

Kang v Zatorski

2020 NY Slip Op 33787(U)

November 12, 2020

Supreme Court, New York County

Docket Number: 805417/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

DAVID KANG,

Plaintiff,

- against-

INDEX NO. 805417/2019
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

DECISION AND ORDER

ALEXANDRA ZATORSKI, ASHNA TEJWANI,
TOMMY LI and NEW YORK UNIVERSITY COLLEGE
OF DENTISTRY,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answer – Affidavits – Exhibits _____
Replying Affidavits

PAPERS NUMBERED

█
█
█

Cross-Motion: Yes X No

Defendants Alexandra Zatorski, D.D.S (“Dr. Zatorski”), Ashna Tejwani, D.D.S. (“Dr. Tejwani”), Tommy Li, D.D.S (“Dr. Li”), and New York University College of Dentistry (“NYU”), and (collectively, “Defendants”) move for an Order pursuant to CPLR §3211(a)(8), dismissing Plaintiff David Kang’s (“Mr. Kang”) Complaint based on Mr. Kang’s failure to obtain personal jurisdiction. Defendants also move pursuant to CPLR §3211(a)(7) to dismiss Mr. Kang’s cause of action for fraud. Mr. Kang opposes the motion.

Mr. Kang commenced this action by filing the summons and complaint on December 12, 2019. Mr. Kang alleges that Defendants were negligent in their care and treatment while rendering dental care and performing dental surgery on Mr. Kang. Mr. Kang alleges that as a result of the alleged negligence, Mr. Kang has sustained personal injuries and suffered physical pain and mental anguish.

Parties’ Contentions

Defendants argue that Mr. Kang failed to properly serve Dr. Li. Defendants assert that while Dr. Li was purportedly served at the building located at 345 East 24th street in New York, New York; Dr. Li has never been employed there, and he has resided in California since June 13, 2017. (See Dr. Li’s supporting affidavit attached

as Exhibit “C”). Therefore, Defendants argue that Dr. Li was never personally served with the Summons and Complaint, was never served at his actual residence or place of business and, thus, never placed on notice of this lawsuit and the complaint should be dismissed as against Dr. Li for lack of jurisdiction over his person.

Defendants further argue that Mr. Kang failed to also properly serve Drs. Zatorski and Tejwani and therefore the Complaint should be dismissed against them for failure to comply with CPLR § 308(2). Defendants assert that Mr. Kang attempted to serve Dr. Zatorski and Dr. Tejwani at the school they were attending for advanced degrees in pediatric dentistry. Defendants argue that Dr. Zatorski and Dr. Tejwani were not personally served with the Complaint. Defendants argue that the only proper method of service would have been personally hand delivering the Complaint or delivering it to their usual place of abode, and neither of these methods were attempted by Mr. Kang.

Moreover, Defendants contend that NYU is a New York not-for-profit educational corporation. Defendants assert that NYU can be served pursuant to the provisions of CPLR § 311(a)(1), which states that:

Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law.

Defendants argue that the Summons and Complaint was not delivered to “an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service” of NYU. Moreover, Defendants argue that the Summons and Complaint was not served via the Secretary of State pursuant to Business Corporation Law § 306 or Not-for-Profit Corporation Law § 306. Defendants assert that the Summons and Complaint was delivered to the address for NYU College of Dentistry, 345 East 24th Street, New York, New York. Therefore, Defendants argue that NYU was not properly served and must be dismissed from this action.

Defendants argue that the Complaint fails to state a cause of action for fraud. Defendants assert that Mr. Kang's allegations are vague and do not properly set forth a valid cause of action based upon fraud and therefore, the claims relating to fraud must be dismissed. Defendants argue that the word "fraud" only appears once in Mr. Kang's Complaint and the Complaint fails to state with specificity a cause of action for fraud that does not arise from the underlying malpractice action.

In opposition, Mr. Kang submits Affidavits of Service stating that Defendants were served at their place of employment and mailed a copy of the Summons and Complaint. Mr. Kang argues that the incidents that are described in the Complaint arose out of actions at NYU, address: 345 E 24th St, New York, NY 10010), and therefore, all of the Defendants were in Manhattan, New York for purposes of personal jurisdiction. Mr. Kang contends that he used a professional service provider to provide service on each Defendant at their known addresses and to the Office of General Counsel of NYU.

Mr. Kang asserts that Dr. Zatorski, Dr. Li, and Dr. Tejwani operated on paying patients/customers from the public for the treatment of dental issues. Mr. Kang argues that NYU is a place of business pursuant to CPLR § 308(6). Mr. Kang further argues that calling a business a school does not negate the fact that NYU is operating as a business. Additionally, Mr. Kang argues that he sets forth a claim for fraud.

Jurisdiction

"CPLR 3211(a)(8) provides that '[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the court has not jurisdiction of the person of the defendant.'" *Silverman v. Minify, LLC*, 2016 N.Y. Slip Op. 30046[U] [N.Y. Sup Ct, New York County 2016] (quoting *Marist Coll. v. Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). "When presented with a motion under CPLR 3211(a)(8), 'the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue.'" *Id.* (quoting *Marist Coll. v. Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. *See Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999].

CPLR § 308 authorizes personal service upon a natural person, "by delivering the summons within the state to a person of suitable age and discretion at the actual

place of business ... of the person to be served and ... by mailing the summons by first class mail to the person to be served at his or her actual place of business ...”. “Personal service by way of delivery to a suitable person at a defendant’s actual place of business is allowed because it is presumed that the business relationship between the deliverer and the defendant will induce the prompt redelivery of the summons to the defendant.” *Glasser v. Keller*, 567 N.Y.S.2d 981, 982 [Sup. Ct. 1991].

“For purposes of this section, ‘actual place of business’ shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.” *Vid v Kaufman*, 282 AD2d 739, 740 [2d Dept 2001].

CPLR § 311-a states that: “[p]ersonal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law.”

Here, Mr. Kang provides Affidavits of Service as to NYU, Dr. Tejwani, Dr. Zatorski, and Dr. Li. All four Affidavits of Service state that the Defendants were served at, 70 WASHINGTON SQUARE SOUTH, NEW YORK, NY 10012. Mr. Kang has demonstrated that there is proper service as to NYU, because the Summons and Complaint was served on NYU’s Office of General Counsel. *See* CPLR § 311-a. However, Mr. Kang did not properly serve Dr. Tejwani, Dr. Zatorski, and Dr. Li. Dr. Li’s Affidavit indicates that he was located in California at the time and was not an employee of NYU, and Mr. Kang has not demonstrated service was effectuated on Dr. Li in California. Additionally, service on Drs. Zatorski and Tejwani was not proper. Drs. Zatorski and Tejwani both state in their Affidavit’s that they were both dental students at the time of the alleged malpractice and are currently students at NYU. Mr. Kang has not shown that NYU is Dr. Tejwani, Dr. Zatorski, and Dr. Li’s actual place of business. *See Vid*, 282 AD2d at 740. Mr. Kang failed to provide evidence that he mailed the Complaint to Dr. Tejwani, Dr. Zatorski, and Dr. Li at their last known residence or actual place of business pursuant to CPLR § 308. The Complaint against Dr. Tejwani, Dr. Zatorski, and Dr. Li is dismissed for lack of personal jurisdiction

Fraud Claim

CPLR § 3211(a)(7) provides that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ...

the pleading fails to state a cause of action.” “As an initial matter, it is important to note that the scope of a court’s inquiry on a motion to dismiss under CPLR 3211(a)(7) is very narrowly circumscribed.” *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91, 108 [1st Dept 2003]. “The court must ‘accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory.’” *Id.* (internal citation omitted). “The complaint must be construed ‘liberally’ (CPLR 3026), and the court must accept as true not only ‘the complaint’s material allegations’ but also ‘whatever can be reasonably inferred therefrom’ in favor of the pleader. *Id.* “In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.” *Id.*

“In order to maintain a cause of action for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages.” *Callas v. Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]. “Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings.” *Id.*

“To plead a viable cause of action for fraud in connection with charges of medical malpractice, the allegations must include knowledge on the part of the physician of the fact of his malpractice and of his patient’s injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by him to his patient known by him to be false at the time it was made, and on which the patient relied to his damage.” *Atton v. Bier*, 12 AD3d 240, 241 [1st Dept 2004] (internal citation omitted). “Without more, concealment by physician or failure to disclose his own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action, thereby entitling the plaintiff to bring his action within the longer period limited for such claims.” *Id.* (internal citation omitted). “Further, the damages resulting from the fraud must be separate and distinct from those generated by the alleged malpractice.” *Id.* (internal citation omitted).

Here, accepting all allegations of Mr. Kang’s Complaint as true and affording him the benefit of every possible favorable inference, Mr. Kang has failed to state a claim for fraud. Mr. Kang did not provide “specific and detailed allegations” to allege fraud. *See Callas*, 192 AD2d at 350. Mr. Kang pleads that: “By reason of the facts and circumstances stated above, the defendants and New York University College of Dentistry have committed fraud, medical and dental malpractice, and inflicted emotional distress on the plaintiff.” (Exhibit “A”, Complaint at 4).

Mr. Kang has failed to allege any damages in his fraud cause of action that are separate and distinct from this claimed in his medical malpractice negligence cause of action, which allege Dr. Zatorski “assured the plaintiff 100% that a root canal or other dental procedure would not occur.” Mr. Kang further alleges that Dr. Zatorski, Dr. Tejwani, and Dr. Li, operated on Mr. Kang “on separate occasions until June 2017.” Mr. Kang alleges that after treating with Dr. Zatorski, Dr. Tejwani, and Dr. Li, Mr. Kang was in severe pain and saw a private dentist who informed Mr. Kang that the tooth operated by Dr. Zatorski, Dr. Tejwani, and Dr. Li required a root canal surgery. Additionally, the damages resulting from the fraud are not “separate and distinct from those generated by the alleged malpractice.” *Atton*, 12 AD3d at 241. Therefore, Mr. Kang’s claim for fraud is dismissed as to all Defendants.

Wherefore it is hereby

ORDERED that Defendants’ motion is granted to the extent that case is dismissed as to Defendants Alexandra Zatorski, D.D.S, Ashna Tejwani, D.D.S., and Tommy Li, D.D.S, and the Clerk is directed to enter judgment severing and dismissing the action as against Defendants Alexandra Zatorski, D.D.S, Ashna Tejwani, D.D.S., and Tommy Li, D.D.S. The remainder of the action shall continue; and it is further

ORDERED that Plaintiff’s cause of action of fraud is dismissed; and it is further

ORDERED that the remaining parties are to appear for a preliminary conference on January 20, 2021 at 10:30am.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: November 12, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION