Hudson v Vaizman
2020 NY Slip Op 32874(U)
August 27, 2020
Supreme Court, Kings County
Docket Number: 503601/2017
Judge: Genine D. Edwards

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 27th day of August 2020.

PRESENT:
Hon. Genine D. Edwards
Justice, Supreme Court

----------x

MS#s 3,5 #6.

MARIA HUDSON,

Plaintiff,

Index. No. 503601/2017

-against-

DECISION

IRINA VAIZMAN, M.D., MARK GELFAND, M.D., MANHATTAN BEACH OB/GYN, STAR MEDICAL OFFICES, P.C., DMITRIY BRONFMAN, M.D., and REGINA KOGAN, P.A.,

Defendants.

----------x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motions and Affirmations in Support	1 - 3
Affirmation in Opposition	4
Affirmations in Partial Opposition	5 - 6
Memorandum of Law	7
Memorandum of Law in Opposition	8
Affirmations in Reply	9 - 11

Defendants in this medical malpractice action seek dismissal on various grounds. Irina Vaizman, M.D. ("Dr. Vaizman") moves, in motion sequence #3, for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against her. Regina Kogan, P.A. ("Kogan") and Dmitriy Bronfman, M.D. ("Dr. Bronfman") move, in motion sequences #5 and #6, respectively, for an order dismissing the amended complaint as time-barred pursuant to CPLR 3211 (a)(5). Plaintiff opposes

these three motions. Defendants Mark Gelfand, M.D. ("Dr. Gelfand") and Star Medical Offices, P.C. partially oppose the motions.

On February 20, 2017, plaintiff commenced this action against Dr. Vaizman and Manhattan Beach OB/GYN. After the depositions of Dr. Vaizman and then non-party Kogan, plaintiff amended her pleadings to add Kogan and Dr. Bronfman as defendants. These motions ensued.

Dr. Irina Vaizman's Motion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering competent and admissible evidence sufficient to demonstrate the absence of any material issues of fact. *See Pinnock v. Mercy Medical Center*, 180 A.D.3d 1088, 119 N.Y.S.3d 559 (2d Dept. 2020); *Pizzo-Juliano v. Southside Hosp.*, 129 A.D.3d 695, 10 N.Y.S.3d 572 (2d Dept. 2015).

Here, Dr. Vaizman failed to make a prima facie showing that she did not establish a physician-patient relationship with plaintiff. Specifically, Dr. Vaizman failed to demonstrate that she did not supervise Kogan's care of plaintiff. *See Shajan v. South Nassau Communities Hosp.*, 99 A.D.3d 786, 952 N.Y.S.2d 448 (2d Dept. 2012). Moreover, although Dr. Vaizman contends that she had no involvement in plaintiff's medical care, the medical records submitted in support of her motion raise factual issues. Notably, Dr. Vaizman is listed throughout plaintiff's medical records as the ordering and referring physician. *See Kleinman v. North Shore University Hosp.*, 148 A.D.3d 693, 48 N.Y.S.3d 455 (2d Dept. 2017); *Thomas v. Hermoso*, 110 A.D.3d 984, 973 N.Y.S.2d 344 (2d Dept. 2013). Given Dr. Vaizman's failure to shoulder her prima facie burden, this

Court need not consider the sufficiency of plaintiff's opposition. *See Pizzo-Juliano*, 129 A.D.3d 695; *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011).

Physician Assistant Regina Kogan's and Dr. Dmitriy Bronfman's Motions

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable." *Ross v. Jamaica Hosp. Medical Center*, 122 A.D.3d 607, 996 N.Y.S.2d 118 (2d Dept. 2014); *See Baptiste v. Harding-Marin*, 88 A.D.3d 752, 930 N.Y.S.2d 670 (2d Dept. 2011).

In the instant matter, it is undisputed that plaintiff added Kogan and Dr. Bronfman to the complaint after the statute of limitations expired. Notwithstanding, plaintiff invokes the relation-back doctrine, an exception to the statute of limitations.

"A plaintiff must establish the applicability of the relation-back doctrine by demonstrating that (1) the causes of action arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his of her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against him or her as well." *Petruzzi v. Purow*, 180 A.D.3d 1083, 120 N.Y.S.3d 159 (2d Dept. 2020); *See Lopez v. Wyckoff Heights Medical Center*, 78 A.D.3d 664, 913 N.Y.S.2d 230 (2d Dept. 2010). "The 'linchpin' of the relation-back doctrine is

whether the new defendant had notice within the applicable limitations period." *Petruzzi*,180 A.D.3d 1083; *See Lopez*, 78 A.D.3d 664.

Plaintiff's claims are premised upon a lone visit to Manhattan OB/GYN on December 4, 2014, in which Kogan and Dr. Bronfman were allegedly engaged. Consequently, the claims arise out of the same transaction or occurrence as the claims asserted against Manhattan OB/GYN and Dr. Vaizman. *See Myung Hwa Jang v. Mang*, 164 A.D.3d 803, 83 N.Y.S.3d 293 (2d Dept. 2018); *Roseman v. Baranowski*, 120 A.D.3d 482, 990 N.Y.S.2d 621 (2d Dept. 2014).

Next, the vicarious liability of Manhattan Beach OB/GYN allows for a finding of unity of interest with Kogan and Dr. Bronfman because the alleged malpractice occurred while they were acting within the scope of their employment by same. *See Petruzzi*, 180 A.D.3d 1083; *Myung Hwa Jang*, 164 A.D.3d 803; *Nani v. Gould*, 39 A.D.3d 508, 833 N.Y.S.2d 198 (2d Dept. 2007).

The third prong of the relation-back doctrine focuses on "whether the defendants could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue them at all 'and that the matter has been laid to rest as far as they are concerned' " *Petruzzi*, 180 A.D.3d 1083; *See Rivera v. Wyckoff Heights Medical Center*, 175 A.D.3d 522, 107 N.Y.S.3d 55 (2d Dept. 2019). Under the circumstances, Kogan and Dr. Bronfman could not have reasonably concluded that there was no intent to sue them since, *inter alia*, their signatures appear in plaintiff's medical records. *See Petruzzi,* 180 A.D.3d 1083; *Rivera*, 175 A.D.3d 522; *Roseman*, 120 A.D.3d 482. Moreover, the records suggest that Kogan and Dr. Bronfman became aware of the suit before the expiration of the statute of limitations. *See Stevens v. Winthrop Nassau*

University Health System, Inc., 89 A.D.3d 835, 932 N.Y.S.2d 514 (2d Dept. 2011); *Lopez*, 78 A.D.3d 664; *Alvarado v. Beth Israel Medical Center*, 60 A.D.3d 981, 876 N.Y.S.2d 147 (2d Dept. 2009).

Finally, plaintiff demonstrated that the failure to originally name Kogan and Dr. Bronfman was due to a mistake. *See Rivera*, 175 A.D.3d 522; *Yanez v. Watkins*, 164 A.D.3d 547, 82 N.Y.S.3d 76 (2d Dept. 2018); *Roseman*, 120 A.D.3d 482.

Accordingly, the motions are denied.

This constitutes the Decision of this Court.

E N T E R,

Hon. Genine D. Edwards
J. S. C.