Bonner v Lynott
2021 NY Slip Op 33317(U)
January 5, 2021
Supreme Court, Tompkins County
Docket Number: Index No. EF2017-0129
Judge: Joseph A. McBride
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 30th day of October 2020.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

KIM BONNER,

Plaintiff,

-vs-

PATRICIA LYNOTT as representative of the Estate of WILLIAM WITTLIN, M.D., deceased

Defendant.

DECISION AND ORDER

Index No. EF2017-0129
RJI No.: 2017-0376-M

APPEARANCES:

COUNSEL FOR PLAINTIFFS:
SCHLATHER STUMBAR PARKS & SALK, LLP
By: Raymond Schlather, Esq.
200 East Buffalo Street
PO Box 353
Ithaca, NY 14851

COUNSEL FOR DEFENDANTS:
SMITH SOVIK KENDRICK & SUGNET, P.C.
By: Kevin Hulslander, Esq.
250 South Clinton Street, Suite 600
Syracuse, NY 13202

JOSEPH A. MCBRIDE, J.S.C.

The case before the Court follows a medical malpractice claim filed by Kim Bonner ("Plaintiff") against Defendant, William Wittlin, M.D. ("Defendant").[1] On September 1, 2020, Defendant filed the current motion for summary judgment pursuant CPLR §3212 seeking dismissal of the complaint. Plaintiff filed a response in opposition. The case was heard at oral argument via Skype on October 30, 2020. Court received and reviewed said motion and decided; as discussed below.[2]

BACKGROUND FACTS

While the basic facts are undisputed, the issue here is whether there is a cause of action giving rise to damages. Plaintiff was engaged in a veterinarian residency training program at Cornell University. Plaintiff's performance history in the program was sporadic, including taking periods of time off, arriving late, and underperforming on her assignments. At one point during her residency, Plaintiff's supervisor, Dr. Elizabeth Buckles, alleges she observed Plaintiff display some "erratic behavior." Concerned with the behavior she observed, Dr. Buckles met with Cornell's school psychologist Dr. Tornuscilo, who in turn called Defendant; Plaintiff's treating psychiatrist. During the telephone conversation, Defendant confirmed he was Plaintiff's treating psychiatrist and he was aware of Plaintiff's "deteriorating" behavior and advised that he would "call her that night" to monitor the situation. At the end of Plaintiff's one-year residency program, she was up for review to either continue the residency or discharge her from the program. The panel decided to discharge her from the program, citing her sporadic performance as the reason. Dr. Buckles was a member on the review panel. Plaintiff then filed suit claiming medical malpractice and for breach of confidentiality alleging Defendant's phone conversation caused the review panel to not renew her residency.[3]

---

[1] During the pendency of this matter, Dr. Wittlin passed away and pursuant an Order dated August 10, 2020, Patricia Lynott as representative of the Estate of William Wittlin, M.D. was substituted as the party defendant.
[2] All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.
[3] Dr. Tornusciolo was also named in the complaint and subsequently prevailed in a Motion to Dismiss via Decision and Order signed by Hon. Eugene D. Faughnan on December 13, 2017.

On September 1, 2020, Defendant filed the current motion for summary judgment seeking a dismissal of the complaint, claiming there are no triable issues of fact. They submit that the facts are undisputed, and despite the disclosure, there is no cause of action as a matter of law. Defendant points out that there is no evidence that the conversation caused the review panel to not renew her residency, claiming the Dr. Buckles was just one person on the board and it was a unanimous decision not to renew and therefore there were no damages despite a disclosure. On the other hand, Plaintiff argues that because Defendant did not submit an expert opinion, the motion must fail.

The matter was scheduled for oral argument on October 30, 2020 via Microsoft Teams. The Court decides as described below.

LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, *274* AD2d 708, 709 (3rd Dept. 2000); see, Boyce v. Vazquez, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." Haner v. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). Mere conclusions and expressions of hope are insufficient to

conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

Here, Plaintiff claims two causes of action: 1) breach of confidentiality under CPLR §4504 and 2) medical malpractice for the breach of confidentiality. First, CPLR §4504 is an evidentiary statute that applies to disclosure by medical professionals of information acquired in attending a patient in a professional capacity." CPLR §4504(a). As stated previously by this Court, §4504 alone may not give rise to a private right of action.[4] See Waldron v. Ball Corp., 210 AD2d 611, 613 (3rd Dept. 1994). However, there may be an existence of a common law cause of action. See Chanko v. American Broadcasting Cos. Inc., 27 NY3d 46, 53-54 (Ct. of App. 2016). "The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages." Id at 53-54.

Moreover, courts have previously held that "the physician-patient relationship creates an implied covenant which when breached is actionable." See Tighe v. Ginsberg, 146 AD2d 269, 271 (4th Dept. 1989). The Tighe Court discussed that a breach of such duty is actionable as a tort, rather than a breach of contract. Id at 271. The nature of the action was further distinguished from a medical malpractice claim as the "breach of duty did not arise during the process in which [the doctor] was utilizing the skills he had been taught" and because the evidence is based on common knowledge, there is no need for expert medical testimony." Id. at 271. Therefore, while the Court does recognize the possibility of a cause of action for breach of confidentiality, the Court cannot find such a breach gives rise a claim for medical malpractice. Furthermore, the Court finds the lack of an expert opinion, does not automatically prevent the Defendant from prevailing.

[4] This Court's prior Decision and Order dated December 13, 2017, dismissed the co-defendant's cause of action for an absence of patient relationship, not for lack of cause of action.

In the case at bar, Defendant, as the moving party, must show a *prima facie* defense to the common law cause of action as outlined in Chanko to prevail on the current motion. Defendant argued two points: first, that any information discussed, was not confidential information that was not already known to Dr. Buckles and Dr. Turnosciolo and further alleges that Plaintiff cannot overcome the damages element for her claim. The Court agrees with Defendant's contentions. While Defendant may have acted in poor taste, he did not disclose anything that was not already known to Dr. Turnosciolo or Dr. Buckles. Cornell was already aware that Defendant was Plaintiff's treating physician. Plaintiff previously provided the HR department a doctor's note excusing an earlier extended absence. A note which was written by Defendant on his letterhead. Dr. Buckles, then observed Plaintiff's erratic behavior and was independently alerted to Plaintiff's mental health status. It was their intention to alert Defendant of Plaintiff's recent behavior. Defendant merely confirmed he was aware of the situation, rather than disclosing "confidential" information, allowing the patient to be identified. Further, the Court agrees that Plaintiff cannot prevail on damages. Plaintiff claims that due to Defendant's actions, her residency was not renewed. The Court find this to be speculative at best. The evidence shows that Dr. Buckles was just one person on this review panel. The review panel held a unanimous decision not to renew Plaintiff's program citing Plaintiff's erratic behavior and underperformance. All facts that are not disputed by Plaintiff. Therefore, Defendant has provided prima facie defense to Plaintiff's claims as a matter of law.

We note, that in Chanko, the Court of Appeals was critical of the lower courts for viewing the allegations too narrowly. However, it must be acknowledged that the Chanko case reviewed a pre-answer motion to dismiss, necessitating a much more liberal construction of the allegations. See 27 NY3d at 55. Here, at the summary judgment stage, the Court finds that the evidence does not give rise to a cause of action.

The burden now shifts to Plaintiff to present a triable question of fact. The Court finds that there are no questions of fact left to be determined. The basic facts are not in dispute. The dispute is a legal one, in whether there is a cause of action. The Court finds that while a cause of action can exist, here, Plaintiff cannot prevail on that claim on the undisputed facts before the Court. Therefore, looking at the case in the light most favorable to the non-moving party, Defendant's Motion for Summary Judgment is GRANTED.

CONCLUSION

Based on all the factors and the foregoing discussion, Defendants' motion for summary judgment is GRANTED. The case shall be DISMISSED as a matter of law.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 1/5/, 2021
Norwich, New York

HON. JOSEPH A. MCBRIDE
Supreme Court Justice