

Bazigos v Westchester Health Assoc.

2022 NY Slip Op 30376(U)

January 24, 2022

Supreme Court, New York County

Docket Number: Index No. 805062/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X INDEX NO. 805062/2018
MOTION DATE 11/15/2021
MOTION SEQ. NO. 002

MICHAEL BAZIGOS,

Plaintiff,

- v -

WESTCHESTER HEALTH ASSOCIATES, WESTCHESTER
HEALTH MEDICAL, P.C., WESTCHESTER HEALTH
ORTHOPEDICS AND SPORTS MEDICINE, NORTHWELL
HEALTH INC., NORTHWELL HEALTH PHYSICIAN PARTNERS,
NORTHWELL HEALTH PARTNERS, LLC and RICHARD NEIL
WEINSTEIN, M.D.,

DECISION AND ORDER

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number 49, 50, 51, 52, 53, 54, and 55
(Motion 002)

were read on this motion to/for DISMISS COMPLAINT

In this action to recover damages for medical malpractice, the defendants Northwell Health, Inc., Northwell Health Physician Partners, and Northwell Health Partners, LLC (hereinafter collectively the Northwell Health defendants), move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them. The plaintiff does not oppose the motion. The motion is granted for failure to state a cause of action, as the Northwell Health defendants are not proper parties to the action.

The plaintiff alleges that the defendants committed medical malpractice and negligence while rendering health related services to him at Westchester Health Orthopedics and Sports Medicine on March 10, 2014 and September 16, 2015. The Northwell Health defendants argue that they are improper parties to the present action, inasmuch as they did not have a legal

relationship with Westchester Health Associates and Westchester Health Medical, P.C., until March 1, 2017 and, thus, after the plaintiff's treatment at Westchester Health Orthopedics and Sports Medicine had been completed. They also argued that they never employed the defendant Richard Neil Weinstein, M.D., and 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 Ill 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 Northwell Health defendants submit the affidavit of Hester Palewitz, the Director of Quality and Performance Improvement at Westchester Health Medical, 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 Northwell Health defendants established that the plaintiff was never a patient of a hospital in the Northwell Health network and, therefore, no “doctor-patient” relationship existed between him and the Northwell Health 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, Palewitz’s affidavit demonstrates that the Northwell Health defendants did not have a legal relationship with any of the Westchester Health entities prior to 2017. Although Westchester Health Associates and Westchester Health Medical, P.C., eventually were included in the Northwell Health network in 2017, Westchester Health Orthopedics and Sports Medicine, the facility where the alleged malpractice was committed, was never included in the Northwell Health network. Finally, Weinstein denied being employed by the Northwell Health defendants during the period of alleged malpractice.

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 failing to oppose the Northwell Health defendants' proof, the plaintiff submits no evidence to show that those defendants assumed the tort liabilities of any of the Westchester Health entities when acquiring them. Inasmuch as the Northwell Health defendants established that they acquired Westchester Health Associates and Westchester Health Medical, P.C., for inclusion in their network only in March 2017 at the earliest, and never acquired Westchester Health Orthopedics and Sports Medicine, 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 Northwell Health defendants.

Accordingly, it is

ORDERED that the motion of the defendants Northwell Health, Inc., Northwell Health Physician Partners, and Northwell Health Partners, LLC, to dismiss the complaint insofar as asserted against them is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendants Northwell Health, Inc., Northwell Health Physician Partners, and Northwell Health Partners, LLC.

This constitutes the Decision and Order of the Court.

1/24/2022
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE