

**Knox v Ogunro**

2019 NY Slip Op 32754(U)

September 19, 2019

Supreme Court, Chemung County

Docket Number: 2016-2032

Judge: Eugene D. Faughnan

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.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Chemung County Courthouse, Elmira, New York, on the 19<sup>th</sup> day of July, 2019.

**PRESENT: HON. EUGENE D. FAUGHNAN**  
**Justice Presiding**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF CHEMUNG

---

KAYLEN KNOX,

Plaintiff,

**DECISION AND ORDER**

-vs-

Index No. 2016-2032

CHARLES OGUNRO, M.D., and  
GUTHRIE ROBERT PACKER HOSPITAL,

Defendants.

---

**APPEARANCES:**

**COUNSEL FOR PLAINTIFF:**

John C. Cherundolo, Esq.  
CHERUNDOLO LAW FIRM, PLLC  
AXA Tower I, 1<sup>st</sup> Floor  
100 Madison Street  
Syracuse, NY 13202

**COUNSEL FOR DEFENDANT:**

For Guthrie Robert Packer Hospital

Mark T. Perry, Esq.  
THE PERRY LAW FIRM, LLC  
305 Linden Street  
Scranton, PA 18503

For Charles Ogunro, M.D.

Philip A. Davalos, III, Esq.  
CIPRIANI & WERNER, P.C.  
415 Wyoming Avenue  
Scranton, PA 18503

**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court upon a motion to dismiss filed by Defendant Guthrie Robert Packer Hospital<sup>1</sup> (“RPH”) and Defendant Charles Ogunro, M.D. (“Ogunro”), with both defendants arguing a lack of jurisdiction pursuant to CPLR §302 (a). Kaylen Knox (“Plaintiff”) opposes the motion arguing jurisdiction pursuant to CPLR §302 (a)(1) or §302 (a)(3).

This medical malpractice claim arises from an allegation of negligent prescription of medications intended to treat a seizure disorder, that allegedly resulted in Plaintiff developing Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis. Plaintiff initially filed a complaint *pro se* on September 19, 2016. The Defendants moved to dismiss the complaint on jurisdictional grounds. Pursuant to a decision dated October 3, 2017, this Court denied the motion without prejudice and directed limited discovery regarding jurisdiction. Thereafter, Plaintiff, through retained counsel, filed a “supplemental summons and complaint” adding a claim for vicarious liability as against RPH on February 14, 2018. Additional limited discovery was granted pursuant to a decision of this Court dated August 15, 2018. Following that additional limited discovery, Defendants again move to dismiss the complaint for lack of jurisdiction.

Plaintiff was originally treated at the Guthrie Clinic Big Flats<sup>2</sup> in Horseheads, New York by his primary care physician Elizabeth Ho, M.D. Dr. Ho advised the Plaintiff that she was unable to treat his condition and needed to refer him to a neurologist. Dr. Ho referred the Plaintiff to a Dr. Koh at RPH, but Plaintiff was ultimately treated by Ogunro. Plaintiff also continued to treat with Dr. Ho. On March 21, 2014, Plaintiff was seen at the emergency department of Arnot Ogden

---

<sup>1</sup>Robert Packer Hospital is a non-profit corporation organized under the laws of Pennsylvania with a facility in Sayre, Pennsylvania.

<sup>2</sup>Guthrie Clinic Big Flats is part of the Guthrie Medical Group, a New York Corporation.

Medical Center in Elmira, New York suffering from seizures and ultimately transferred to the intensive care unit. He was transferred to RPH on March 22, 2014.

Dr. Ho's deposition was taken on March 15, 2019. Dr. Ho testified that referrals to specialists are made based upon the expertise of the doctor in dealing with the specific condition of the patient. Dr. Ho denied the existence of any policy encouraging referrals to RPH doctors. She agreed that there are neurologists that are part of RPH and that she has referred patients to them, as well as to neurologists in Rochester, New York, Arnot Ogden Medical Center, and independent neurology groups.

RPH responded to Requests to Admit, and denied that RPH owns or leases any property, or has any bank accounts or that it files any tax returns in New York State. Additionally, RPH is not licensed to do business in New York nor does it have any employees who treat, market or solicit patients in New York. In response to interrogatories, it denied any marketing plan directed toward New York State but acknowledged that due to the close proximity to the New York/Pennsylvania State line, some media overlaps the states and as a result, some advertising is likely seen in New York State. RPH also specifically denied the existence of any agreements with New York facilities to transfer patients to RPH other than Arnot Ogden Medical Center agreeing to receive the transfer of certain obstetrical and neonatal patients.

Dr. Ogunro is licensed to practice medicine in Pennsylvania. He transacts no business in New York. Ogunro is not employed by RPH but rather is a contractor employed by Comp Health. Plaintiff alleges that Ogunro spoke with a pharmacist at Walgreen's Pharmacy in Elmira, New York who allegedly questioned the prescription, but Ogunro denies any such conversation, nor does he have any awareness of anyone else speaking with the pharmacy.

RPH argues that the Court lacks jurisdiction as RPH does not transact business nor supply goods and services within New York State. Additionally, it argues that the *situs* of any alleged tortious act was in Pennsylvania. Moreover, RPH does not solicit business in New York nor derive

revenue from services rendered in New York. Plaintiff argues that RPH and Guthrie Medical Group have the same parent company and the referral from Guthrie Medical Group to RPH establishes a sufficient link between the two entities to confer jurisdiction on the latter.

Ogunro argues that he has never transacted business in New York and is not licensed to practice medicine in New York. He also argues that the *situs* of any alleged malpractice was in Pennsylvania and that he never spoke with a pharmacist from New York regarding the subject prescription.

## DISCUSSION AND LEGAL ANALYSIS

### CPLR §302 (a)(1)

New York jurisdiction may be found where a party “transacts any business within the state or contracts anywhere to supply goods or services in the state . . .” CPLR §302 (a)(1). “Whether a non-domiciliary is transacting business within the meaning of CPLR 302 (a) (1) is a fact based determination, and requires a finding that the non-domiciliary's activities were purposeful and established ‘a substantial relationship between the transaction and the claim asserted.’” *Paterno v. Laser Spine Inst.*, 24 NY3d 370, 376 (2014); citing *Fischbarg v. Doucet*, 9 NY3d 375, 380, (2007); see *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65, 71 (2006).

“Purposeful activities are volitional acts by which the non-domiciliary ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” *Fischbarg*, 9 NY3d at 380 quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 NY2d 377, 382 (1967). “More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York.” *Paterno* at 376. “Where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302 (a) (1).” *Paterno* at 377 (citation omitted).

In the present matter, there is no evidence that RPH conducts any business in New York. There is no evidence of an agreement between RPH and any facility in New York for referrals other than Arnot Ogden's agreement to accept transfers of certain obstetric and neonatal patients. Additionally, although some advertising can be seen in New York, there is no evidence that it is targeted at New York consumers but rather is seen by New York residents due to the proximity of RPH to the New York border and the fact that the areas share a media market. Moreover, although Dr. Ho's medical group and RPH share the same parent company, they are separate entities organized under New York and Pennsylvania law respectively. Additionally, Dr. Ho denied any policy encouraging or requiring the referral of patients to RPH. Although Dr. Ho did not remember the specifics of the Plaintiff's referral, Plaintiff himself stated in his June 29, 2017 affidavit that "[t]he reason I decided to treat with Dr. Ogunro at Guthrie Robert Packer Hospital was the positive reputation of the facility."

Likewise, Ogunro has established that he has no contacts with New York and in no way solicits business in New York. Ogunro is employed by Comp Health and is contracted to RPH. The fact that he wrote a prescription which he knew, or should have known, would be filled by a New York pharmacy in no way represents significant contacts with New York. *See Etra v. Matta*, 61 NY2d 455 (1984).

For the foregoing reasons, the Court concludes that neither RPH nor Ogunro are subject to New York State jurisdiction pursuant to CPLR §302 (a)(1).

### **CPLR §302 (a)(3)**

As pled, Plaintiff asserts jurisdiction pursuant to CPLR §302 (a)(3). This section provides for jurisdiction where a non-domiciliary:

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for

defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

CPLR §302 (a)(3).

In the present matter, the alleged medical malpractice was the prescription of certain drugs to treat Plaintiff's seizure disorder. Plaintiff alleges that he developed Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis as a result of the alleged malpractice. However, "the situs of the injury in medical malpractice cases is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury." *McGowan v. Smith*, 52 NY2d 268, 273-274 (1981).

It is undisputed that the Plaintiff's treatment with Ogunro occurred at RHP in Sayre, Pennsylvania. The Plaintiff was given a prescription for the medication at his appointment at RHP and there is some indication in the record that the first dose was administered at RHP. The fact that Plaintiff allegedly began to experience side effects while in New York is of no significance for jurisdictional purposes. In this matter, the *situs* of the alleged injury was RHP in Sayre, Pennsylvania.

Nor is the Court persuaded that the allegations of a telephone conversation between Ogunro and a pharmacist in Elmira are sufficient to confer jurisdiction. First, there is insufficient evidence that any such conversation occurred. Even after the additional discovery, Plaintiff has provided nothing to support or confirm that the conversation occurred, and Ogunro has denied that it took place. Second, even if there was a telephone conversation, that would not provide adequate basis to find jurisdiction, any more than writing a prescription that the doctor knew would be filled in New York. *See Etra v. Matta*, 61 NY2d 455 (1984). The situs of the alleged injury was still at

RHP in Pennsylvania.

Based on the foregoing discussion, the Court concludes that neither RPH nor Ogunro are subject to New York State jurisdiction pursuant to CPLR §302 (a)(3)<sup>3</sup>

**CONCLUSION**

Following the additional limited discovery afforded to Plaintiff in this Court’s two prior decisions, the Court concludes that there is not an adequate basis to find that the Court has personal jurisdiction over the Defendants pursuant to any of the grounds listed in CPLR §302.

For the reasons set forth herein, Defendants’ motions to dismiss are **GRANTED**.

This constitutes the **Decision and Order** of the Court.

Dated: September 19, 2019  
Elmira, New York

  
\_\_\_\_\_  
HON. EUGENE D. FAUGHNAN  
Supreme Court Justice

---

<sup>3</sup>Plaintiff argues in their submission that jurisdiction can be found based upon CPLR 302 (a)(2) [commission of a tortious act within the state] but provides no basis for this claim. To the extent that the alleged conversation between Ogunro and a pharmacist regarding the prescription is the basis, the Court has no proof in admissible form to support the allegation. Any statement by the Plaintiff regarding this alleged conversation is hearsay.