

Jaffe v NYU Winthrop Hosp.

2018 NY Slip Op 34075(U)

August 16, 2018

Supreme Court, Nassau County

Docket Number: Index No. 614135/2017

Judge: John M. Galasso

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
LORRAINE JAFFE, as Administratrix of the Estate
of DANIEL JAFFE, Deceased,

Plaintiff,

- against -

Index No. 614135/2017
Sequence # 001

Part 18
6/6/18

MG

NYU WINTHROP HOSPITAL, WINTHROP
UNIVERSITY HOSPITAL and NYU LANGONE
HEALTH SYSTEM,

Defendant.

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| Notice of Motion..... | 1 |
| Affirmation in Opposition..... | 2 |
| Affirmation in Reply..... | 3 |

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Upon the foregoing papers, the motion of the defendants, NYU Winthrop University Hospital, f/k/a Winthrop University Hospital and NYU Langone Health System, for an Order dismissing the amended verified complaint of the plaintiff, Lorraine Jaffe, as Administratrix of the Estate of Daniel Jaffe, deceased, as and against defendant NYU Langone Health System, pursuant to CPLR Sections 3211(a) (1) and (7), is granted, as determined below.

This is an action sounding in medical malpractice, wherein plaintiff, Lorraine Jaffe, as Administratrix of the Estate of Daniel Jaffe, deceased, is seeking damages for serious personal injuries and wrongful death of Daniel Jaffe.

Defendants contend that plaintiff's amended verified complaint should be dismissed as to defendant NYU Langone Health System (hereinafter "NYU Langone") because NYU Langone did not administer any care at issue, and because NYU Langone is not vicariously liable for the acts or omissions of the co-defendant NYU Winthrop University Hospital, f/k/a Winthrop University Hospital. Defendants assert that the affiliation of Winthrop University Hospital and NYU Langone which merged as defendant NYU Winthrop University Hospital occurred on April 1, 2017, after the dates of treatment rendered to Daniel Jaffe while he was a patient at Winthrop University Hospital from July 28, 2015 to August 11, 2015. In support of it motion, defendants submit a copy of the verified complaint, the affidavit of Michael E. Browdy, Director of Insurance for NYU Langone, the affidavit of Palmira Cataliotti, Senior Vice President and Chief Financial

Officer of NYU Winthrop Hospital, and a copy of the Affiliation Agreement between Winthrop University Hospital and NYU Langone.

The affidavit of Michael E. Browdy, Director of Insurance for NYU Langone (hereinafter “Browdy”) states that he performed a search of the health information management department records which revealed no record of treatment of plaintiff’s decedent, Daniel Jaffe by any NYU Langone Health System during the time period set forth in the verified complaint. The Browdy affidavit also states that during the time period alleged in the plaintiff’s amended verified complaint, co-defendants Winthrop University Hospital were not agents, servants or employees of NYU Langone.

The affidavit of Palmira Cataliotti, Senior Vice President and Chief Financial Officer of NYU Winthrop Hospital (hereinafter “Cataliotti”) states that she is responsible for directing administering and coordinating hospital financial activities in accordance with the bylaws and policies established by the president and board of directors. Cataliotti attests that the affiliation agreement between Winthrop University Hospital and NYU Langone went into effect on April 1, 2017 and prior to the alleged dates of plaintiff’s malpractice claims, and that no relationship exists between NYU Langone and Winthrop University Hospital at the time alleged in the amended verified complaint. Cataliotti also states in her affidavit that NYU Winthrop Hospital currently operates as a separate legal entity from NYU Langone with regard to assets, liabilities, facilities and financial statements.

The affiliation agreement states in relevant part, that “From and after the effective date, each party (the “Indemnifying Party”) will protect, defend, hold harmless and indemnify the other Party and its officers, directors, trustees, employees, agents and affiliates ..... from, against and in respect of any and all losses, claims, suits, actions, liabilities, deficiencies, penalties, fines, costs, damages.... and expenses whatsoever....” The affiliation agreement attached to the defendants’ motion papers, states that the agreement includes an execution date as of October 25, 2016.

In opposition, plaintiff contends that NYU Langone is a proper defendant because it merged with and owns and/or controls Winthrop University Hospital, citing the affiliation agreement which sets forth that “NYU Langone will become the sole corporate member of Winthrop University Hospital” that “Winthrop University Hospital will merge into NYU Langone” and that “Winthrop University Hospital and NYU Langone will ‘work collaboratively’”. Plaintiff also asserts that the instant motion to dismiss is premature as discovery has not taken place.

On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff’s allegations are accepted as true and accorded the benefit of every possible favorable inference (*see Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Reiver v. Burkhart Wexler & Hirschberg, LLP*, 73 A.D.3d 1149, 901 N.Y.S.2d 690). A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the

documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *First Keystone Consultants, Inc. v. DDR Constr. Servs.*, 74 A.D.3d 1135, 904 N.Y.S.2d 113). In order for evidence to qualify as “documentary,” it must be unambiguous, authentic, and undeniable (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84–86, 898 N.Y.S.2d 569). Neither affidavits, deposition testimony, nor letters are considered “documentary evidence” within the intendment of CPLR 3211(a)(1) (*see Suchmacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686; *Fontanetta v. John Doe 1*, 73 A.D.3d at 85–87, 898 N.Y.S.2d 569). *Granada Condominium III Ass’n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2d Dept. 2010]. In as much as the submitted affidavits of Browdy and Cataliotti do not constitute “documentary evidence” within the meaning of CPLR 3211(a)(1), this Court turns to consider whether the affiliation agreement submitted by defendants refutes the factual allegations alleged in plaintiff’s amended verified complaint and/or provides a basis to dismiss plaintiff’s complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

The affiliation agreement shows an execution date of October 25, 2016, a date that occurred subsequent to the alleged dates that the medical malpractice occurred from on or about July 28, 2015 through on or about August 11, 2015. The agreement also shows that indemnification would apply from on or after the effective date of the agreement.

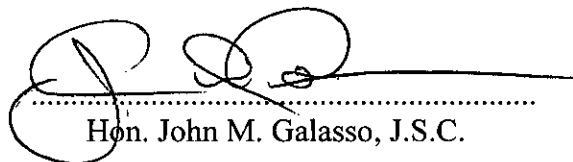
“When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one ... [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 682–683, 941 N.Y.S.2d 675 [citations and internal quotation marks omitted]). *Thaw v. North Shore University Hosp.* 129 A.D.3d 937, 12 N.Y.S.2d 152 [2d Dept. 2015].

While the affiliation agreement does not include an effective date within the four corners of the document, the Cataliotti affidavit submitted by defendants sets forth that the effective date of the agreement is April 1, 2017, in which NYU Langone and Winthrop University Hospital became NYU Winthrop Hospital, and that prior to the effective date of the agreement no relationship existed between NYU Langone and Winthrop University Hospital. In as much as the indemnifications provision of the affiliation agreement provides not dispute as to the liability of NYU Langone at the time of plaintiff’s dates of alleged malpractice, the amended verified complaint fails to state a cause of action with regard to this defendant.

Accordingly, the motion of the defendants is granted. and plaintiff's amended verified complaint is dismissed with regard to defendant, NYU Langone Health System, only.

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

August 16, 2018



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Hon. John M. Galasso, J.S.C.

**ENTERED**  
AUG 21 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE