

Martinez v City of New York

2007 NY Slip Op 30739(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0111838/2002

Judge: Eileen A. Rakower

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Rakower
Justice

PART 5

Index Number : 111838/2002

MARTINEZ, SOFIA

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 4/12/07


EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
SOFIA MARTINEZ,
Plaintiff,

Index No.
111838/02

- against -

DECISION/ORDER

THE CITY OF NEW YORK and NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,
Defendants.

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she was sexually assaulted on November 4, 2001. While recovering from back surgery at Harlem Hospital, plaintiff alleges she was touched by an employee of said hospital who she believed to be a male nurse. Specifically, plaintiff contends an individual now known to be named Mr. Bramwell, touched and fondled the private parts of the plaintiff's body, and penetrated her vagina without her consent. Mr. Bramwell also is alleged to have committed similar assaults on other female patients before plaintiff's incident.

Defendants initially moved for summary judgment on October 5, 2005. Justice Michael Stallman rendered a decision dated February 24, 2006 which ordered that the motion for summary judgment "be recalendared for additional submissions in light of court-ordered disclosure of documents that were produced for in camera inspection." The decision of Justice Stallman set forth various disclosure requirements with dates by which documents were to be provided to plaintiff. The parties stipulated to adjourning the instant motion from May 24, 2006 to June 28, 2006 and again from June 28, 2006 to August 15, 2006 while plaintiff pursued investigation which arose from the in camera inspection.

At a compliance conference scheduled for November 6, 2006, an issue arose regarding what defendants claimed to be a "typographical error" on a "charge sheet."

The sheet listed an incident in which Mr. Bramwell sexually assaulted another female patient on November 1, 2001, three days before plaintiff's incident. The charge sheet also referred to a police report that had been filed for that incident. Defendants agreed to withdraw their motion for summary judgment without prejudice in order that they could produce a witness to clarify the error. On December 11, 2006 defendants produced Ms. Lydia Perez, Director of Security at Harlem Hospital. Ms. Perez testified that the police report filed on November 1, 2001 on the charge sheet must have been an error because she did a search of her records and found a police report only for plaintiff's incident on November 4, 2001.

Defendants now move for summary judgment. They argue that they had no knowledge of Mr. Bramwell's propensity to commit sexual assault and thus they should not be held liable under the theory of negligent hiring or retention. Defendants reassert their claim that the prior sexual assaults on patients were only discovered after an investigation into plaintiff's claim. Defendants submit the deposition testimony of Ms. Perez in order to clarify that the complaints listed on the hospital's charge sheet were recorded after plaintiff's incident.

Charge II of the Notice and Statement of Charges states:

Specification: On November 1, 2001 you shaved a female patient's pubic area without a doctor's order requesting same. A Police Report was generated because of this incident; and you were placed on a pre-hearing suspension.

Plaintiff, in her opposition, argues that Ms. Perez's testimony did not conclusively establish that there had been a typographical error on the charge sheet. Plaintiff points out that Ms. Perez testified to never having seen the Notice and Statement of Charges, the document which contained the alleged typographical error. Further, although Ms. Perez stated that the date was a mistake, the basis for the statement was only a cursory review of a police report generated by someone else in her department.

Q: Ms. Perez, I'm just going to show you this three-page document. It's been marked Plaintiff's Exhibit 1. Would you just take a look at it for me. Are you familiar with this document?

A: No.

Q: The first page is entitled "Notice and Statement of Charges," is that correct?

A: Yes.

...

Q: Under what circumstances would a Notice of Charges be sent to an employee at Harlem Hospital?

...

A: When it deals with hospital police, only if I was bringing up an employee of mine on charges. This would be the notification that they receive.

...

Q: The third page of that document is Exhibit A, and it details a series of charges. Have you had time to review that?

A: Yes.

Q: Are you familiar with any of those charges?

A: No.

Q: Looking at this document, does that refresh your recollection as to Mr. Bramwell in any way or an incident involving Mr. Bramwell?

A: Specification II makes a reference to a police report that we generated.

Q: A police report that you generated?

A: That our department generated.

Q: Would this be the police report that it references to your knowledge? (Handing.)

A: Yes.

...

Q: How do you recognize it?

A: It's a police report generated by one of my staff members.

...

Q: Have you seen this document before?

...

A: I don't recall. It had to pass through my desk because I review every report.

Q: Now charge II makes reference to a police report, is that correct?

A: Correct

Q: And you identified the police report we're looking at as Exhibit 2 as the report referenced in charge II?

A: Yes.

Q: Charge II makes mention of an incident which occurred on November 1st, 2001, is that correct?

A: Yes.

Q: Can you tell me what the date on that police report is, the date of the incident?

A: November 4th.

Q: Do you have any personal knowledge as to how that report

referenced in charge II could be the same report?

A: I could only attest to this report, when we received it. That would be November 4th.

Q: Can you attest to the report being referenced in charge II in Exhibit A being the same report?

A: The date on this report is incorrect.

...

Q: How can you be sure that the date is incorrect?

A: Because this is the date that it was reported to us as occurring. (Perez Deposition, Pages 19-24)

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

In *N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247 (2002), the court found that:

It is settled law that a necessary element of a negligent supervision claim requires a showing that the defendant knew of the employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure.

Plaintiff asserts that there is an issue as to whether Harlem Hospital learned of the alleged assaults committed prior to plaintiff's incident. Plaintiff asserts that the

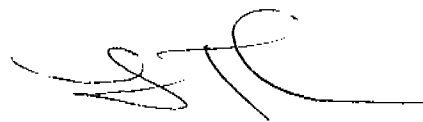
charge sheet demonstrates that they knew of one incident on November 1st which was reported to police, which preceded the November 4th incident complained of here. Defendants rely on the deposition testimony of Ms. Perez to show that they only learned of the November 1st incident after the November 4th incident was reported. However, Ms. Perez does not have personal knowledge of the subject charge sheet and she merely speculates as to why she thinks that the date and the reference made to a police report on the charge sheet were made in error. Ms. Perez's testimony does not negate plaintiff's claim as a matter of law, and there remains an issue of fact as to whether defendants did have any notice of the prior sexual assaults committed by Mr. Bramwell.

Wherefore it is hereby

ORDERED that defendants motion for summary judgment is denied.

This constitutes the Decision and Order of this Court. All other relief requested is denied.

DATED: April 12, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE