

Benson v Webster

2012 NY Slip Op 32990(U)

December 16, 2012

Supreme Court, New York County

Docket Number: 100933/2011

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Index Number : 100933/2011
BENSON, ARMEN
vs.
WEBSTER, OLIVIA
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
DEC 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/16/12

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2**

ARMEN BENSON,
Plaintiff,
-against-

INDEX NO. 100933/2011
Motion Sequence 004
DECISION & ORDER

OLIVIA WEBSTER, MARY LEONARD, GARY
GUERRIERO P.T. and GARY GUERRIERO
P.T.P.C.,
Defendants.

LOUIS B. YORK, J.:

In this personal injury action, defendants Mary Leonard (Leonard), Gary Guerriero P.T. (Guerriero), Gary Guerriero P.T.P.C. (Guerriero Company) and United States Athletic Training Center, Inc.¹ (USATC) move for leave to reargue the court’s decision of July 13, 2012, granting plaintiff Armen Benson’s motion for leave to amend the complaint, and, upon reargument, partially deny plaintiff’s motion for leave to amend the complaint. Plaintiff opposes and cross-moves for an extension of time to serve defendant Olivia Webster (Webster), and to amend the caption.

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DEC 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

Background

Plaintiff visited USATC on November 11, 2009, with a physician’s prescription for physical therapy to deal with his lower back and neck pain. Guerriero allegedly “exercised control of the physical therapists” at USATC. Motion, Ex. A² (Amended Complaint), ¶ 6.

¹At times, this entity is referred to as United States Athletic Training Center.

²Exhibit A to the instant motion includes plaintiff’s first complaint, under New York County index No. 112258/2010, which he later discontinued, the active complaint in this action, under New York County index No. 100933/2011 (Complaint), and the amended complaint, as filed after the court’s decision of July 13, 2012 (Amended Complaint). The three versions of the complaint are respectively marked, within Exhibit A, as exhibits A, B and F.

Leonard, Guerriero's wife, gave plaintiff a tour of the facility, and chose Webster as his physical therapist. Plaintiff returned to USATC, on November 17, 2009, for his first session with Webster. According to the Amended Complaint, plaintiff was injured by Webster "during her initial examination when she suddenly and forcefully pushed down with a hammer-fist blow on Plaintiff ARMEN B. BENSON's forearms." *Id.*, ¶ 42. Plaintiff allegedly felt "a 'POP' sound from his arm," and experienced "extreme pain in his left bicep, causing him to scream out in pain." *Id.*

Plaintiff returned to USATC on November 19, 2010, and on at least eight subsequent occasions, for physical therapy sessions with Webster. *Id.*, ¶ 44. Although he regularly complained of pain, Webster told him that "the therapy is working and that he would feel better." *Id.*

On December 22, 2009, plaintiff had an MRI, which revealed that he had "a complete rupture of the biceps tendon in the left arm." Complaint, ¶ 29. Another MRI, taken on January 20, 2010, led to a similar conclusion. *Id.*, ¶ 31. Surgery followed on February 11, 2010.

On July 16, 2010, plaintiff commenced an action against USATC, Mary Guerriero and Webster, New York County index No. 112258/2010, which he later discontinued without prejudice. The instant action commenced on January 24, 2011, with the complaint asserting negligence against Webster, Leonard, Guerriero and the Guerriero Company. The court denied plaintiff's motion for leave to amend the complaint, on December 7, 2011, because of his failure to appear for oral argument. Motion, Ex. A. When he moved again for leave to amend the complaint, without first moving to vacate the prior default, the court denied that motion, on April

Other unmarked papers are interleaved with these and other marked exhibits in Exhibit A.

18, 2012. *Id.*

On July 13, 2012, the court granted plaintiff's motion both to vacate the default and for leave to amend the summons and complaint. *Id.*, Ex. D. The Amended Summons and Amended Complaint add USATC as a defendant, and identify Leonard as a/k/a Mary Guerriero and Webster as a/k/a Olivia J. Sadeler. *Id.*, Ex. A. The Amended Complaint describes Guerriero and his wife as the owner-operators of USATC. Amended Complaint, ¶¶ 7, 10, 12, 13 and 14. Also, Webster is identified as a licensed physical therapist, then employed by USATC, Guerriero and/or the Guerriero Company. *Id.*, ¶¶ 15, 22-24.

The Amended Complaint asserts causes of action for fraud individually against USATC, the Guerriero Company, Guerriero and Leonard (first, second, third and fourth causes of action); negligent misrepresentation individually against USATC, the Guerriero Company, Guerriero and Leonard (fifth, sixth, seventh and eighth causes of action); violation of New York's deceptive acts and practices law (General Business Law § 349) against USATC, the Guerriero Company, Guerriero and Leonard (ninth, tenth, eleventh and twelfth); violation of New York's Education Law individually against USATC, Leonard and the Guerriero Company (thirteenth, fourteenth and fifteenth); professional malpractice against USATC, the Guerriero Company, Guerriero and Webster (sixteenth); negligent supervision against USATC and the Guerriero Company (seventeenth); lack of informed consent against USATC, the Guerriero Company and Webster (eighteenth); negligence against all defendants (nineteenth); breach of contract individually against USATC, the Guerriero Company, Guerriero and Leonard (twentieth, twenty-first, twenty-second and twenty-third causes of action). The Amended Complaint concludes with a statement of intention to seek punitive damages.

Discussion

Defendants's Motion for Leave to Reargue

According to CPLR 2221 (d) (2), a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” *See Kent v 534 E. 11th St.*, 80 AD3d 106, 116 (1st Dept 2010) (“A motion for reargument is addressed to the court’s discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law”).

Defendants claim that, in their opposition to the challenged motion, they argued that the proposed first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, twentieth, twenty-first and twenty-second causes of action were futile as a matter of law, a position the court did not address in its decision. In its decision of July 13, 2012, the court focused on the procedural aspects of plaintiff’s motion to vacate the previous default. Defendants are correct in that the substantive contents of the proposed causes of action were not reviewed in depth. For that reason, defendants’s motion for leave to reargue the court’s decision of July 13, 2012, granting plaintiff leave to amend his complaint, is granted.

Reargument of Plaintiff’s Motion for Leave to Amend

CPLR 3025 (b) provides that “[l]eave [to amend pleadings] shall be freely given upon such terms as may be just including the granting of costs and continuances.” “It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay.” *Anoun v City of New York*, 85 AD3d 694, 694 (1st Dept 2011) (internal

quotation marks and citation omitted). “On a motion to amend pleadings (CPLR 3025 [b]), the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face.” *Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs.*, 173 AD2d 210, 210 (1st Dept 1991).

Defendants claim that the proposed first through eighth causes of action for fraud and negligent misrepresentation lack a basis in fact. All eight allege that the specified defendants could not lawfully provide plaintiff with his prescribed physical therapy services because the businesses, USATC and the Guerriero Company, were not properly licensed to operate a physical therapy facility. Plaintiff charges that the defendants knew or should have known that they were making false and misleading oral and written representations to the contrary. Plaintiff’s reliance upon these misrepresentations resulted in his harm, according to the proposed Amended Complaint.

“[I]n a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.”

Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 (2011); *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 (1st Dept 2006).

Plaintiff’s affidavit of merit described how he selected USATC. “In my search for a good physical therapy clinic, I came across the website for USATC and liked what I saw. The photos showed a large, modern, clean facility run by professionals, and it said that they treat all kinds of patients.” Benson Aff., ¶ 4. Once he signed on, he stated that he “was exposed to poor treatment and suffered permanent injury,” because USATC was not licensed as a physical therapy facility. *Id.*, ¶ 12. In this motion practice, defendants do not claim to be a licensed physical therapy

facility. Leonard, in her affidavit opposing the original motion, said that “USATC is a gymnasium and provides facilities for physical therapy.” Motion, Ex. A, ¶ 3. USATC had no employees at the time of the incident, according to Leonard, its president; licensed physical therapists were employees of the Guerriero Company. *Id.*, ¶¶ 3-4. It is undisputed that Webster, an employee of the Guerriero Company, was a licensed physical therapist. A copy of her New York State license was attached to defendants’ papers, and she was the only person at USATC who treated plaintiff. Defendants maintain that plaintiff’s harm, if any, was unconnected to the licensing status of the businesses, which they do not question.

Webster was in a lawful position to provide physical therapy to plaintiff, and, therefore, in defendants’ view, there was no false representation of a material fact. Plaintiff stated that, when visiting USATC initially, “Ms. LEONARD told me that Ms. WEBSTER was most suitable to filling the prescription for physical therapy.” *Id.*, ¶ 5. At the time of the incident, New York Business Corporation Law § 1504 (a) held that “[n]o professional service corporation may render professional services except through individuals authorized by law to render such professional services as individuals.” Assuming that defendants identified anyone of themselves falsely, that did not disqualify Webster from treating plaintiff.

However, the proposed Amended Complaint alleges that USATC “made material representations to Plaintiff ARMEN B. BENSON that it was a licensed physical therapy facility” (Amended Complaint, ¶¶ 53 and 108), and charged that the other defendants made similar “false and misleading” representations to plaintiff (*id.*, ¶¶ 73, 86, 98, 129, 144 and 160). Such allegations meet the liberal pleading standards for stating causes of action for fraud, pursuant to CPLR 3211 (a) (7), whereby the court will “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether

the facts as alleged fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Plaintiff is permitted to assert the proposed first through fourth causes of action.

“A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007); *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 (2000); *Murphy v Kuhn*, 90 NY2d 266, 270 (1997). There has been no showing of a special relationship between the parties, thereby eliminating the basis for the proposed fifth through eighth causes of action for negligent misrepresentation.

The proposed ninth, tenth, eleventh and twelfth causes of action assert violations of New York’s deceptive acts and practices law (General Business Law § 349) against USATC, the Guerriero Company, Guerriero and Leonard. The allegations here are general assertions of “multiple deceptive acts and practices in the conduct of their business,” and “false advertising.” In order to pursue a private cause of action under the statute, plaintiff “must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute.” *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). The ninth, tenth, eleventh and twelfth causes of action do not meet this standard, and will not be included in the Amended Complaint.

The proposed thirteenth, fourteenth and fifteenth causes of action assert violation of New York’s Education Law, individually against USATC, Leonard and the Guerriero Company, because they engaged in the unauthorized practice of physical therapy, in the absence of proper

licensing. Education Law § 6512 (1) provides that:

“Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession, . . . shall be guilty of a class E felony.”

However, no private right of action attends to this statute. *Requa v Coopers & Lybrand*, 303 AD2d 159, 159 (1st Dept 2003) (“Contrary to plaintiff’s contention, title VIII of the New York Education Law [Education Law § 6500 *et seq.*], which provides for the regulation of the admission to and practice of certain professions, does not provide for a private right of action by an individual who sustains damages as a result of professional misconduct defined therein”). Plaintiff concedes this point (*Berardelli Aff.*, ¶ 2 [a]), and the proposed thirteenth, fourteenth and fifteenth causes of action are, therefore, rejected.

The proposed twentieth, twenty-first, twenty-second and twenty-third causes of action claim breach of contract individually against USATC, the Guerriero Company, Guerriero and Leonard. Defendants argue that these causes of action are duplicative of the unchallenged sixteenth cause of action for malpractice, asserted against the same set of defendants. Plaintiff concedes this point only in regard to the Guerriero Company and Guerriero, the twenty-first and twenty-second causes of action. However, there is no meaningful distinction among the defendants in this regard, and what the court held in *Scalisi v New York Univ. Med. Ctr.* (24 AD3d 145, 147 [1st Dept 2005]) (“It is also well-established New York law that where a cause of action lies in medical malpractice, a breach of contract action is legally redundant, and may not be pursued unless plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result”) applies here

as well. The proposed twentieth, twenty-first, twenty-second and twenty-third causes of action for breach of contract are rejected.

Plaintiff's Cross Motion for an Extension of Time to Serve

It is undisputed that Webster left USATC's employ, moved out of state and uses another name, probably as a result of marriage. She has not been served the Amended Summons and Amended Complaint, in spite of the court's directive, in the July 13, 2012 order, that she be served within 15 days. Plaintiff states that it hired Premier Legal Services, Inc. (Premier), a local process server, which turned to a California firm, to serve Webster. Plaintiff submits a copy of its order to Premier, and Premier's letter explaining that the California firm failed to serve Webster. Cross Motion, Exs. H and I. Only when Premier inquired, on August 10, 2012, of the status of the service upon Webster was it notified of the failure, according to the letter.

Plaintiff now requests an extension of time to serve, contending that it has good cause for failing to timely serve Webster, and that an extension would serve the interest of justice. When a defendant is not timely served a summons and complaint, CPLR 306-b permits the court to "dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

Defendants, in opposition to plaintiff's request, argue that plaintiff failed to exercise diligence in supervising the steps taken to effect service on Webster. However, plaintiff's efforts to serve Webster were reasonably diligent in hiring an experienced process serving firm (*see Stryker v Stelmak*, 69 AD3d 454, 455 [1st Dept 2010]), and there has been no showing of prejudice to defendants (*see Hernandez v Abdul-Salaam*, 93 AD3d 522, 522 [1st Dept 2012]). Plaintiff shall be given an extension of time to serve Webster.

The Amended Summons and the Amended Complaint bear the caption:

ARMEN BENSON,

Plaintiff

-against-

UNITED STATES ATHLETIC TRAINING CENTER,
INC., GARY GUERRIERO P.T. P.C., GARY
GUERRIERO, P.T., MARY LEONARD a/k/a MARY
GUERRIERO, and OLIVIA J. WEBSTER a/k/a
OLIVIA J. SADELER,

Defendants.

Plaintiff's cross motion to amend the caption to read the same is granted.

Accordingly, it is

ORDERED that defendants Mary Leonard, Gary Guerriero P.T., Gary Guerriero P.T.P.C. and United States Athletic Training Center's motion for leave to reargue the court's decision of July 13, 2012, granting plaintiff Armen Benson's motion for leave to amend the complaint, is granted; and it is further

ORDERED that, upon reargument, plaintiff's motion for leave to amend the complaint is granted to the extent that the Amended Complaint in the proposed form annexed to the moving papers, with the exception of the proposed fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, twentieth, twenty-first, twenty-second and twenty-third causes of action, shall be deemed served upon defendants' receipt of a copy of this order; and it is further

ORDERED that moving defendants shall file and serve an answer to the Amended Complaint within 20 days of the receipt of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross motion for an extension of time to serve defendant Olivia J. Webster a/k/a Olivia J. Sadeler with the Amended Summons and Amended Complaint is granted, and plaintiff shall serve Webster/Sadeler the Amended Summons and

Complaint within 15 days of his receipt of a copy of this order with notice of entry; and it is further

ORDERED that Webster/Sadeler shall file and serve an answer to the Amended Complaint within 20 days of its receipt; and it is further

ORDERED that plaintiff's cross motion to amend the caption of the instant action is granted, and the caption is amended as follows:

ARMEN BENSON,
Plaintiff
-against-
UNITED STATES ATHLETIC TRAINING CENTER,
INC., GARY GUERRIERO P.T. P.C., GARY
GUERRIERO, P.T., MARY LEONARD a/k/a MARY
GUERRIERO, and OLIVIA J. WEBSTER a/k/a
OLIVIA J. SADELER,
Defendants.

and it is further

ORDERED that the movant shall file a copy of this Order with the Clerk of Trial Support and the County Clerk. Both are directed to mark their records accordingly.

FILED
DEC 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

DATED: December 16, 2012

ENTER:

lby

LOUIS B. YORK
J.S.C.