glasberg appended to this motion is an amalgamation of the text from the March 25, 2015 agreement and the signature page of the January 2016 agreement. Because Beker allegedly signed the January 2016 agreement in the wrong place above Dr. Glasberg’s name, she argues that the signature on the signature page of the agreement above Beker’s name was fraudulently made by someone else.

Motion to Dismiss

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994]) The Court “accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory.” (*id.*) “Submissions offered in opposition to the motion must also be accepted as true for purposes of determining whether there is any cognizable cause of action.” (*Hakim v Hakim*, 99 AD3d 498, 501 [1st Dept 2012])

Release

CPLR 3211 (a) (5) provides that, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . payment, release. . .” “[A] valid release constitutes a complete bar to an action on a claim which is the subject of the

release.” (*Centro Empresarial Cempresa S.A. v Amerca Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]) “If the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties.” (*id.*) However “[a] release may be invalidated . . . for any of ‘the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake.’” (*Centro Empresarial Cempresa S.A.* at 276)

Fraud

Fraud is “infinite in variety.” (*U.S. v Mangan*, 575 F2d 32, 36 [2d Cir 1978]) “Under State law and general contract law, a forged signature renders a contract void *ab initio*.” (*Orlosky v Empire Sec. Systems, Inc.*, 230 AD3d 401, 403 [3d Dept 1997])

Discussion

On this motion to dismiss, the Court accepts the facts alleged in Beker’s complaint as true. (*see Leon v Martinez*, 84 N.Y.2d 83, 87 [1994]) The Court accords Beker the benefit of every possible favorable inference and determines only whether the facts as alleged fit within any cognizable legal theory. (*id.*) Beker’s submission offered in opposition to Dr. Glasberg’s motion to dismiss is also accepted as true. (*see Hakim v Hakim*, 99 AD3d 498, 501 [1st Dept 2012])

Although Dr. Glasberg argues that the agreement constitutes a complete bar to Beker’s claims for medical malpractice and failure to procure informed consent, the agreement may be invalidated on the basis of fraud. (*see Centro Empresarial Cempresa S.A. v Amerca Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]) Such a basis is raised by Beker who asserts that she did not sign the agreement annexed to Dr. Glasberg’s motion. (Opposition of Beker at 1, 2) Her claim, the truth of which the Court must accept, is that the agreement submitted by Dr. Glasberg fraudulently consists of text and a signature page from two different agreements that Dr. Glasberg rejected. As support for this assertion, Beker argues that the agreement is purportedly the March 25, 2015 agreement yet it does not reflect the complaint Beker added in her own handwriting. Neither does the agreement bear the signatures of the March 25, 2015 agreement witnesses, Susan and Helen. Instead the signatures undersigned are those of Zineb and Christopher Barry who witnessed the January 2016 agreement. Additionally, the court must accept as true Beker’s assertion that she improperly signed the January 2016 agreement above Dr. Glasberg’s name

prompting Dr. Glasberg to reject it. Because Beker's signature is written above her name in the agreement submitted by Dr. Glasberg, Beker insinuates that her signature was forged. Under State law and general contract law, this forged signature would render the agreement void *ab initio*. (see *Orlosky v Empire Sec. Systems, Inc.*, 230 AD3d 401, 403 [3d Dept 1997]) Accordingly, Beker submits a viable opposition to the motion.¹ Dr. Glasberg's instant motion to dismiss fails.

Wherefore, it is hereby,

ORDERED that Defendant Scot Bradley Glasberg, M.D.'s motion to dismiss Plaintiff Sylvie Beker's complaint pursuant to CPLR 3211 (a) (5) is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: September 5, 2017



EILEEN A. RAKOWER, J.S.C.

¹ Although Dr. Glasberg claims that he mailed a \$5,000 check to Beker, Beker contends that she never received such a check. The Court must accept the truth of Beker's contention. No evidence is submitted showing that Beker cashed this check and Dr. Glasberg's ledger only shows that a "6/30/2016" check marked "Sylvie Becker Settlement" is "VOID." (Glasberg's exhibit G)