SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Christine J. Wright and Burt L. Wright,

Plaintiffs,

Index No.
805475/2016

DECISION and ORDER

- against -

Mot. Seq. #001

Kok-Min Kyan, MD, Rene Marcias- Rodriguez, MD, Lenox Hill Hospital, and Northwell Health, Inc.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by the filing of a Summons with Notice on December 14, 2016. This is an action alleging medical malpractice and lack of informed consent arising from medical treatment that Christine J. Wright ("Ms. Wright") received from defendants from June 23, 2014 through July 3, 2014. Her spouse Burt L. Wright brings a derivative claim for loss of services.

Presently before the court are defendants Lenox Hill Hospital and Northwell Health, Inc.'s ("Northwell Health") motions to dismiss the action as against them. By Notice of Motion filed on May 15, 2017, defendants move to dismiss the Complaint as to Lenox Hill Hospital pursuant to CPLR § 3211(a)(8) for plaintiffs' failure to acquire jurisdiction over Lenox Hill Hospital. Defendants move to dismiss the Complaint as to Northwell Health, pursuant to CPLR § 3211(a)(1) and (7). Plaintiffs oppose the motions. Plaintiffs cross move for an order pursuant to CPLR § 306-b granting them an extension to serve the Summons with Notice and Verified Complaint upon Lenox Hill Hospital, and deeming the pleadings annexed to their motion timely served, nunc pro tunc, on Lenox Hill Hospital. Plaintiffs, alternatively, seek an Order pursuant to CPLR § 306-b, granting them an extension to effectuate the service of the Summons with Notice and Verified Complaint upon Lenox Hill Hospital. Defendants oppose the cross motion.

Motion to dismiss the Complaint as to Lenox Hill Hospital

Turning first to defendants' motion to dismiss the Complaint as to Lenox Hill Hospital based on a lack of jurisdiction, CPLR § 3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that … the court has not jurisdiction of the person of the defendant."

Plaintiffs served the Summons with Notice upon Lenox Hill Hospital by service of process upon Ryann Cordaro ("Ms. Cordaro") at 2000 Marcus Avenue, New Hyde Park, New York, on December 22, 2016.

A process server's affidavit constitutes prima facie evidence of proper service. (*Matter of Nazarian v. Monaco Imports, Ltd.*, 255 A.D.2d 265 [1st Dept. 1998]). A defendant's "sworn, nonconclusory denial of service" is sufficient to dispute the veracity or content of the process server's affidavit. (*NYCTL 1998–1 Trust v. Rabinowitz,* 7 A.D.3d 459 [1st Dept. 2004]).

CPLR § 311(a)(1) provides for personal service on a corporation by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." CPLR § 311(a)(1) requires that the process server tender process directly to an authorized corporate representative, rather than an unauthorized person who later hands the process to an officer or other qualified representative. (*Jiggetts v. MTA Metro-N. R.R.*, 121 A.D.3d 414, 414 [1st Dept. 2014]).

In her sworn affidavit, Ms. Cordero states that she is a Senior Executive Assistant in the Legal Department of Northwell Health. Ms. Cordero further states that she is "not an agent authorized to receive service on behalf of Lenox Hill Hospital, or any other hospital, nor [has she] ever been an employee of Lenox Hill Hospital." Ms. Cordero states that the building located at 2000 Marcus Avenue, the location where service was made, is the address for the Northwell Health, and not Lenox Hill Hospital.

Plaintiffs do not challenge defendants' claim that the service made upon Lenox Hill Hospital via delivery of the Summons with Notice to Ms. Cordero was defective. Instead, by way of cross motion, plaintiffs seek additional time pursuant to CPLR § 306-b to serve their pleading upon Lenox Hill Hospital.

This Court may exercise its discretion to extend the 120-day period in CPLR §306-b to enable plaintiffs to properly serve Lenox Hill Hospital. CPLR §306-b

provides that "[i]f service is not made upon a defendant within the [120-day period] provided in this section, the court, upon motion, shall dismiss the action without prejudice... or upon good cause shown or in the interest of justice, extend the time for service."

A "good cause" extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. (*Henneberry v. Borstein*, 91 A.D.3d 493, 496 [1st Dep't 2012]). Good cause has been found where "the plaintiff's failure to timely serve process is a result of circumstances beyond its control." (*Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 32 [1st Dep't 2009]). The "good cause" extension, however, does not include conduct that is considered to be "law office failure." (*Henneberry*, 91 A.D.3d at 496).

An extension "in the interest of justice" is broader and more flexible than a "good cause" extension and can include law office failures as long as there is no prejudice to the defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 [2001] ["CPLR 306–b provides for an *additional and broader standard, i.e.,* the 'interest of justice,' to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant"]). A court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor ..., including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." (*Henneberry*, 91 A.D.3d at 496, citing *Leader,* 97 N.Y.2d at 105-106).

This action was commenced by the filing of a Summons with Notice on December 14, 2016. Plaintiffs attempted service on Lenox Hill Hospital on December 22, 2016. On January 17, 2017, defendants' attorneys filed a Notice of Appearance and Demand for Complaint on behalf of Lenox Hill Hospital and Northwell Health. On February 24, 2017, plaintiffs served a Verified Complaint on defendants in response to defendants' demand for a complaint. On March 15, 2017, defendants served their Answer, along with discovery demands. On May 15, 2017, defendants filed the instant motion to dismiss the action as against Lenox Hill Hospital based on lack of personal jurisdiction. On July 21, 2017, plaintiffs filed their cross motion seeking an extension to serve the Summons with Notice and Verified Complaint upon Lenox Hill Hospital.

In their cross motion, plaintiffs argue that they should be afforded an extension of time to serve Lenox Hill Hospital. Plaintiffs argue that "good cause" exists to warrant the extension because they have made reasonably diligent efforts to effectuate service upon Lenox Hill Hospital within the time provide by CPLR

§306-b. Plaintiffs assert that "Mr. Cordaro, nor anyone else from the legal department at Northwell Health, Inc., made any attempt to advise the process server (or your undersigned's office) that he/it was not accepting service of process on behalf of its hospital defendant, Lenox Hill Hospital, despite the Summons with Notice stating unequivocally that it is being served as Lenox Hill Hospital, c/o Northwell Health, Inc., Att: Office of Legal Affairs." Plaintiffs' counsel states that upon receipt of defendants' motion to dismiss, he contacted defendants' counsel and advised her that he had been hospitalized and out of the office. Plaintiffs' counsel requested that defendants withdraw their motion and waive the jurisdictional defect in the service. He states that once defendants' counsel advised him that defendants would not withdraw the motion, he then brought the cross motion on behalf of plaintiffs to extend the time to serve.

In opposition, defendants argue that good cause is not shown because plaintiffs should have realized that their attempted service on Lenox Hill Hospital, a hospital located in New York city, by leaving a copy with Mr. Cordaro at the Northwell Health building, located in Nassau County, was not proper as to Lenox Hill Hospital.

Plaintiffs further argue that "the interest of justice" would be served by granting their request for an extension of time to serve Lenox Hill Hospital. Plaintiffs argue that they made reasonably diligent efforts to serve Lenox Hill Hospital and brought the instant application without delay after the issue of service of process was raised. Plaintiffs further argue that the statute of limitations in this action has expired. With respect to the issue of statute of limitations, plaintiffs' medical malpractice cause of action accrued at the latest on July 3, 2014. Pursuant to the applicable two and one half year statute of limitations afforded to actions for medical malpractice, plaintiffs had until January 3, 2017 to commence litigation. Since this action was filed on December 22, 2016, it was commenced within the statute of limitations and was timely. However, while the action was timely filed, the statute of limitations has now expired.

Plaintiffs further argue that an extension would not create any prejudice to Lenox Hill Hospital because Lenox Hill Hospital has appeared and received actual notice of the action at most 27 days after its commencement on December 14, 2016 and within 120 days following the filing of the Summons with Notice. Plaintiffs further argue that Lenox Hill Hospital has already interposed an Answer, and sought discovery from Plaintiffs prior to making their motion.

Defendants, in turn, argue that the "interest of justice" does not warrant an extension of time because plaintiffs failed to exercise reasonable diligence in

attempting to effectuate service, Lenox Hill was served with the complaint after the expiration of the statute of limitations (although the action was filed timely), plaintiffs failed to establish a meritorious claim, and plaintiffs failed to act promptly.

Here, plaintiffs timely commenced the action and exercised reasonable diligence and made a good-faith attempt to serve Lenox Hill Hospital within the 120-day period. Defendants received actual notice of the lawsuit within the 120 days period and before the statute of limitations expired, as evidenced by the notice of appearance filed by their attorney on January 17, 2017. Defendants have not shown any prejudice resulting from a delay in formal service. Therefore, even if this case does not qualify for an extension under the "good cause" exception, this Court finds that an extension granting Plaintiff additional time to effect proper service is warranted in the interest of justice. (*See Lippett v. Educ. All.*, 14 A.D.3d 430, 431 [1st Dep't 2005] [granting extension in the interest of justice where action was timely commenced, plaintiff made good-faith attempt to serve defendant, defendant received actual notice of the claim within the 120-day period and before expiration of statute of limitations and showed no prejudice from the delay]).

Motion to dismiss the Complaint as to Northwell Health

Defendants also move for an Order, pursuant to CPLR 3211(a)(1), (a)(7), and (c), granting dismissal of the Complaint as to defendant Northwell Health.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> (1) a defense is founded upon documentary evidence; or …
>
> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly

contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable." (*Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 996–97, 913 N.Y.S.2d 668 [2d Dept. 2010]). "Neither affidavits, deposition testimony, nor letters are considered 'documentary evidence' within the intendment of CPLR 3211(a)(1)." (*Granada*, 78 A.D.3d at 996-997). *See also Flowers v. 73rd Townhouse LLC*, 99 A.D. 3d 431 [1st Dept 2012]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

"[A] claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. (*Weiner v. Lenox Hill Hosp.*, 88 N.Y.2d 784, 788 [1996]). To establish a *prima facie* case of medical malpractice, "a plaintiff must show not only that the doctor deviated from accepted medical practice but also that the alleged deviation proximately caused the patient's injury." (*Koeppel v Park*, 228 A.D. 2d 288, 289 [1st Dept 1996]). A hospital is liable for the negligence or malpractice of its employees. (*Hill v. St. Clare's Hosp.*, 67 N.Y. 2d 72 [1986]).

The Complaint alleges that Ms. Wright was admitted to Lenox Hill Hospital and received medical care from defendants Kok-Min Kyan, M.D. ("Dr. Kyan") and Rene Marcias-Rodriguez, M.D. ("Dr. Marcias-Rodriguez"), from June 23, 2014 through July 3, 2014. The Complaint alleges, *inter alia*, that Dr. Kyan and Dr. Marcias-Rodriguez were negligent in the prenatal and postnatal medical care they provided to Wright, and Wright sustained damages as result. The Complaint alleges that Lenox Hill Hospital and Northwell Health are liable for the acts and or omissions of Dr. Kyan and Dr. Marcias-Rodriguez under the doctrine of respondeat superior.

Specifically, as against Northwell Health, the Complaint alleges that from June 23, 2014 through July 3, 2014, Northwell Health was "liable for the acts and/or omissions of its employee[s]" Dr. Kyan and Dr. Marcias-Rodrigeuz under the doctrine of respondeat superior. The fourth cause of action alleges that on June 23, 2014 through July 3, 2014, Wright "was a patient under the professional

medical treatment and care of defendant, Northwell Health, Inc., its physicians, nurses, physician assistants, agents, servants, and/or employees," including Dr. Kyan and Dr. Marcias-Rodriguez, the medical treatment Wright received from them was performed "improperly, negligently, and carelessly," and Wright sustained injuries as a result.

In support of their motion to dismiss, Defendants assert that that Northwell Health does not render medical care and while it is the corporate parent of Lenox Hill Hospital, it does not maintain control over Lenox Hill Hospital, and therefore cannot be liable for medical malpractice. Defendants submit the affidavit of Avraham Z. Schwartz, Esq., who is currently employed by Northwell Health, as the Assistant Vice President of Risk Management. Mr. Schwartz states that he is "familiar with corporate relationship between Northwell Health, Inc., and Lenox Hill Hospital, as well as the applicable liability insurance coverage relative to this matter." Mr. Schwartz further states, "Lenox Hill Hospital maintains professional liability insurance through Northwell Health, Inc. The type and amount of professional liability insurance available is not affected by whether or not Northwell Health, Inc., is a named party to this action."

Plaintiffs have alleged that Northwell Hospital employed physicians who rendered medical care to Wright, that the treatment was rendered in a way that deviated from accepted medical practice, and that such departure was a proximate cause of injury to Wright. Accordingly, accepting all allegations of the Verified Complaint as true, plaintiffs have asserted a cause of action for medical malpractice against Northwell Health. The affidavit of Mr. Schwartz does not conclusively establish a defense to plaintiffs' Complaint as a matter of law.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss the Complaint as against defendant Lenox Hill Hospital is denied; and it is further

ORDERED that plaintiffs' cross motion to extend the time to serve Lenox Hill Hospital is granted and plaintiffs are provided with a 30 day extension to properly effect service upon defendant Lenox Hill Hospital; and it is further

ORDERED that Defendants' motion to dismiss the Complaint as against defendant Northwell Health, Inc., is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: September 28, 2017

EILEEN A. RAKOWER, J.S.C.