Janik v Lebovits
2021 NY Slip Op 32220(U)
November 8, 2021
Supreme Court, New York County
Docket Number: Index No. 805223/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

---X

ALEKSANDRA JANIK,

Plaintiff,

- v -

PINKAS E. LEBOVITS M.D., PINKAS E. LEBOVITS M.D., P.C., and JULIANA BIZERRIL-WILLIAMS, RPA-C,

Defendants.

---X

INDEX NO. 805223/2018

MOTION DATE 06/15/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice, the defendants Pinkas E. Lebovits, M.D., and Pinkas E. Lebovits, M.D., P.C. (together the Lebovits defendants), move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint insofar as asserted against them. The defendant Juliana Bizerril-Williams, RPA-C, separately moves, in papers incorrectly denominated as a cross motion, for the same relief as to her. The plaintiff opposes both the motion and the separate motion. The motions are granted, and the amended complaint is dismissed.

Initially, Bizerril-Williams's motion is not a proper cross motion because it does not seek relief against a moving party; instead, her motion is, in effect, a separate motion (*see* CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214 requires such a

separate motion to be made on at least eight days notice. The mislabeling of a motion as a cross motion, however, may treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d at 404). In any event, Bizerril-Williams uploaded her notice of cross motion to the NYSCEF electronic filing system on April 5, 2021 and made her application returnable on April 21, 2021---16 days prior to the return date. Therefore, Bizerril-Williams's motion may be heard as a timely noticed motion.

By order dated June 18, 2019, the court (Madden, J.), denied, in part, the Lebovits defendants' pre-answer motion to dismiss the initial complaint, which had been made on the ground, among others, that the exclusivity provisions of Workers' Compensation Law barred the plaintiff's malpractice claim against them. Specifically, they argued that the plaintiff was their employee, and another employee had performed the medical procedure that is the subject of this action at their office. The court noted that the standard for whether the plaintiff's claim was thus barred required consideration of whether the professional services that had been provided were offered and paid for by the plaintiff's employer, the services were not available to the general public, and the plaintiff obtained the services not as a member of the public, but only as a consequence of her employment. The court concluded that, inasmuch as no discovery had been conducted at that juncture, it could not determine on papers alone whether the application of those factors warranted dismissal of the complaint. Bizerril-Williams was added as a defendant, discovery ensued, and all of the parties were deposed. After completion of discovery, the Lebovits defendants and Bizerril-Williams made the instant motions.

It is undisputed that, as of February 25, 2016, the plaintiff was employed as a medical assistant by the defendant Pinkas E. Lebovits, M.D., P.C. She alleges that, on February 25, 2016, she sustained chemical burns as a consequence of the malpractice of Bizerril-Williams, a physician's assistant who was also the plaintiff's coworker, when Bizerril-Williams negligently performed sclerotherapy upon her to treat her spider veins.

In their moving papers, the Lebovits defendants rely upon the pleadings, the bills of particulars, the parties' deposition transcripts, billing records, insurance records, written office policies, Lebovits's affidavit, the affidavit previously submitted by the plaintiff in opposition to the pre-answer motion to dismiss, and the affirmation of Robert Tornambe, M.D. Bizerril-Williams relies upon the same documentation.

According to Lebovits's affidavit and the parties' deposition testimony, Bizerril-Williams performed sclerotherapy on herself, the plaintiff, and another coworker at the same time on February 25, 2016. Lebovits avers that he was not present when this treatment was performed, that the sclerotherapy was not covered by the plaintiff's health insurance, and that the plaintiff was not charged for this treatment. Torambe asserts that

> "Ms. Janik was a medical assistant at this office. She occasionally assisted me when I saw patients in this office. She asked me to look at a burn that she related to sclerotherapy performed on her by Ms. Williams, who was a co-worker and physician's assistant. I asked her why she let Ms. Williams perform it, and why she did not ask me to do it. She replied that Ms. Williams offered to do it as a favor. She also told me that Dr. Lebovits did not know anything about it. I recommended wound care. I cannot find a record for this one-time encounter, so either I did not make a note because I saw her as a courtesy or my note was lost. I confirmed these details in a text message to Dr. Lebovits when he asked me if I had seen her."

In the affidavit that she had submitted in opposition to the Lebovits defendants' pre-answer motion to dismiss the complaint, the plaintiff asserted that

> "Because I was an employee, I was extended the courtesy of not having to sign in, but I had to make an official appointment and be treated during [office] work hours. All the procedures were done outside my [own] work hours, and I was treated like any other patient would. My treatments were documented in my chart, and my insurance was billed accordingly.

After describing the procedure, her injuries, and her follow-up treatment with Lebovits, the plaintiff asserted that she "was not charged for the sclerotherapy because Williams told me that all procedures for employees were free." She nonetheless averred that "I was seen in my capacity as a patient, not as an employee."

The written office policies of the Lebovits defendants included the following provision:

> "Providers, Physician Assistants, (PA), Nurse Practitioners (NP), Registered Nurses (RN) must get an approval from Pinkas E. Lebovits M.D. if they want to treat any personal family members or any staff members of the practice Pinkas E. Lebovits, M.D., P.C."

According to Lebovits, he "never authorized or approved any treatment to be rendered by Ms. Williams to Ms. Janik on February 25, 2016." Bizerril-Williams, conversely, testified that she obtained Lebovits's approval to treat patients. As she described it, she requested Lebovits's permission, and he responded

> "'Okay. You can start to do the procedure.' So he said – he authorized me to do it. I asked him then, because the girls -- the two medical assistants, they got excited when I was going to do the procedure. So they asked me if I could do on them. And I said, "Let me talk to Dr. Lebovits because you're employee[s]. I need to make sure it's okay because it will be free of charge.' That's just how it [g]oes in an office when it was [an] employee."

The plaintiff testified at her deposition that she did not recall whether, prior to February 25, 2016, Bizerril-Williams had performed sclerotherapy on any other patients at the Lebovits defendants' office. Bizerril-Williams testified that, prior to that date, she had performed between 10 and 15 sclerotherapy procedures on other patients prior to beginning her employment with the Lebovits defendants in 2015, but that the plaintiff and another coworker were the first two patients upon whom she performed the procedure at the Lebovits defendants' office. As she explained it, "I was starting with Dr. Lebovits. And the two medical assistants volunteered for me to start. They are the first patients that I had." Bizerril-Williams further testified that, at the time of her deposition in November 2020, the only three patients to whom she provided sclerotherapy treatment during her entire tenure as an employee of Pinkas E. Lebovits, M.D., P.C., were the plaintiff, the plaintiff's other coworker, and Bizerril-Williams herself.

In opposition to the two motions, the plaintiff relies on the same documentation as the defendants, and also submits records of her office visits with the Lebovits defendants. She alleges that, at the time of the subject sclerotherapy procedure, she was being treated as a patient, with her treatments being documented and billed to her insurance as they would have been billed in connection with any other patient. She asserts that she was a regular patient of

the Lebovits defendants, inasmuch as she had numerous appointments with the Lebovits defendants prior to the subject incident, including on January 11, 2016, January 16, 2016, and January 28, 2016, and received various treatments in addition to sclerotherapy, including shave biopsies. She claims that she did not receive the subject treatment during her regular work hours but, instead, on her lunch hour and, thus, should not be presumed to be an employee for the purposes of the Workers' Compensation Law She contends that the treatment was not incidental to her work and was not sought or provided as a result of her employment.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st

Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

The issue of whether and when the Workers' Compensation Law bars a malpractice claim against a co-worker of a plaintiff employed by a health-care facility was addressed at length by the Appellate Division, First Department, in *Feliciano-Delgado v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.* (281 AD2d 312 [1st Dept 2001]). In that action, a nurse employed by a union's health-care center was examined and treated in connection with foot pain by five individual physicians and podiatrists employed by the center. When the treatment allegedly was unsuccessful, she commenced a medical malpractice action against the providers and the center, asserting that they failed to diagnose and treat reflex sympathetic dystrophy (now known generally as complex regional pain syndrome). The defendants moved for summary judgment dismissing the complaint on the ground that the action was barred by the exclusivity provisions of the Workers' Compensation Law. The Supreme Court denied the motion, but the Appellate Division reversed, concluding that the action was indeed barred by the Workers' Compensation Law.

As the Court explained it,

> "The 'fellow-employee rule' of the Workers' Compensation Law provides that '[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ' (Workers' Compensation Law § 29[6]). As this Court has recently pointed out, analysis of whether the provision applies in a given instance must focus on three key factors: 'the doctor's professional services were offered and paid for by the employer; the services were not available to the general public; and plaintiff obtained the services not as a member of the public but only as a consequence of his employment' (*see, Marange v Slivinski*, 257 AD2d 427, 428 [1st Dept 1999]).
>
> "In *Garcia v Iserson* (33 NY2d 421 [1974]), the Court of Appeals explained that where an employee was treated in his employer's infirmary by a physician paid

> by the employer to provide such care, the employee's resulting claim of malpractice against his fellow employee-physician falls within the scope of the Workers' Compensation Law's exclusivity provision. The *Garcia* Court distinguished *Volk v City of New York* (284 NY 279 [1940]) with the explanation that in *Volk*, the plaintiff, an employee at a public hospital, sought treatment at the hospital just as any member of the public was entitled to, and accordingly, 'the services which she received were not incidental to her employment' (33 NY2d at 423, *supra*). This distinction between the two types of situations has been maintained repeatedly: on one hand, there are those where hospital employees seek treatment as a hospital patient, and, on the other, those where medical services rendered by a co-employee are only available to employees. While in the former situation, the injuries resulting from the alleged malpractice do not 'arise out of the injured person's employment,' in the latter, 'a nexus exists between the plaintiff's employment and the occurrence of the malpractice' (*see, e.g., Firestein v Kingsbrook Jewish Med. Ctr.*, 137 AD2d 34, 39 [2d Dept 1988])"

(*Feliciano-Delgado v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 281 AD2d at 313-314). Thus, following *Volk*, the First Department has held that, even where a hospital employee obtained Workers' Compensation benefits for medical malpractice committed by her employer, as long as the employee obtains the same care from the hospital as is provided to the general public, "[i]t is well settled that neither section 11 nor section 29 of the Workers' Compensation Law bars the claim of a hospital employee who alleges negligent care by the hospital under these circumstances, even if the underlying injury was suffered in the course of employment" (*Manswell v St. Luke's Hosp.*, 16 AD3d 182, 183 [1st Dept 2005]).

The Appellate Division in *Feliciano-Delgado*, however, rejected the plaintiff's claim that her situation was equivalent to those of hospital employees who sought care at the hospitals that employed them. It reasoned that

> "the cases involving employees of public hospitals who obtain medical care at those hospitals are not controlling here. The requirement that the services received be unavailable to the general public does not necessarily require that the availability of medical services have been limited to employees. Where, as here, the provision of medical services is available exclusively to a limited, well-defined group, it is not being provided to 'the general public.'
>
> "Moreover, in *Litwak v Our Lady of Victory Hosp.* (238 AD2d 879 [4th Dept 1997]), the Fourth Department clarified the application of the fellow-employee rule where the services were available to the public. It explained, 'In determining whether the exclusive remedy of the Workers' Compensation Law bars a cause of action for medical malpractice, several factors must be considered, including whether the medical services obtained by the employee were available generally

> to members of the public and, *if so, whether the employee obtained those services as a member of the public as opposed to "only in consequence of his employment*" [citations omitted].' (*Litwak, supra*, at 879 [emphasis added].) Here, unlike *Litwak*, plaintiff obtained the allegedly negligent medical service from her fellow employees not as a member of the public, but 'in consequence of [her] employment' (*id.*). Consequently, even accepting plaintiff's contention that the medical services provided by her employer should be deemed to have been 'available generally to members of the public,' since she herself was unable to avail herself of those services as a member of the public, the exclusive remedy of Workers' Compensation Law § 29(6) bars her from proceeding with this plenary action for alleged medical malpractice by her fellow employees"

(*Feliciano-Delgado v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 281 AD2d at 314-315).

The *Felciano-Delgado* court

> "also reject[ed] plaintiff's contention that the Workers' Compensation Law exclusivity provision is inapplicable where the plaintiff was not performing the work for which she was employed at the time of her injury, so that her injury did not flow as a natural consequence of her duties as an employee. Nor may plaintiff succeed with the argument that Workers' Compensation is not available because she did not suffer an injury but was instead suffering from a medical condition.
>
> "The 'work related' element is satisfied by the 'nexus' between the plaintiff's employment and the employer's provision of medical services not available to the public (*see, Firestein, supra*). There is no requirement that the medical condition upon which a negligent treatment claim is based must be an 'injury,' or that it must be a direct consequence of the plaintiff's employment duties (*see, e.g., Garcia v Iserson*, 33 NY2d 421, *supra* [negligent injection for treatment of cold]; *Woods v Dador*, 187 AD2d 648 [2d Dept 1992] [failure to diagnose heart attack]; *Marange v Slivinski*, 257 AD2d 427, *supra* [failure to diagnose breast cancer])."

(*id.* at 315; *see Walsh v Pisano*, 190 AD3d 535, 536 [1st Dept 2021] [Workers' Compensation Law bars medical malpractice action by J.P. Morgan employee against physician who, although employed by NYU, was retained by J.P. Morgan to provide free medical services to its employees]; *Lotysz v Montgomery*, 309 AD2d 628, 628 [1st Dept 2003] [employee of New York Jets football team who obtained treatment from team doctors solely by reason of his employment by the team, and not as a member of the general public, was barred by Workers' Compensation Law from maintaining action against team or individual physician]).

The defendants here established their prima facie entitlement to judgment as a matter of law by establishing that, at the time the subject treatment was rendered to the plaintiff, neither the Lebovits defendants nor Bizerril-Williams were providing sclerotherapy to the general public, but that Bizerril-Williams, the plaintiff's coworker, provided such treatment only to herself, the plaintiff, and another coworker. Bizerril-Williams performed the procedure on the plaintiff as a "volunteer" who would not be charged for it. Even if the procedure would thereafter become a procedure provided by the defendants to the general public, the defendants established that the plaintiff obtained the treatment only as a consequence of her employment, as no patients other than herself and her coworker were offered the procedure. Moreover, the defendants established that, regardless of whether Bizerril-Williams obtained Lebovits's approval to perform the procedure upon the plaintiff, office policy required her to do so, establishing that any treatments provided by medical professionals to other staff members were considered separate and apart from treatments rendered to members of the general public. In addition, notwithstanding the dispute between Lebovits and Bizerril-Williams as to whether the latter obtained the necessary approval to perform the procedures, the defendants established that the treatment was provided free of charge as a courtesy to staff members.

In opposition to the defendants' showing that the treatment was provided free of charge, the plaintiff failed to raise a triable issue of fact as to whether the subject professional services were neither offered nor paid for by the employer. It is irrelevant for the purposes of the court's inquiry as to whether the plaintiff's medical insurer was billed for the procedure and, in any event, the insurer did not provide any benefits to cover the cost of the procedure. In fact, the plaintiff adduced no evidence even suggesting that she would be responsible for any fees or charges in the event that her insurer did not provide coverage. Nor did the plaintiff raise a triable issue of fact as to whether the services were not available to the general public. She did not, and could not, assert that the defendants regularly offered sclerotherapy treatments to the general public prior to February 25, 2016, nor did she refute Bizerril-Williams's testimony that

the plaintiff and another coworker were the first and only "volunteer" patients receiving such treatment at the Lebovits defendants' office. The plaintiff's conclusory statements that she was a regular patient and acting in her capacity as a member of the general public while receiving treatment at the Lebovits defendants' office are insufficient to defeat summary judgment, and insufficient to raise a triable issue of fact as to whether she in fact obtained the services as a member of the public, and not merely as a consequence of her employment. Even if the plaintiff received other dermatological treatments at the Lebovits defendants' office on three occasions during the month prior to the subject incident, and was only treated during her lunch hour, these facts do not raise a triable issue sufficient to rebut the defendants' showing that she obtained the subject treatment only as a consequence of her employment.

Accordingly, it is

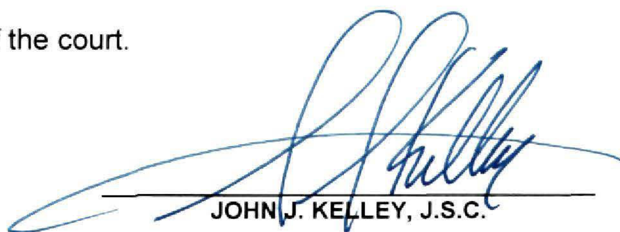
ORDERED that the motion of the defendants Pinkas E. Lebovits, M.D., and Pinkas E. Lebovits, M.D., P.C., for summary judgment dismissing the amended complaint insofar as asserted against them is granted, and the amended complaint is dismissed insofar as asserted against the defendants Pinkas E. Lebovits, M.D., and Pinkas E. Lebovits, M.D., P.C.; and it is further,

ORDERED that the separate motion of the defendant Juliana Bizerril-Williams, RPA-C, for summary judgment dismissing the amended complaint insofar as asserted against her is granted, and the amended complaint is dismissed insofar as asserted against the defendant Juliana Bizerril-Williams, RPA-C; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

INDEX NO. 805223/2018
RECEIVED NYSCEF: 11/08/2021

This constitutes the Decision and Order of the court.



11/8/2021
DATE

JOHN J. KELLEY, J.S.C.

MOTION 1:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE
MOTION 2:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE