Newman v Mount Sinai Med. Ctr., Inc.
2018 NY Slip Op 30172(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 151392/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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AJA NEWMAN,

Plaintiff,

- against -

THE MOUNT SINAI MEDICAL CENTER, INC., THE MOUNT SINAI HOSPITAL; MOUNT SINAI HEALTH SYSTEM, DAVID NEWMAN, MD; ANDREW LAPSLEY, PA; ANDY S. JAGODA, MD; XIAO HAN, MD; LEILANI P. HARAYO, RN; JUNE RANOLA WALKER, RN; GABRIEL ABREU, RN; SELENA N. HUNTER, RN; TREMAINE REID, RN; and JOHN-JANE Doe 1-10, all in their official and individual capacities,

Defendants.

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Index No.
151392/2016

DECISION and ORDER

Mot. Seq. #001

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

Plaintiff Aja Newman ("Aja") commenced this medical malpractice action by summons and complaint on February 21, 2016 against Defendants The Mount Sinai Medical Center, Inc ("Mount Sinai Inc), The Mount Sinai Hospital (Mount Sinai Hospital), Mount Sinai Health System ("Health"), David Newman, M.D. ("Newman"), Andrew Lapsley, P.A. ("Lapsley"), Andy S. Jagoda, M.D. ("Jagoda"), Xiao Han, M.D., ("Han"), Leilani P. Harayo, R.N. ("Harayo"), June Ranola Walker, R.N. ("Walker"), Gabriel Abreu, R.N. ("Abreu"), Selena N. Hunter, R.N. ("Hunter"), Tremaine Reid, R.N. ("Reid"), and John-Jane Doe 1-10 ("Doe 1-10") (collectively "Defendants"). Aja alleges *inter alia* that Newman[1] sexually assaulted her and Defendants departed from accepted standards of medical practice thereafter. Her first cause of action alleges *inter alia* that Mount Sinai Inc and Mount Sinai Hospital negligently hired and retained dangerous staff. The second and third causes of action allege *inter alia* that Newman assaulted and

[1] Newman is currently serving a two-year sentence in Gowanda Correctional Facility. (affirmation of Lichtman at 3)

battered Aja. The fourth cause of action alleges *inter alia* that Defendants intentionally inflicted emotional distress upon Aja. The fifth cause of action alleges *inter alia* that Defendants negligently inflicted emotional distress upon Aja. The sixth cause of action alleges *inter alia* that Defendants departed from accepted standards of medical practice when they failed to properly record the medications administered to Aja and failed to report the alleged assault and battery. Originally, Newman retained the law firm of Hafetz & Necheles (H&N).

Pursuant to CPLR 321, H&N moves by Order to Show Cause to withdraw as counsel for Newman. Newman does not oppose. However, Aja opposes and cross-moves for an order compelling Newman to produce discovery pursuant to this Court's order dated November 21, 2017. Aja also moves to sever the causes of action against Newman in accordance with CPLR 603.

Aja argues that she served her discovery demands on Newman on August 9, 2017 and November 20, 2017. On November 21, 2017, this Court entered an Order directing Newman to respond to the demands by January 5, 2018. Among other things, this Court also directed that Aja be deposed on or before January 10, 2018. Aja alleges that this discovery remains outstanding in spite of this Court's November 21, 2017 order. Aja argues that she will be prejudiced by delay should the Court grant H&N's withdrawal without first compelling discovery. Indeed, Aja asserts that H&N seeks leave to withdraw because of the "difficulty in reaching and communicating . . . with Dr. Newman." (affirmation of Lichtman at 5). Insofar as Dr. Newman's incarceration may further delay resolution of this action, Aja argues that severance of her claims against him is warranted. Especially because her claims against Newman are different from those of the other defendants. Furthermore, Aja asserts that severance will not prejudice the other defendants because they did not raise any cross-claims against Newman.

The parties appeared for a conference on January 30, 2018. Aja represented that Newman provided her with the discovery that she sought in this Order to Show Cause. Additionally, H&N addressed its reasons for withdrawal during an *in-camera* conference. Among the reasons provided, H&N stated that as a criminal defense firm, it does not represent clients in civil actions. Indeed, it only appeared in this civil action because Newman had the firm on retainer in connection with the prior criminal action. H&N submits an affidavit of Newman wherein he consents to H&N's withdrawal and indicates his intention to proceed *pro se*. Additionally, Lapsley represented that he joins in with the opposition filed by Mount Sinai Inc, Mount Sinai Hospital, Health, Jagoda, Han, Harayo, Walker, Abreu, and Hunter. These defendants oppose Aja's request to sever the claims against Newman. They

argue *inter alia* that common questions of facts are involved and that Aja has not shown prejudice.

Attorney Withdrawal

CPLR 321 (2) provides, "An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct." The First Department has stated, "[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client." (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]). The Code of Professional Responsibility provides in relevant part, "a lawyer may withdraw from representing a client when . . . the client knowingly and freely assents to termination of the employment." (McKinney's Cons Laws of NY, Book 29, Rules of Professional Conduct Rule 1.16 [c] [10])

"[A]bsent proof of discharge for cause, [an attorney] cannot be compelled to give up plaintiff's file before such disbursements are paid or secured." (*Tuff & Rumble Management, Inc, v Landmark Distributors, Inc.*, 254 AD2d 15, 15 [1st Dept 1998]) Accordingly, in *Warsop v Novik* (50 AD3d 608, 609 [1st Dept 2008]), the First Department of the Appellate Division modified the trial court's order to provide "that the subject file be turned over only after plaintiff pays disbursements . . . or provides security therefor . . ."

Severance

CPLR 603 provides that, "In furtherance of convenience or to avoid prejudice the court may order a severance of claims . . ." "Severance splits a single action into one or more distinct actions, each of which will have a separate trial and its own final judgment and bill of costs." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, 2017 Electronic Update, CPLR § 603) Severing claims is within the judge's discretion. (*see Hopper v Regional Scaffolding and Hoisting Co., Inc.*, 272 AD2d 242 [1st Dept 2000].)

"Where there is a 'common nucleus of facts,' severance requires a showing that a joint trial will result in 'prejudice or substantial delay.'" (*Vecciarelli v King Pharmaceuticals, Inc.*, 71 AD3d 595, 596 [1st Dept 2010].) This showing must be made by the party moving for severance. (*id.*) Should the court find that severance

will not avoid confusion, delay or prejudice but raise the possibility of inconsistent verdicts with respect to liability, severance should be denied. (*id.*) Indeed, "[o]ne jury hearing all of the evidence can better determine the extent to which each defendant caused plaintiff's injuries and should eliminate the possibility of inconsistent verdicts which might result from separate trials." (*Kupferschmid v Hennessy*, 221 AD2d 225, 226 [1st Dept 1995].)

However, moving to sever claims maybe premature when "it is too early . . . for a determination that such a format will cause prejudice or substantial delay." (*see Vecciarelli v King Pharmaceuticals, Inc*, 71 AD3d 595 [1st Dept 2010].) In such cases, the First Department has previously denied the motion" without prejudice to renewal after completion of discovery." (*id.*)

Respondeat Superior

"An intentional tort, such as the assault here, committed by an employee can result in liability for his or her employer, under respondeat superior if the employee was acting 'within the scope of the employment' at the time of the commission of the tort." (*Ramos v Jake Realty Co.*, 21 AD3d 744, [1st Dept 2005].)

Negligent Hiring and Retention

"In those instances where an employer cannot be held vicariously liable for torts committed by its employee, the employer can still be held liable under theories of negligent hiring and negligent retention." (*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004].) "An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." (*id.* at 130)

Negligent and Intentional Infliction of Emotional Distress

"A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." (*Sheila C. v Povich*, 11 AD3d at 129.)

A "cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants 'so

outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to regarded as atrocious, and utterly intolerable in a civilized community." (*Sheila C. v Povich*, 11 AD3d at 129.)

Discussion

Preliminarily, the discovery request is moot because Newman provided Aja with the materials that she sought. Because Newman, in his affidavit, knowingly and freely assents to the termination of H&N's employment, good and sufficient cause exists for H&N to withdraw. (McKinney's Cons Laws of NY, Book 29, Rules of Professional Conduct Rule 1.16 [c] [10]; *Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017].) Insofar as Newman states his intention to proceed *pro se*, a stay of this action is not required.

Whether Aja's claims against Newman warrant severance is a matter within this Court's discretion. (*see Hopper v Regional Scaffolding and Hoisting Co., Inc.*, 272 AD2d 242 [1st Dept 2000].) Here, there is a common nucleus of facts because all of the claims against the Defendants regard Newman's assault and battery and the events that transpired thereafter. (*Vecciarelli v King Pharmaceuticals, Inc.*, 71 AD3d 595, 596 [1st Dept 2010].) Aja accordingly must show that a joint trial will result in prejudice or substantial delay. (*id.*) That Newman is incarcerated and intends to proceed *pro se* is not persuasive. Although Aja argues that Newman's circumstances will likely delay trial, his circumstances may have the opposite effect because he is not working or traveling. Indeed, the parties know exactly where he resides until he completes his sentence notwithstanding the possibility of an earlier discharge. Severance would not avoid confusion either, but complicate the resolution of these claims, many of which involve vicarious liability. (*Vecciarelli v King Pharmaceuticals, Inc.*, 71 AD3d at 596) For instance, it is alleged that Newman administered a second shot of morphine to Aja prior to the alleged sexual assault. Without making any findings of fact or determinations of law, the Court notes that one jury could find that Newman intentionally committed this tort while acting within the scope of his employment while the other jury may not. (*Ramos v Jake Realty Co.*, 21 AD3d 744, [1st Dept 2005].) Therefore, inconsistent verdicts would be returned as to Mount Sinai Inc and Mount Sinai Hospital's liability under respondeat superior. (*id.*) Accordingly, "[o]ne jury hearing all of the evidence can better determine the extent to which each defendant caused plaintiff's injuries and should eliminate the possibility of inconsistent verdicts which might result from separate trials." (*Kupferschmid v Hennessy*, 221 AD2d 225, 226 [1st Dept 1995].) However, the Court notes that discovery is not complete. Without more information and perhaps motion practice, "it is too early .

. . for a determination that [the current] format will cause prejudice or substantial delay." (*see Vecciarelli v King Pharmaceuticals, Inc*, 71 AD3d 595 [1st Dept 2010].)

Wherefore it is hereby,

ORDERED that Hafetz & Necheles's Order to Show Cause to be relieved as attorneys for defendant David Newman, M.D. is granted without opposition; and it is further

ORDERED that Aja Newman's request for severance of her claims against defendant David Newman, M.D. is denied without prejudice to renewal after completion of discovery; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Hafetz & Necheles serve a copy of this order with notice of entry upon defendant David Newman, M.D. and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Hafetz & Necheles serve a copy of any disbursements, costs and expenses upon David Newman, M.D.; and it is further

ORDERED that, WITHIN 5 DAYS OF THE DATE OF THIS DECISION, David Newman, M.D. pay the disbursements, costs and expenses or provide security therefor; and it is further

ORDERED that, WITHIN 6 DAYS OF THE DATE OF THIS DECISION, the law firm of Hafetz & Necheles serve David Newman, M.D.'s client file upon David Newman, M.D.; and it is further

ORDERED that all parties are directed to appear for a compliance conference on March 6, 2018, at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D.

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

Dated: JANUARY 31, 2018

Eileen A. Rakower, J.S.C.