SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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CARL FULLING,

Plaintiff,

- v -

MOUNT SINAI HEALTH SYSTEM, INC., MOUNT SINAI HEALTH NETWORK, LLC, MOUNT SINAI HOSPITALS GROUP, INC., SOUTH NASSAU COMMUNITIES HOSPITAL, GRAND SOUTH POINT, LLC. and BAYVIEW MANOR, LLC, doing business as SOUTH POINT PLAZA NURSING AND REHABILITATION CENTER,

Defendants.

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INDEX NO. 805293/2019

MOTION DATE 03/02/2021

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 40, 41, 42, 46, 47, 48, and 53 (Motion 001)

were read on this motion to/for DISMISS COMPLAINT.

In this action to recover damages for medical malpractice and lack of informed consent, the defendants Mount Sinai Health System Inc., Mount Sinai Health Network LLC, and Mount Sinai Hospitals Group, Inc. (hereinafter collectively the Mt. Sinai defendants), move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted for failure to state a cause of action, as the Mount Sinai defendants are not proper parties to the action.

The plaintiff commenced this action on September 6, 2019. On November 4, 2019, the Mt. Sinai defendants made the instant motion, the matter was thereupon assigned to Justice Joan Madden, and the motion initially was made returnable on December 3, 2019. In late January 2021, after the motion had been adjourned on several occasions, the action was reassigned to this court.

The plaintiff alleges that the defendants committed medical malpractice and negligence, and that they failed to obtain his informed consent for certain procedures, in the course of providing medical, surgical, nursing, and rehabilitation care and treatment, first at the defendant South Nassau Communities Hospital (SNCH) in January 2017, and then at South Point Plaza Nursing and Rehabilitation Center, beginning in November 2017. The Mt. Sinai defendants argue that they are improper parties to the present action, inasmuch as they acquired SNCH and incorporated it into the Mt. Sinai health network in 2018, and thus after the plaintiff's treatment at SNCH had been completed. They also assert that they never provided any care or treatment to the plaintiff.

Under CPLR 3211(a)(1), a dismissal is warranted "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]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable" (*Dixon v 105 W. 75th St., LLC,* 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Affidavits do not qualify as documentary evidence (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 85-86). The Mt. Sinai defendants submit the affidavit of Beth Essig, the Executive Vice President and General Counsel of Mt. Sinai Health System, Inc. (MSHS), as their primary evidence but, as an affidavit, this evidence is insufficient to warrant a dismissal under CPLR 3211(a)(1). It does not, however, preclude dismissal under an alternate theory.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible

favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Where, as here, the court considers evidentiary material beyond the complaint, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.).

A complaint must be dismissed against a defendant for failure to state a cause of action where it establishes that it is not a proper party (*see Matter of Brown v Foster*, 73 AD3d 917, 918 [2d Dept 2010]). In this action, the Mt. Sinai defendants established that the plaintiff was never a patient of a hospital in the Mt. Sinai network and, therefore, no "doctor-patient" relationship existed between him and the Mt. Sinai defendants that would give rise to a medical malpractice claim against them (*see Heller v Peekskill Community Hosp*., 198 AD2d 265 [2d Dept 1993]). Moreover, Essig's affidavit demonstrates that the Mt. Sinai defendants did not own, maintain, or operate SNCH prior to 2018. Hence, any malpractice committed by SNCH occurred almost one year prior to the Mt. Sinai defendants' acquisition of SNCH.

Generally, a corporation that acquires the assets of another corporation is not liable for the torts of its predecessor, absent certain specific exceptions (*see Schumacher v Richards Shear Co.,* 59 NY2d 239, 244-245 [1983]). These exceptions may apply if

> "(1) [the purchaser] expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations"

(*id.* at 245). In opposition to the Mt. Sinai defendants' proof, the plaintiff submits no evidence to show that those defendants assumed the tort liabilities of SNCH when acquiring it. Inasmuch as the Mt. Sinai defendants established that they acquired SNCH for inclusion in their network in January 2018 at the earliest, and the plaintiff cannot show that any of the exceptions identified above apply to the present situation, those defendants have demonstrated that they are not proper parties. Consequently, a fact alleged by the plaintiff to have been a fact "was not a fact at all," and the plaintiff has adduced no evidence to raise a question as to whether a significant dispute exists regarding that issue. He thus does not "have" a cause of action against the Mt. Sinai defendants.

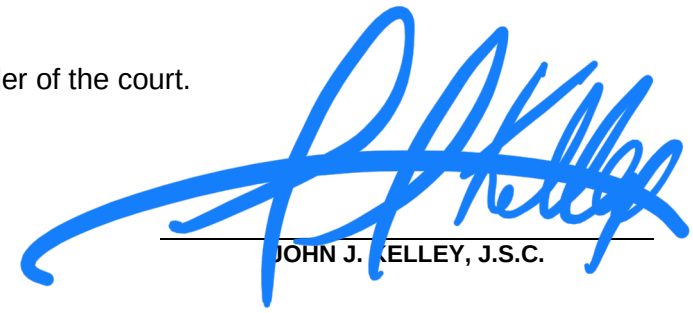
There is no merit to the plaintiff's contention that Essig's affidavit was of no probative force because it was merely an "attorney's affidavit." Essig is an officer of MSHS, and thus has personal knowledge of the transactions of that corporation, as well as its affiliates, such as the other two Mt. Sinai entities named as defendants herein. Nor is there merit to the plaintiff's contention that the Mt. Sinai defendants effectively moved to dismiss the complaint only as to one of them, or that they only established that one of them was not a proper party. The court concludes that it may be reasonably inferred from Essig's affidavit that the relationship of all of the Mt. Sinai defendants to SNCH is the same. Moreover, the court rejects the plaintiff's argument that, by failing employ to employ the word "control" in discussing the absence of ownership, operation, maintenance, relationship, or responsibility over SNCH until 2018, the Mt. Sinai defendants' showing was insufficient to warrant dismissal. "[T]alismanic, unbending allegations" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 493 [2008]) are not required to establish the absence of responsibility or legal liability.

Hence, the Mt. Sinai defendants' motion must be granted pursuant to CPLR 3211(a)(7), and the complaint must be dismissed with prejudice as against them for failure to state a cause of action.

Accordingly, it is

ORDERED that the motion of the defendants Mount Sinai Health System, Inc., Mount Sinai Health Network, LLC, and Mount Sinai Hospitals Group Inc., to dismiss the complaint insofar as asserted against them is granted, and the complaint is dismissed as against the defendants Mount Sinai Health System, Inc., Mount Sinai Health Network, LLC, and Mount Sinai Hospitals Group Inc.

This constitutes the Decision and Order of the court.



3/5/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE