

Janik v Lebovits

2019 NY Slip Op 31782(U)

June 18, 2019

Supreme Court, New York County

Docket Number: 805223/18

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 11

-----X
 ALEKSANDRA JANIK,

INDEX NO. 805223/18

Plaintiff,

-against-

PINKAS E. LEBOVITS, MD, and PINKAS E.
 LEBOVITS, M.D., P.C.,

-----X
 JOAN A. MADDEN, J.:

In this medical malpractice action, defendants move for an order pursuant to CPLR 3211(a)(2) dismissing the amended complaint for lack of subject matter jurisdiction based on the Worker's Compensation Law. Alternatively, defendants move for an order pursuant to CPLR 3211(a) (7) dismissing the second, third, fourth, sixth and seventh causes of action in the amended complaint, as duplicative and for failure to state a cause of action; and dismissing the claims for exemplary damages as insufficiently pleaded.¹ Plaintiff opposes the motion.

On February 25, 2016, plaintiff was treated at defendants' dermatological practice by physician assistant Juliana Bizerril-Williams. Plaintiff alleges that as a result of a sclerotherapy treatment on her right leg (injections to treat spider veins), her leg was chemically burned, the burn never resolved and the "damage and disfigurement are permanent." Plaintiff commenced this action on July 6, 2018. The amended complaint asserts causes of action against all

¹Defendants' motion will be considered as addressed to the amended complaint. Although the motion is addressed to the original complaint, before plaintiff filed opposition, the parties stipulated to permit plaintiff to amend the summons and complaint to add Juliana Bizerril-Williams as a party defendant. The amended complaint also eliminates the original sixth cause of action for negligence per se. All defendants, including Ms. Williams, have filed answers to the amended complaint.

defendants for medical malpractice (first), negligence (second), failure to diagnose (third), failure to treat (fourth), lack of informed consent (fifth) and res ipsa loquitur (seventh). The amended complaint also asserts a claim for “vicarious liability/respondeat superior/agency” (sixth) against the corporate defendant; and the first, second, third, fourth and fifth causes of action seek exemplary as well as compensatory damages.

To the extent defendants move for dismissal based on the Worker’s Compensation Law, the motion is denied. Section 29(6) of the Worker’s Compensation Law provides that Worker’s Compensation benefits shall be the exclusive remedy when an employee is “injured or killed by the negligence or wrong of another in the same employ.” See Marange v. Slivinski, 257 AD2d 427 (1st Dept 1999). This provision applies to an employee’s malpractice claim against a doctor or other medical provider “whose professional services were made available to the employee at the employer’s expense and on its premises.” Garcia v. Isserson, 33 NY2d 421, 422-423 (1974). “The key factors dictating the application of the fellow-employee rule are as follows: the doctor’s professional services were offered and paid for by the employer; the services were not available to the general public; and plaintiff obtained the services not as a member of the public but only as a consequence of his employment.” Marange v. Slivinski, *supra*.

On the record before the Court, which includes affidavits from both defendant Dr. Lebovits and plaintiff, it cannot be determined that the foregoing factors have been satisfied as a matter of law. No discovery has taken place so the parties have not yet had an opportunity to explore these issues. Once discovery is complete, however, defendants can still move for summary judgment, if warranted, based on their Worker’s Compensation defense. Notably, nearly all of the cases cited by defendants involve summary judgment motions. See Crosson v.

Jamaica Hospital Medical Center, 14 AD3d 587 (2nd Dept 2005); Lotysz v. Montgomery, 309 AD2d 628 (1st Dept 2003), lv app den 2 NY3d 707 (2004); Carman v. Abter, 300 AD2d 160 (1st Dept 2002); Faele v. New York City Health & Hospitals Corp, 283 AD2d 547 (2nd Dept 2001); Feliciano-Delgado v. New York Hotel Trades Council & Hotel Association of New York City Health Center, Inc, 281 AD2d 312 (1st Dept 2001); Cronin v. Perry, 244 AD2d 448 (2nd Dept 1997); Nash v. Oberman, 117 AD2d 724 (2nd Dept), lv app den 68 NY2d 607 (1986).

Defendants alternatively move to dismiss five of the seven causes of action on the grounds that they fail to state a cause of action or are duplicative. On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must liberally construe the complaint, accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, and accord plaintiff the benefit of every possible favorable inference. See 511 West 232nd Owners Corp v. Jennifer Realty Co, 98 NY2d 144, 151-152 (2002); Leon v. Martinez, 84 NY2d 83, 87-88 (1994); Gorelik v. Mount Sinai Hospital Center, 19 AD3d 319 (1st Dept 2005), lv app den 6 NY3d 707 (2006). The motion must be denied if from the four corners of the complaint, “factual allegations are discerned which taken together manifest any cause of action cognizable at law.” 511 West 232nd Owners Corp v. Jennifer Realty Co, *supra* (quoting Polonetsky v. Better Homes Depot, Inc, 97 NY2d 46, 54 [2001]); see also Gorelik v. Mount Sinai Hospital Center, *supra*.

The second cause of action for negligence is dismissed to the extent it alleges negligence in connection with medical treatment, but the allegations as to negligent hiring, training, supervision and retention shall stand. See Bleiler v. Bodnar, 65 NY2d 65 (1985). Ordinarily, where a here, plaintiff alleges that Bizerril-Williams was acting within the scope of her

employment, a claim for negligent hiring, supervision, training and retention fails. See Marshall v. Antell, 147 AD3d 478 (1st Dept 2017). At this pleading stage of the action, however, plaintiff will be permitted to assert the causes of action in the alternative, particularly since the record suggests that an issue may exist as to whether Bizerril-William was acting within the scope of her employment when she performed the sclerotherapy treatment on plaintiff.

The third and fourth causes of action for failure to treat and diagnose are dismissed as subsumed in plaintiff's medical malpractice claim. Failure to treat or diagnose are not separate theories of liability, but separate factual bases for a medical malpractice claim.

Dismissal is denied as to the sixth cause of action for "vicarious liability/respondeat superior/agency." This claim is asserted against only corporate defendant Pinkas E. Lebovits, M.D., P.C. In his affidavit, Dr. Lebovits admits that Bizerill-Williams was employed by "my professional corporation." Since a "hospital or other medical facility is liable for the negligence or malpractice of its employees," plaintiff adequately asserts a claim for vicarious liability against the corporate defendant for any negligence on the part of its employee Bizerril-Williams. See Hill v. St. Clare's Hospital, 67 NY2d 72 (1986); Bradshaw v. Lenox Hill Hospital, 126 AD3d 484 (1st Dept 2015).

The seventh cause of action for res ipsa loquitur is dismissed. "Res ipsa loquitur is not a separate theory of liability but merely 'a common-sense application of the probative value of circumstantial evidence.'" Smith v. Consolidated Edison Co of New York, Inc., 104 AD3d 428 (1st Dept 2013) (quoting Abbott v. Page Airways, Inc., 23 NY2d 502 [1969]). Plaintiff, however, may invoke the doctrine of res ipsa loquitur if it is warranted by the facts in this action.

Finally, plaintiff's claims for exemplary damages are dismissed. Exemplary or punitive damages are not recoverable in a medical malpractice action "unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." Schiffer v. Speaker, 36 AD3d 520, 521 (1st Dept 2007). The amended complaint does not allege any conduct rising to the level required to warrant exemplary damages. See id.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is granted only to the extent of dismissing the allegations in the second cause of action relating to medical treatment, and dismissing in their entirety, the third, fourth and seventh causes of action; and it is further

ORDERED that the motion is denied as to the sixth cause of action, and the balance of the second cause of action alleging negligent hiring, training, supervision and retention; and it is further

ORDERED that pursuant to the parties' stipulation the summons and complaint are amended and Juliana Bizerril-Williams, RPA-C, shall be added as a party defendant, and the caption as amended shall read as follows:

ALEKSANDRA JANIK

Plaintiff,

-against-

PINKAS E. LEBOVITS, MD, PINKAS E. LEBOVITS,
M.D., P.C., and JULIANA BIZERRIL-WILLIAMS, RPA-C,

Defendants.

And it is further

ORDERED that within 20 days of the date of this decision and order plaintiff shall serve and file a Second Amended Complaint that conforms with this decision and order; and it is further

ORDERED that plaintiff shall forthwith serve a copy of this decision and order with notice of entry on the Clerk of the Trial Support Office (Room 158) and the County Clerk so that their records may be altered to reflect the change in the caption adding the new party-defendant Juliana Bizerril-Williams, RPA-C; and it is further

ORDERED that the parties shall appear for preliminary conference on June 27, 2019 at 9:30 am in Part 11, Room 351, 60 Centre Street.

DATED: ~~June 18, 2019~~ June 18, 2019

ENTER:



J.S.C.

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