

<b>Robins v Procure Treatment Ctrs., Inc.</b>
2018 NY Slip Op 31455(U)
July 2, 2018
Supreme Court, New York County
Docket Number: 805644/2015
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. George J. Silver PART 10**

*Justice*

**BARBARA ROBINS**

**Plaintiff**

**v.**

**PROCURE TREATMENT CENTERS, INC., PRINCETON PROCURE MANAGEMENT LLC, PROCURE PROTON THERAPY CENTER, PRINCETON RADIATION ONCOLOGY, OREN CAHLON, MD, HENRY K. TSAI, MD, EUGEN B HUG, MD, BRIAN H. CHON, MD, LISA "DOE" (JANE DOE #1), JOSE "DOE" (JOHN DOE #1), RAJ SHRIVASTAVA, MD, THE MOUNT SINAI HOSPITAL and IBI PROTON THERAPY, INC. a/k/a IBI PROTON EQUIPMENT**

**Defendants.**

INDEX NO. 805644/2015

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

MOTION CAL. NO. \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Defendants RAJ SHRIVASTAVA, MD and MOUNT SINAI HOSPITAL ("defendants") move, pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7), for an order dismissing plaintiff's Verified Complaint as against them for failure to state a viable cause of action.

This matter arises from claims by plaintiff BARBARA ROBINS ("plaintiff") that while she was undergoing proton therapy of the head at a proton therapy center, she was exposed to excessive and unnecessary doses of radiation to both optic nerves, rendering her blind from radiation toxicity.

Defendants contend that plaintiff cannot sustain a viable cause of action against them since none of the moving defendants administered, directed or supervised plaintiff's proton therapy, and none received a referral fee or fee for services in connection with the proton therapy administered to plaintiff. Moreover, defendants contend that they did not render treatment to plaintiff pursuant to a consortium agreement with Procure Proton Therapy Center, the facility at which plaintiff's therapy was administered. As such, pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7), defendants submit that plaintiff's Verified Complaint must be dismissed in its entirety as to Dr. Shrivastava and Mt. Sinai, as it fails to state a viable cause of action against either moving defendant.

In opposition, plaintiff contends that her allegations are not that defendants directly managed her treatment in New Jersey, but that they co-" managed" her proton radiation treatment from New York, in tandem with Princeton Procure Management, LLC ("PPM") and physicians of Princeton Radiation Oncology ("PRO"),

as evidenced in billing records. PPM alleges that defendants billed plaintiff for the services rendered by Dr. Shrivastava, a New York State licensed physician, in the amount of \$217,061.00, and took plaintiff's money for these billed services.

In an affidavit dated February 26, 2018, Tom Hsin-Chieh Wang ("Wang"), a PPM employee, confirmed that PPM had indeed put Dr. Shrivastava on plaintiff's billing statements for "management," that these bills had been paid, and that Dr. Shrivastava was routinely copied on "external treatment notes" regarding her case. Plaintiff annexes her own affidavit in opposition to defendants' motion. In it, she avers that Dr. Shrivastava was a member Mount Sinai's tumor board which sent plaintiff to PPM. There, she states that she was provided with dozens of bills totaling \$217,016.00 for Dr. Shrivastava's "management" of her case. Plaintiff further states that on at least twelve (12\_ of the dates on which he was managing her case, the cyclotron failed, raising issues about plaintiff's safety.

On January 25, 2018, the Appellate Division, First Department held, "[I]n this case, plaintiff did not seek out PPM. She says that she was directed to PPM by her New York doctor, defendant, Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava's services" (see *Robins v. Procure Treatment Centers, Inc.*, 157 AD3d 606 [1st Dept. 2018]). As such, as with PPM, it would appear here that plaintiff has a "sufficient start" in establishing that New York courts have jurisdiction over defendants under CPLR §§ 301 and 302(a)(1) to be entitled to disclosure pursuant to CPLR §3211(d) (see *Peterson v. Spartan Indus.*, 33 NY2d 463, 467 [1974]). As such, dismissal at this juncture in the litigation would be premature.

As defendants' affidavits raise questions of fact in view of the aforementioned billing records, and as plaintiff is entitled to have all inferences drawn in her favor on a CPLR §3211 motion to dismiss, plaintiff submits that the instant motion must be denied.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez*, 84 NY2d 83 [1994]; *1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR §3211(a) (7) motion (see *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, 262 AD2d 607, *supra*), and the court will not examine affidavits submitted on a CPLR §3211(a) (7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR §3211(a) (7) motion for the

limited purpose of correcting defects in the complaint (see *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]). In determining a motion brought pursuant to CPLR §3211(a) (7), the court “must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory” (*1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771, *supra*).

Moreover, pursuant to CPLR §3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” Such a motion may be granted “only where the documentary evidence utterly refutes [the complaint’s] factual allegations, conclusively establishing a defense as a matter of law” (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314 [2002]). The test on a CPLR §3211(a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P. C.*, 267 AD2d 10, 11 [1st Dept 1999]).

In the instant case, evidence supporting plaintiff’s allegations is contained in the billing records annexed to plaintiff’s opposition, which directly link Dr. Shrivastava to “management” of plaintiff’s radiation treatment. The substantial sum billed for his services, \$217,061.00, and PPM’s admission in the Wang affidavit that PPM did indeed put him on the bills and copied him on many notes related to her care, directly contradicts Dr. Shrivastava’s moving affidavit.

Moreover, in her affidavit, plaintiff confirmed that she received her billing statements from Princeton Procure, not from the individual physicians, and that she signed her insurance checks over to PPM to pay for their services as billed. This confirms that plaintiff paid Princeton Procure for Dr. Shrivastava’s services, irrespective of whether Dr. Shrivastava acknowledges receiving those payments. In his affidavit, Dr. Shrivastava also states that he has, “no recollection of being present when plaintiff’s case was presented to a Mt. Sinai tumor board.” Dr. Shrivastava’s self-serving affidavit and challenged recollection cannot serve as a basis for judgment in defendants’ favor, especially since plaintiff contends that she was informed by Mt. Sinai that Dr. Shrivastava was in fact on the tumor board that reviewed her case. Indeed, Dr. Shrivastava’s affidavit is belied by the fact that he was on the tumor board, regularly was copied on notes pertaining to plaintiff’s case, and appears on the billing records that bill for his management of plaintiff’s care on 29 out of her 42 treatment sessions for a total of \$217,016.00.

Plaintiff should be afforded the opportunity to review documents related to Dr. Shrivastava’s billing and depose Dr. Shrivastava and other members of the tumor board on behalf of Mt Sinai, before a motion to dismiss such as the instant motion

can truly be entertained. As the documents submitted in connection with defendant's motion do not unequivocally establish a basis for judgment in defendants' favor, and as plaintiff has furnished sufficient evidence to challenge the instant motion, defendants' motion is denied, without prejudice to defendants renewing their application following further discovery, including the disclosure of outstanding discovery demands to plaintiff, and defendants permitting plaintiff to perform a forensic accounting.

Accordingly, it is hereby

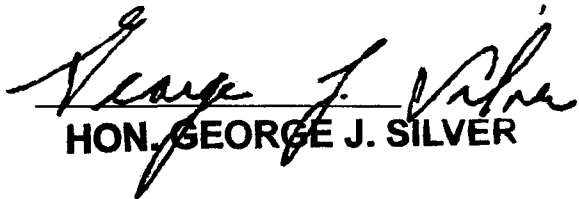
ORDERED that defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiff's cross motion compelling discovery is granted to the extent that defendants are directed to respond to plaintiff's outstanding discovery demands and permit plaintiff to perform a forensic accounting; and it is further

ORDERED that the parties are directed to appear for a conference before the court on Tuesday August 21, 2018 at 9:30 AM at 111 Centre Street, Room 1227.

The foregoing constitutes the decision and order of the court.

Dated: July 2, 2018  
New York, New York

  
HON. GEORGE J. SILVER

- 1. Check one: .....  Case Disposed  Non-Final Disposition
- 2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other