

Ornstein v New York City Health & Hosps. Corp.

2004 NY Slip Op 30094(U)

January 5, 2004

Supreme Court, New York County

Docket Number: 0110914/0914

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13

Justice

Helen Ornstein

INDEX NO. 110914/01

- v -

MOTION DATE 9/4/03

MOTION SEQ. NO. 002

New York City Health and Hospitals Corporation and Leslie Boyd

MOTION CAL. NO. 104

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR 3211 (a) (7), dismissing a portion of plaintiff's claim for damages, is denied.

In this personal injury action, plaintiff, who was a nurse working in the emergency room at Bellevue Hospital Center on September 1, 2000, claims that she has suffered both physical and emotional injuries as a result of having been stuck by a needle that was used on a patient suffering from AIDS. Plaintiff does not claim that she contracted the HIV virus as a result of the needle prick. In fact, the record shows that plaintiff underwent several HIV tests in the months following her exposure to the virus, and that all tests were negative. Rather, she alleges that she sustained physical injuries including a puncture wound to the right thumb, and side effects from the antiviral medication regimen that she started after being pricked by the needle. She also alleges that she has suffered post-traumatic stress disorder, panic attacks, sleep difficulties, and that she has been unable to return to her work as an emergency room nurse due to a fear of again being stuck by a needle that

MOTION/CASE IS REFERRED TO JUSTICE DATED: _____

J.S.C.

had been used on an AIDS patient.

Defendant has moved for an order limiting plaintiff's claim for emotional distress to the six months subsequent to the date that she was exposed to the virus. Citing Brown v. New York City Health and Hospitals Corporation (225 AD2d 36), and Taormina v. State of New York (286 AD2d 490). two Second Department decisions, defendant asserts that plaintiff's claim for damages sustained more than six months after exposure must be dismissed because based on the consensus of the medical community, the HIV virus develops within six months after exposure, and any fear of contracting HIV after this six-month period in the face of negative test results is accordingly unreasonable as a matter of law.

Significantly, as is pointed out by plaintiff, she is not claiming that she continued to suffer from "AIDS phobia" (Brown, id., p. 37) even after the six month period following the needle prick. She had tested negative during this period. She is claiming continuing emotional and psychological injuries as a result of the incident. In Taormina, cited by defendant, the court dismissed a claim for negligent infliction of emotional distress based on the fear of contracting AIDS on the ground that the two-year old plaintiff could not be fearful of contracting the virus. Because the plaintiff here is not limiting her claim to damages sustained as a result of "AIDS phobia", the holding in Taormina is not applicable.

In Brown, id., the plaintiff had not undergone testing to determine if she had contracted the HIV virus, and in opposition to defendant's motion for an order compelling her to undergo the test, plaintiff urged that requiring her to be tested would be emotionally harmful, in that if she tested positive, she would not be able to continue to function. The court did not order plaintiff to be tested, but ruled that defendant was entitled to partial summary judgment dismissing plaintiff's claims for injuries suffered after the initial six-month period following exposure unless she presented evidence of a positive HIV-antibody test, holding that "[t]he plaintiff's fear of contracting AIDS would be unreasonable as a matter of law after six months, assuming a negative HIV-antibody test result." (id., p. 49). This holding, which applies to the fear of contracting AIDS, is not applicable to the claim here, which does not seek to recover for "AIDS phobia" damages after the initial six-month period following exposure.

To the extent that defendant is correct in its assertion that the Brown court implicitly rejected plaintiffs' argument that she could recover damages for post-traumatic stress even after the six-month period following exposure, I decline to follow that implicit holding, but instead am guided by the Third Department's explicit holding in Fosby v. Albany Memorial Hospital (252 AD2d 606). In Fosby, the Third Department dismissed a claim for damages based on "AIDS phobia" because the plaintiff in that case, an emergency room patient who had been accidentally stuck by a needle when she reached for a blanket, could not prove actual exposure to HIV. The hospital had refused to provide plaintiff with a copy of the incident report that would tell her how the needle had been previously used, and had advised her that she should consider the needle infectious and be tested for the HIV virus at three, six, and 12 month intervals. The plaintiff tested negative.

While the court, citing Brown, *supra*, and other "AIDS phobia" cases, held that plaintiff did not have a viable "AIDS phobia" claim because she had no proof of actual exposure to the virus, it also held that "[l]acking the requisite proof of actual exposure to HIV, a plaintiff may nevertheless pursue a claim to recover for negligent infliction of emotional distress where "there exists 'an especial likelihood of genuine and serious mental distress, arising from *** special circumstances, which serves as a guarantee that the claim is not spurious'" (Johnson v. State of New York, 37 NY2d 378, 382, quoting Prosser, Torts, § 54, at 330 [the ed.]; see Schulman v. Prudential Ins. Co. of Am., 226 AD2d 164)." (*id.*, p. 608).

The situation in Fosby which the Third Department held "may well constitute such a 'special circumstance' (@., p. 608) was "defendant's unexplained refusal to provide plaintiff with any information regarding the needle." (@., p. 608). The situation in this case is even more compelling. Plaintiff, an emergency room nurse, knew that she was caring for an AIDS patient, and that the needle which punctured her thumb had been used on this patient. In her deposition testimony, plaintiff stated that when she arrived in the emergency room to start her work shift she was told that the patient, a prisoner from Riker's Island, had AIDS and had been admitted to rule out TB. She examined the patient and found his condition to be critical. According to plaintiff, he told her that he wanted to die, and that he had stopped taking all of his meds at Rikers and knew that he was dying. He weighed

about 80 pounds, and was *so* weak that he could hardly turn over by himself. Plaintiff further testified that when she went to the patient's bed to clean him up after he had soiled the bed, she found an intracath needle sticking out of the mattress, and she removed it and discarded it into a needle box. After she and another nurse finished washing the patient, they went to turn him in the bed and that was when another intracath needle went through her thumb. Thus, plaintiff knew that she had been punctured with a needle that had been used on an AIDS patient, a patient whom she knew was suffering and in critical condition, and who told her that he wanted to die. Additionally, plaintiff testified that after her doctor first prescribed antiviral medication for her, he increased the doses because of the AIDS patient's viral load.

This situation, even more *so* than in Fosby, supports a conclusion that plaintiff's claim for emotional damages is not spurious and that she has therefore stated a claim for emotional harm beyond the initial six-month period of exposure to the HIV virus, "especially if supported by objective manifestations of that harm." (Johnson v. State of New York, 37 NY2d 378, 382). Here, plaintiff has submitted proof of such objective manifestations through the report of an examining psychiatrist, who found in November 2001 (over a year after she had been stuck by the needle) that plaintiff was suffering from, inter alia, "post-traumatic stress disorder, chronic, currently mild severity." (Report of Dr. Solomon Mishkin, Plaintiff's Affirmation in Opposition, Ex. B).

Based upon the foregoing, defendant's motion for an order dismissing any claim for emotional damages for the time period subsequent to the initial six-month exposure to **HIV** virus, is denied.

Dated: January 5, 2004

ENTER:

JA-A

J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**