

Larios v Gauthier

2023 NY Slip Op 32616(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 805203/2022

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS PART 10M

Justice

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JOSE LARIOS,

Plaintiff,

- v -

ARINXE RANDY GAUTHIER, SEBASTIAN VALDIVIESO
RUEDA, HOWARD KATZ and NEW YORK CITY HEALTH +
HOSPITALS CORPORATION/ HARLEM,

Defendants.

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INDEX NO. 805203/2022

MOTION DATE 01/09/2023,
01/16/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 38, 39, 41

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 40, 43, 45, 46, 47, 48, 49, 50

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

Upon the foregoing documents, the court grants Defendant Howard Katz’s (“Dr. Katz”) motion to dismiss Plaintiff Jose Larios’ (“Plaintiff”) complaint against him for lack of personal jurisdiction, filed under motion sequence 001, and the court denies Plaintiff’s motion to strike certain affirmative defenses, for partial summary judgment and for additional relief, filed under motion sequence 002.

Plaintiff brought this medical malpractice/lack of informed consent action against Defendants Arinx Randy Gauthier, Sebastian Valdivieso Rueda, Dr. Katz and New York City Health + Hospitals Corporation/Harlem (“HHC”) (collectively “Defendants”).

Under motion sequence 001, Defendant Dr. Katz now moves to dismiss Plaintiff’s complaint for lack of personal jurisdiction for failure to properly serve him with the summons and complaint. Plaintiff opposes the motion.

Under motion sequence 002, Plaintiff now moves to strike Defendants' eleventh affirmative defense, Dr. Katz's thirteenth affirmative defense for lack of personal jurisdiction and Defendant HHC's eighteenth affirmative defense, which is actually its seventeenth affirmative defense of immunity from punitive damages. Plaintiff also seeks an order compelling Dr. Katz and HHC to provide "a current accurate service address" for Defendant Dr. Katz, granting Plaintiff an extension of time to serve Defendant Dr. Katz and granting summary judgment in Plaintiff's favor on the issue that Defendant HHC is vicariously liable for the acts and/or omissions of Defendant Dr. Katz. Defendants oppose Plaintiff's motion.

As to the issue of whether Plaintiff properly served Defendant Dr. Katz, the court finds that Plaintiff failed to do so. Therefore, the court grants Defendant Dr. Katz's motion to dismiss Plaintiff's complaint, the court denies the portions of Plaintiff's motion seeking an order striking Defendant Dr. Katz's thirteenth affirmative defense for lack of personal jurisdiction, compelling Defendant Dr. Katz and HHC to provide Dr. Katz's current address and extending Plaintiff's time to serve Defendant Dr. Katz.

Here, Dr. Katz demonstrated that Plaintiff attempted to serve him at his prior employer and at his previous residence. Additionally, the court agrees with Defendant Dr. Katz and finds that Plaintiff failed to demonstrate due diligence in attempting to properly serve Defendant Dr. Katz and he failed to demonstrate his entitlement to an extension of time to serve Dr. Katz for good cause or in the interest of justice. Therefore, Plaintiff failed to demonstrate that his process server properly and timely served Defendant Dr. Katz with the summons and complaint, pursuant to CPLR 308, and the time for which to do so has expired.

Additionally, the court finds that Plaintiff failed to demonstrate his entitlement to the additional relief requested in his motion regarding service of Defendant Dr. Katz. Plaintiff failed

to demonstrate that dismissal of the affirmative defense is warranted, particularly since the court finds that service was improper. Defendants Dr. Katz and HHC are not obligated to provide Plaintiff with “a current accurate service address,” but the court notes that generally Defendant HHC is only required to provide Plaintiff with Defendant Dr. Katz’ last known address in their records. Additionally, since the statute of limitations expired, the 120-day period for which to serve Defendant Dr. Katz expired, and since the court denies Plaintiff’s request for an extension of time to serve Defendant Dr. Katz, any subsequent service on Defendant Dr. Katz would be futile.

As to the portion of Plaintiff’s motion seeking summary judgment in Plaintiff’s favor on the issue that Defendant HHC is vicariously liable for the acts and/or omissions of Defendant Dr. Katz, the court finds that such order would be premature at this time as discovery regarding this issue has not been completed. However, it is clear that since Defendant Dr. Katz was an employee of Defendant HHC at the time of Plaintiff’s treatment, should Plaintiff demonstrate that Defendant Dr. Katz’s alleged acts and/or omissions giving rise to Plaintiff’s alleged injuries and damages occurred during the time of such employment and within the scope of such employment, then barring any unforeseen issues, Defendant HHC would be held vicariously liable for Dr. Katz’s acts and/or omissions. However, at this time, such circumstances have yet to be established.

The court denies the remainder of Plaintiff’s motion regarding dismissal of certain affirmative defenses.

Defendants’ eleventh affirmative defense states that “[t]he injuries complained of were due exclusively to causes of so extraordinary a nature that they could not reasonably have been

foreseen and the result avoided.” Since discovery is ongoing, Plaintiff failed to demonstrate that dismissal of this affirmative defense is warranted.

Defendant HHC’s seventeenth affirmative defense states that it is “a governmental entity and therefore, immune from any claim for punitive damages.” Plaintiff failed to demonstrate that dismissal of this affirmative defense is warranted.

Therefore the court grants Defendant Dr. Katz’s motion to dismiss under motion sequence 001 and denies Plaintiff’s motion for various relief under motion sequence 002.

The court has considered any additional arguments raised by the parties, but not specifically discussed herein, and the court denies any additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant Howard Katz’s motion to dismiss Plaintiff Jose Larios’ complaint against him, filed under motion sequence 001, the court dismisses Plaintiff Jose Larios’ complaint as against Defendant Howard Katz only and directs the Clerk of the Court to enter judgment in favor of Defendant Howard Katz as against Plaintiff Jose Larios without costs to any party; and it is further

ORDERED that the court amends the caption to delete Defendant Howard Katz from the caption and directs the Clerk of the Court to amend the caption to the following:

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JOSE LARIOS,

Plaintiff,

-against-

ARINXE RANDY GAUTHIER, SEBASTIAN
VALDIVIESO RUEDA AND NEW YORK CITY
HEALTH + HOSPITALS CORPORATION/HARLEM,

Defendants.
-----X

and it is further;

ORDERED that counsel for Defendant Howard Katz shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the amended caption pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the court denies Plaintiff Jose Larios’ motion filed under motion sequence 002.

This constitutes the decision and order of the court.


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7/28/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input checked="" 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"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE