Jane Doe #3 v New York & Presbyt. Hosp.
2017 NY Slip Op 31894(U)
September 8, 2017
Supreme Court, New York County
Docket Number: 152438/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

JANE DOE #3, JANE DOE #4, JANE DOE #5 and JANE DOE #6,

Plaintiffs,

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL; COLUMBIA-PRESBYTERIAN MEDICAL CENTER; COLUMBIA UNIVERSITY MEDICAL CENTER; COLUMBIA-PRESBYTERIAN MEDICAL CENTER EAST SIDE ASSOCIATES; EAST SIDE ASSOCIATES; ROBERT HADDEN; THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS; PRESBYTERIAN HOSPITAL PHYSICIAN SERVICES ORGANIZATION, INC.; COLUMBIA-CORNELL CARE, LLC; COLUMBIA CORNELL NETWORK PHYSICIANS, INC.; SLOANE HOSPITAL FOR WOMEN,

Defendants.

INDEX NO.	152438/2017
MOTION DATE	09-06-2017
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to 9 were read on this motion pursuant to CPLR §3211[a] [4], [5] and [7] to dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5 - 6
Replying Affidavits	7 - 8, 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that the motion by defendants: The New York and Presbyterian Hospital, Columbia Presbyterian Medical Center, Columbia University Medical Center, Columbia-Presbyterian Medical Center, Presbyterian Hospital Physician Services Organization, Inc. and Sloan Hospital for Women ("Hospital Defendants"), The Trustee of Columbia University in the City of New York, Columbia University College of Physicians and Surgeons, Columbia-Presbyterian Medical Center East Side Associates and East Side Associates ("University Defendants") (together collectively referred to as the "Hospital/University Defendants"), pursuant to CPLR §3211[a][5] dismissing the first, second, third, fourth, fifth, sixth, seventh and eighth causes of action asserted against them as time-barred and pursuant to CPLR §3211[a][7] dismissing the ninth and tenth causes of action for failure to state a cause of action, alternatively, pursuant to CPLR §3211[a][4] dismissing or staying this action on the grounds that two other actions are pending in Supreme Court New York County between the same parties, is granted as stated herein. The remainder of the relief sought is denied.

This matter arises from the alleged sexual assault of plaintiffs by Dr. Robert Hadden while they were patients in his gynecologic practice. On June 1, 2015 Robert Hadden was criminally indicted. On February 22, 2016 he pled guilty to one count of criminal sexual act in the third degree and one count of forcible touching. On March 29, 2016 he was sentenced to zero days time served and a one year conditional discharge. Robert Hadden gave up his medical

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

license, is no longer allowed to practice medicine in any part of the United States, and was classified as a level one sex offender.

This action was commenced on March 15, 2017 after Mr. Hadden was sentenced and convicted. The complaint asserts ten causes of action against the Hospital/University Defendants and Robert Hadden for: (1) general negligence , (2) civil battery, (3) criminal battery, (4) negligence and professional negligence, (5) negligent infliction of emotional distress, (6) intentional infliction of emotional distress, (7) negligent hiring and negligent supervision, (8) failure to investigate criminally suspicious activities (9) defamation and (10) for punitive damages (Mot. Exh. A). The claims are substantially the same as the other two cases, with some additional causes of action and one new plaintiff, Jane Doe #6.

The Hospital/University Defendants' motion seeks an Order: pursuant to CPLR §3211[a][5] and CPLR §215[8] dismissing the first, second, third, fourth, fifth, sixth, seventh and eighth causes of action asserted against them as time-barred and pursuant to CPLR §3211[a][7] dismissing the ninth and tenth causes of action for failure to state a cause of action. Alternatively, the Hospital/ University Defendants, pursuant to CPLR §3211[a][4], seek to dismiss or stay this action on the grounds that two other actions are pending in Supreme Court New York County between the same parties.

Pursuant to CPLR §3211[a][5] an action may be dismissed as barred by the statute of limitations (Pahlad ex rel. Berger v. Brustman, 33 A.D. 3d 518, 823 N.Y.S. 2d 61 [1st Dept. 2006]). The Hospital/University Defendants' reliance on the statute of limitations for claims of (1) general negligence, (2) civil battery, (3) criminal battery, (4) negligence and professional negligence, (5) negligent infliction of emotional distress, (6) intentional infliction of emotional distress, (7) negligent hiring and negligent supervision, is misplaced. Plaintiffs' properly rely on CPLR §215[8] which permits an action to be brought against both the wrongdoer and the employer for intentional torts, within one year from the termination of a criminal action. CPLR §215[8] applies where the relationship with the employer is "so related to the criminal defendant" as to result in vicarious liability (Alford v. St. Nicholas Holding Corp., 218 A.D. 2d 622, 631 N.Y.S. 2d 30 [1st Dept., 1995]).

This action was commenced within one year of the termination of the criminal action. The Hospital/University Defendants have not shown they were unaware of Robert Hadden's behavior such that they could avoid the application of CPLR §215[8].

An employer is vicariously liable for torts committed by an employee that are foreseeable and within the scope of employment. A sexual assault by a hospital employee is generally committed for personal motives, unrelated to hospital business, and is a departure from the scope of employment, eliminating vicarious liability for the tortious acts (Judith M. v. Sisters of Charity Hosp., 93 N.Y. 2d 932, 715 N.E. 2d 95, 693 N.Y.S. 2d 67 [1999] and N.X. v. Cabrini Medical Center, 97 N.Y. 2d 247, 765 N.E. 2d 844, 739, N.Y.S. 2d 348 [2002]). However, a hospital has a duty to safeguard the welfare of patients from reasonably foreseeable harm. The hospital is required to show that there was no prior knowledge of the employee's propensities (N.X. v. Cabrini Medical Center, 97 N.Y. 2d 247, supra at page 253). The claims against a hospital for negligent hiring of an employee can be sustained where, "a plaintiff show[s] that the employer was on notice of a propensity by the employee to commit the alleged acts" triggering "a duty to protect the plaintiff from a known or suspected sexual predator" (G.C. v. Yonkers General Hosp., 50 A.D. 3d 472, 858 N.Y.S. 2d 11 [1st Dept., 2008]).

Documents filed in the criminal case state that at least one nurse allegedly witnessed Robert Hadden inappropriately touching a patient at the Audubon Clinic in Washington Heights, and reported the incident to two different supervisors between 1993 and 1994. A former nurse assistant and registered medical assistant at the hospital became his patient after 1995, and allegedly reported an erection during treatment to another nurse. A patient between 2003 and 2004, allegedly advised two other doctors in Robert Hadden's medical practice that she did not want him to deliver her baby after inappropriate touching (Opp. Exh. A, pgs. 11 and 17, Victim 10 and 11, and Witness 19). These allegations provided potential notice of Robert Hadden's propensities to sustain the first eight causes of action under CPLR §215[8].

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. The facts alleged are given the benefit of every favorable inference (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence, or are inherently lacking in credibility, will not be presumed to be true and are susceptible to dismissal (Simkin v. Blank, 19 N.Y. 3d 46, 968 N.E. 2d 459, 945 N.Y.S. 2d 222 [2012]).

Plaintiffs' ninth cause of action for defamation fails to state a claim and must be dismissed. Plaintiffs' are alleging that the defamatory statements were made by attorneys and the legal team from the date of the initial filing of the Civil action. Statements made as part of judicial proceedings by protected participants, including attorneys and witnesses, are privileged and not subject to a defamation claim (Park Knoll Associates v. Schmidt, 59 N.Y. 2d 205, 451 N.E. 2d 182, 464 N.Y.S. 2d 424 [1983] and Manhattan Sports Restaurants of America LLC v. Lieu, 146 A.D. 3d 727, 45 N.Y.S. 3d 468 [1st Dept., 2017]). In any case, plaintiffs conclusory and broadly worded claims fail to state specific details of the alleged defamation as required under CPLR §3016[a], to sustain the cause of action (BDCM Fund Adviser, L.L.C. v. Zenni, 98 A.D. 3d 915, 952 N.Y.S. 2d 104 [1st Dept. 2012]).

Plaintiffs' tenth cause of action for punitive damages must also be dismissed. Punitive damages cannot be asserted as a separate cause of action because they constitute an element of the total claim for damages on underlying causes of action (APS Food Sys. v. Ward Foods, 70 A.D. 2d 483,421 N.Y.S. 2d 223 [1st Dept., 1970] and Podesta v. Assumable Homes Development II Corp., 137 A.D. 3d 767, 31 N.Y.S. 3d 74 [2nd Dept., 2016]).

Defendants have not stated a reason to dismiss this action under CPLR §3211[a][4]. The Court, pursuant to CPLR §3211[a][4] may "... make such order as justice requires" (Posada v. New York State Dept. of Health, 54 A.D. 3d 1100, 866 N.Y.S. 2d 785 [3rd Dept., 2008]). Multiple actions with similar issues and parties aligned in interest, pending in the State of New York should not be dismissed, rather they should be joined or consolidated (Liberty Surplus Ins. Corp. v. Harleysville Ins. Co. of New York, 140 A.D. 3d 621, 33 N.Y.S. 3d 706 [1st Dept. 2016]).

On August 12, 2013 a plaintiff identified as Jane Doe #10 commenced an action in Supreme Court New York County filed under Index No. 805293/2013. The Hospital/University Defendants claim Jane Doe #10 is Jane Doe #5 in this action. On April 17, 2014 three plaintiffs identified as "L.K., E.P. and G.I." commenced an action in Supreme Court New York County filed under Index No. 805131/2014. The Hospital/University Defendants claim that E.P is Jane Doe #3 and G.I. is Jane Doe # 4 in this action. L.K. is no longer a party to that action. The actions filed

under Index Nos. 805293/2013 and 805131/2014 were commenced before Robert Hadden was indicted, remain active and by stipulation are already joined for discovery. In the interests of justice this action will be joined with the other two actions for discovery.

Accordingly, it is ORDERED that the motion by defendants: The New York and Presbyterian Hospital, Columbia Presbyterian Medical Center, Columbia University Medical Center, Columbia-Presbyterian Medical Center, Presbyterian Hospital Physician Services Organization, Inc. and Sloan Hospital for Women, The Trustee of Columbia University in the City of New York, Columbia University College of Physicians and Surgeons, Columbia-Presbyterian Medical Center East Side Associates, and East Side Associates pursuant to CPLR §3211[a] [4], [5] and [7] to dismiss this action in its entirety, alternatively to dismiss the first, second, third, fourth, fifth, sixth, seventh and eighth cause of action asserted against them as time-barred, and the ninth and tenth causes of action for failure to state a cause of action, is granted only as to dismissing the ninth and tenth causes of action, and it is further,

ORDERED, that the ninth and tenth causes of action in the complaint are severed and dismissed, and it is further,

ORDERED that this action is joined in this court, for discovery with the actions filed under index numbers 805293/2013 Jane Doe #10 v. The Trustees of Columbia University in the City of New York et al, and 805131/2014, E.P. and G.I. v. The Trustees of Columbia University in the City of New York, et al., and it is further,

ORDERED that movants are directed to serve a copy of this order with notice of entry pursuant to e-filing protocol, on all parties, and on the County Clerk (Room 141B), and on the Trial Support Clerk located in the General Clerk's Office (Room 119), who are hereby directed to mark the court's records to reflect the joinder for discovery of the actions, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED, that plaintiff shall pursuant to e-filing protocol serve and file a copy of this Order with Notice of Entry on the defendants, and it is further,

ORDERED, that the defendants shall within twenty (20) days from the date of service of a copy of this Order with Notice of Entry serve and file an Answer on the plaintiff, the remaining defendant, and file the same with the Clerk of this Court, and it is further,

ORDERED, that counsel are directed to appear for a preliminary conference in IAS Part 13, at 71 Thomas Street, on November 15, 2017 at 9:30a.m..

ENTER:

MANUEL J. MENDEZ, J.S.C.

Dated: September 8, 2017

MANUEL J. MENDEZ J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE