

<b>Fulton v NYU Langone Hosps.</b>
2020 NY Slip Op 30718(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 805353/19
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

-----X INDEX NO.: 805353/19  
JAMES F. FULTON, JR. and KRISTIN L. FULTON,

Plaintiffs,

-against-

NYU LANGONE HOSPITALS, NYU LANGONE HOSPITALS -  
TISCH HOSPITAL, NYU LANGONE HEALTH SYSTEM,  
NYU LANGONE HEALTH, NYU SCHOOL OF MEDICINE,  
NYU LANGONE RADIOLOGY ASSOCIATES, NYU LANGONE  
DIAGNOSTICS, LLC, MARSHA A. HARRIS, M.D.,  
BRIAN P. HARLIN, M.D., STEVEN Z. BRANDEIS, M.D.,  
COLON AND RECTAL SURGERY OF MANHATTAN, P.C.,  
KAREN B. WAGNER, M.D., LENOX HILL RADIOLOGY  
AND MEDICAL IMAGING ASSOCIATES, P.C., RADNET,  
INC., MARISSA L. ANDERSON, M.D., MIROSLAV PEEV,  
M.D., CHRISTIE A. LECH, M.D., ASHLEY C. MILLER, M.D.,  
JOSEPH B. LEVIN, M.D., SEAN M. FARQUHARSON, M.D.,  
PETER PATALANO, M.D., HERSH CHANDARANA, M.D.,  
JOVAN BEGOVIC, M.D., CLAYTON LI, M.D., SIMENG  
WANG, M.D., KATIE L. SHERWOOD, P.A., BLAKE  
A. HOLL, P.A., MENG N. QIAN, P.A., CHRISTOPHER  
J. BURKE, P.A., JENNIFER KIRSCHENBAUM, R.N.,  
and GUERDELYNE AUGUSTIN, R.N.,

Defendants.

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

In this action for medical malpractice, defendant Steven Z. Brandeis, M.D. (“Dr. Brandeis”) moves to dismiss the complaint against him pursuant to CPLR 3211(a)(1) and (7), asserting that he cannot be held liable to plaintiffs as he never treated plaintiff James F. Fulton. Plaintiffs oppose the motion, which is denied for the reasons below.

This action arises out of allegations that defendants failed to provide appropriate medical care and treatment, and supervision of such care and treatment, to Mr. Fulton during a routine benign polyp removal performed on November 9, 2018, which resulted in severe and permanent injury including multiple organ failure, sepsis and four partial limb amputations.

This action was commenced on October 29, 2019, and certain defendants have answered the complaint. Discovery has not been conducted and a preliminary conference has been scheduled for March 5, 2020.

After receiving several extensions of time to answer the complaint, Dr. Brandeis now moves to dismiss based on documentary evidence (CPLR 3211(a)(1)) and for failure to state a cause of action (CPLR 3211(a)(7)). In support of his motion, Dr. Brandeis, who is a partner in Colon and Rectal Surgery of Manhattan, P.C., the practice which treated Mr. Fulton, submits his affirmation in which he states:

Upon being served with the Summons and Complaint in this matter, I reviewed the electronic medical records regarding [Mr. Fulton] from NYU as an inpatient and outpatient. Based on my review of the relevant records and my independent recollection, I can state with reasonable certainty that I have never treated the plaintiff in my lifetime. Moreover, upon information and belief, I have never met the plaintiff in my lifetime, and I have never communicated with the plaintiff in any way, including via telephone or electronically via email, text, fax, or otherwise. Since I never treated [Mr. Fulton] I do not maintain any medical records pertaining to him. Additionally, based on my review of the records and my independent recollection, I have never received any communications pertaining to the plaintiff (i.e. a phone call, voicemail, text, email or other communication) during the period of the alleged malpractice that I failed to respond to. Based on my review of the plaintiffs records, from November 9, 2018 to November 12, 2018, I did not have a responsibility to treat patients who were admitted to NYU Langone Hospitals on behalf of my partners at Colon and Rectal Surgery of Manhattan, P.C. In other words, I was not "on call" to treat or communicate with patients that weekend. Additionally, from November 4, 2018 to November 9, 2018, I was not on-call and had no responsibility to communicate with patients of Colon and Rectal Surgery of Manhattan, P.C.

Dr. Brandeis also submits copies of office records of defendant Dr. Marsha Harris, M.D. of defendant Colon Rectal Surgery Manhattan, P.C., and refers to NYU's medical records regarding Mr. Fulton's treatment there, but fails to submit them, noting that they are more than

3,000 pages long.

Plaintiffs oppose the motion, arguing that the complaint states a cause of action against Dr. Brandeis, that an affirmation is of no probative value since it is not sworn, and the motion is premature given that no discovery has been conducted.

In reply, Dr. Brandeis submits an affidavit which essentially summarizes that statements in his affirmation.

For the reasons below, the motion to dismiss is denied. As a preliminary matter, a review of the complaint in this action indicates that it states a cognizable claim for medical malpractice against Dr Brandeis, accordingly, the remaining issue is whether the evidence relied on by Dr. Brandeis warrant dismissing the complaint against him.

“A CPLR 3211(a)(7) motion ...may be used to dispose of an action in which the plaintiff identifie[s] a cognizable cause of action but fail[s] to assert a material allegation necessary to support the cause of action.” Basis Yield Alpha Fund v. Goldman Sachs, Group, Inc., 115 AD3d 128, 134 (1<sup>st</sup> Dept 2014). In support of such a motion, “a defendant can submit evidence ... attacking a well-pleaded cognizable claim...[and] if the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate.” Id at 135 (internal citations omitted).

“A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.” Fontanetta v. John Doe 1, 73 AD3d 78, 86, 87 (2d Dept. 2010)(internal citations and quotations omitted), “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of undisputed authenticity; and

(3) its contents are essentially undeniable. VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 AD3d 189, 193 (1<sup>st</sup> Dept 2019)(internal citation omitted).

Here, the evidence relied upon by Dr. Brandeis, including his own affirmation and affidavit do not qualify for documentary evidence or otherwise provide a basis for dismissing the complaint. See Tsimerman v. Janoff, 40 AD3d 242 (1<sup>st</sup> Dept 2007)(finding that “affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint”); Berger v. Temple Beth-El of Great Neck, 303 AD2d 346, 347 (2d Dept 2003)(holding that “defendants' submissions in support of their motion included two affidavits which should not have been considered by the Supreme Court on a motion to dismiss pursuant to CPLR 3211(a)(1) because they do not constitute documentary evidence”). As for the medical records submitted by Dr. Brandeis, they are incomplete and do not conclusively relieve him of liability.

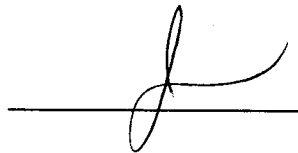
In view of the above, it is

ORDERED that the motion by Dr. Brandeis to dismiss the complaint is denied; and it is further

ORDERED that Dr. Brandeis shall answer the complaint within 20 days of efileing this order; and it is further

ORDERED that the preliminary conference scheduled for March 5, 2020 is adjourned to April 16, 2020 at 11 am.

DATED: March 3, 2020



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