

Dantzig v Slater

2021 NY Slip Op 31252(U)

April 7, 2021

Supreme Court, New York County

Docket Number: 805398/2020

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

PAUL DANTZIG,

Plaintiff,

- against-

INDEX NO. 805398/2020

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO. 1

JAMES SLATER MD

NYU LANGONE (TISCH) HOSPITAL,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answer — Affidavits — Exhibits

Replying Affidavits

Defendants James N. Slater, MD s/h/a James Slater MD (“Dr. Slater”) and NYU Langone Hospitals s/h/a NYU Langone (Tisch) Hospital (“NYULH”) (collectively, “Defendants”) move for an Order dismissing the action on various grounds including pursuant to CPLR 3211(a)(4) (pending action), CPLR 3211(a)(5) (statute of limitations), and CPLR 3211(a)(7) (failure to state a claim). Defendants also move for a protective order striking Pro Se Plaintiff Paul Dantzig’s (“Plaintiff”) supplemental bill of particulars and interrogatories dated June 24, 2020, June 30, 2020, July 2, 2020, July 6, 2020, July 14, 2020, and July 15, 2020.

Alternatively, Defendants request an Order (1) consolidating the instant action with the prior action that is pending and bears the index number 805253/2018; (2) compelling Plaintiff to properly serve Dr. Slater and NYULH;¹ and (3) compelling Plaintiff’s production of a certificate of merit pursuant to CPLR 3012-a. Defendants also move pursuant to CPLR 8303-a and 22 NYCRR 130-1.1 for the issuance of costs and sanctions as against Plaintiff on the grounds that this action is frivolous. Plaintiff opposes the motion.²

¹ The issue regarding service is moot. Defendants have e-filed copies of the affidavits of service and Defendants are not challenging how service was made.

² Defendants argue that Plaintiff’s “opposition papers should be rejected on the basis that they are procedurally defective and fail to comport with the parameters of CPLR 2106.” Defendants argue that Plaintiff’s affirmation lacks an endorsement of a notary public so licensed in the state of New York and is not affirmed to be “true under the penalties of perjury” pursuant to CPLR 2106.

Relevant Background

Plaintiff commenced this action on December 5, 2020. Plaintiff alleges in the Complaint that on March 23, 2018, he had a cardiac catheterization and insertion of a stent in the left anterior descending artery performed by non-party Pramod Sanghi M.D. (“Dr. Sanghi”) at NYULH. Plaintiff claims he “did not have an indication for a stent,” the stent was contraindicated and caused “at least two comorbidities including mitral insufficiency and nocturnal hypertension.”

In the Complaint, Plaintiff states that he has previously sued Dr. Sanghi. Plaintiff claims that Dr. Sanghi answered in an interrogatory dated July 29, 2020 “that he was instructed what stent to insert (38 mm stent manufactured by Abbott) and where to put it (mid left anterior descending artery) by James Slater MD.” Plaintiff alleges that prior to the March 23, 2018 procedure, Dr. Slater “had never met Paul Dantzig, had never done a physical exam on him and knew nothing about his medical history or lab results.” Dr. Slater further claims that Plaintiff never gave Dr. Slater permission to provide any medical care to him. Plaintiff alleges that on March 23, 2018, Dr. Slater “received a payment from Abbott labs the maker of the stent, which was disguised as a ‘research grant’” which was “highly irregular as a research grant, suspicious and a definite conflict of interest in Dr. Slater’s decision on the stent” and “may have violated federal anti kickback statute and rico (sic) violations.”

Plaintiff alleges that “James Slater’s action caused Pramod Sanghi MD to lie on the operative report to cover up his mistake.” Plaintiff further alleges that “James Slater’s directive on the stent caused damage to the diagonal artery causing mitral insufficiency and nocturnal hypertension,” “caused ‘jailing’ of the diagonal artery putting Paul Dantzig at extreme risk of dying during the catheterization, and “James Slater’s decision to direct Dr. Sanghi about the size and location of the stent was dangerous, negligent, reckless, unprofessional and unethical.” Plaintiff alleges that NYULH “was negligent in appreciating James Slater as head of the cardiac catheterization lab and to act recklessly without proper supervision and by not operating the cardiac catheterization lab in a proper, professional and ethical manner as required by the State of New York.” Plaintiff alleges, “While the surgical malpractice took place outside the statute of limitation, it was within the 1 year statute of limitation from the discovery of the malpractice.”

On July 31, 2018, Plaintiff commenced a prior action against Richard L. Mueller, MD (“Dr. Mueller”), Dr. Sanghi, and NYULH. The action bears the index number 805253/2018 and is referenced in the Complaint in this action, as indicated above. In the 2018 Action, Plaintiff asserted claims of medical malpractice and fraud associated with a cardiac catheterization procedure performed by Dr. Sanghi in March 2018. By decisions dated November 19, 2020 and December 10, 2020, Judge Madden dismissed the 2018 Action against NYULH on the basis that Plaintiff failed to establish the existence of a hospital/physician-patient relationship and held that Plaintiff’s demand for information relating to Abbott was not “relevant or material to plaintiff’s claim for medical malpractice and that the \$650 payment on the date of his surgery was not relevant to plaintiff’s procedure.”

Defendants’ Motion to Dismiss

Motion to dismiss pursuant to CPLR § 3211(a)(5)

Defendants also move to dismiss pursuant to CPLR § 3211(a)(5). Defendants contend that the action was commenced on December 5, 2020, which is more than two and a half years since the accrual of the alleged medical malpractice on March 23, 2018. Defendants argue that any allegations against Dr. Slater and NYULH should be dismissed in their entirety pursuant to CPLR 214-a. In opposition, Plaintiff argues, “While the 2 ½ year statute expired, the case was correctly filed within the 1 year statute from the time when the negligence was discovered.” Defendants, in their reply, argue that Plaintiff “misstates the applicable tolling provisions with respect to medical malpractice actions, which apply to actions concerning failure to diagnose cancer (Lavern’s Law) and ‘foreign objects’—neither of which are at issue herein.” Defendants further argue, “Likewise, plaintiff was aware of the facts and circumstances central to this action, including the stent placement, since March 2018 when the procedure occurred. It is also quite apparent that plaintiff, who is a physician licensed to practice medicine in the state of New York, had sufficient knowledge of, experience with, and access to information in connection with his medical condition.” Defendants further argue, “While plaintiff disingenuously indicates that the first time that he became aware of Dr. Slater was in July 2020, on November 18, 2019 - over a year after the filing of the instant action—Dr. Sanghi served a response (in the prior 2018 action) to plaintiff’s interrogatory mentioning Dr. Slater (emphasis added).”

CPLR § 3211 (a)(5), states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the cause of

action may not be maintained because of ... statute of limitations.” “A party moving a complaint as barred by the applicable statute of limitations must establish, prima facie, that the period in which to commence the action has expired.” *Murray v. Charap*, 150 AD3d 752, 753 (2d Dept 2017). “The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period. *Murray*, 150 AD3d at 753.

Pursuant to CPLR §214-a, an action sounding in medical malpractice must be commenced within two years and six months of “the act, omission or failure complained of, or last treatment where continuous treatment for the same illness, injury or condition that gave rise to said act, omission or failure.” If an action is commenced beyond the two year and six-month statute, it is time-barred and will be dismissed. *Bickel v. Abramson, et al.*, 178 A.D2d 138, 576 (1st Dept 1991). With respect to “foreign objects,” CPLR 214-a permits the commencement of a medical malpractice action involving a “foreign object in the body of a patient” . . . “within one year of the date of such discovery or of the date of the discovery of facts which would reasonably lead to such discovery, whichever is earlier.” “It is well settled that an intentionally implanted device is not a ‘foreign object’ within the meaning of CPLR 214-a.” *Teixeira v Bhalla, M.D.*, 2018 N.Y. Slip Op. 30825[U], 4 [N.Y. Sup Ct, Suffolk County 2018](citing *LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212-213, 668 NYS2d 546 [1998], among other cases).

Since the action was commenced more than two and a half years after the accrual of the alleged medical malpractice on March 23, 2018, Plaintiff’s allegations of medical malpractice against Dr. Slater and NYULH are dismissed pursuant to CPLR 214-a.

Motion to Dismiss Under CPLR § 3211(a)(7)

Defendants also move to dismiss the action pursuant to CPLR § 3211(a)(7). Defendants argue that Plaintiff’s “complaint fails to contain any factual allegation that plaintiff had a hospital/physician-patient relationship with either Dr. Slater or NYULH.” As stated above, the claim of medical malpractice is time-barred.

Additionally, the Complaint alleges that on March 23, 2018, Dr. Slater “received a payment from Abbott labs [,] the maker of the stent, which was disguised as a ‘research grant’” and which was “highly irregular as a research grant, suspicious

and a definite conflict of interest in Dr. Slater's decision on the stent" and "may have violated federal anti kickback statute and rico (sic) violations."

CPLR § 3211(a)(7) provides that a party may move dismiss an action on the ground that "the pleading fails to state a cause of action." 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].

"In order to maintain a cause of action for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages." *Callas v. Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]. CPLR § 3016 requires particularity in the pleading of a fraud cause of action.

"To plead a viable cause of action for fraud in connection with charges of medical malpractice, the allegations must include knowledge on the part of the physician of the fact of his malpractice and of his patient's injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by him to his patient known by him to be false at the time it was made, and on which the patient relied to his damage." *Atton v. Bier*, 12 AD3d 240, 241 [1st Dept 2004] (internal citation omitted). "Without more, concealment by physician or failure to disclose his own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action, thereby entitling the plaintiff to bring his action within the longer period limited for such claims." *Id.* (internal citation omitted). "Further, the damages resulting from the fraud must be separate and distinct from those generated by the alleged malpractice." *Id.* (internal citation omitted).

Dr. Slater's alleged "payment from Abbott labs, the maker of the stent," which "was disguised as a 'research grant,'" even if true, fails to state a claim of fraud. There are no allegations of any material misrepresentations made to Plaintiff or damages that are distinct from the alleged malpractice.

Wherefore, it is hereby

ORDERED that Defendants James N. Slater, MD s/h/a James Slater MD and NYU Langone Hospitals s/h/a NYU Langone (Tisch) Hospital's motion for an Order dismissing the action is granted and the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants' request for the issuance of costs and sanctions is denied.

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

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Dated: April 7, 2021

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION