

Garner v State Univ. of N.Y.

2017 NY Slip Op 33334(U)

October 23, 2017

Supreme Court, Erie County

Docket Number: 810073/2017

Judge: Frederick J. Marshall

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STATE OF NEW YORK: SUPREME COURT: COUNTY OF ERIE

Dr. ANNE A. GARNER, appearing Pro Se

INDEX # 810073/2017

Plaintiff

Hon. Frederick J. Marshall

VS.

ORDER

THE STATE UNIVERSITY OF NEW YORK,
AT BUFFALO SCHOOL OF DENTAL MEDICINE,
Dr. M. Glick, Dr. J. Gambacorta, Dr. E. Monaco,
Dr. M. Fagin, Dr. R. Cohen, Dr. J. Brewer, Dr. O. Shibley,
Dr. G. Alexander, Dr. H. Kim, Dr. H. Ghadhanfari, Dr. A. Tawati,
Dr. K. Benkhail, Dr. H. Ghloom, Dr. E. Elathamna,
Dr. C. Hernandez, Dr. M. Mobarhan.

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:

Four motions having been designated by the NYSCEF filing system having come before this Court, with Motion # 1 brought by the Defendants seeking an Order extending the Defendant's time to answer or move, with Motion # 2 having been brought by the Defendants seeking an Order dismissing plaintiff's Complaint, with Motion # 3 having been brought by the Plaintiff seeking an Order of default judgment against the Defendants and with Motion # 4 having been brought by the Plaintiff and called by the Plaintiff an "Affidavit in Opposition and Notice of Cross Motion", and the motions having duly come to be heard before me at a Special Term of this Court, Part 5, thereof, at the Erie County Courthouse, Buffalo, New York on the 17th day of October, 2017, and Eric T. Schneiderman, Attorney General of the State of New York (Carlton K. Brownell, III, AAG, of counsel) having appeared for the Defendants in support of Motions # 1 and # 2, and in opposition to Motions # 3 and # 4, and Dr. Anne A. Garner, appearing Pro Se,

having appeared for the Plaintiff in support of Motions # 3 and # 4 and in opposition to Motions # 1 and # 2, and

NOW, upon reading and filing the Notice of Motion to Extend Time to Answer or Move, dated September 21, 2017, and the Affirmation in Support of Motion to Extend Time to Appear on Behalf of Various Defendants, of Carlton K. Brownell, III, AAG., dated September 21, 2017, with exhibits and pleadings attached thereto, and upon reading and filing the Notice of Motion to Dismiss Complaint, dated September 29, 2017, and the Affirmation in Support of Motion to Dismiss of Carlton K. Brownell, III, AAG, dated September 29, 2017, with exhibits and pleadings attached thereto, and the Affidavit of Joseph Zambon, DDS, sworn to on September 28, 2017, with exhibits attached thereto, and the Notice of Motion for Default Judgment, dated October 3, 2017, and the Affidavit in Support of Motion for Default Judgment, of Anne A. Garner, sworn to October 3, 2017, and the Supplemental Affirmation on Support of Motion to Dismiss of Carlton Brownell, III, AAG, dated October 4, 2017, with exhibits attached thereto, and the Affirmation in Opposition to Motion for Default Judgment of Carlton K. Brownell, III, AAG, dated October 5, 2017, with exhibits attached thereto, and the Affidavit in Opposition and Notice of Cross Motion, of Dr. Anne A. Garner, sworn to October 6, 2017, and the Plaintiff's Answering Affidavit Re Defendants' Supplemental Affirmation in Support of Defendant' Motion to Dismiss, of Dr. Anne A. Garner, sworn to October 10, 2017, with exhibits attached thereto, and Plaintiff's Reply Affidavit Re Defendants' Notice of Motion To Extend Time to Appear or Move, of Dr. Anne A. Garner, sworn to October 10, 2017, and the Reply Affirmation in Support of Motion to Dismiss, of Carlton K. Brownell, III., AAG, dated October 13, 2017, with Exhibits attached thereto, and

Plaintiff's Answering Affidavit in Response to Defendants' Reply Affirmation in Support of Defendants' Motion to Dismiss, of Dr. Anne A. Garner, sworn to October 16, 2017, with exhibits attached thereto, and the Amended Affidavit of Dr. Anne A. Garner, sworn to October 16, 2017.

AND, due deliberation having been had on all of the above, and a Memorandum Decision which is attached hereto as Exhibit A and which is incorporated herein by reference, having been filed on October 23, 2017, it is hereby,

ORDERED, that Defendant's Motion to Dismiss the Complaint against The State University of New York at Buffalo School of Dental Medicine is granted, and the case against it is dismissed, and it is further,

ORDERED, that Defendant's Motion to Dismiss the Complaint against the individual defendants, with the exception of Dr. Ghadhanfari, Dr. Tawati, Dr. Benkhaial, Dr. Ghloom, Dr. Elahamna and Dr. Hernandez is denied, without prejudice to renew at a future date when sufficient facts are available to the parties, and it is further,

ORDERED, that Defendants Motion to Dismiss the Complaint against Dr. Ghadhanfari, Dr. Tawati, Dr. Benkhaial, Dr. Ghloom, Dr. Elahamna and Dr. Hernandez is denied without prejudice as premature, and it is further,

ORDERED, that all proceedings in this case are stayed pending the outcome of the case in the Court of Claims against the individually named defendants.

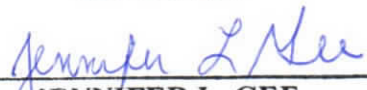
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GRANTED



Hon. Frederick J. Marshall, J.S.C.

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BY 
JENNIFER L. GEE
COURT CLERK

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ANNE A. GARNER

Plaintiff

**MEMORANDUM
DECISION**

-vs-

THE STATE UNIVERSITY OF NEW YORK AT
BUFFALO SCHOOL OF DENTAL MEDICINE

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DR. M. GLICK
DR. J GAMBACORTA
DR. E. MONACO
DR. M. FAGIN
DR. R COHEN
DR. J. BREWER
DR. O. SHIBLEY
DR. G. ALEXANDER
DR. H. KIM
DR. H. GHANDHANFARI
DR. A. TAWATI
DR. K. BENKHAIAL
DR. H. GHLOOM
DR. E. ELATHAMNA
DR. C. HERNANDEZ
DR. M. MOBARHAN

Defendants

APPEARANCES: ANNE A. GARNER, Pro Se
Attorney for Plaintiff

CARLTON K. BROWNELL, III, ESQ.
Assistant Attorney General
Attorney for Defendants

The defendants have brought a motion to dismiss plaintiff's complaint based on several grounds. Those grounds are as follows:

- 1) Plaintiff's action is barred by the applicable Statute of Limitations. CPLR §3211(a)5.
- 2) That the Court does not have jurisdiction over the defendant, State University of New York at Buffalo School of Dental Medicine since it is part of the State University of New York system and, thus, a corporate agency within the State's Department of Education, an arm of the State of New York. CPLR §3211(a)2.

- 3) That there is another action pending between the same parties for the same causes of action in the New York State Court of Claims. CPLR §3211(a)4.
- 4) That the Court does not have personal jurisdiction over defendants Ghandhanfari, Tawati, Benkhalai, Ghloom, Elathamna and Hernandez inasmuch as the said defendants have not been served with the Summons and Complaint. CPLR §3211(a)8.

Clearly, the case against the defendant, State University of New York at Buffalo School of Dental Medicine must be dismissed inasmuch as the Supreme Court does not have jurisdiction over a New York State entity which, by law, must be sued in the Court of Claims. *Morell v Balasubramanian*, 70 N.Y.2d 297 [1987]. Court of Claims Act §9. Therefore, the complaint, insofar as it alleges claims against the State University of New York at Buffalo School of Dental Medicine, is dismissed.

Defendants' motion to dismiss the complaint based upon the expiration of the dental malpractice Statute of Limitations pursuant to CPLR §214-a, is denied without prejudice. There is an insufficient record before the Court to determine the exact dates on which the alleged dental malpractice occurred and by whom these alleged acts were preformed. Other than a general allegation in the plaintiff's complaint that she was treated at the School of Dental Medicine between 2006 and 2015, such essential information is absent. Nor has any bill of particulars been demanded or furnished, or other discovery completed. While the "continuous treatment doctrine" has been disavowed by the plaintiff in her responding papers, she engaged in a lengthy discussion of the applicability of the "continuous treatment doctrine" in her papers. Whether the "continuous treatment doctrine" may be successfully applied in this case will be dependent upon many facts, most of which are unknown to the Court at this time.

Therefore, defendants' motion on this ground is denied without prejudice to renew at a future date when sufficient facts are available to the parties.

Similarly, defendants' motion to dismiss as to the six individual named defendants who have not been served is premature. The summons and complaint were filed in the Erie County Clerk's Office on July 27, 2017. Thereafter, plaintiff had 120 days to effect service of the summons and complaint upon the named defendants. Plaintiff's time to effect service has not yet expired, and therefore, the defendants' motion on this ground is denied without prejudice.

Finally, the defendants have moved to dismiss plaintiff's lawsuit pursuant to CPLR 3211(a)4 because the same party defendants, including the individual defendants, are being sued in the New York State Court of Claims. That claim was filed on May 3, 2016. The defendants contend that the relief sought in this Supreme Court proceeding is essentially the same relief being sought in the New York State Court of Claims lawsuit. It certainly would appear so and the plaintiff does not deny it. It is also noted that four additional defendants were sued in the Court of Claims who were not sued in the State Supreme Court lawsuit. However, only substantial but not complete, identity of parties is all that is required to seek dismissal under CPLR §3211(a)4. Barringer v Zgoda, 91 AD2d 811 [3rd Dept.1982].

In the Court's opinion, the individual defendants may be sued in the State Supreme Court despite the fact that they are employees of the State of New York, because the complaint herein alleges a breach of a duty owed individually by each treating dentist who has been named as a defendant in this proceeding. Morell v Balasubramanian, supra at 301. While it is true that the individual defendants have also been sued in the Court of Claims, that lawsuit is still pending and motions to dismiss are, as yet, unresolved. Under these circumstances, the preferred course of action is to avoid the outright dismissal of the complaint against the individually named defendants and to issue a stay of all proceedings in State Supreme Court pending the disposition of claims against the individually named defendants in the Court of Claims. SafeCard Servs. v American Express Travel Related Servs. Co., 203 AD2d 65 [1st Dept.1994]. Therefore,

pending the outcome of the case pending in the Court of Claims against the individually named defendants, who are also named defendants in the Supreme Court lawsuit, the defendants' motion to dismiss on this ground is denied without prejudice and the action pending in State Supreme Court is stayed.

The defendants have also made a timely motion to extend their time to answer the complaint inasmuch as all individual defendants have yet to be served. The defendants' motion is granted and the time to answer the complaint is extended until 30 days after lifting of the stay granted herein. Plaintiff's cross-motion for a default judgment is denied.

Submit Order.

DATED: October 23, 2017


Hon. FREDERICK J. MARSHALL
Justice, Supreme Court