

Miller v Llado
2020 NY Slip Op 35778(U)
April 10, 2020
Supreme Court, Orange County
Docket Number: Index No. EF 001471-2019
Judge: Sandra B. Sciortino
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ORIGINAL

To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
MELISSA MILLER

Plaintiff,

-against-

EMMANUEL E. LLADO,MD; VIRTUAL
RADIOLOGIC CORPORATION; VIRTUAL
RADIOLOGIC PROFESSIONALS OF NEW
YORK, P.A.; NEW YORK RADIOLOGY
ALLIANCE AND ST. ANTHONY COMMUNITY
HOSPITAL,

DefendantS

-----X
SCIORTINO, J.

DECISION

INDEX NO.: EF 001471-2019

Sequence Nos. 1

This medical malpractice matter arises from an alleged delayed breast cancer diagnosis. The plaintiff alleges that the defendant Dr. Emmanuel E. Llado misread the original mammogram films. The issue raised in this application is Dr. Llado's employment between January 17, 2017 and May 7, 2017, the time period relevant to this matter.

This application is brought by Virtual Radiologic Corporation (hereinafter VRC) and Virtual Radiologic Professionals of New York, P.A. (hereinafter VRP) pursuant to Civil Practice Law & Rules 3211(a)(1). The application seeks dismissal of the complaint based on documentary evidence.

The plaintiff, in her complaint filed on February 25, 2019, sets forth alternate employer allegations. (Exhibit D of moving papers) It is alleged in paragraph 9 of the complaint that VRC

is the doctor's employer while paragraph 13 accuses VRP. The allegation in paragraph 17 names defendant New York Radiology Alliance (NYRA) as the employer. Paragraphs 18 and 19 recite a relationship between the defendant corporations and defendant St. Anthony's Hospital in which one or all corporations, through their employee Dr. Lladro, reviewed imaging studies.

The defendants' answers are somewhat helpful in narrowing down the employment possibilities. Defendants St. Anthony's and Dr. Llado, in their individual answers, claim to lack sufficient knowledge or information to respond to paragraphs 9, 13, 17, 18 and 19. Defendants VRC and VRP, in their verified answer filed May 20, 2019, deny the allegation of their employment of the defendant doctor in the relevant time period. NYRA, in its verified answer filed July 17, 2019, "admits that NEW YORK RADIOLOGY ALLIANCE employed EMMANUELE E. LLADO, MD." (NYSCEF document 17, Paragraph "Third")

In support of their application, VRC and VRP provide, as exhibit A, an Asset Purchase Agreement (Agreement) dated January 9, 2015. The parties to the Agreement are Imaging Advantage, LLC; Radadvantage, a Professional Corporation; Virtual Radiologic Corporation; VRC Holdings Corp.; Virtual Radiologic Professionals of New York, P.A., and Virtual Radiologic Professionals of New Jersey, P.A. Imaging Advantage, LLC and Radadvantage are identified as "Buyer Manager" and "Buyer" respectively. Virtual Radiologic Professionals of New York, P.A., and Virtual Radiologic Professionals of New Jersey, P.A. are identified as "Sellers."

A Disclosure Schedule of the assets included in the sale are attached to the motion papers as Exhibit B. Schedule 2.10(a), Part 1, (entitled "Purchased Assets"), paragraph i, (entitled "Employment Agreements" and then Physician Employment Agreements) contains a provision specifically addressing defendant Llado:

40. Physician Employment Agreement between Virtual Radiologic Professionals of New York, P.A. and Emmanuel Llado, M.D. dated September 29, 2010, as amended October 1, 2011, as further amended January 1, 2013, as further amended June 1, 2013, as further amended February 23, 2014. (Exhibit B, document page 23)

The moving defendants also provide an affidavit from Ryan M. Check. (Exhibit C) Check identifies himself as Vice President, General Counsel and Secretary of Virtual Radiologic Corporation and Secretary of Virtual Radiologic Professionals of New York, P.A. Being fully familiar with the "legal and contractual relationships" of VPRC and VRP, he reiterates the Agreement provision by which defendant Llado's employment contract was sold as an asset pursuant to the January 2015 Agreement. In short, Check avers that the doctor's employment contract was with VRP alone, never with VRC. He further avers assignment of the contract to Imaging Advantage, LLC effective March 9, 2015. Finally, Check avers that neither VRC nor VRP had any relationship with defendant St. Anthony Hospital during the time period relevant to this action.

Plaintiff is the only party to oppose the application. Primarily arguing that the application is premature, plaintiff relies on the admission by the moving defendants that an employer/employee relationship with Llado existed at one time. Plaintiff further states that Llado "confirmed that he has been employed at [co-defendant] New York Radiology Alliance." Evidence of the confirmation is a printout from a computer search on Dr. Llado in which his office is listed as that of NYRA. (Exhibit A to opposition papers) Plaintiff also makes reference to Llado's admission that he is a "licensed physician in New York State," the only admission made in his verified answer. (Exhibit B to opposition papers)

Plaintiff then presents a somewhat circuitous discussion of a perceived current relationship

between New York Radiology Alliance and “VRAD.” The Court’s attention is directed to the NYRA website which, apparently, contains the “on-call schedule for New York Radiology Alliance’s radiologists, including Dr. Llado.” (Affirmation in opposition, ¶8) This seems to confirm NYRA’s admission in its answer that it employs Dr. Llado.

Illegible copies of the schedules, apparently for December 2018 and all of 2019, are attached as Exhibit C to the opposition papers. Counsel states that 129 references to VRad are made in the schedules and then concludes that VRad is Virtual Radiologic Corporation. “All you have to do is dial the Minnesota based phone numbers listed and the virtual answer you get is for Virtual Radiologic Corporation.” (*Id.*) Even if the Court were inclined to call, no phone numbers are given. And, it is unclear how, if true, this obviates the admission of employment made by NYRA.

Plaintiff counsel then asks the Court to conclude that, since At. Anthony’s Hospital and Dr. Llado were on the NYRA schedule in 2018 and part of 2019, they must have been on the schedule in 2017. “There is no reason to suspect that New York Radiology Alliance’s January 2017 schedule is not similar to the schedules published in 2018 and 2019.” (*Id.*) It is not explained why the 2015 Agreement transferring defendant’s Llado’s employment contract as of March 2015 should not raise such suspicions. It is also not explained why reference to VRad is indicative of an employer/employee relationship between VRC and/or VRP and Llado.

Civil Practice Laws & Rules §3211(a)(1) allows for motion for dismissal based on documentary evidence. Such application may be made before issue is joined. Civ. Prac. Laws & Rules §3211(c) The pleadings must be afforded a liberal construction (*see Leon v. Martinez*, 84 N.Y.2d 83 [1994]; CPLR 3026) In *Leon*, Court of Appeals specified, “We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,

and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Id.* at 87-88)

A dismissal under CPLR 3211(a)(1) is “warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*citations omitted*). (*Id.* at 88) A motion to dismiss under CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002])

VRC and VRP, the moving defendants, provide an Asset Purchase Agreement dated January 9, 2015. The Agreement documents the sale of the then employment contract between the defendant doctor in this matter, Emmanuel Llado, and moving defendant VRC. As of March 9, 2015, approximately 2 years prior to the allegedly negligent reading of the plaintiff’s mammogram films, NYRAD became the defendant doctor’s employer. The motion for dismissal is further supported by NYRAD’s answer in which it admits to employing Llado.

Documents that have traditionally qualified for evidentiary consideration under CPLR 3211(a)(1) are those which are 1) unambiguous, 2) of undeniable authenticity, and 3) reflect content that is essentially undeniable (*citations omitted*). Documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic, and undeniable (*citations omitted*). (Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3211:10)

The Agreement and NYRAD’s answer clearly qualify as documentary evidence sufficient to support a 3211 motion.

The application is further supported by Ryan Check, Vice President, General Counsel and

Secretary of VRC and Secretary of VRP. Check avers that Llado had a Physician Employment Agreement with VRC and never had a relationship with VRP. Though it may not suffice as documentary evidence, Check's affidavit bolsters the contents of the acceptable documents for a 3211 motion.

VRC and VPR have established *prima facie* entitlement to dismissal of the complaint. The plaintiff has failed to refute the documentary evidence.

Plaintiff's final argument rests on the theory of vicarious liability. A defendant hospital, it is argued, can be held responsible for the negligence treatment of an emergency room patient seeking treatment, even if the treatment is rendered by a provider not directly employed by the hospital itself. No one can argue with this well established law. Quoting the Court of Appeals in *Hill v. St. Clare's Hospital*, 67 NY2d 72, plaintiff points out that responsibility may exist where an independent contractor provides services at a medical facility and is perceived to be an employee of the facility. In light of the unrefuted documentary proof presented, the legal theory is irrelevant to this motion.

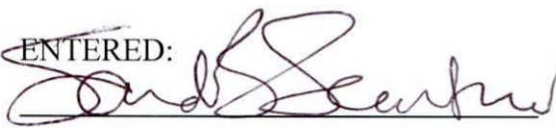
On the basis of the foregoing, it is

ORDERED that the defendants' motion for dismissal of the complaint as against them is granted.

All matters not decided herein are denied.

This decision shall constitute the order of the Court.

Dated: April 10, 2020
Goshen, New York

ENTERED: 
SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*