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SHORT FORM ORDER

INDEX No. 12-19062

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MG
002 - MotD

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ROSS ANDREW PERLOW HANSEN, by his Mother and Natural Guardian, DONNA PERLOW, DONNA PERLOW, Individually, and RICHARD HANSEN,

Plaintiffs,

- against -

FRANK JOHN NINIVAGGI, M.D., MARC BONAGUIDE, THE DEVEREAUX GLEN HOLME SCHOOL, JOHN DOE and JANE DOE,

Defendants.

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Attorney for Defendant Frank John Ninivaggi, M.D.
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Attorney for Defendant The Devereaux Glen Holme School and Marc Bonaguide
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Upon the following papers numbered 1 to 26 read on these motions to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; 6 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 21 ; Replying Affidavits and supporting papers 22 - 24; 25 - 26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Frank John Ninivaggi, M.D. for an order pursuant to CPLR 3211 (a) (8) dismissing the action for lack of personal jurisdiction is granted; and it is further

ORDERED that the motion by defendants The Devereaux Glen Holme School and Marc Bonaguide for an order pursuant to CPLR 3211 (a) (8) dismissing the action for lack of personal jurisdiction is converted to a motion for summary judgment pursuant to CPLR 3211 (c) and adjourned as set forth herein.

Plaintiffs commenced this negligence and medical malpractice action against The Devereaux Glen Holme School ("Devereaux"), a private school in Connecticut which Ross Andrew Perlow Hansen ("the plaintiff") attended, Dr. Ninivaggi, a psychiatrist, and Marc Bonaguide, a licensed social worker employed by Devereaux. The plaintiffs allege in the complaint that while the plaintiff attended Devereaux, he became a patient of Dr. Ninivaggi and a client of Mr. Bonaguide, and that while under their care, the plaintiff was not properly assessed and monitored during a medication taper, causing him to sustain physical and psychological injuries, for which he was hospitalized, after an episode that occurred while he was home on Christmas break.

In their answers, Devereaux and Mr. Bonaguide assert lack of personal jurisdiction as an affirmative defense. Dr. Ninivaggi has not served an answer.

Dr. Ninivaggi now moves to dismiss the complaint based on lack of personal jurisdiction, and Devereaux and Mr. Bonaguide move separately to dismiss the complaint based on lack of personal jurisdiction.

CPLR 302 provides, in pertinent part, that a court may exercise personal jurisdiction over any non-domicilliary who, in person or through an agent:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or . . .
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> (I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

While "[w]hat constitutes a transaction of business has not been precisely defined . . . it is clear that under the right circumstances, a single act may constitute a transaction within the ambit of the long-arm statute . . . Indeed, proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (Farkas v Farkas, 36 AD3d 852, 852 [2nd Dept 2007] [internal quotation marks and citations omitted]; see also, Paolucci v Kamas, 84 AD3d 766, 767 [2nd Dept 2011]). In determining whether a defendant's activities in New York were purposeful, the court must "closely examine the defendant's contacts for their quality" (Licci v Lebanese Can. Bank, SAL, 20 NY3d 327, 338 [2012]; see also, Grimaldi v Guinn, 72 AD3d 37 [2nd Dept 2010]).

With respect to Dr. Ninivaggi's assertion of lack of personal jurisdiction, Dr. Ninivaggi submitted an affidavit demonstrating that he does not transact business or own property in New York, and maintains no other contacts with New York which would support the exercise of long-arm jurisdiction over him (see Pursnani v Stylish Move Sportswear, Inc., 92 AD3d 663 [2nd Dept 2012]). Specifically, Dr. Ninivaggi states in his affidavit that he is a psychiatrist and is licensed to practice medicine in Connecticut. He is a consulting psychiatrist for students who are residents of Devereux, which is located in Connecticut. He states that he is not an employee of Devereux, but is an independent contractor who performs psychiatric services for students who attend Devereux. He prescribed medication for the plaintiff and was in the process of tapering a medication that had been prescribed due to side effects that the plaintiff had experienced while on the medication. His treatment of the plaintiff took place at Devereaux. He spoke to the plaintiff's parents on the phone several times regarding the tapering of the medication. He also spoke to Dr. Lipschitz of Long Island Jewish Hospital where the child had been admitted after the episode. Dr. Ninivaggi states that he has never lived in New York or practiced medicine there. All of the treatment which he provided to the plaintiff and the medications prescribed took place in Connecticut. He was served personally on August 28, 2012 at his home in Connecticut. He has never transacted business in New York or consented to jurisdiction in any New York court.

In her affidavit in opposition, Mrs. Perlow states that Dr. Ninivaggi was the in-school psychiatrist provided by Devereaux to treat the plaintiff and that he was paid by Devereaux for his services. She believed that Dr. Ninivaggi was employed by Devereaux and that he was Devereaux's Medical Director. She discussed the treatment of her son with Dr. Ninivaggi over the phone. Mr. Reese states in his affidavit that his investigation revealed that Dr. Ninivaggi is the Medical Director of Devereaux. In addition, he authored two books and has been published by a publisher in New York State. Mr. Reese states that he ordered a book written by Dr. Ninivaggi on the internet and it was shipped to his home in New York. Dr. Ninivaggi also advertises in a magazine called Psychology Today. In a reply affidavit, Dr. Ninivaggi states that he authored two chapters in a book which was published in Illinois. He also wrote two books in 2008 and 2010 which were published in Maryland. In 2011, he received royalties of $1,055.54 and in 2012 he received less than $1,000.00 in royalties. He does advertise his books in Psychology Today and that advertisement and his books can be found on the internet by anyone. He also states that he is acting as the Medical Director for Devereaux but he is not employed by them. He is an independent contractor and only provides consulting psychiatric services to Devereaux. It has been held that "mere solicitation of business within the state does not constitute the transaction of business within the state, unless the solicitation in New York is supplemented by business transactions occurring in the state" (O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 201 [1st Dept 2003]). It has also been held that communications and shipments sent to New York by an out-of-state doctor to a plaintiff's New York physician do not support CPLR 302 (a) (1) jurisdiction (see Etra v Matta, 94 AD2d 581, affd 61 NY2d 455 [1984]). In Etra v Matta, the defendant, similar to Dr. Ninivaggi, was not licensed to practice medicine in New York, did not solicit the plaintiff as a patient or maintain/own property or an office in New York or have any other business affiliations in New York, and merely exchanged telephone calls and letters with the plaintiff's doctor in New York after treating the plaintiff. The Appellate Division held that the doctor's treatment of a New York State resident in another state including telephone calls and letters to his New York physician could "not be deemed a purposeful act by which he availed himself of the privilege of conducting activities here, thus invoking the benefits and protections of this

state's laws" (id. at 584). The Appellate Division went on to state that even if the doctor's contacts could be seen as a transaction of business, "these contacts into New York State were for [the plaintiff's] benefit, and not for the purpose of transacting business in this state" (id. at 585). In affirming, the Court of Appeals stated that "[v]iewing the totality of [the doctor's] contacts with this State, in the form of written and telephonic communications and the additional provision of the experimental drug, we believe them to be too insubstantial to amount to such a 'transaction of business' as to warrant subjecting [the doctor] to suit in this forum" (Etra v Matta, 61 NY2d at 458-459). Likewise, here, the court finds that Dr. Ninivaggi's communications with the plaintiff's mother and his New York physician regarding the plaintiff's care is not enough to subject Dr. Ninivaggi to personal jurisdiction via CPLR 302 (a) (1).

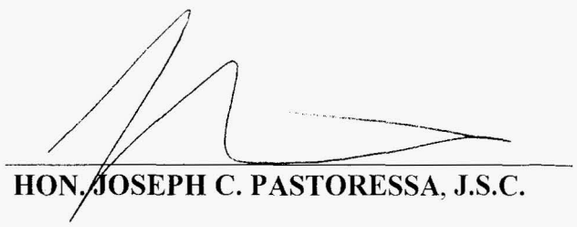
In addition, the plaintiff has not established that Dr. Ninivaggi should be subject to personal jurisdiction via CPLR 302 (a) (3). Even if it is found that Dr. Ninivaggi committed a tortious act in Connecticut which caused injury to the plaintiff in New York, the plaintiff has not established that Dr. Ninivaggi regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in New York, or expects or should reasonably expect that his actions have consequences in New York and derives substantial revenue from interstate or international commerce (see CPLR 302 [a] [3]; Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC, 90 AD3d 977 [2nd Dept 2011]). The court further notes that the plaintiffs failed to establish that essential jurisdictional facts may exist that are not presently known so as to warrant further jurisdictional discovery with respect to Dr. Ninivaggi (see Peters v Peters, 101 AD3d 403 [1st Dept 2012]).

Regarding the motion made by Devereaux and Mr. Bonaguide, which is pursuant to CPLR 3211 (a) (8), the court notes that the motion, having been made subsequent to service of answers by Devereaux and Mr. Bonaguide (*see* CPLR 3211 [e]), erroneously seeks relief under CPLR 3211 and should have been brought under CPLR 3212.

Whenever a court elects to treat an erroneously labeled motion as one for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211 [c]) unless a specific request for summary judgment was made and it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (see Kaplan v Roberts, 91 AD3d 127 [2nd Dept 2012]; Schultz v Estate of Sloan, 20 AD3d 520 [2nd Dept 2005]). Here, upon review of the papers, there was no specific request made for summary judgment and it cannot be said that the parties have deliberately charted such a course.

Accordingly, the motion by Dr. Ninivaggi is granted and the parties are hereby advised of the court's intention to treat the motion made by Devereaux and Mr. Bonaguide as one for summary judgment. The parties shall have an opportunity to make an appropriate record by the service and filing of additional affidavits and other supporting papers no later than three weeks from the date of this order. Upon the expiration of the three-week period, Devereaux and Mr. Bonaguide may re-notice this motion for hearing on five days' notice. Upon the service and filing of such notice, Devereaux and Mr. Bonaguide shall also serve upon the Clerk a copy of this order, and the Clerk, upon receipt, shall assign this motion a new sequence number.

Dated: September 23, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION