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| <b>Harris v Healthplus Surgery Ctr. LLC</b>  |
| 2020 NY Slip Op 31628(U)   |
| May 20, 2020   |
| Supreme Court, Kings County  |
| Docket Number: 505979/19   |
| Judge: Marsha L. Steinhardt  |
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,

Justice.

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APRIL HARRIS,

Plaintiff,

-against-

Index No. 505979/19

HEALTHPLUS SURGERY CENTER, LLC, and  
MICHAEL JURKOWICH, M.D.,

Mot. Seq. No. 1-2

Defendants.

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The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion, Affirmations,

Memoranda of Law, and Exhibits Annexed \_\_\_\_\_

17-19, 22-26

Affirmations (Affidavits) in Opposition and Exhibits Annexed \_\_\_\_\_

28, 31-32

Affirmations and Memoranda of Law in Reply \_\_\_\_\_

29, 33

Defendant HealthPlus Surgery Center, LLC (HealthPlus) moves, pre-answer, for an order, pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (8), dismissing the amended complaint as against it with prejudice (Seq. No. 1). Co-defendant Michael Jurkowich, M.D. (Dr. Jurkowich), cross-moves post-answer for an order, pursuant to CPLR 3211 (a) (1), dismissing the amended complaint as against him with prejudice (Seq. No. 2). Plaintiff April Harris (plaintiff) opposes both motions.

Now upon the foregoing papers and after oral argument and due deliberation had thereon: (1) the branch of HealthPlus’s motion which is to dismiss the amended complaint as against it pursuant to CPLR 3211 (a) (8) is *granted*, and the amended

complaint is dismissed as against HealthPlus without prejudice; and (2) the remaining branch of HealthPlus's motion and the entirety of Dr. Jurkowich's cross motion which are, in each instance, to dismiss the amended complaint as against them pursuant to CPLR 3211 (a) (1) are both *denied*.

### ***Background***

This is an action sounding in negligence and medical malpractice wherein plaintiff alleges that on Nov. 13, 2018, and again on Dec. 11, 2018, she received an epidural from Dr. Jurkowich, a New York-licensed physician, at the ambulatory surgery center owned and operated by HealthPlus in Saddle Brook, New Jersey (the Saddle Brook center) (Amended Complaint [AC], ¶¶ 18-19 [NYSCEF #6]). She further alleges that on Dec. 27, 2018 and again on Jan. 3, 2019, she tested positive for HIV (AC, ¶¶ 22, 24-25). Prior to Nov. 13, 2018 (*i.e.*, the date of her first epidural), she allegedly had not been diagnosed with HIV (AC, ¶ 26). Plaintiff claims that she "contracted her HIV infection during one of the aforesaid two surgical procedures which [Dr.] Jurkowich performed on her at HealthPlus in Saddle Brook, New Jersey" (AC, ¶ 28 [capitalization omitted]).

### ***Discussion***

#### ***The Defense of Lack of Personal Jurisdiction Under CPLR 3211 (a) (8)***

HealthPlus contends, in support of the initial branch of its motion which is to dismiss for lack of personal jurisdiction, that plaintiff lacks jurisdiction over it under either CPLR 301 (general, all-purpose jurisdiction), CPLR 302 (a) (1) (transaction of business in New York or supplying services to New York), or CPLR 302 (a) (3) (a tortious act outside New York causing injury to person in New York). This branch of HealthPlus's motion is supported by the affidavit of its administrator which avers, *without contradiction from plaintiff*, that

HealthPlus: (1) is a New Jersey limited liability company with its principal place of business in Saddle Brook, New Jersey; (2) does not have any offices in New York; (3) conducts no advertising in New York; (4) does not have a referral program with any New York medical facilities or physicians; (5) does not engage in any direct contact with potential patients residing in New York in an effort to solicit business; and (6) employs no physicians from New York or from any other state to perform procedures in its Saddle Brook center (*see* Affidavit of Betty McCabe, dated Oct. 2, 2019, ¶¶ 3-8 [e-filed as part of NYSCEF #19]).

Under modern jurisprudence, a court may assert general, all-purpose jurisdiction under CPLR 301 or specific, conduct-linked jurisdiction under CPLR 302 (a) (1) and (3). With respect to the general, all-purpose jurisdiction under CPLR 301, HealthPlus has met its burden by submitting the aforementioned affidavit of its administrator. In opposition, plaintiff has failed to establish that HealthPlus's principal place of business was in New York.

With respect to the specific, conduct-linked jurisdiction, New York's long-arm statute, CPLR 302, provides, in relevant part, that New York courts may exercise personal jurisdiction over any non-domiciliary which "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]), or which "commits a tortious act without the state causing injury to person or property within the state" (CPLR 302 [a] [3]). Under CPLR 302 (a) (1), a New York court may exercise personal jurisdiction over a non-domiciliary if the non-domiciliary has purposefully transacted business within the state and there is "a substantial relationship between the transaction and the claim asserted" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [internal quotation marks omitted]).

“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” (*id.* [internal quotation marks omitted]). “More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York” (*id.*). “[T]o determine whether personal jurisdiction exists under CPLR 302 (a) (1), the court must determine (1) whether the defendant purposefully availed itself of the privilege of conducting activities within the forum State by either transacting business in New York or contracting to supply . . . services in New York, and (2) whether the claim arose from that business transaction or from the contract to supply . . . services” (*Qudsi v Larios*, 173 AD3d 920, 922-923 [2d Dept 2019] [internal quotation marks and citations omitted]). “[T]o satisfy the second prong of the jurisdictional inquiry, there must be an articulable nexus or a substantial relationship between a defendant’s New York activities and the cause of action sued upon” (*id.* at 923 [internal quotation marks and citations omitted]). Here, the fact that Dr. Jurkowich, a New York-licensed physician, performed both epidurals on plaintiff at HealthPlus in New Jersey and that HealthPlus arranged for plaintiff’s transportation to its Saddle Brook center, does not establish that HealthPlus invoked the laws or privileges of New York so as to subject it to the specific, conduct-linked jurisdiction under CPLR 302 (a) (1).

Likewise, plaintiff has failed to make a prima facie showing that it is proper for the Court to exercise personal jurisdiction over HealthPlus under CPLR 302 (a) (3). “[T]he 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” (*Paterno*, 24 NY3d at 381). As the epidurals which allegedly caused plaintiff to become infected were performed in New Jersey, CPLR 302 (a) (3) provides no basis for the Court to exercise personal jurisdiction over HealthPlus (*see Minella v Restifo*, 124 AD3d 486, 486-487 [1st Dept 2015]). More fundamentally, plaintiff has presented no evidence that HealthPlus regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from services rendered in New York (*see* CPLR 302 [a] [3] [i]), or derived substantial revenue from interstate commerce (*see Shataro v Ephraim*, 137 AD3d 1248, 1249 [2d Dept 2016]).

In sum, plaintiff has failed to establish that HealthPlus had the requisite “minimum contacts” with New York, such that the prospect of HealthPlus defending a suit in this State would comport with the “traditional notions of fair play and substantial justice,” as required by the Federal Due Process Clause (*see Waggaman v Arauzo*, 117 AD3d 724, 725-726 [2d Dept 2014], *lv denied* 24 NY3d 903 [2014]). Accordingly, the initial branch of HealthPlus’s motion which is to dismiss the amended complaint as against it for lack of personal jurisdiction is *granted*.

#### *The Defense of Documentary Evidence Under CPLR 3211 (a) (1)*

HealthPlus further contends, joined by Dr. Jurkowich, that plaintiff’s claims as against each of them are barred by documentary evidence. Defendants rely, in this regard, on the findings of the New Jersey Department of Health (NJ DOH) that: (1) patients at the Saddle Brook center might have been exposed to HIV, among other pathogens, between Jan. 1, 2018

and Sept. 7, 2018 (the NJ DOH review period); (2) as of Sept. 7, 2018, the Saddle Brook center was deemed by the NJ DOH to have been non-compliant with infection control and was closed on that day; and (3) as of Sept. 27, 2018, the Saddle Brook center became compliant with infection control, as certified by the NJ DOH during its inspection on that day, and was re-opened on the following day (*see* Exhibits A through G to Ms. McCabe's affidavit [e-filed as part of NYSCEF #19]). Defendants maintain that NJ DOH's certification of proper infection control at the Saddle Brook center on Sept. 27, 2018 conclusively defeats plaintiff's claim that she became infected two-to-three months later.

“Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, the initial finding by the NJ DOH of a potential for nosocomial infections at the Saddle Brook center, followed by its certification of proper infection control, does not conclusively refute plaintiff's claim of a subsequent infection. The sterility and integrity of surgical instruments, as well as general infection control, are not subject to temporal constraints. That plaintiff allegedly became infected at the Saddle Brook center after the expiration of the NJ DOH review period does not bar her claim. Conversely, that other patients of the Saddle Brook center might have become infected during the NJ DOH review period does not establish her claim. Accordingly, the remaining branch of HealthPlus's motion and the entirety of Dr. Jurkowich's cross motion are both *denied*.

**Conclusion**

In Seq. No. 1, HealthPlus’s motion is *granted to the extent* that the amended complaint is dismissed as against it without prejudice for lack of personal jurisdiction under CPLR 3211 (a) (8), and the remainder of its motion is denied.

In Seq. No. 2, Dr. Jurkowich’s cross motion is *denied*.

The action is severed and continued against Dr. Jurkowich.

The caption is amended to read as follows:

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APRIL HARRIS,

Plaintiff,

-against-

Index No. 505979/19

MICHAEL JURKOWICH, M.D.,

Defendant.

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HealthPlus’s counsel is directed to electronically serve a copy of this decision and order with notice of entry on the respective counsel to plaintiff and Dr. Jurkowich, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision, order and judgment of the Court.

ENTER,



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J. S. C.