SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 61

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JILL ENTEL,

Plaintiff,

-against-

Index No.
116443/98

BETH ISRAEL HOSPITAL,

Defendant.

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LOUISE GRUNER-GANS, J.:

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, defendant Beth Israel Hospital (the "Hospital") moves for summary judgment dismissing the complaint. Plaintiff Jill Entel cross-moves, pursuant to CPLR 3025, for an order: (1) granting leave to amend the complaint to assert a cause of action for medical malpractice; and (2) striking the Hospital's answer on the ground that it has willfully failed to respond to a trial subpoena and violated prior discovery orders. In Motion Sequence No. 002, the Hospital moves, pursuant to CPLR 3104, for an order quashing the subpoena served on it on October 31, 2000.

Plaintiff Entel commenced this action, alleging that she was sexually assaulted on July 2, 1996 in the recovery room of the Hospital, while under the influence of general anesthesia after gall bladder surgery (a laparoscopic cholecystectomy). She asserts that the alleged incident occurred due to the Hospital's negligence in failing to provide proper security during her recovery, negligently hiring her assailant, and negligently breaching its duty to monitor and protect her in the recovery

room. Entel also relies on the doctrine of res ipsa loquitur.

The Hospital now moves for summary judgment, claiming that Entel has failed to establish a cause of negligence against it. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

Relying on, inter alia, Entel's bill of particulars, dated December 28, 1998, and Entel' deposition held on September 29, 1999, the Hospital argues that Entel has failed to establish a prima facie case of negligence against it, since she failed to identify who committed the alleged assault, or where and when it occurred. The Hospital also maintains that Entel failed to establish any notice of any prior similar criminal activity at the Hospital, or that a Hospital employee was involved in the alleged assault. Additionally, the Hospital contends that Entel cannot establish the critical elements of a res ipsa case.

Entel's counsel concedes that the evidence is insufficient to determine conclusively exactly how Entel was

injured. However, he argues that the facts reasonably establish that she was sexually assaulted in the recovery room, after she was brought there from the operating room. He contends that since Entel was continuously monitored from the time that she was operated on in the operating room, to the time that she was brought to the recovery room, the "most reasonable inference is that the assault occurred in the recovery room with curtains drawn, or that she was wrongfully removed from the recovery room, assaulted and then returned" (Bowman's Affirmation, dated 11/00). He argues that, if the assault occurred earlier, someone on the surgical team would have witnessed it, since the records indicated that more than one person was with the plaintiff during surgery and through the time that she was taken to the recovery room. He further alleges that the assault could not have occurred after her stay in the recovery room, since she would most likely have been sufficiently lucid to remember it.

Counsel also refers to the Hospital's Policy and Procedure Manual for the standard of care for the recovery room, referred to as the Post Anesthesia Care Unit ("PACU") therein, which states as follows:

> PURPOSE:
> The purpose of the PACU is to provide an environment for the patient that supports close observation, the means for immediately administering all levels of care, and safety measures following anesthesia and surgery.

Counsel argues that the Hospital failed to closely observe Entel while she was recovering from the effects of

anesthesia, and that the circumstantial evidence supports a reasonable inference that the alleged failure to properly monitor was a cause of the injury, and thus should be presented to the jury.

Here, Entel seeks to hold the Hospital liable in negligence for, inter alia, failing to properly monitor her while she was in the recovery room. She claims that a prima facie case of negligence is made by the circumstantial evidence that she was sexually assaulted while under the Hospital's exclusive control, and while she was helpless, under the influence of anesthesia.

> To demonstrate a prima facie case of negligence based wholly on circumstantial evidence, "[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." The law does not require that plaintiff's proof "positively exclude every other possible cause" of the accident but defendant's negligence. Rather, her poof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.

(Schneider v Kings Highway Hospital Center, Inc., 67 NY2d 743, 744 [1986] [citations omitted]). In determining the adequacy of the plaintiff's evidence, this Court must consider same "in the light most favorable to plaintiff" (see, Pollicina v Misericordia Hospital Medical Center, 158 AD2d 194, 200 [1st Dept 1990], citing Schneider v Kings Highway Hospital Center, Inc., supra).

In order to establish a prima facie case of negligence, a plaintiff must demonstrate (1) the existence of a duty on the

defendant's part as to the plaintiff, (2) a breach of this duty, and (3) an injury to the plaintiff as a result thereof (Megna v Becton Dickinson & Co., 215 AD2d 542 [2d Dept], lv denied 86 NY2d 868 [1995]). A hospital unquestionably has a duty to safeguard the welfare of its patients, even "'from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety'" (Morris v Lenox Hill Hospital, 232 AD2d 184, 185 [1st Dept 1996], affd 90 NY2d 953 [1997] [citations omitted]).

The circumstantial evidence essentially relied on by Entel to demonstrate the Hospital's breach of its duty to safeguard her in the PACU consists of (1) the Hospital's medical records which indicate that she arrived at the PACU at 4:15 p.m. accompanied by the OR team, and that she was in the PACU's care for approximately three hours (Entel's Exhibit C, the Hospital's records);, (2) her father's affidavit which suggests that the Hospital did not know where Entel was between 4:30 p.m. and 5:15 p.m., when the receptionist made phone calls, on his behalf, to inquire as to Entel's whereabouts after her surgery (Entel's Exhibit E, David D. Brady's affidavit, dated 10/30/00), (3) Entel's deposition testimony that she first discovered in the late afternoon of July 3, 1996, after she was discharged from the Hospital, that her genitals were swollen (Entel's Exhibit B, Entel's deposition taken on 9/29/99, at 120-121); and (4) the medical records from Bellevue Hospital, wherein a physical examination of her genital areas, on July 5, 1996, revealed,

inter alia, "genitalia bruise on right labia major positive for swelling/tenderness, swelling with redness left labia" (Entel's Exhibit A, Bellevue Hospital records). Entel's deposition indicates that she was placed under general anesthesia for her surgery, and that her first recollection of consciousness after the surgery was in the recovery room, when she saw her father (Entel's Exhibit B, Entel's deposition taken on 9/29/99, at 83). Her father alleges that Entel regained consciousness at about 6:00 p.m. (Entel's Exhibit E, David D. Brady's affidavit dated 10/30/00).

The circumstantial evidence relied on by Entel does not support her counsel's speculation, that an alleged sexual assault occurred while Entel was in the PACU, or that she was wrongfully removed from the PACU, assaulted, and then returned. Although Entel's father alleges that the Hospital did not know where Entel was during the period of 4:30 p.m. and 5:30 p.m., the Hospital's records indicate that Entel was brought to the PACU by the OR team after the surgery was completed, and that her neurological, respiratory and cardiovascular conditions were continually observed every ½ hour from 4:15 p.m. to 7:15 p.m. by a nurse. Further, while Entel alleges that she discovered genital swelling on July 3, 1996, she did not seek medical attention at Bellevue Hospital until July 5, 1996, two days later. Additionally, although it appears from Bellevue Hospital's records that Entel had genital swelling on July 5, 1996, plaintiff acknowledged that vaginal specimens taken at Bellevue Hospital were negative for

semen.

Plaintiff does not produce sufficient circumstantial evidence from which a logical inference may be drawn leading to the conclusion that Entel's alleged injury occurred in the Hospital, or that the Hospital was negligent in failing to properly safeguard and monitor her (see, Schneider v Kings Highway Hospital Center, Inc., 67 NY2d 743, supra). Any inferences of negligence would be based upon mere speculation, which is insufficient to prove negligence based wholly on circumstantial evidence (id.).

Further, the circumstantial evidence relied on by Entel does not afford a sufficient basis for an inference of negligence under the doctrine of res ipsa loquitur.

To demonstrate the existence of a triable issue by relying on a res ipsa loquitur theory, the plaintiff must establish three things: (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality causing the accident was within defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution on the part of plaintiff (Kambat v St. Francis Hospital, 89 NY2d 489, 494 [1997]).

Entel relies on Morris v Lenox Hill Hospital (the "Morris Case") (232 AD2d 184, supra) in support of her position. In the Morris Case, the injured plaintiffs asserted negligence and malpractice claims against Lenox Hill Hospital arising from the poisoning of intravenous fluid, administered while each was

unconscious and recovering from orthopedic surgery. In both cases, Pavulon, a neuromuscular blocking agent was injected into intravenous bags, causing the patients to suffer respiratory paralysis. While it was unknown who administered the Pavulon, the Court held that the circumstances of the incident were sufficient to allow an inference of negligence under the doctrine of res ipsa loquitur, in light of the hospital's concession that access to Pavulon was restricted to its agents. Thus, while, in the Morris Case, the plaintiffs were able to point to an instrumentality in the defendant's exclusive control, here, in the instant action, it is undisputed that Entel does not know where or how the alleged injury occurred or who the alleged assailant was. Thus, she cannot point to any agency or instrumentality within defendant's exclusive control that caused her alleged injury.

Plaintiff also fails to demonstrate a prima facie case of negligence based on the negligent hiring of her unknown assailant. A necessary element of such a cause of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (Kenneth R v Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [2d Dept 1997]). Here, it is unknown who the alleged assailant was, thus, the record is devoid of any facts indicating that the alleged assailant was in the Hospital's employ.

Thus, the Hospital has demonstrated its entitlement to summary judgment on the negligence claims (Winegrad v New York

Univ. Med. Ctr., 64 NY2d 851, supra).

Entel cross-moves for leave to amend the complaint to include a malpractice claim.

> [A] claim sounds in medical malpractice when the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." By contrast, when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty," the claim sounds in negligence.

(Weiner v Lenox Hill Hosp., 88 NY2d 784, 788 [1996] [citations omitted]).

The proposed second cause of action for malpractice is essentially based upon the Hospital's alleged negligent breach of its "professional medical duty to monitor and protect plaintiff" (Exhibit I, Proposed Amended Complaint, ¶ 11), a duty which has been recognized in negligence claims (see, Morris v Lenox Hill Hospital, supra). Therefore, Entel's application for leave to amend the complaint to add a malpractice claim is denied.

In view of the foregoing, Engel's application, pursuant to CPLR 3126, for an order striking the Hospital's answer on the ground that it failed to produce outstanding discovery, is moot. In any event, she waived her right to discovery by filing a note of issue, dated August 28, 2000 with a certificate of readiness, without any exclusions (Elghanayan v Elghanayan, 265 AD2d 262 [1st Dept 1999]).

In view of the foregoing, the Hospital's motion, in

Motion Sequence No. 002, pursuant to CPLR 2304, for an order quashing the trial subpoena served on it on October 31, 2000 is also moot.

Accordingly, it is

ORDERED that the Hospital's motion, in Motion Sequence No. 001, for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to the Hospital as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's cross motion, in Motion Sequence No. 001, for leave to amend the complaint is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion, in Motion Sequence No. 001, for an order striking the Hospital's answer is denied as moot; and it is further

ORDERED that the Hospital's motion, in Motion Sequence No. 002, for an order quashing the subpoena is also denied as moot.

Dated: 3/20/01

ENTER:

J. S. C.

HON. LOUISE GRUNER GANS