

McCabe v Central Park Aesthetic & Laser
2017 NY Slip Op 32275(U)
October 24, 2017
Supreme Court, New York County
Docket Number: 158508/16
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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MICHAEL MCCABE,

Plaintiff,

INDEX NO. 158508/16

-against-

CENTRAL PARK AESTHETIC & LASER,
YUSUF MAMDANI, ZAHRA MAMDANI, and
JANE DOE,

Defendants.

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JOAN A. MADDEN, J.:

Defendants Central Park Aesthetic & Laser ("Central Park Aesthetic"), Yusuf Mamdani, Zahra Mamdani (collectively "defendants") move for an order pursuant to CPLR 3211(a)(1), (5) and (7), and CPLR 214-a, dismissing the complaint as barred by the statute of limitations, based on a defense founded on documentary evidence, and for failure to state a cause of action. Plaintiff opposes the motion and cross-moves to amend the complaint to add Y. Mamdani, M.D., P.C. as a defendant and to substitute Erszebeth Azarowicz for defendant Jane Doe. Defendants oppose the cross-motion.

The complaint alleges that on October 17, 2013, defendant "Jane Doe, an individual known by the first name Elizabeth," an employee of defendant Central Park Aesthetic, negligently performed a laser hair removal treatment on his face and forehead, and as a result he "sustained severe and permanent personal injuries, scarring, pain and humiliation." The complaint also alleges that defendants Yusuf Mamdani and Zahra Mamdani "negligently failed to supervise, train, control and manage their employee defendant Jane Doe."

In support of dismissal, defendants argue that the commencement of the action on October 11, 2016 was untimely, since an action for negligent laser hair removal sounds in medical malpractice, which is governed by a 2 ½ year statute of limitations. With respect to defendant Central Park Aesthetic, defendants argue the corporate entity “Central Park Aesthetic & Laser LLC” was not incorporated until May 2014, which was after plaintiff’s October 2013 treatment, and the “entity through which plaintiff receive[d] the underlying services and treatment” was Y. Mamdani, M.D., P.C. As to individual defendant Zahra Mamdani, defendants argue she “provided no services” to plaintiff on October 17, 2013, and “was not a shareholder or officer in the medical or professional corporation that rendered the services.”

First addressing the statute of limitations issue, the parties agree that the action is timely if the three year period for ordinary negligence applies, but the action is time-barred if the shortened period of 2 ½ years for medical malpractice is applicable. As explained above, the complaint asserts claims for negligence, and negligent supervision and training. Defendants, however, maintain that the claims sound in medical malpractice, asserting that the laser hair removal treatment provided by Ms. Azarowicz was “performed under the supervision of Dr. Mamdani, the procedure was related and connected to medical care and the procedure was performed under the exercise of professional judgment.”

To support such assertions, defendants submit an affidavit from Dr. Mamdani, a board certified Obstetrician and Gynecologist, explaining that “as part of my Gynecological and Obstetric practice back on and around October 17, 2013, if any of my patients had issues concerning abnormal hair growth or other cosmetic issues such as varicose veins my office (Y. Mamdani, M.D., P.C.) provided services including laser hair removal.” He explains that as the

“laser aesthetic and specifically laser hair removal services grew in my Gynecological practice, Y. Mamdani M.D., P.C. began to provide these services to men such as Mr. McCabe.” He states that based on the record attached to his attorney’s affirmation, “Mr. McCabe evidently came to Y. Mamdani, M.D., P.C. on October 17, 2013 for laser hair removal to several portions of his body including between his eyebrows,” and all of his “laser hair removal services were provided by my aesthetician on that date, Erszabeth Azarowicz.”¹ He states that the laser hair removal services provided to Mr. McCabe on October 17, 2013, “while performed by Ms. Azarowicz were under my direction and control, even if I was not physically present in the office Ms. Azarowicz could contact me via telephone with any questions and concerns.”

Dr. Mamdani further states that “I have provided Ms. Azarowicz with instructions as to how to provide laser hair removal to patients such as Mr. McCabe and as to when such laser hair removal would have been contraindicated either because of pre-existing conditions the patient may have been suffering from or because of medications that the patient may have taken prior to the laser hair removal treatment, and “[i]f any issues were to arise regarding the propriety of providing the laser hair removal, Ms. Azarowicz was instructed to immediately contact me for direction as to whether or not to perform the laser hair removal services.” He states that “[t]herefore, it is my position that the laser hair removal services provided by Y. Mamdani, M.D., P.C. on and around October 17, 2013 were performed under my general supervision by a licensed aesthetician.”

¹While Dr. Mamdani states that Ms. Azarowicz is “licensed by the State of New York as an aesthetician to provide laser hair removal,” New York does not regulate laser hair removal. In 2017, however, legislation was introduced in the New York State Assembly (A7977A) and Senate (S6088-A) that would amend the General Business Law to require licensing and regulation of laser hair removal technicians. www.nysenate.gov/legislation/bills/2017/S6088

In opposition, plaintiff asserts that his claims for negligence and negligent supervision and training do not sound in medical malpractice, as he had no doctor patient relationship with Dr. Mamdani, he did not seek any medical treatment for any medical condition from defendants and he never interacted with Dr. Mamdani. He argues that defendants' records are devoid of any mention of Dr. Mamdani ever having examined him and devoid of any diagnostic tests or medical diagnosis that might indicate a doctor patient relationship. Plaintiff also argues that defendant Zahra Mamdani admits in an email that Central Park Aesthetics is affiliated with, but separate from, the Ob/Gyn office of Dr. Mamdani, and "admits by omission that defendant Azarowicz was not a medical professional by inviting Mr. McCabe back to the office for free treatments with a new employee who has a 'medical degree.'"

To support his arguments, plaintiff submits his own affidavit explaining that in "Spring 2013, I was looking for a business convenient to my home, that performed laser hair removal services," and "[a]fter conducting some research, I found a listing for Defendant, Central Park Aesthetic & Laser, on the Yelp website." He states that the "Yelp page did not mention any affiliation with a medical office." His first visit to defendant Central Park Aesthetics was on or about May 30, 2013, and he returned for "similar laser hair removal services" on June 13, 2013, July 11, 2013 and August 15, 2013. On his fifth visit on October 17, 2013, "the procedure was negligently performed by Defendant Erszabeth Azarowicz [Jane Doe]." He explains that "[d]uring and immediately following the October 17, 2013 procedure I complained about severe pain from the procedure at which time Defendant Azarowicz stated that she had set the setting on the laser machine to 'double strength.'" He states that when "I returned home, I noticed that a blister had formed in between my eyebrows where I had received the laser hair removal process."

Plaintiff states that he “never sought nor received medical treatments from Defendants, nor did I suffer from any medical condition that would have caused me to seek medical treatment from Defendants.” He further states that during his five visits to Central Park Aesthetics, he “never saw” Dr. Mamdani, he “never sought treatment or received treatment from” Dr. Mamdani, he “was never interviewed or examined” by Dr. Mamdani, he “never received a diagnosis” from Dr. Mamdani” and “never once interacted” with Dr. Mamdani. Plaintiff states he was “simply receiving laser hair removal services from Defendant, Central Park Aesthetics & Laser,” and “was never a patient of Dr. Yusuf Mamdani’s or his medical office, but only a customer of Defendants.”

It is well settled that a complaint “sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient.” Davis v. South Nassau Communities Hospital, 26 NY3d 563 (2015) (quoting 1B NY PJI3d 2:150 at 47 [2015]). “[A] negligent act or omission by a health care professional may receive the benefits of the shortened limitations period if such professional was engaged in conduct ‘that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.’” Perez v. Fitzgerald, 115 AD3d 177, 180 (1st Dept), lv app dismissed 23 NY3d 949 (2014) (quoting Bleiler v. Bodnar, 65 NY2d 65, 72 [1985]).

Courts have found that “claims against hospitals and medical corporations based on allegations that physical therapists, technicians, nurses, etc. committed ‘medical malpractice’ fall within the ambit of CPLR 214-a where the treatment rendered by the health care providers was performed at the direction of a physician or pursuant to a hospital protocol which was part and

parcel of patient care.” Perez v. Fitzgerald, *supra* at 182. “In addition, the alleged injury was found to have occurred during the course of medical treatment or bore a substantial relationship to such treatment pursuant to a referral or prescription from a physician.” *Id*; see e.g. Spiegel v. Goldfarb, 66 AD3d 873 (2nd Dept 2009), lv den 15 NY3d 711 (2010) (laboratory services performed at direction of physician held to be “crucial element” of plaintiff’s diagnosis and treatment and an “integral part of the process of rendering medical treatment”); Ryan v. Korn, 57 AD3d 507 (2nd Dept 2008) (burns caused by physical therapist’s application of heating pad were substantially related to plaintiff’s medical treatment); Meiselman v. Fogel, 50 AD3d 979 (2nd Dept), app dism 11 NY3d 783 (2008) (physical therapy prescribed by plaintiff’s physician either constituted medical treatment or bore a substantial relationship to such treatment); Pattavina v. DiLorenzo, 26 AD3d 167 (1st Dept 2006) (injuries to plaintiff’s back resulting from physical therapy constituted medical treatment or bore a substantial relation to medical treatment); Levinson v. Health South Manhattan, 17 AD3d 247 (1st Dept 2005) (malpractice statute of limitations applies to physical therapist’s use of electrical stimulation that constituted an integral part of the rendering of professional medical treatment).

Applying the foregoing analysis to the facts as presented, the Court concludes that defendants have failed to establish that the laser hair removal procedure to remove the hair from between plaintiff’s eyebrows constituted medical treatment or was substantially related to the rendition of medical treatment to plaintiff by a licensed physician. See Davis v. South Nassau Communities Hospital, *supra*; Perez v. Fitzgerald, *supra*. To the contrary, the record conclusively shows that the procedure was purely cosmetic in nature, and bore no relationship to any medical condition or treatment by a licensed physician. See Scivoli v. Levit, 79 AD3d 1011

(2nd Dept 2010). Although Dr. Mamdani's states that the laser hair removal services provided to plaintiff by Ms. Azarowicz were performed under his "direction and control" and under his "general supervision," that fact alone fails to establish that "the challenged conduct 'bears a substantial relationship to the rendition of medical treatment' to a particular patient." Weiner v. Lenox Hill Hospital, 88 NY2d 784, 788 (1996); see Davis v. South Nassau Communities Hospital, *supra*. Rather, the undisputed record establishes that Dr. Mamdani did not personally direct, administer or supervise the procedure performed on plaintiff by Ms. Azarowicz on October 17, 2013. It is also undisputed that plaintiff never met with Dr. Mamdani, and Dr. Mamdani never examined plaintiff, did not prescribe laser hair removal treatments for plaintiff, and did not provide any diagnosis or medical advice to plaintiff.

The facts of the instant action are similar to the facts in Scivoli v. Levit, *supra*, where plaintiff alleged she was injured during a procedure performed by a cosmetologist at the offices of defendant, a physician specializing in dermatology. Plaintiff met with an employee of defendant at defendant's medical center to discuss the removal of facial hair, and did not meet the defendant physician until a few months after the procedure. Defendant moved for summary judgment dismissing the complaint as time-barred under the 2 ½ year statute of limitations for medical malpractice. The Appellate Division Second Department denied the motion, holding that "defendant failed to establish as a matter of law that the plaintiff was seen by either a registered physician's assistant or a physician, or that the subject treatment was medical or bore a substantial relationship to medical treatment." *Id* at 1012.

The case on which defendants rely, Melkoyan v. Galizi, 49 Misc3d 1205(A) (Sup Ct, Westchester Co 2015), is a decision from a court of concurrent jurisdiction, and in any event is

not dispositive, as the complaint alleged only a timely claim for medical malpractice arising out of laser hair removal treatments, and no issue was raised as to the applicable statute of limitations.

Thus, in the absence of evidence showing that plaintiff was seen by Dr. Mamdani, or that the laser hair removal procedure bore a substantial relationship to the rendition of medical treatment to plaintiff, defendants are not entitled to invoke the shortened limitations period for medical malpractice. See Weiner v. Lenox Hill Hospital, *supra*; Scivoli v. Levit, *supra*. Hence, the branch of defendants' motion to dismiss the complaint as time-barred is denied.

Defendants argue that the complaint should be dismissed as against the corporate entity Central Park Aesthetic & Laser, **LLP**, since the corporate entity did not exist until it was incorporated in May 13, 2104, which was after plaintiff's October 2013 treatment. Defendants' argument is misleading and disingenuous, as the corporate entity is not named as a defendant. Only the non-corporate entity, Central Park Aesthetic & Laser, is named as a defendant, and plaintiff is not seeking to add the corporate entity as a defendant. Thus, the branch of defendants' motion to dismiss the complaint as against Central Park Aesthetic & Laser, LLP is denied.

Defendants argue that the complaint fails to state a cause of action against defendant Zahra Mamdani. While Zahra Mamdani states in her affidavit that in October 2013, she was the "office manager" of Y. Mamdani M.D., P.C. and that she "had nothing to do with" the laser hair removal services provided to plaintiff on October 17, 2013, she has not adequately explained her connection to defendant Central Park Aesthetics & Laser, and the relationship, if any, between that entity and Y. Mamdani M.D., P.C. Moreover, the record indicates that she had some

connection to Central Park Aesthetics & Laser, as she spoke to plaintiff on the telephone and communicated with him by e-mail regarding his October 17, 2013 treatment. The Court agrees with plaintiff that some “ambiguity” exists with respect to the business structure and ownership of Central Park & Aesthetics & Laser, since that entity existed in some form when he was treated, had its own website and was listed on Yelp. Thus, on the record presented, the Court is unable to conclude that the complaint fails to state a cause of action against defendant Zahra Mamdani, and the branch of defendants’ motion to dismiss is denied as to defendant Zahra Mamdani.

Finally, plaintiff’s cross-motion to amend the summons and complaint is granted. It is well settled that leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit. See CPLR 3025(b); Davis v. South Nassau Communities Hospital, supra at 580; Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc., 27 AD3d 323 (1st Dept 2006). Plaintiff seeks to add Y. Mamdani, M.D. P.C. as a defendant and to substitute Erszabeth Azarowicz for defendant Jane Doe. Given defendants’ admission that Ms. Azarowicz was the aesthetician who performed the laser hair removal procedure on plaintiff on October 17, 2013, plaintiff shall be permitted to substitute her for the defendant named as “Jane Doe.” Moreover, given defendants’ position that Y. Mamdani, M.D., P.C. was the “entity though which plaintiff receives the underlying services and treatment in issue in this litigation,” plaintiff shall be permitted to add . Mamdani, M.D., P.C. as a defendant.

In opposition, defendants argue that the claims against the proposed new defendants are time-barred even under the three-year period and that the relation-back doctrine is inapplicable.

Defendants have no standing to raise any issue as to the timeliness of the claims against the new defendants since any affirmative defense relating to the statute of limitations must be raised by the party to whom such defense belongs. See Orix Financial Services, Inc v. Haynes, 56 AD3d 377 (1st Dept 2008); Paladino v. Time Warner Cable of New York City, 16 AD3d 646 (2nd Dept 2005). Where, as here, leave is sought to add defendants, the proposed new defendants need not be served with notice of the motion. Eastern States Electrical Contractors, Inc v. William L. Crow Construction Co, 153 AD2d 522 (1st Dept 1989). Since the proposed defendants are not yet before the court, it is not proper at this juncture to consider whether they may have a defense based on the statute of limitations. See DeFilippo v. Knolls of Melville Redevelopment Co, 29 Misc3d 1228(A) (Sup Ct, Suffolk Co 2010).

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied in its entirety and defendants shall serve and file their answers within 20 days of the e-filing of this decision and order; and it is further

ORDERED that plaintiff's cross-motion to amend the summons and complaint is granted and the proposed Amended Summons and Verified Amended Complaint, e-filed as Document #25, shall be deemed served on the previously appearing defendants on service of a copy of this decision and order with notice of entry; and it is further

ORDERED that plaintiff shall serve the new defendants, Erszebeth Azarowicz and Y. Mamdani, M.D., P.C., within 20 days of the e-filing of this decision and order, and said defendants shall serve and file their answers within 20 days of said service; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), and the County Clerk, so that the court's records may be altered to reflect the change in the caption substituting Erszebeth Azarowicz for defendant "Jane Doe" and adding Y. Mamdani, M.D., P.C. as a new defendant; and it is further

ORDERED that the caption as amended shall read as follows:

MICHAEL MCCABE,

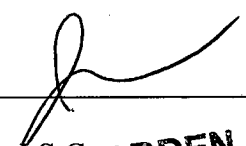
Plaintiff,
-against-

CENTRAL PARK AESTHETIC & LASER, YUSUF
MAMDANI, ZAHRA MAMDANI, ERSZEBETH
AZAROWICZ and Y. MAMDANI, M.D., P.C.,

Defendants.

DATED: October 24, 2017

ENTER:


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