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

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Tania Ventura Perez, Administrator of the Estate of Ramona Antonia Perez,

Plaintiff(s),

- against -

139 Medical Facility, P.C., Muhammad Mishbah-Ul Haque, M.D., Muhammad Haque Jr., M.D., Jee Sook Lee, M.D., Jacqueline Flores, N.P., Yasmine Jones, N.P., Natalie Wilson, N.P. and Michelle Cabrera, P.A.,

Defendants.

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Index No. 450552/2016

Decision and Order

Mot. Seq. 8

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

Defendant Yasmine Jones, N.P. ("Jones"), moves by Order to Show Cause for an Order "vacating the notice of vouching-in dated August 9, 2019 as untimely; and dismissing any vouching-in claims against Jones as jurisdictionally barred."

Defendants 139 Medical Facility, P.C. d/b/a Avicenna Care ("139 Medical Facility"), Muhammad M. Haque, M.D. s/h/a Muhammad Mishbah-ul Haque, M.D., and Muhammad Haque, Jr., M.D. (collectively, "Defendants") oppose the motion.

Background

Ramona Antonia Perez ("the Decedent") was treated at 130 Medical Facility from September 25, 2008 through and including April 2, 2013 for various ailments including headaches, shortness of breath, and coughing. She died on March 11, 2014. Tania Ventura Perez ("Plaintiff"), as the administrator of the Decedent's estate, brought this medical malpractice action on August 4, 2015 alleging that the Decedent died from brain and lung cancer that the defendants negligently failed to

detect and treat. The defendants are physicians, nurse practitioners, and a physician assistant that are alleged to have been employees of 139 Medical Facility who rendered medical care to the Decedent.

On July 29, 2016, Plaintiff moved for default judgment against Jones based on Jones' failure to appear in the action. On August 30, 2016, the Honorable Joan B. Lobis, J.S.C. granted Plaintiff's motion "solely to the extent of setting to matter down for an inquest on what damages were proximately caused by the malpractice of Yasmine Jones, N.P., and the extent of damages." The Order stated that "[j]udgment on liability is granted on default."

By Order to Show Cause filed on September 17, 2018, Jones moved to vacate the August 30, 2016 Order. Jones asserted that personal jurisdiction had not been properly obtained over her. The motion was resolved by Stipulation dated October 9, 2018 which was so-ordered by this Court. The Stipulation stated that the "[t]he action against NP Jones is discontinued with prejudice solely on the ground of lack of personal jurisdiction."

Depositions were completed in August 2018. Plaintiff filed her notice of issue in January 2019.

On July 4, 2019, Defendant Jacqueline Flores, N.P., and Michelle Cabrera, P.A., were granted summary judgment after the close of discovery. Defendant Natalie Wilson, N.P., has not appeared in this action.

On August 9, 2019, Defendant 139 Medical Facility, P.C., sent a "Notice of Vouching-In of NP Yasmine Jones." The notice of vouching-in states, "Defendant, 139 Medical Facility, P.C., offers to NP Yasmine Jones, individually, the opportunity to fully assume and undertake the defense of said defendant at NP Yasmine Jones' own cost and expense, against the causes of action asserted against them by plaintiff, Tania Ventura Perez." The notice further provides that if Jones "refuses the defendant's offer to fully assume and undertake the defense of said defendant, at NP Yasmine Jones' own cost and expense, and a judgment is subsequently returned against said defendant at trial, said defendant shall hold NP Yasmine Jones liable and responsible for said judgment, together with all further costs and damages incurred by the defendant herein in proceeding to trial and incurring said further costs and damages."

The parties adjourned the trial that was scheduled to commence on September 16, 2019. The matter is scheduled for trial on February 19, 2020.

Parties' Contentions

Jones contends that the motion should be granted because the notice of vouching-in is untimely because it was served on the eve of trial; jurisdictionally barred as the Court does not have jurisdiction over Jones who has resided in California for over seven years; and service is improper as Jones does not reside at the address where the notice was served.

Defendants argue that "[j]urisdiction is not a basis to strike a Notice" since it "is merely an invitation to the vouchee." Defendants argue that "any concern regarding jurisdiction is premature, and would be properly resolved in the context of any future action on a judgment, not at this time." Defendants further argue that the Notice was made timely and "[t]here can be no real claim to prejudice from the timing of the Notice."

Legal Standard

"In substance vouching-in is simply a notice that an action is pending, and an offer to the vouchee to come in and defend, in default thereof the voucher will hold him liable. The procedure is very informal, no particular language is required, and the notice may be written or oral." *Urbach v City of New York*, 46 Misc 2d 503, 504 (Sup Ct 1965).

"Vouching-in is a common law procedure, which has been little used since the adoption of a statutory third-party practice, but in any event [,] it is limited to cases where the voucher's right to relief over rests on a cause of action identical with that asserted by plaintiff against the original defendant, and there is authority to the effect that it should be confined to these limits." *Urbach,* 46 Misc 2d at 505 (citations omitted). "A party which is properly vouched in and does not undertake the defense of the main action may be bound by the judgment, but if such a party is improperly vouched in and elects not to undertake a defense he may always raise this as a defense to an action on the judgment. There is no magic *ipso facto* liability flowing from such a notice [to vouch in]." *Id.* at 504-505.

N.Y.Prac., Com. Litig. in New York State Courts § 9:15 (4th ed.) explains "vouching in" as follows:

> "Vouching in" is a rarely-used common-law procedure predating the enactment of statutory impleader, by which a

> named defendant (the voucher) may seek to have a non-party (the vouchee) bound by the judgment ultimately obtained in the primary action. This procedure, sometimes said to be grounded on principles analogous to those of res judicata, is "usually limited to cases where the voucher's right to relief over rests on a cause of action identical with that asserted by the plaintiff against the original defendant." The right to vouch in another party typically occurs in an indemnity situation, such as where a general contractor seeks indemnity from a subcontractor, or in a scenario in which one party is contractually obligated to indemnify another. A non-party is effectively vouched in upon receiving notice of the primary action from the voucher. Such notice may be informally provided, either orally or in writing, but must be accompanied by the voucher's offer to allow the vouchee to control the defense of the action. So long as these minimal requirements are met, the vouching in notice cannot be dismissed or vacated by the court unless it is clearly untimely.

In *Castignoli*, 242 A.D.2d 357, a notice of vouching-in was served four months after the note of issue had been served and ten months after all depositions had been completed. The court found that the notice of vouching-in was untimely.

Discussion

In the instant matter, Jones was served with the notice of vouching-in over a year after the action was discontinued against her based on a lack of personal jurisdiction. Defendants were aware of Jones, any potential cross claims against her, and Plaintiff's discontinuance of the action as against her; however, Defendants never commenced a third party action against her. Rather, Defendants decided to wait until ten months after the discontinuance, a year after the completion of depositions, and eight months after the note of issue was filed to serve the Notice. The Notice was therefore not served in a timely fashion.

Wherefore it is hereby

ORDERED that the Order to Show Cause is granted and the notice of vouching-in dated August 9, 2019 is vacated as untimely.

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

Dated: JANUARY 15, 2020

Eileen A. Rakower, J.S.C.