

Galpern v Giglio
2022 NY Slip Op 32646(U)
August 5, 2022
Supreme Court, New York County
Docket Number: Index No. 153365/2021
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

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INDEX NO. 153365/2021

TAMARA GALPERN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

GRAZIANO D. GIGLIO DDS and JANE DOE,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for

DISMISSAL

In this tort action, defendants Graziano D. Giglio, DDS and Jane Doe move, pursuant to CPLR 3012-a and 3406(a), to dismiss the complaint due to plaintiff's failure to file a certificate of merit and notice of dental malpractice action or, in the alternative, for an order, pursuant to CPLR 3126 and/or 3042, dismissing the complaint or precluding the plaintiff from offering evidence at trial due to her failure to provide discovery and a bill of particulars. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from a series of events which occurred during February 2021 while plaintiff Tamara Galpern was receiving dental treatment from defendant Graziano D. Giglio, DDS and his unnamed assistant, sued herein as defendant Jane Doe. Doc. 1. In her complaint, filed April 7, 2021, plaintiff alleged the following causes of action: battery, assault, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, false

imprisonment, defamation per se, exposure to a disease or toxic substance; dental malpractice; and violation of sections 349 and 349-C of the General Business Law. Doc.1. The complaint was accompanied by neither a certificate of merit, as required by CPLR 3012-a, or a notice of dental malpractice, as required by CPLR 3406. Doc. 1.

Defendants joined issue by their answers filed May 10, 2021. Docs. 7, 9. Concomitantly with the service of their answers, defendants served demands for bills of particular as well as combined discovery demands. Docs. 11, 13, 15.

Defendants now move, pursuant to CPLR 3012-a and 3406(a), to dismiss the complaint due to plaintiff's failure to file a certificate of merit and notice of dental malpractice action or, in the alternative, for an order, pursuant to CPLR 3126 and/or 3042, dismissing the complaint due to plaintiff's failure to provide discovery and a bill of particulars. Docs. 21-30.

In opposition to the motion, plaintiff argues that she was not required to file a certificate of merit because she was self-represented when the action was commenced. Doc. 32. Plaintiff further asserts that she responded to the defendants' discovery demands. Doc. 32.

In reply, defendants substantially reiterate their initial arguments. Doc. 35.

LEGAL CONCLUSIONS

CPLR 3012-a requires a plaintiff to file a certificate of merit in a medical, dental or podiatric malpractice case. However, there is no automatic dismissal of an action due to a plaintiff's failure to file a certificate of merit (*See Fortune v New York City Health & Hosps. Corps.*, 193 AD3d 138 [1st Dept 2021]). Additionally, CPLR 3012-a (f) provides that the statute "shall not be applicable to a plaintiff who is not represented by an attorney." Here, although the plaintiff was not represented by counsel at the time the action was commenced, she is now represented by counsel who submitted opposition to the instant motion.

The language of the statute does not address this scenario, but the goals of the [L]egislature, i.e., to “improve the quality of medical malpractice adjudications and deter the commencement of frivolous cases,” (Mc Kinney’s 1986 Session Laws of NY, chap. 266, sec. 1), will likely be better served by requiring the newly retained attorney to produce a certificate within a reasonable period of time. This matter will lie in the discretion of the judge. If the action was recently commenced, a stronger argument can be made that the newly retained attorney should be required to produce a certificate.

(Connors, McKinney’s Cons Laws of NY, Book 7B, CPLR 3012-a:1[f]).

Given the foregoing guidance by the McKinney’s commentaries, this Court, in its discretion, directs plaintiff’s counsel to file a certificate of merit within 30 days of the service of this order with notice of entry if plaintiff wishes to pursue her dental malpractice claim. Although plaintiff alleges dental malpractice in her complaint, it is unclear from the moving papers whether this is a claim she wishes to pursue. Specifically, plaintiff’s counsel alleges in his affirmation in opposition that the defendants committed dental malpractice (Doc. 32 at pars. 3, 27) while simultaneously asserting that “this case arises out of Graziano’s actions that are unrelated to his profession” (Doc. 32 at par. 6); “[i]n this case, the underlying issues arise out of the [d]efendants’ actions that have nothing to do with dental work” (Doc. 32 at par. 10); and that “[p]laintiff is not alleging contamination or poor dental work, or anything related in the nature of the [d]efendant’s profession” (Doc. 32 at par. 13). Should plaintiff wish to discontinue her medical malpractice claim (her ninth cause of action), she must do so within 30 days of service of this order with notice of entry.

Nor are the defendants entitled to dismissal pursuant to CPLR 3406. “Neither the plain language of 3406(a) nor the structure of the [Medical Malpractice Reform Act] supports the conclusion that the Legislature intended dismissal to be a sanction for failure to timely file [a notice of dental malpractice]” (*Tewari v Tsoutsouras*, 75 NY2d 1, 7 [1989]). If a notice is not filed by a

plaintiff pursuant to CPLR 3406 in a medical malpractice action, a defendant seeking expeditious resolution of underlying claim may move to compel the filing of the same and, if the plaintiff then disregards the court's order to file it, she may be deemed in willful violation either of the calendar control rules set forth in CPLR 3406(b), or of the order directing discovery, both of which permit dismissal of action (*See Tewari*, 75 NY at 10-11). Moreover, as noted above, it is unclear whether plaintiff even wishes to pursue her dental malpractice claim.

Finally, the defendants have failed to establish that they are entitled to any discovery sanctions. Where, as here, a movant seeks such relief, he or she must submit an "affirmation of the good faith effort to resolve the issues raised by the motion [which] shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR 202.7[c]). Here, although counsel for the defendants purports to submit an affirmation of good faith (Doc. 23), it is utterly conclusory and fails set forth any of the details required by 22 NYCRR 202.7(c) (*See, e.g., 241 Fifth Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013] [*citations omitted*]). Thus, the branch of the defendants' motion seeking discovery sanctions is denied with leave to renew upon proper papers. Should the parties wish to discuss any discovery issues in lieu of re-litigating the defendants' motion, they may contact the Part 58 Clerk to arrange for a conference to do so.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendants Graziano D. Giglio, DDS and Jane Doe seeking to dismiss the complaint pursuant to CPLR 3012-a is denied; and it is further

ORDERED that the branch of the motion by defendants Graziano D. Giglio, DDS and Jane Doe seeking dismissal of the complaint pursuant to CPLR 3406 is denied; and it is further

ORDERED that, if plaintiff Tamara Galpern wishes to pursue a claim for dental malpractice in this action, then her attorney shall file a certificate of merit pursuant to CPLR 3012-a within 30 days of service of this order with notice of entry; and it is further

ORDERED that, if plaintiff Tamara Galpern does not wish to pursue a claim for dental malpractice in this action, then she shall discontinue such claim (plaintiff's ninth cause of action) within 30 days of service of this order with notice of entry; and it is further

ORDERED that the branch of the motion by defendants Graziano D. Giglio, DDS and Jane Doe seeking dismissal of the complaint and/or preclusion pursuant to CPLR 3126 and/or 3042 is denied with leave to renew upon proper papers; and it is further

ORDERED that the defendants are directed to serve this order with notice of entry within 5 days after the entry of this order.

8/5/2022

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

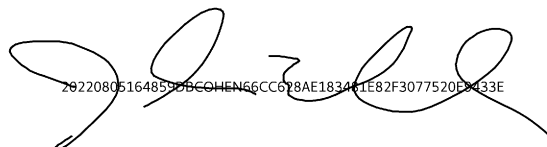
FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE



DAVID B. COHEN, J.S.C.