

Williams v Wagerik

2024 NY Slip Op 35093(U)

September 13, 2024

Supreme Court, Richmond County

Docket Number: Index No. 150936/2021

Judge: Orlando Marrazzo, Jr.

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

Present:

-----X
JERMAINE WILLIAMS

Plaintiff,

**Hon. Orlando Marrazzo, Jr.,
J.S.C.**

v

DECISION & ORDER

DIANE WAGERIK and RICHMOND UNIVERSITY
MEDICAL CENTER,

Index No. 150936/2021

Motion Seq. Nos. 001 and 003

Defendants.
-----X

The Court considered the following papers associated with Motion Seq. Nos. 001 and 003,

submitted on July 24, 2024:

Papers:

NYSCEF Document Nos.:

Notice of Motion and Affirmation

20-24

Motion Seq. No. 001

By Defendant Richmond Medical Center s/h/a Richmond
University Medical Center, with exhibits, filed February 27, 2024

**Notice of Cross-Motion and Affirmation in Support of
Plaintiff's Cross-Motion to Amend Complaint and in
Opposition to Defendant's Motion to Dismiss**

36-38

Motion Seq. Nos. 001 and 003

By Plaintiff, with exhibits, filed July 17, 2024

**Opposition to Plaintiff's Motion to Amend and Reply to
Plaintiff's Opposition to Motion to Dismiss**

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Motion Seq. Nos. 001 and 003

By Defendant Richmond Medical Center s/h/a Richmond
University Medical Center, filed July 19, 2024

**Reply Affirmation in Further Support of Plaintiff's Cross-
Motion to Amend Complaint**

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Motion Seq. No. 003

By Plaintiff, filed July 23, 2024

Upon the foregoing papers, the motion to dismiss the Complaint by defendant Richmond
Medical Center s/h/a Richmond University Medical Center is DENIED IN PART as to the first

and third causes of action and GRANTED IN PART as to the fourth, fifth, and sixth causes of action, and the motion by plaintiff Jermaine Williams to amend the Complaint is GRANTED.

Relevant Facts

Plaintiff Jermaine Williams (hereinafter "Plaintiff") alleges that on November 28, 2019, Plaintiff was transported to a local hospital in an ambulance operated and overseen by defendant Richmond Medical Center s/h/a Richmond University Medical Center (hereinafter "Defendant"). While treating Plaintiff in the ambulance, Defendant's employee, Diane Wagerick (hereinafter "Wagerick"), took a picture of Plaintiff's confidential personal and medical information and posted the picture to Wagerick's Facebook page.

Procedural History

Plaintiff commenced this action on May 12, 2021, by filing a Summons and Complaint against defendants The City of New York, New York City Fire Department, and Wagerick. The City of New York and the City of New York s/h/a New York City Fire Department (hereinafter "the City") joined issue by filing an Answer on June 2, 2021. On September 27, 2021, pursuant to a stipulation with the City, Plaintiff filed an Amended Complaint adding Defendant as a party. The City filed an Answer to the Amended Complaint (hereinafter the "Complaint") on October 12, 2021, and Defendant joined issue by filing an Answer on January 11, 2022. Wagerick has not answered or appeared in this action to date.

Plaintiff's Complaint asserts six causes of action, for breach of fiduciary duty of confidentiality, for negligence *per se* based on a violation of the HIPAA privacy rule, for negligence *per se* based on a violation of CPLR § 4504(a), for negligence *per se* based on a violation of Education Law § 6509(9) and 8 NYCRR § 60.1(d)(3), for public disclosure of private facts, and for punitive damages.

The City moved to dismiss the Complaint and all crossclaims against it pursuant to CPLR § 3211(a)(7) (Motion Seq. No. 002). This Court granted the City's motion in its entirety without opposition and amended the caption accordingly (NYSCEF Doc No. 43, decision + order).

Defendant now moves pursuant to CPLR § 3211(a)(7) to dismiss the Complaint for failure to state a cause of action for which relief may be granted. Plaintiff conceded to withdraw his second cause of action for negligence *per se* based on a violation of the HIPAA privacy rule (NYSCEF Doc. No. 37, affirmation in support of plaintiff's cross-motion to amend complaint and in opposition to defendant's motion to dismiss, p. 6 ¶¶ 31-32). Plaintiff opposes the remainder of the motion and cross-moves pursuant to CPLR § 3025(b) for leave to amend the Complaint, which Defendant opposes. For the reasons stated below, Defendant's motion is denied in part and granted in part and Plaintiff's cross-motion is granted in its entirety.

Defendant's Motion to Dismiss

When considering a motion to dismiss pursuant to CPLR § 3211(a)(7), "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Antoine v Kalandrishvili*, 150 AD3d 941, 941 [2d Dept 2017], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 82 NY2d at 88, citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976], and quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [internal quotation marks omitted]). Dismissal is therefore inappropriate "when a cause can be discerned in the facts alleged, no matter how poorly those facts are stated" (*Greschler v Greschler*, 71 AD2d 322, 325 [2d Dept 1979], citing CPLR § 3026, and

Guggenheimer v. Ginsburg, 43 NY2d at 275). When the moving defendant submits evidentiary material in support of its motion to dismiss, "it may be considered in assessing the viability of a complaint, but unless the defendant demonstrates that a material fact alleged by the plaintiff to be true 'is not a fact at all' and that 'no significant dispute exists regarding it', the complaint should not be dismissed" (*Williams v New York City Housing Authority*, 238 AD2d 413, 414 [2d Dept 1997], quoting *Guggenheimer v Ginsburg* at 275).

Defendant argues Plaintiff fails to state any cause of action against it because Defendant is not vicariously liable for the actions of its former employee, Wagerick, who Defendant argues was acting outside the scope of her employment at the time of the incident. The doctrine of *respondeat superior* permits an employer to be held "vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Medical Center*, 97 NY2d 247, 251 [2002], citing *Riviello v Waldron*, 47 NY2d 297, 302 [1979]; *Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678, 679 [2d Dept 2013]). "Whether an employee acted within the scope of employment is a fact-based inquiry" (*Rivera v State of New York*, 34 NY3d 383, 390 [2019], citing *Riviello*, 47 NY2d at 302-303).

Plaintiff's first cause of action is for breach of fiduciary duty. To state a cause of action for breach of fiduciary duty, the plaintiff must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by defendant's misconduct" (*Wallkill Medical Development, LLC v Catskill Orange Orthopaedics, P.C.*, 178 AD3d 987, 988-989 [2d Dept 2019], quoting *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]).

Plaintiff's third cause of action is for negligence *per se* based on a violation of CPLR § 4504(a). CPLR § 4504 prohibits medical practitioners, including public or private corporations or other legal entities, from disclosing any information "acquired in attending a patient in a

professional capacity, and which was necessary to enable him to act in that capacity," without the patient's consent (*id.* subd. [a]). To state a cause of action under that statute, the plaintiff must allege (1) the existence of a practitioner-patient relationship; (2) the practitioner obtained the patient's information while treating the patient; (3) the practitioner disclosed the patient's information to someone unrelated to the patient's medical treatment, and in a manner that allows for the patient to be identified; (4) the patient did not consent to the disclosure; and (5) damages (*see Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 53-54 [2016] [citations omitted]).

Here, accepting the pleaded facts as true and according Plaintiff the benefit of every inference, Plaintiff states a cause of action for breach of fiduciary duty of confidentiality and a cause of action for negligence *per se* based on a violation of CPLR § 4504. The evidence submitted by Defendant in support of its motion does not demonstrate that the facts in the Complaint are 'not facts at all' and raises questions of fact as to whether Wagerick was acting within the scope of her employment at the time of the incident and, in turn, whether Defendant is vicariously liable for Wagerick's acts. Thus, Defendant's motion to dismiss the first cause of action and the third cause of action is DENIED.

Plaintiff's fourth cause of action is for negligence *per se* based on a violation of Education Law § 6509(9) and 8 NYCRR 60.1(d)(3). Title VIII of the Education Law governs the licensing and practice of certain professions, including the practice of medicine, but "does not provide for a private right of action by an individual who sustains damages as a result of professional misconduct defined therein" (*Requa v Coopers & Lybrand*, 303 AD2d 159, 159 [1st Dept 2003]; *Kaspiev v Pankova*, 179 AD3d 513, 514 [2020]). Further, 8 NYCRR 60.1 does not currently contain subsection (d)(3), nor does that statute contain the language cited in the Complaint.

Accordingly, Defendant's motion to dismiss the fourth cause of action is GRANTED and that cause of action is dismissed.

Plaintiff's fifth cause of action is for public disclosure of private facts. There is no common law right to privacy in New York (*Messenger ex rel. Messenger v Gruner + Jahr Printing and Pub.*, 94 NY2d 436, 441 [2000] [citations omitted]). Civil Rights Law § 50 creates a limited statutory right to privacy, criminalizing the use of a person's "name, portrait, picture, likeness, or voice" for advertising or trade purposes without first obtaining that person's written consent (*id.*). Accepting the pleaded facts as true and according Plaintiff the benefit of every inference, Plaintiff's Complaint fails to state a cause of action based on the right to privacy. Accordingly, Defendant's motion to dismiss the fifth cause of action is GRANTED and that cause of action is dismissed.

Plaintiff's sixth cause of action is for punitive damages. "New York does not recognize an independent cause of action for punitive damages" (*Aronis v TLC Vision Centers, Inc.*, 49 AD3d 576, 577 [2d Dept 2008], quoting *Randi A.J. v Long Is. Surgi-Ctr.*, 46 AD3d 74, 80 [2007]). Accordingly, Defendant's motion to dismiss the sixth cause of action is GRANTED and that cause of action is dismissed.

Plaintiff's Motion to Amend the Complaint

CPLR 3025 provides leave to amend pleadings "shall be freely given upon such terms as may be just" (*id.* para [b]). Amendment should be denied only "where prejudice or surprise to the opposing party results directly from the moving party's delay" and the determination is within the court's sound discretion (*Ofman v Bluestone*, 227 AD3d 822 [2d Dept 2024], quoting *CitiMortgage, Inc. v Nunez*, 198 AD3d 865, 866 [2021] [additional citations and internal quotation marks omitted]). Here, Defendant has not demonstrated any such prejudice or surprise.

Accordingly, Plaintiff's motion to amend its pleadings is GRANTED to the extent the amended pleadings comport with the remainder of this Decision and Order.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the first and third causes of action is DENIED, and it is further

ORDERED that Defendant's motion to dismiss the second cause of action is GRANTED on consent of the parties, and it is further

ORDERED that Defendants' motion to dismiss the fourth, fifth, and sixth causes of action is GRANTED, and it is further

ORDERED that Plaintiff's motion to amend the pleadings is GRANTED, and it is further

ORDERED that the Clerk shall mark its records accordingly.

DATED: 9/13/2024

ENTER,



HON. ORLANDO MARRAZZO, JR., J.S.C.