

Manning v New York City Health & Hosps. Corp.
2023 NY Slip Op 30354(U)
January 30, 2023
Supreme Court, New York County
Docket Number: Index No. 805399/2018
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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BRUCE MANNING

INDEX NO. 805399/2018

MOTION DATE 01/24/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 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

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

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment on the issue of liability (Mot. Seq. No. 002) is granted, and defendants' cross motion for summary judgment dismissing the complaint is denied. The parties are directed to appear in Part 40 on **April 17, 2023, at 9:30 a.m.**, for the purpose of selecting a date for trial on the issue of plaintiff's damages.

This action arises out of alleged medical malpractice in connection with the care and treatment of the 54-year-old plaintiff Bruce Manning, who was a patient at Bellevue Hospital, an HHC facility, from October 6, 2017 through November 14, 2017. Plaintiff claims that Bellevue, its agents, servants, and employees improperly placed and failed to monitor the skin under an AnchorFast Oral Endotracheal Tube Fastener, so that when the tube was removed ten days after its placement, a pressure wound was found to have severed through plaintiff's upper lip. It is claimed, *inter alia*, that defendant failed to examine the skin/lip beneath the tube fastener despite an October 9, 2017 wound care note that evaluated plaintiff as being at "high risk for skin

breakdown” (*see* NYSCEF Doc. No. 58). The Nursing Progress Notes with Care Plan dated October 9, 2017, October 12, 2017, October 13, 2017, October 14, 2017, and October 15, 2017 (*see* NYSCEF Doc. No. 59) reflect no examinations, recommendations, or assessments regarding plaintiff’s lip beneath the AnchorFast Oral Endotracheal Tube Fastener. Plaintiff remained intubated from October 6, 2017 through October 16, 2017, during which time defendant concedes (*see* NYSCEF Doc. No. 67, para 29) that plaintiff was **sedated and unconscious**.

On October 16, 2017 plaintiff failed a trial to extubate. During and after the procedure, plaintiff’s upper lip was noted to be split horizontally, measuring 4x2 cm with 100% slough and erythema. Wound assessment attributed the injury to the AnchorFast Oral Endotracheal Tube Fastener. Plastic surgery and wound care were consulted, and the upper lip was closed without any complication. The plastic surgeon noted that the wound was “likely a through and through laceration.” 4-0 chromic sutures were placed in the skin and two absorbable sutures were applied. Plaintiff was successfully extubated on October 21, 2017 and was released from the hospital several weeks later.

The manufacturer’s instructions for the AnchorFast Oral Endotracheal Tube Fastener warn that “excessive pressure created by the device may cause dermal injury, tissue ischemia or necrosis” and suggest “reposition[ing] of the tube side to side every two hours or more frequently, to minimize the risk of injury to the skin and/or lips from unrelieved pressure. The instructions provide that to minimize the risk of a pressure injury, inspection of the patient’s lip and skin should be performed “**at least every two hours or more frequently if the patient’s condition dictates,**” and to “discontinue use of the device if redness or skin irritation occurs” (*see* NYSCEF Doc. No. 57; emphasis supplied).

Plaintiff pled the doctrine of *Res Ipsa Loquitur* in his December 11, 2018 complaint (*see* NYSCEF Doc. No. 1, paras 14, 56) and now moves for judgment on liability as a matter of law pursuant to that doctrine (*see* NYSCEF Doc. No. 47, para 4).

Defendant cross moves for summary judgment dismissing the complaint on the grounds that the treatment rendered to plaintiff was appropriate and in accordance with the accepted standards of care. In support, defendant relies upon the expert affirmation of critical care physician, Ian Newmark, M.D. (*see* NYSCEF Doc. No. 68), who sets forth that “any purported injury as a result of the life saving measures that were taken were not the result of malpractice” and that the risk of moving or adjusting the tube holder far outweighed any benefit to preventing injury to Mr. Manning’s upper lip.

The court will first address plaintiff’s summary judgment motion.

Insofar as plaintiff relies on the doctrine of *res ipsa loquitur*, it is noted that the doctrine has been applied to medical malpractice actions “to allow the factfinder to infer negligence from the mere happening of an event” (*States v. Lourdes Hospital*, 100 NY2d 208, 210-211 [2003]). There are three prerequisites to invoking *res ipsa loquitur*: “First, the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third and last, it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Kambat v. St. Francis*, 89 NY2d 489, 494 [1997]); *see also James v. Wormuth*, 21 NY3d 540 [2013]). “To rely on *res ipsa loquitur*, a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions affords a rational basis for concluding that ‘it is more likely than not’ that the injury was caused by defendant’s negligence” (*Kambat v. St. Francis Hosp.*, 89 NY2d 489, 494, *quoting*

Restatement [Second] of Torts §328 D, Comment E, and that other possible causes are “so reduced that the greater probability lies at defendant’s door” (*Kambat v. St. Francis Hosp.*, 89 NY2d at 495 [internal quotation marks omitted]).

Here, plaintiff has met all three requirements for a *prima facie* showing of medical malpractice based on the doctrine of *res ipsa loquitur* (*i.e.*, the hole through plaintiff’s upper lip did not occur in the absence of negligence; the tube holder was under the exclusive control of defendant’s staff, and the plaintiff did not contribute to his injury because he was unconscious), as supported by the affidavit of fact witness Dawana Simmons (*see* NYSCEF Doc. No. 48), the parties’ deposition testimony, Bellevue’s Nursing Policy & Procedure Manual (*see* NYSCEF Doc. No. 56), and the Manufacturer’s Instruction for the ETH Fastener (*see* NYSCEF Doc. No. 57). Accordingly, summary judgment is awarded to plaintiff on the issue of liability.

Defendant’s cross motion for summary judgment is denied.

Assuming *arguendo* that this Court countenanced the redacted affidavit of plaintiff’s nursing expert, defendant’s cross motion would still be denied since triable issues of fact (*i.e.*, whether defendant’s agents, servants, or employees acted within the standard of care by not monitoring the condition of plaintiff’s skin for ten days prior to the attempt to extubate) preclude an award of summary judgment in defendant’s favor.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff on liability; and it is further

ORDERED that the defendant's cross motion for summary judgment is denied; and it is further

ORDERED that all additional requests for relief are hereby denied; and it is further

ORDERED that the parties appear in Part 40 on **April 17, 2023 at 9:30 a.m.** to select a date for a trial on plaintiff's damages.

1/30/2023

DATE

Hon. Judith N. McMahon

JUDITH MCMAHON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE