

Barba v Decicco

2020 NY Slip Op 34444(U)

September 16, 2020

Supreme Court, Nassau County

Docket Number: 603724/2017

Judge: Anna Anzalone

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. ANNA R. ANZALONE

Justice of the Supreme Court

_____ X

CHARLES BARBA, JR.,

TRIAL/IAS, PART 15

NASSAU COUNTY

Plaintiff

Index No. 603724/2017

- against -

Motion Seq. No.: 3, 4

JOHN J. DECICCO, DPM. JOHN J. DECICCO, DPM,

PC, STEVEN LOGIN, MS., PT AND PROACTIVE

PHYSICAL THERAPY AND WELLNESS, PC,

Defendants.

_____ X

Papers Read on this Motion

Defendants Steven Login and Proactive Physical Therapy and Wellness, PC Notice of Motion..1

Plaintiff’s Affirmation in Opposition.....2

Defendants Steven Login and Proactive Physical Therapy and Wellness, PC Reply Affirmation.3

Defendant DeCicco Notice of Motion.....4

Plaintiff’s Affirmation in Opposition.....5

Defendant Decco Reply Affirmation.....6

The instant action alleges medical, podiatric and professional (physical therapy) malpractice and negligence. The complaint submits that defendants John J. DeCicco, DPM, John J. DeCicco, DPM, PC (“DeCicco”) undertook to render podiatric care, treatment and/or services

to plaintiff from on or about January 2010 through October 10, 2016. The complaint also submits that defendants Steven Login, MS, PT (“Login”) and Proactive Physical Therapy and Wellness, PC (“PT Facility”) undertook to render physical therapy care, treatment and/or services to plaintiff from on or about January 6, 2017 through January 24, 2017.

Plaintiff claims injury to his right heel while undergoing physical therapy for severe right foot atrophy and calcaneal fracture on six occasions between January 6, 2017 and January 24, 2017 administered by defendant Login at defendant PT Facility. Plaintiff was referred to the defendant PT Facility for rehabilitation by a non-party orthopedist, Dr. Bryan Ding. Plaintiff claims that Login was negligent in placing plaintiff on a treadmill at a fast rate of speed resulting in a right heel wound, and dehiscence requiring multiple surgeries including debridements and skin grafts. Plaintiff also alleges that defendant DeCicco (plaintiff’s former podiatrist) failed to diagnose and treat an infection in plaintiff’s right foot in the period of time before Login administered physical therapy.

Plaintiff served the summons and complaint on or about April 28, 2017. On July 13, 2017 Defendants Login and PT Facility served a verified answer together with various demands including a demand pursuant to CPLR §3101 (d) requiring plaintiff to notice the defense of any and all expert trial witnesses. Plaintiff filed a note of issue and certificate of readiness on April 1, 2019. On August 26, 2019, the Court issued a Decision and Order granting Joshua A Schulman, Esq., plaintiff’s prior counsel to withdraw. Prior to withdrawal as counsel, Mr. Shulman did not serve an expert witness disclosure. On February 27, 2020, Merson Law, PLLC, filed a notice of appearance as new counsel for plaintiff. On March 3, 2020, defendants Login and PT Facility wrote plaintiff new counsel renewing the demand for an expert witness response, as well as demanding authorizations for trial subpoenas. As of the date of the instant motion, July 17, 2020

defendant contends that plaintiff's counsel has failed to respond to the demands for notice pursuant to CPLR §3101(d).

Defendant Login and PT Facility now moves for an Order (sequence number 3) dismissing the action, in its entirety for plaintiff's failure to serve an expert witness response pursuant to CPLR §3101 (d). Moving defendants argue that expert testimony is required to establish a *prima facie* case of medical/professional malpractice, and since the plaintiff has failed to serve expert witness responses, they cannot as a matter of law meet their *prima facie* burdens of proof at trial.

In response to the instant motion, plaintiff's counsel served an expert witness response and argues that it is not untimely. Plaintiff also argues that CPLR §3101 (d) (1) (i) requires a party to disclose his or her expert witness and certain expert information when served with a proper demand, but does not require a response at any particular time or "mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute" *Mazzurco v. Gordon*, 173 AD3d 1001, 102 NYS3d 730, (2 d Dept 2019). Additionally, plaintiff argues that generally, preclusion is unwarranted without evidence of intentional or willful failure to disclose and a showing of prejudice by the party seeking preclusion. *Id* In their reply papers, moving defendant acknowledges receipt of the plaintiff expert disclosure now submitted in opposition to the instant motion but claim that plaintiff's podiatric expert lacks the qualification and reliability required to be able to offer an opinion at the time of trial as to the standard of care for a physical therapist.

The court notes that although in March of 2020, the standards and goals for a trial in this matter was July 20, 2020, there is no trial date set at this time due to the current global pandemic. Furthermore, there is no evidence that the plaintiff intentionally or willfully failed to disclose the expert information nor prejudice to the moving defendants as a result of the disclosure not being

sooner. Accordingly, defendant Login and PT Facility’s motion for an Order (sequence number 3) dismissing the action, in its entirety for plaintiff’s failure to serve an expert witness response pursuant to CPLR §3101 (d) is denied in its entirety.

Similarly, defendant DeCicco’s motion (sequence number 4) for an Order pursuant to CPLR §3101 (d) and CPLR §3126 dismissing the plaintiff’s summons and verified complaint due to plaintiff’s failure to serve an expert disclosure and response to defendants’ demand for trial authorization is denied.

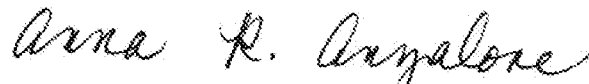
Plaintiff shall respond to any outstanding demand by any of the defendants for trial authorizations within 30 days of this Order. Any issues not addressed shall be deemed denied. The parties are directed to appear in Central Jury at 100 Supreme Court Drive, Mineola, New York, on January 28, 2021 subject to the discretion of the Justice presiding.

Counsel for defendants Steven Login and Proactive Physical Therapy and Wellness, PC shall file and serve a copy of the order with notice of entry upon all parties, within twenty (20) days of this Order.

This constitutes the Decision and Order of the Court.

DATED: September 16, 2020
Mineola, New York

ENTER:



HON. ANNA R. ANZALONE

ENTERED

Sep 21 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE