

Berzosa v Kim
2021 NY Slip Op 31253(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 805406/2019
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 6**

Justice

LAURA C. PERALTA BERZOSA,

Plaintiff,

- against-

**INDEX NO. 805406/2019
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO. 1**

**LYVAN KIM, DMD, VINH LY, DDS and
LEE FAMILY DENTISTRY, P.,**

Decision and Order

Defendants.

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

PAPERS NUMBERED

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

Defendants Lyvan Kim, DMD (“Dr. Kim”), Vinh Ly, DDS (“Dr. Ly”), and Lee Family Dentistry (collectively, “Defendants”) move for an Order pursuant CPLR 3211, dismissing all claims as to Dr. Ly. Plaintiff Laura C. Peralta Berzosa (“Plaintiff”) opposes.

Factual Background/Parties’ Contentions

On December 12, 2019, Plaintiff filed the Summons and Complaint against the Defendants. Plaintiff alleges that she sustained serious and permanent personal injuries as a result of the negligence and other departures from the standard of care by Defendants during treatment rendered by Defendants to Plaintiff, including surgical implant, dental, medical services and/or dental restoration, rendered between November 30, 2016 and March 4, 2019.

On January 13, 2020, Defendants interposed their Answers and issue was duly joined. Defendants denied all substantive claims.

Plaintiff claims that Dr. Ly’s dental treatment at issue took place at Lee Family Dentistry between November 30, 2016 and March 4, 2019.

In support of their motion, Defendants submit the Attorney Affirmation of Robyn S. Goldfarb (“Ms. Goldfarb”). Ms. Goldfarb asserts that:

Upon contact with Dr. Ly, our firm learned from him that he never performed dental treatment upon the plaintiff,

whatsoever. As a matter of fact, the plaintiff was only treated in the New York office of Lee Family Dentistry and Dr. Ly has never treated patients at said office, as he is not licensed in dentistry in the State of New York.

Defendants also submit as Exhibit “E”, Dr. Ly’s sworn affidavit before a notary public dated September 17, 2020. Dr. Ly’s affidavit “initially sets forth Dr. Ly’s credentials as a dentist, licensed as such in New Jersey since 2018, following his completing his dental school education at Temple University in 2018.” Dr. Ly states that “[a]fter receiving his dental license, he began working at Vinh Q. Ly D.M.D. L.L.C. located in the same office space as defendant Lee Family Dentistry P.C. in New Jersey only.” Dr. Ly further states that “[w]hile he has practiced dentistry at the office space of defendant Lee Family Dentistry P.C., located in New Jersey, he has never been employed nor performed treatment on any patients of defendant Lee Family Dentistry, P.C.” Dr. Ly asserts that he has no personal knowledge of Plaintiff and he has never met nor treated Plaintiff. Defendants argue that Plaintiff was a patient of Dr. Kim at the offices of Defendant Lee Family Dentistry, P.C. between November 30, 2016 and March 4, 2019. Defendants assert that Dr. Ly was attending dental school until May 2018 and was not licensed to practice dentistry during much of the time of Plaintiff’s dental treatment.

In opposition, Plaintiff argues that Dr. Ly’s affidavit “does not show that Plaintiff failed to assert a material allegation necessary to support her causes of action for negligence and other departures from the standard of care by the Defendants.” Plaintiff asserts that Dr. Ly’s argument that he is not liable is not a basis for a motion to dismiss for failure to state a cause of action. Plaintiff contends that a Preliminary Conference has not been held and “Plaintiff has not yet had the opportunity to depose any of the Defendants or to complete other needed discovery.” Plaintiff argues that “[a]t this early point in the lawsuit, converting the motion to dismiss by Defendant, VINH LY, DDS, to a motion for summary judgment would be very premature and prejudicial to Plaintiff.”

Discussion

The standard for dismissal under CPLR § 3211(a)(7) “is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” *Sokol v. Leader*, 74 A.D.3d 1180, 1180-1181 [2d Dept 2010]. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 [1964]. Furthermore, the Court must “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.” *Nonnon v. City of N.Y.*, 9 N.Y.3d 825, 827 (2007); quoting *Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994].

Here, the Complaint alleges that:

26. Defendant, DR. VINH LY, DDS, undertook and agreed to render medical, dental, surgical care and treatment, dental surgery and/or oral and maxillofacial surgery to the Plaintiff.

27. Defendant, DR. VINH LY, DDS, negligently, recklessly and carelessly rendered dental care and treatment to the Plaintiff on or about November 30, 2016 and continuing through to and including March 4, 2019.

28. That the treatment rendered by Defendant, DR. VINH LY, DDS, was not in accord with good and accepted standards of medical, dental surgical care and treatment, dental surgery and/or oral and maxillofacial surgery.

29. That on June 22, 2017, the surgical implant dental medical services rendered by Defendant, DR. VINH LY, DDS, was not in accord with good and accepted standards of medical, dental surgical care and treatment, dental surgery and/or oral and maxillofacial surgery.

30. As a result of the negligence, recklessness and carelessness of Defendant, DR. VINH LY, DDS, and without any want of care on the part of Plaintiff, the Plaintiff suffered grave bodily injury complications related thereto, need for additional surgery and treatment, and mental anguish.

Accepting Plaintiff’s allegations as true, the four corners of the Complaint state a cause of action for medical malpractice as against Dr. Ly.

Wherefore, it is hereby

ORDERED that Defendants Lyvan Kim, DMD, Vinh Ly, DDS, and Lee Family Dentistry's motion is denied; and it is further

ORDERED that a preliminary conference is scheduled for May 24, 2021 at 10:00 am by Teams.

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

Dated: April 6, 2021

ENTER: 
J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION