Jane Doe JV v Guarnaccia
2022 NY Slip Op 35179(U)
November 2, 2022
Supreme Court, Queens County
Docket Number: Index No. 400064/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: HON. LAURENCE L. LOVE, *Justice* — PART 63M

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JANE DOE JV,

Plaintiff,

- v -

GARY GUARNACCIA, M.D., GARY GUARNACCIA, P.C., GUARNACCIA MEDICAL ASSOCIATES, P.C., MEDEX DIAGNOSTIC & TREATMENT CENTER, and MEDEX DIAGNOSTIC AND TREATMENT CENTER, LLC.,

Defendants.

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INDEX NO. 400064/2020

MOTION DATE 09/29/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15-27, 30-32 were read on this motion to/for DISMISS.

In this tort action filed pursuant to the Child Victims Act ("CVA"), Defendant Medex Diagnostic & Treatment Center and Medex Diagnostic and Treatment Center LLC ("Medex") moves for dismissal of the complaint as against it based on documentary evidence pursuant to CPLR 3211(a) (1) and (7). Plaintiff opposes.

BACKGROUND

Plaintiff alleges that between 1989 and 1990, when she was approximately 15 or 16 years old, she was sexually abused by Defendant Gary Guarnaccia MD. Plaintiff alleges that Dr. Guarnaccia, a gynecologist, committed his abuse during medical appointments at his office in Forrest Hills, New York.

Plaintiff's complaint alleges that at all times mentioned, Dr. Guarnaccia was an agent, servant, and/or employee of Defendants Gary Guarnaccia, P.C. and Gary Guarnaccia Medical

Associates, P.C.[1], a corporation incorporated in the state of New York. Plaintiff's complaint additionally alleges that at all times, Dr. Guarnaccia was an agent, servant and/or employee of Medex, acting within the scope of his employment or agency with Medex.

Medex now moves for dismissal of the complaint on the grounds that Dr. Guarnaccia could not have been working under the scope of his employment with Medex during the events giving rise to the complaint, as Medex did not exist until 2000, and Dr. Guarnaccia did not become a part-time employee of Medex until 2015. In support, Medex has submitted a copy of its 2015 Asset Purchase Agreement with Guarnaccia Medical Associates, an affidavit from Oleg Aronov, a managing member of Medex, and a copy of Medex's Articles of Organization and New York Department of State Entity Information.

DISCUSSION

On a motion to dismiss based upon documentary evidence, defendant must present evidence which "utterly refutes" plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]). The Court may consider documentary evidence that conclusively establishes the plaintiff has no cause of action. See *Rovello v Orofino Realty Co*., 40 NY2d 633, 635-36 (1976); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc*., 115 A.D.3d 128, 134 (1st Dept 2014); see also *Facebook, Inc. v DLA Piper LLP* (*US),* 134 AD3d 610, 613 (1st Dept 2015) ("[f]actual allegations presumed to be true on a motion pursuant to CPRL 3211 may properly be negated by affidavits and documentary evidence."). Evidence is deemed "documentary" for purposes of CPLR 3211(a)(1) when it is unambiguous, authentic and of undisputed authenticity.

[1] Gary Guarnaccia, P.C. is the former name of Gary Guarnaccia Medical Associates, P.C..

Here, Medex's Articles of Incorporation reflect that it is a domestic limited liability company incorporated on July 20, 2000. The Asset Purchase Agreement between Medex, Dr. Guarnaccia, and Gary Guarnaccia Medical Associates, P.C. is dated January 30, 2015 and states that Medex shall purchase "the assets of [Gary Guarnaccia Medical Associates, P.C.]" and will "assume only those liabilities that [Medex] specifically agrees to assume (and no others) set forth on Schedule 2.3".

Schedule 2.3[2] states that "Patients of the Business from and after the Closing Date shall be patients of [Medex] with all attendant liabilities (and benefits)…..provided, however, that [Dr. Guarnaccia and Gary Guarnaccia Medical Associates, P.C.] *solely shall retain liabilities* relating to such patients of the Business with respect to any services rendered…*prior to the Closing Date*." (Emphasis added).

Notwithstanding the fact that Medex was not in existence at the time of the alleged misconduct and the express language in the Asset Purchase Agreement stating that Medex only assumes liabilities accruing after January 30, 2015, Plaintiff argues dismissal is premature. Plaintiff maintains there are questions of fact regarding whether Medex can be held liable for Dr. Guarnaccia's 1989-1990 abuse.

While a corporation that acquires the assets of another can generally not be held liable for the torts of its predecessor, the Court of Appeals in *Schumacher v Richards Shear Co., Inc.* articulated four exceptions: "a corporation may be held liable for the torts of its predecessor if (1) it 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

[2] Schedule 2.3 was not originally submitted as an exhibit to Medex's motion but was uploaded on reply.

selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (59 NY2d 239, 244-45 [1983]).

Plaintiff argues that the third exception may apply here, as Guarnaccia Medical Associates, P.C. is still listed as an active corporation with the New York Department of State, and therefore, Medex's asset purchase may have been a mere "continuation" of Dr. Guanaccia's practice. However, this same argument was raised and rejected by the court in *Schumacher* when plaintiffs argued that the defendant, Logemann Brothers Company, Inc., was a continuation of the predecessor Richard Shear Company:

> "The only arguable basis upon which plaintiffs can predicate a finding of successor liability is to characterize Logemann as a "mere continuation" of Richards Shear Company. The exception refers to corporate reorganization, however, where only one corporation survives the transaction; the predecessor corporation must be extinguished. The cases cited by plaintiff do not hold otherwise. Since Richards Shear survived the instant purchase agreement as a distinct, albeit meager, entity, the Appellate Division properly concluded that Logemann cannot be considered a mere continuation of Richards Shear."
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> (*id.* [citations omitted]).

The fact that Guarnaccia Medical Associates, P.C. survived the asset purchase as a distinct corporation (but one no longer doing business since Dr. Guaranaccia became a part-time employee of Medex in 2015) thus actually supports a lack of liability for Medex, given that under *Schumacher*, the Asset Purchase Agreement cannot be deemed a continuation.

Accordingly, Medex has established entitlement to dismissal of this action against it, and the motion is granted in full.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Medex Diagnostic & Treatment Center and Medex Diagnostic and Treatment Center LLC ("Medex") pursuant to CPLR 3211(a)(1) and (a)(7) for dismissal of Plaintiff's complaint (Motion Seq. 002) is granted and the complaint is dismissed in its entirety as against said defendant; and it is further

ORDERED that this action is severed and continues against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Medex shall serve a copy of this order with notice of entry within ten (10) days upon all parties and the Clerk of the Court and the Trial Support Office or Clerk of the General Clerk's Office, as appropriate, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days.

11/02/2022
DATE

LAURENCE L. LOVE, 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**

FILED
11/3/2022
COUNTY CLERK
QUEENS COUNTY