

<b>Lamberti v Martingano</b>
2007 NY Slip Op 31335(U)
May 28, 2007
Supreme Court, Richmond County
Docket Number: 0102965/2006
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**PART DCM 3**

**Index No.: 102965/2006**

**Motion No.: 1 & 2**

**ROSEMARY LAMBERTI,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**FRANCIS X. MARTINGANO, ELI SERUR and  
WOMEN'S HEALTHCARE SPECIALISTS,  
MEDICAL PRACTICE, P.C.,**

*Defendants*

The following items were considered in the review of this motion for summary judgment and to file a late notice of medical malpractice

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3
Replying Papers	4
Exhibits	Attached to Papers
Memorandum of Law	5

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 2, the plaintiff moves unopposed pursuant to CPLR § 2004 to file *nunc pro tunc* a late Notice of Medical Malpractice Action. CPLR § 3404 requires *inter alia* that:

“Not more than sixty days after issue is joined, the plaintiff in an action to recover damages for dental, medical or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action, on a form to be specified by the chief administrator of the courts...The time for filing a notice of dental, medical or podiatric malpractice action may be extended by the court only upon a motion made pursuant to section two thousand four of this chapter.”

As this action is still in its infancy stage of discovery, there is no prejudice against the defendants, Drs. Martingano and Serur, as well as their P.C., Women's Healthcare Specialists. Accordingly, the plaintiff's motion to file a late notice of medical malpractice is granted.

In motion number 1, the plaintiff moves for summary judgment as to liability only based upon a theory of *Res Ipsa Loquitur* for performing a “bi-lateral salpingo-oophorectomy” on the plaintiff, but errantly leaving the left ovary behind. The defendants oppose motion number 1.

This action arises to recover for injuries sustained by the plaintiff based upon the alleged medical malpractice of the defendants. On March 11, 2004, the defendants purportedly performed a “laparoscopic assisted vaginal hysterectomy bilateral salpingo-oophorectomy” on the plaintiff. However, the plaintiff, based upon the post-operative pathology report prepared by Shanthi Govindaraj, M.D., who states that “specimen is labeled uterus, cervix, tubes plus ovaries,” but the “left fallopian tube and left ovary are absent,” alleges medical malpractice by the defendants based upon the failure of the defendants to remove both the right and left ovaries and fallopian tubes. Furthermore, the plaintiff alleges that the defendants continued to treat the plaintiff, including the performance of another gynecological surgery and the prescription for estrogen therapy (contraindicated for patients with an ovary) as if both the left and right ovaries and tubes were removed.

Generally, the doctrine of *res ipsa loquitur* applies when the plaintiff establishes three elements. First, the event must be of the kind which ordinarily does not occur in the absence of someone's negligence. Second, the event must be caused by an agency or instrumentality within the exclusive control of the defendant. Finally, the accident must not have been due to any voluntary action or contribution by the plaintiff (*Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219 [1986]).

Here, the plaintiff argues that all of the conditions necessary for the application of *res ipsa loquitur* have been met. Specifically, the plaintiff argues that: 1) the failure to remove the left ovary and left fallopian tube during surgery intending to remove both ovaries and both fallopian tubes does not ordinarily occur in the absence of someone's negligence; 2) both of the defendants who performed the surgery are before the court and the surgery performed was with the exclusive control of both of the surgeons; and, 3) the plaintiff was under anesthesia during the course of the surgery, thereby precluding her from contributing in any form to her injuries.

In opposition to the plaintiff's motion, the defendants rely upon the sworn affidavits of both Drs. Martingano and Serur, the named defendants in this action. Dr. Martingano, in paragraph 10 of his affidavit states:

“In the previous surgeries that I performed on this patient, Ms. Lamberti's left ovary was consistently adherent to pelvic wall, frozen down into cul-de-sac, and highly involved with proliferative disease, cysts, dense adhesions and scar tissue. Our operative findings in the LAV-BSO – described by the pathologist as focally hemorrhagic tan tissue at the left cornua of corpus uteri - lead me to believe this was left ovarian tissue.”

Paragraph 10 of Dr. Serur's affidavit states:

“Ms. Lamberti was informed in advance of surgery that Dr. Martingano and I would attempt to remove as much tissue as could safely be resected. Given this patient's history of five prior laparotomies for endometriosis resulting in dense adhesion formation, it was never guaranteed that this surgery would cure plaintiff's condition, or that the surgeons involved would be able to remove all of the disease-involved tissue.”

In 1997, the Court of Appeals applied the doctrine of *res ipsa loquitor* in medical malpractice litigation in the case of *Kambat v. St. Francis Hosp.* (89 N.Y.2d 489 [1997]). The *Kambat* case became the quintessential *res ipsa loquitor* case often cited amongst law professors, law students, practicing lawyers, the judiciary, and lay persons alike. *Kambat* presented a set of facts where a surgeon, performing a surgical procedure negligently left a foreign object, to wit an eighteen by eighteen inch laparotomy pad, inside the plaintiff's stomach after the surgery was complete. Writing for a unanimous court, Chief Judge Kaye cites to Prosser and Keaton on torts stating that “There are, however, some medical and surgical errors on which any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care. When an operation leaves a sponge or implement in the patient's interior,... the thing speaks for itself without the aid of any expert's advice.” The court further states that “the lay jury here did not require expert testimony to conclude that an 18-by-18-inch laparotomy pad is not ordinarily discovered inside a patient's abdomen following a hysterectomy in the absence of negligence.”

Although the plaintiff relies upon *Kambat* to justify the granting of summary judgment, the facts of this action do not lend themselves to the granting of summary judgment based upon the theory of *res ipsa loquitor*. In *Kambat*, the facts can be boiled down to leaving a foreign object

inside the body; whereas here, the facts are that the doctors failed to remove certain organic tissue from the body. The court is not competent to pass judgement based upon the facts of this action, without the aide of expert medical testimony, that the defendants departed from good and accepted medical practice in allegedly not removing the left ovary and left fallopian tubes; and that the departures were the proximate causes of the plaintiff's injuries. (*Holbrook v. United Hospital Med. Ctr.* 248 AD2d 358 [2d Dept 1998].) Therefore, at this early stage in the litigation of the action, summary judgment, based upon a theory of *res ipsa loquitor* is inappropriate.

Accordingly, it is hereby:

ORDERED, that motion number 1, made by the plaintiff for summary judgment based upon a theory of *res ipsa loquitor* is denied; and it is further

ORDERED, that motion number 2, made by the plaintiff for leave to file, *nunc pro tunc*, a late notice of medical malpractice action is granted; and it is further

ORDERED, that the plaintiff shall have 60 days from the date this order is entered by the County Clerk or Richmond County to pay the necessary fees, and file with the Clerk of the Supreme Court of Richmond County a "Notice of Medical Malpractice Action;" and it is further

ORDERED, that all parties return to DCM 3 at 9:30 AM on **June 12, 2007** to enter into a preliminary conference order.

ENTER,

DATED: May 23, 2007

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Joseph J. Maltese  
Justice of the Supreme Court