Bossio v New Century Chiropractic Servs., P.C.
2017 NY Slip Op 33306(U)
September 14, 2017
Supreme Court, Bronx County
Docket Number: 22827/2016E
Judge: Robert T. Johnson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DORIS BOSSIO,

Plaintiff,

-against

NEW CENTURY CHIROPRACTIC SERVICES, P.C. d/b/a NEW CENTURY CHIROPRACTIC WELLNESS, DIAMOND & SCHULTZ PHYSICAL THERAPY, and RICHARD SARMIENTO, RPT,

Defendants.

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DECISION & ORDER

Index No. 22827/2016E

Motion Seq. # 002

Johnson, J.S.C.

The following papers, numbered 1-3 were considered on the motion to dismiss:

PAPERS	**NUMBERED**
Notice of Motion and annexed Exhibits and Affidavits	**1**
Answering Affidavits and Exhibits	**2**
Reply Affirmation	**3**

Upon the foregoing papers, this motion is decided as follows:

This medical malpractice action against Defendant Diamond & Schultz Physical Therapy, P.C., d/b/a Dynamic Sports Physical Therapy (for purposes of this motion, "the Defendant"), and its co-defendants arises out of physical therapy treatment provided by Defendants to Plaintiff in 2014. Plaintiff alleges that she re-tore the meniscus in her right knee when Defendants were providing post-surgery physical therapy treatment to her. The only date stated in the complaint is April 29, 2014. It is not clear from the complaint or the papers submitted to the Court how, when or where the injury occurred.

The motion currently before the Court is Defendant's pre-answer motion to dismiss pursuant to CPLR § 3211 (a) (7) and (a)(1) insofar as asserted against it. Defendant argues that

Plaintiff was not a patient of its clinic until June 9, 2014, approximately six weeks after the only date of treatment or injury alleged in the complaint, and thus the complaint should be dismissed. Defendant also argues that it had no employer-employee relationship or any association with co-defendant Richard Sarmiento–another physical therapist who allegedly treated Plaintiff–and therefore liability cannot be imposed on Defendant under the doctrine of respondeat superior.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Rietschel v. Maimonides Med. Ctr.*, 83 A.D.3d 810 [2d Dep't 2011](internal quotation marks omitted); *see also Simkin v. Blank*, 19 N.Y.3d 46, 52 [2012]("[o]n a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference")(citation omitted); *Leon .v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). A motion under CPLR 3211 (a) (7) address only the adequacy of the pleading (*Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 255 [2d Dep't 2012]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 [2d Dep't 2006]).

Here, the complaint alleges, *inter alia*, that "[a]t all times herein mentioned, including April 29, 2014, the physical therapy treatment that was rendered to Plaintiff, Doris Bossio, by the defendants herein. . . was negligent and careless." Although Defendant states that the physician-

patient relationship did not begin until June 9, 2014, dismissal is not warranted. The complaint does not limit the treatment date to April 29, 2014, but uses such phrases as "at all times mentioned, including April 29, 2014," and "at all times hereinafter mentioned" and "at all times herein mentioned." Inasmuch as the complaint does not allege that Plaintiff's injury occurred prior to June 9, 2017, the facts set forth therein fit into a cognizable legal theory.

Defendant also argues that the action should be dismissed pursuant to CPLR § 3211 (a) (1). Under this subdivision, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *(Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]; *Art and Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, [1st Dep't 2014]). In order for a document to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable (*Fontanetta v. John Doe 1*, 73 A.D.3d 78 [2d Dep't 2010]). Judicial records, and out-of-court transactions including mortgages, deeds, contracts, and other papers, the contents of which are "essentially undeniable" generally qualify as "documentary evidence" (*Id.*; *see also Bronxville Knolls v. Webster Town Ctr. Partnership*, 221 A.D.2d 248 [1st Dep't 1995]). Affidavits, deposition testimony, and letters are generally not considered to be documentary evidence pursuant to CPLR § 3211 (a) (1) (*See Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431 [1st Dep't 2014]; *Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74 [1st Dep't 2003]).

Here, the documentary evidence submitted by Defendant consists of a Medical History Form, a "New Patient Registration & Personal Information" form, and a physical therapy patient agreement, all dated June 9, 2014, as well as clinical and daily treatment notes. These handwritten notes state that Plaintiff suffered an initial sports injury in January 2014, and seem to

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further indicate that Plaintiff underwent an "initial repair" to her right meniscus on April 4, 2014, and then experienced a "failure" on April 29, 2014. Plaintiff then underwent knee meniscal repair surgery on May 30, 2014. According to the records, Plaintiff had her first physical therapy evaluation with Defendant on June 9, 2014, and continued treatment at least until August 12, 2014.

Defendant argues that these documents prove that the injury allegedly suffered by Plaintiff on April 29, 2014, occurred prior to her treatment by Defendant, and thus it cannot be liable. Even if true, however, none of these documents qualify as "documentary evidence" since they are not unambiguous, authentic, or undeniable, and do not "utterly refute" the factual allegations set forth in the complaint or "conclusively establishing a defense as a matter of law" (*Mill Fin. LLC v. Gillett*, 122 A.D.3d 98 [1st Dep't 2014]). The records contain notes of a third person recording statements apparently made by Plaintiff. This type of evidence raises issues of credibility for a jury to decide (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dep't 2014]).

In view of this determination, the Court does not reach the parties' remaining contentions. Accordingly, Defendant's motion to dismiss the complaint is denied.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
September 14, 2017

Hon. Robert T. Johnson
Supreme Court Justice