Piacquadio v Visiting Nurse Servs. in Westchester, Inc.
2021 NY Slip Op 33375(U)
January 22, 2021
Supreme Court, Westchester County
Docket Number: Index No: 59200/2018
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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RUTH PIACQUADIO and ANGELO PIACQUADIO,

Plaintiffs,

-against-

VISITING NURSE SERVICES IN WESTCHESTER, INC. and "ROB YOUNG," PHYSICAL THERAPIST,

Defendants.

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DECISION & ORDER

Index No: 59200/2018

Motion Return Date: November 27, 2020
Sequence Nos. 2 and 3

The following papers (NYSCEF document nos. 61-104; 107; 109-114) were read on: (1) the motion by the defendant, "Rob Young," Physical Therapist, for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against him (sequence no. 2); and (2) the motion by the defendant, Visiting Nurse Services in Westchester, Inc., for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against it; and for an order granting summary judgment on its cross-claims asserted against defendant, "Rob Young", for breach of contract and contractual indemnification (sequence no. 3).

Motion Sequence No. 2
Notice of Motion-Affirmation-Exhibits (A-I; J1-J8; K-N)
Affirmation in Opposition (by plaintiffs)-Affidavits (2)
Reply Affirmation-Exhibits (1-2)

Motion Sequence No. 3
Notice of Motion-Affirmation-Exhibits (A-S)
Affirmation in Partial Opposition (by defendant "Rob Young")
Affirmation in Opposition (by plaintiffs)-Affidavits (2)
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion by the defendant, "Rob Young," Physical Therapist, is granted, and so much of the plaintiffs' complaint as asserts a cause of action against said defendant is dismissed; and it is further

ORDERED the branch of the motion by the defendant, Visiting Nurse Services in Westchester, Inc., for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against it is granted, and so much of the plaintiffs' complaint as asserts a cause of action against said defendant is dismissed; and it is further

ORDERED the remaining branch of the motion by the defendant, Visiting Nurse Services in Westchester, Inc., for an order granting summary judgment on its cross-claims asserted against the defendant, "Rob Young", for breach of contract and contractual indemnification is granted solely to the extent that defendant, Visiting Nurse Services in Westchester, Inc., is awarded partial summary judgment on the issue of liability on its cross-claim alleging breach of contract for failure to procure insurance, and this branch of the motion is otherwise denied, and the cross-claims are hereby severed; and it is further

ORDERED the parties to the severed cross-claims are directed to appear in the Settlement Conference Part for a settlement conference on the issue of damages on VNSW's cross-claim for breach of contract against Young. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the defendants of the date, time, and method of the settlement conference.

Plaintiffs sue to recover monetary damages for personal injuries allegedly sustained as a result of occupational therapy services provided by the defendant, "Rob Young" (Young), to the plaintiff, Ruth Piacquadio (Plaintiff), on July 17, 2015.

On February 16, 2015, Plaintiff presented to New York-Presbyterian/Lawrence Hospital with symptoms of confusion and slurred speech. She was diagnosed with a stroke. Although her initial symptoms subsided, the hospital records documented residual stroke symptoms including, left sided weakness.

Plaintiff was subsequently discharged to rehabilitation facilities where she received, among other things, occupational therapy, to assist with left sided weakness including movement of the left arm. Ultimately, plaintiff was discharged with home health services through the defendant, Visiting Nurse Services in Westchester, Inc. (VNSW), through which she received, among other things, occupational therapy.

On June 19, 2015, Plaintiff was evaluated by a VNSW nurse who documented, among other things, left hemiparesis. On June 22, 2015, plaintiff was evaluated by the defendant-occupational therapist, Young. Upon assessment, Young documented that Plaintiff had limited elevation and experienced pain in the left upper extremity at the end of range of motion. At deposition, Plaintiff testified that when she first met with Young, his goal was to assist plaintiff in moving her left arm (*see* Plaintiff tr at 180, lines 9-16) because she indicated that she was having difficulty lifting her left arm due to weakness (*see id.* at 167, lines 16-25).

As part of the treatment plan to get the left arm moving, Plaintiff testified that Young provided a pulley device system for her to use (*see id.* at 181, lines 8-23). The pulley system, also known as an over-the-door shoulder pulley, is a therapeutic device intended to improve range of motion and is comprised of a metal bracket and a rope cord connected to two handles and which is secured to a door (*see* Young Tr at 71-72; 79). The device is used by an individual sitting down, grasping the handles and moving the handles back and forth to provide range of motion to the arms (*see id.* at 77-78; 81).

The pulley device was used during the occupational therapy sessions with Young and in the presence of Young. Young provided Plaintiff with instructions on how to use the device. During the final session with the use of the pulley, plaintiff testified that she was having difficulty grasping the handles on the pulley. As a result, she testified that Young tied her left hand to the handle which was connected to one end of the pulley. Young then began pulling down on the right end of the cord which caused Plaintiff's left arm to raise. Plaintiff testified that Young kept pulling the cord down in an effort to get Plaintiff's left arm to go "a little more" (Plaintiff tr at 200, line 18). As a result, plaintiff's left arm continued to elevate until it reached a point where plaintiff felt a pop in her left shoulder (*see generally id.* at 199-206). Ultimately, Plaintiff underwent arthroscopic left shoulder surgery.

Plaintiffs commenced this action with the filing of a summons and complaint on June 12, 2018, alleging that on July 17, 2015, Plaintiff sustained injuries to her left shoulder due to the negligence of Young. Plaintiff sued VNSW upon the grounds that they are vicariously liable for the negligence of Young. The complaint alleges a loss of consortium claim on behalf of plaintiff Angelo Piacquadio, the spouse of Plaintiff.

On July 26, 2018, VNSW interposed an answer with various affirmative defenses including, among others, that plaintiff's complaint is barred by the applicable statute of limitations (CPLR 214-a). VNSW additionally asserted cross-claims against Young for, *inter alia*, breach of contract for failure to procure insurance in accordance with an agreement requiring Young to obtain and maintain insurance coverage for VNSW.

Prior to interposing an answer, Young moved to dismiss the complaint insofar as asserted against him upon the grounds that the action is barred by the statute of limitations pursuant to CPLR 3211 (a) (5) and CPLR 214-a. By order dated and filed October 30, 2018, the court denied the motion without prejudice to a motion for summary judgment dismissing the complaint upon the grounds that the action is time barred. In its order, the court noted, *inter alia*, that based on the evidence before it, it could not determine whether the alleged conduct of Young "amount[ed] to medical treatment or [bore] a substantial relationship to the rendition of medical treatment by a licensed physician" (*Bleiler v Bodner*, 65 NY2d 65, 72 [1985]).

Thereafter, Young interposed an answer asserting various affirmative defenses including that the action is barred by the statute of limitations. The parties proceeded to discovery.

Following the completion of discovery, defendant Young moves for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against him upon the grounds that the action is barred by the statute of limitations or, in the alternative, upon the grounds that he did not depart from good and accepted occupational therapy practice (motion sequence no. 2). Defendant VNSW separately moves for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against it upon the grounds that it cannot be held vicariously liable for the acts of Young and additionally moves for an order granting summary judgment on its cross-claims for breach of contract and contractual indemnification against Young (motion sequence no. 3).

Motion by Defendant Young for Summary Judgment
Sequence No. 2

In support of the motion, Young proffers, among other things, an expert affirmation report, as well as copies of the pleadings, medical records, and the deposition testimonies of plaintiffs and defendant Young. Based thereon, Young contends that the evidence demonstrates that plaintiffs' allegations sound in medical malpractice and not ordinary negligence. Specifically, Young argues that the evidence establishes that the conduct complained of constitutes medical treatment because at the time of the subject incident, Young was rendering professional services as a trained and licensed occupational therapist. As a result, Young argues the action is barred by the statute of limitations pursuant to CPLR 214-a since it was commenced more than two years and six months following the subject incident on July 17, 2015.

In opposition, plaintiffs argue, among other things, that because the occupational therapy services rendered to plaintiff were not performed at the direction or at the request of a physician, the allegations are more appropriately characterized as negligence and not medical malpractice. Thus, plaintiffs assert that the action is timely since it was commenced within three years of the subject incident (*see* CPLR 214).

In reply, Young asserts, among other things, that plaintiffs mischaracterize the law that occupational therapists do not come within the purview of CPLR 214-a unless the services are rendered at the direction of a physician. In any event, Young notes that the evidence establishes that Plaintiff's occupational therapy was prescribed by plaintiff's physician.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most

favorable to the nonmovant (*see Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

"To dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Singh v Edelstein*, 103 AD3d 873, 874 [2d Dept 2013]). Once the defendant meets this initial burden, the burden of going forward shifts to plaintiff "to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether [plaintiff] actually commenced this action within the applicable limitations period" (*see id.* at 874-875).

CPLR 214-a provides that a medical malpractice action "must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure[.]"

"In applying the statute of limitations, courts look to the reality or the essence of the action and not its form" (*Pacio v Franklin Hosp.*, 63 AD3d 1130, 1132 [2d Dept 2009] [internal quotation marks omitted]). "[T]he distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787 [1996] [internal quotation marks omitted]). "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" (*Rabinovich v Maimonides Medical Center*, 179 AD3d 88, 93 [2d Dept 2019] [internal quotation marks omitted]). Thus, where the determination involves a consideration of professional skill and judgment, the action is one for medical malpractice (*see id.*). "A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient constitutes medical malpractice" (*id.*). By contrast, "[w]hen the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the failure to fulfill a different duty, the claim sounds in ordinary negligence" (*id.*).

Here, the evidence demonstrates that the conduct complained of constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment to the plaintiff which required the professional skill and knowledge of the defendant-occupational therapist. Young is a licensed occupational therapist in the State of New York and exercised

his professional judgment in recommending appropriate therapeutic exercises to plaintiff based on, among other things, her complaints of left arm weakness, including the use of the pulley device system, in order to help with range of motion and alleviate pain in the shoulder. At deposition, plaintiff conceded that she used the pulley system at the recommendation of Young and that Young provided her instructions on how to use the device.

Thus, defendant established, *prima facie*, that the allegations sound in medical malpractice since the acts complained of involve a matter of medical science or specialized skill not ordinarily possessed by lay persons (*see Rabinovich*, 179 AD3d at 93). Based thereon, defendants established, *prima facie*, the time to sue expired since the action was not commenced within two years and six months following the subject incident (*see* CPLR 214-a). Plaintiff was last treated by defendant Young on July 17, 2015, and this action was not commenced until June 12, 2018.

In addition, while not necessary to establish its *prima facie* entitlement to judgment as a matter of law dismissing the complaint upon the grounds that the action is time barred, defendant proffers the expert affirmation of Tammy Abdan, OTR/L, CHT. Initially, the court notes that Abdan, a licensed occupational therapist, is ineligible to submit an affirmation under CPLR 2106 (a) since she is not an attorney, physician, osteopath or dentist. However, since plaintiff failed to raise an objection to same, the court has considered the affirmation (*see Gentle Acupuncture, P.C. v Tri-State Consumer Ins. Co.*, 55 Misc3d 147(A), *1 [App Term, 2d Dept, 9th and 10th Judicial Districts 2017]; *Chiappone v North Shore University Hosp.*, Sup Ct, Queens County, June 8, 2020, O'Donoghue, J., index No. 700097/2016). Abdan, who based her review upon the deposition transcripts, medical records and the bill of particulars, opined within a reasonable degree of industry certainty, within the field of occupational therapy, that: (1) the use of the pulley constitutes therapeutic treatment for certain medical conditions including plaintiff's shoulder condition; (2) the overdoor pulley is used only after an assessment by a licensed healthcare provider, such as an occupational therapist; (3) the determination that such therapeutic exercise is indicated for a patient is based upon the occupational therapist's education, training, and experience; and (4) Young did not depart from good and accepted occupational therapy practice in implementing the overdoor pulley system.

Insofar as Young established his *prima facie* entitlement to judgment as a matter of law dismissing the complaint upon the grounds that this action is barred by the statute of limitations, the burden of going forward shifted to plaintiffs to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 560, 562; *Singh*, 103 AD3d at 874-875).

In opposition, plaintiffs failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Plaintiffs' contention that occupational therapists do not come within the purview of CPLR 214-a is without merit. "The Court of Appeals has explained that malpractice actions may apply to acts or omissions committed by individuals and entities

other than physicians where those acts or omissions either constitute medical treatment or bear a substantial relationship to the rendition of medical treatment" (*Rabinovich*, 179 AD3d at 95, quoting *Karasek v LaJoie*, 92 NY2d 171, 174-175 [1998]).

Motion by Defendant VNSW for Summary Judgment
Sequence No. 3

Insofar as plaintiffs' complaint was dismissed against Young, VNSW cannot be held vicariously liable for Young's alleged negligent actions (*see Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 837 [2d Dept 2008]; *Moorhouse v Standard, N.Y.*, 124 AD3d 1, 12 [1st Dept 2014]).

In any event, VNSW established, *prima facie*, that Young was an independent contractor and VNSW did not instruct nor supervise nor control the manner in which Young treated plaintiff. Accordingly, the burden of going forward shifted to plaintiffs to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 560, 562).

In opposition, plaintiffs failed to raise a triable issue of material fact (*see* CPLR 3212 [b]).

The court next addresses that portion of VNSW's motion for summary judgment on its cross-claims for contractual indemnification and breach of contract for failure to procure insurance asserted against Young.

Contractual Indemnification

In support of the motion, VNSW proffers an agreement entitled "Independent Contractor Agreement to Provide Occupational Therapy Services" dated August 10, 2016, which was signed and entered between VNSW and Young. In the agreement, Young agreed to:

> "maintain in force professional liability insurance in the amount of not less than $1,000,000/$3,000,000 and further agrees to indemnify, hold harmless and exonerate [VNSW] from any and all liability for damages, losses, costs, and acts of negligence arising out of [Young's] actions under this agreement, and further agrees to add the name of [VNSW] as a named insured and to submit a certificate of insurance to [VNSW], if so requested."

The agreement specifically conditioned any indemnification on a finding of negligence by Young. Insofar as the complaint has been dismissed against Young, the indemnification provision has not been triggered and thus, VNSW is not entitled to summary judgment on the indemnification provision.

Breach of Contract

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). "If such a showing is made, the promisor is liable to the promisee for the resulting damages for the promisor's failure to obtain the required insurance coverage, including the liability of the promisee to the plaintiff and the costs incurred in defending against the plaintiff's action" (*Keelan v Sivan*, 234 AD2d 516, 517 [2d Dept 1996] [internal citations omitted]). Last, an insurance procurement clause is "entirely independent of the indemnification provision in the parties' contract, [and] a final determination of the promisor's liability need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Keelan*, 234 AD2d at 518 [internal quotation marks and brackets omitted]).

Here, VNSW established its *prima facie* entitlement to judgment as a matter of law on its cross-claim for breach of contract by demonstrating that Young failed to procure insurance naming VNSW as an additional insured in accordance with the terms of the agreement and that it is therefore entitled to recover from Young out-of-pocket expenses resulting from the breach including reasonable attorneys' fees (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111 [2001]).

In opposition, Young failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Young's contention that the agreement was not properly authenticated is without merit. Not only did Young fail to respond to the notice to admit served upon him on September 7, 2018, which sought authenticity of the agreement, thereby deeming same admitted (*see* CPLR 3123 [a]), but he also authenticated the agreement at his deposition.

To the extent not specifically addressed herein, the court finds the remaining arguments of plaintiffs and Young unavailing.

E N T E R,

Dated: White Plains, New York
January 22, 2021

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HON. JOAN B. LEFKOWITZ, J.S.C.