

**Klein-Bullock v North Shore Univ. Hosp. at
Forest Hills**

2007 NY Slip Op 32088(U)

July 3, 2007

Supreme Court, New York County

Docket Number: 0114009/2005

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

JAQUELINE KLEIN-BULLOCK, Individually and as
Administratrix of the Estate of RUTH KLEIN a/k/a
RUTH S. KLEIN, Deceased

Plaintiff,

Index No.: 114009/05

MOTION DATE _____

-v-

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

NORTH SHORE UNIVERSITY HOSPITAL AT
FOREST HILLS and NORTH SHORE-LONG
ISLAND JEWISH HEALTH SYSTEM,

Defendants.

The following papers, 1- 4, were read on this motion by plaintiff, pursuant to CPLR §4404,
to set aside the jury verdict on the grounds that the trial court failed to charge the jury on *res ipsa*
loquitur.

Notice of Motion - Affidavits - Exhibits -Memorandum
Opposition -
Replying Affidavits

FILED
JUL 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Papers Numbered
1-3 _____
4 _____

Cross-Motion: Yes No

In the instant medical malpractice action, the plaintiff alleged that on April 11, 2005, while plaintiff's decedent, Ruth Klein, was being treated in connection with her diabetic condition in the intensive care unit of North Shore University Hospital at Forest Hills, she sustained multiple fractures to her upper and lower extremities due to physical intervention by the staff at the facility. The decedent underwent surgery to repair the aforementioned fractures and ultimately died within a week of sustaining those injuries. The medical examiner who performed the autopsy of plaintiff's decedent categorized the manner of her death as accidental, due to fractures to the lower and upper extremities during physical intervention by others. Notwithstanding the findings of the medical examiner, there was much testimony during the trial of this action, as well as documentary evidence contained in decedent's medical chart, that decedent, an approximately 80 year old osteoporotic woman, caused or contributed to her own injuries by, *inter alia*, climbing out of her hospital bed and being agitated, combative and abusive, *i.e.*, kicking at a nurse, attempting to stab a respiratory therapist, and throwing a medical device at a nurse's aide. Additionally, plaintiff's decedent was discovered with her arm caught between the side rail and mattress of her hospital

bed. It was when the rail was lowered to release her arm that her arm fracture was discovered.¹

During the charge conference, plaintiff's counsel requested that the jury be given the *res ipsa loquitur* charge. However, because of the evidence presented at trial that decedent's own conduct contributed to her injuries, the Court declined plaintiff's request for the *res ipsa loquitur* charge. The trial concluded on March 29, 2007, with a jury verdict in favor of defendants North Shore University Hospital at Forest Hills and North Shore- Long Island Jewish Health Systems. The plaintiff presently moves to set aside that verdict, arguing that the Court erroneously declined to charge the jury with *res ipsa loquitur*. For the reasons set forth below, plaintiff's motion is denied

"Where the actual or specific cause of an accident is unknown, under the doctrine of *res ipsa loquitur* a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 [1997], citing *Abbott v. Page*, 23 NY2d 502 [1969]; Restatement [Second] of Torts §328 D, comments *a, b*. Plaintiff's proof must establish the following three elements to invoke the doctrine of *res ipsa loquitur*: (1) the accident must be of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality causing the accident was within the defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff. See *Kambat, supra*; see also *Tora v. GVP AG*, 31 AD3d 341 [1st Dept. 2006]; *Banca Di Roma v. Mutual of America Life Ins. Co.*, 17 AD3d 119 [1st Dept. 2005]. If a plaintiff establishes these conditions, a prima facie negligence case exists and plaintiff is entitled to have *res ipsa loquitur* charged to the jury. See *Kambat, supra*.

Though a plaintiff need not exclude every possible alternative explanation for the injury, if other possible explanations are so numerous or likely that the greater probability of negligence no longer lay with the defendant, *res ipsa loquitur* cannot apply. As set forth by the Court of Appeals:

"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 afford a rational basis for concluding that 'it was more likely than not' that the injury was caused by defendant's negligence. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury 'be so reduced that the greater probability lies at the defendant's door'."

Kambat, supra (internal citations omitted).

The first element permits the exercise of common experience to reach a conclusion as to whether the accident, by virtue of its very nature, would ordinarily occur in the absence of

¹ It is noted that there was evidence presented at the time of trial that one of the nurses employed by defendant hospital attempted to extract decedent's arm from between the bed and the bed rail prior to getting assistance from other staff members in lowering the bed rail to remove the arm. It appears that the jury credited this testimony, as they answered a jury interrogatory asking whether the nurse attempted to extract the arm in this manner, in the affirmative. Notwithstanding, in another interrogatory, the jury set forth that the nurse was not negligent in her attempts to extract the decedent's arm in such a manner.

negligence. *Id.*; see also *Seung Ja Cho v. In-Chul Song*, 286 AD2d 248 [1st Dept. 2001]. Plaintiff in the instant action argues that a person being treated in the intensive care unit of a hospital does not ordinarily sustain fractures in the absence of negligence. The court acknowledges that under the simplified set of facts set forth by plaintiff in her motion papers, the first element may have been met. However, under the facts established through the testimony, as well as other evidence, at trial, it cannot be said that the fractures sustained by plaintiff's decedent could not have occurred in the absence of negligence. Plaintiff's decedent was an approximately 80 year old osteoporotic woman,² who was uncooperative, combative and abusive. There was ample testimony during the course of the trial to establish that plaintiff's decedent climbed over the rail of her hospital bed in an attempt to walk home, kicked at a nurse, attempted to stab a respiratory therapist, threw a medical device at a nurse's aide, and lodged her arm between the side rail and mattress of her hospital bed. When a person who is at a high risk for sustaining fractures engages in such behavior it cannot be said that their injuries were more likely than not caused by defendant's negligence, as it is just as likely, that such injuries were caused by some action of the patient.

With respect to the second element, plaintiff argues that the instrumentality causing the accident was the hospital staff, and that the instrumentality was under the control of the defendant facility. Therefore, according to plaintiff, the second element has been satisfied. Despite this argument, the evidence, again, fails to demonstrate that the injuries sustained by plaintiff's decedent were more likely than not caused by the hospital staff. As previously set forth, although the medical examiner who performed the autopsy of plaintiff's decedent categorized the manner of her death as accidental, due to fractures to the lower and upper extremities during physical intervention by others, there was extensive testimony during the trial of this action which would establish that the decedent's own actions were the cause of her injuries. Therefore, it is the view of this court that plaintiff has failed to meet the second element required to entitle her to have *res ipsa loquitur* charged to the jury.

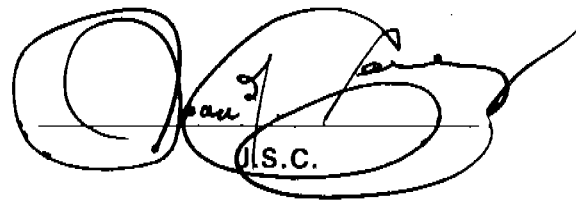
Similarly, as a result of the actions of plaintiff's decedent while a patient at the defendant's facility, plaintiff clearly cannot satisfy the third required element, *i.e.*, that the accident was not due to any voluntary action or contribution by plaintiff. The third element seeks to establish that it was more likely than not that a plaintiff's injury was caused by a defendant's negligence, rather than any contributory negligence by the plaintiff. See *Hawkins v. Brooklyn-Caledonian Hosp.*, 239 A.D.2d 549. As set forth above, based upon the actions of the decedent while a patient of the intensive care unit of North Shore University Hospital at Forest Hills, it cannot be said that the decedent's injuries were more likely than not caused solely by defendant's negligence, as opposed to being caused or contributed to as a result of the voluntary actions of plaintiff's decedent. Accordingly, plaintiff was not entitled to have *res ipsa loquitur* charged to the jury.

² It is noted that while decedent's osteoporosis does not lessen defendant's degree of responsibility or care, her condition is relevant to the jury's ability to draw a reasonable inference as to whether Ms. Klein could have sustained the fractures in the absence of negligence.

Based on the foregoing, it is hereby

ORDERED plaintiff's motion to set aside the verdict of the jury entered on March 29, 2007 is denied.

Dated: 7/3/2007



Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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