

Schaaff v Antonacci

2018 NY Slip Op 30845(U)

April 27, 2018

Supreme Court, New York County

Docket Number: 805065/17

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

-----X
MICHAEL SCHAAFF,

Index No.: 805065/17

Plaintiff,

-against-

M. DARRYL ANTONACCI, M.D., F.A.C.S. and
UNIVERSITY MEDICAL GROUP OF PRINCETON
AT PLAINSBORO,

Defendants.

-----X\
JOAN MADDEN, J.:

Defendants move to dismiss the complaint pursuant to CPLR 327(a) on forum non
conueniens grounds. Plaintiff oppose the motion.

Background

This is an action for medical malpractice and lack of informed consent arising out of back
surgery performed on plaintiff by defendant Darryl Antonacci, M.D. (Dr. Antonacci) on February
27, 2015, at the facility of defendant University Medical Group of Princeton At Plainsboro
("University Medical") located in New Jersey. Plaintiff commenced this action *pro se* by filing a
summons and complaint in this court on February 23, 2017. On February 27, 2017, the *pro se*
plaintiff filed a complaint in New Jersey Superior Court ("the New Jersey Action"). On August
21, 2017, plaintiff retained counsel. Based on the pendency of the New Jersey Action,
defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(4) on the grounds of
another action pending. The motion was rendered moot after plaintiff filed a stipulation in the
New Jersey Action dismissing the action without prejudice.

Defendants now move to dismiss the complaint on forum non conveniens grounds,

asserting that plaintiff's claims are more appropriately adjudicated in New Jersey which is the where the surgery giving rise to the alleged malpractice occurred, and where Dr. Antonacci and plaintiff both reside. As for University Medical, defendants note that it was formed under the laws of New Jersey and has its principal place of business in New Jersey. In support of their motion, defendants submit Dr. Antonacci's affirmation in which he states that "he maintain[s] a fully staffed primary New Jersey office open daily, and an unstaffed secondary New York office," and that with the exception of one post-operative office visit by plaintiff to his Manhattan office on April 8, 2015, he did not render any care to plaintiff in New York. According to Dr. Antonacci, he sees patients in his New York office "two or three hours a week" but does not see patients there every week. He also states that he saw plaintiff at a post-surgery emergency room visit in New Jersey.

In opposition, plaintiff argues that defendants have failed to show that New York is an inconvenient forum without a substantial nexus to the action.¹ Specifically, plaintiff asserts that although the surgery occurred in New Jersey, the majority of treatment occurred at Dr. Antonacci's New York office, Dr. Antonacci is licensed to practice medicine in New York, and the medical imaging was performed in New York, and thus the true locus of the action is in New York. In support of his position, plaintiff submits his affidavit in which he provides a New Jersey address² and states that he "primarily saw Dr. Antonacci in his New York

¹Plaintiff also argues that Dr. Antonacci's affirmation is inadmissible as he is a party to this action and thus does not meet the requirements of CPLR 2016(a) for submission of a physician's affirmation. However, this argument is moot as defendants submit an affidavit from Dr. Antonacci in reply, together with a certificate of conformity.

²In his affirmation in opposition, plaintiff's counsel erroneously states that plaintiff is a New York resident.

office....underwent all diagnostic testing in New York...[and has] routinely returned to New York for treatment.” Plaintiff states that Dr. Antonacci “insisted that the surgery be performed at [University Medical] although my preferred location was Mount Sinai Hospital in New York.” Plaintiff also states that “up to and prior to the date of surgery, I was working in the State of New York.”

In addition, plaintiff argues that as the medical imaging was performed in New York, numerous treating physicians from New York may be called at trial. Plaintiff argues that under these circumstances, the motion should be denied as although the parties are not New York residents, New York has a substantial interest in the action and the burden on the New York courts is low, citing Krieger v. Glatter, 129 AD3d 536 (1st Dept 2015)(denying motion to dismiss personal injury action commenced in New York on forum non conveniens grounds even though all the parties and a number of healthcare providers were New Jersey residents, where accident occurred in New York and plaintiff received considerable treatment in New York, and New York Police Department responded to incident).

In reply, defendants argue that to the extent that the court finds that the location of plaintiff’s visits to Dr. Antonacci’s office is a factor in deciding the motion, that a hearing be held with respect to this issue. They also note that although plaintiff maintains that he will call treating physicians from New York at trial, he fails to identify such witnesses.

By interim order dated February 8, 2018, the court directed defendants to provide medical records with respect to plaintiff’s treatment, separated as to treatment occurring in New York and New Jersey, gave plaintiff an opportunity to submit supplemental papers in response to these records, and set the matter down for oral argument.

The medical records submitted by defendants show that with respect to plaintiff's treatment in New York, Dr. Antonacci saw plaintiff once before surgery, on February 11, 2015, and once afterwards, on April 8, 2015. As for plaintiff's treatment in New Jersey, in addition to the February 27, 2015 surgery, the records show that Dr. Antonacci saw plaintiff in his New Jersey office for his initial consultation on February 3, 2015, and three times after surgery on March 17, and 24, 2015, and on June 2, 2015. Dr. Anotonacci also saw plaintiff in at emergency room at a New Jersey hospital on March 6, 2015.

In his supplemental response, plaintiff maintains that he had extensive diagnostic testing performed in New York both before and after the surgery, and was treated in New York for the injuries he sustained as a result of the alleged malpractice, including corrective surgery.³

Discussion

In determining whether an action should be dismissed on forum non conveniens grounds, the court considers various factors including "the residency of the parties, the potential hardship to proposed witnesses, the availability of another forum, the situs of the underlying accident, and the burden upon the New York courts...." Economos v. Zizikas, 18 AD3d 392, 393 (1st Dept 2005); see also, Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 478-479 (1984), cert denied, 469 US 1108 (1985). The issue of whether New York is an inconvenient forum is subject to the discretion of the trial court and no single factor is controlling. Islamic Republic of Iran v. Pahlavi, 62 NY2d at 478-479.

³Plaintiff also argues that this court has personal jurisdiction over defendants based on their New York contacts and the transaction of business in the state. The court need not address this argument since whether the court has personal jurisdiction over defendants is not at issue on this motion.

“Generally, nonresidents of New York State are allowed to bring an action in the state to litigate their disputes as a matter of comity. However, courts are not required to use their resources to hear cases that have no connection to their state.” Economos v. Zizikas, 18 AD3d at 393. In this connection, it has been held that “[a] nonresident plaintiff in a tort case must demonstrate special circumstances which would warrant the retention of the action in New York, or risk dismissal of the action on forum non conveniens grounds.” Id

Under this standard, the court finds that the motion should be granted as the surgery underlying this malpractice action occurred in New Jersey, and the parties are New Jersey residents. In addition, the majority of plaintiff medical treatment by Dr. Antonacci occurred at his New Jersey office. Furthermore, while plaintiff had medical imaging performed in New York and was treated post-operatively in here, these treatments are not directly related to the claims of malpractice. Moreover, New Jersey provides an appropriate forum for adjudicating the claim and, as directed below, the grant of this motion shall be conditioned on defendants’ waiver of any statute of limitations defense.

Finally, Krieger v. Glatter on which plaintiff relies in opposition to the motion, is distinguishable from the instant case. In that case, the court denied a motion to dismiss on forum non conveniens grounds where the parties were New Jersey residents and plaintiff had received medical care in New Jersey; however, significantly, the underlying motor vehicle accident happened in New York, and was responded to by New York City police officers.⁴ In contrast, here, not only are the parties New Jersey residents and a New Jersey hospital, but the underlying

⁴In addition, the court in Kreiger noted that discovery in the action had been completed and liability determined.

event in this action, that is plaintiff's surgery, occurred in New Jersey.

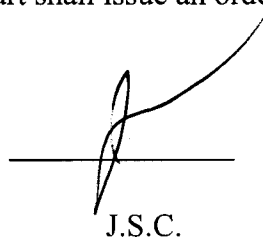
Accordingly, it is

ORDERED that defendants' motion to dismiss this action on the ground that New York is an inconvenient forum is granted on condition that defendants stipulate to waive the defense of statute of limitations in the event the action is commenced in New Jersey; and it is further

ORDERED that within 30 days of efileing this order, defendants shall efile proof that they waived the statute of limitations defense and notify the court as to such efileing; and it is further

ORDERED that upon receipt of such notice, the court shall issue an order directing the Clerk of the Court to dismiss the complaint.

DATED: April 27 2018



J.S.C.

**HON. JOAN A. MADDEN
J.S.C.**