

DePerte v Brookhaven Home Health Agency, Inc.

2007 NY Slip Op 32184(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0023554/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-7-07
ADJ. DATE 6-5-07
Mot. Seq. # 002 - MD
003 - XMG

-----X	:		:	
MATTHEW DePERTE,	:		:	STEVEN WILDSTEIN, P.C.
	:		:	Attorney for Plaintiff
	:	Plaintiff,	:	98 Cutter Mill Road
	:		:	Great Neck, New York 11021
	:	- against -	:	
	:		:	FUREY, KERLEY, WALSH, et al.
	:		:	Attorney for Defendant
BROOKHAVEN HOME HEALTH AGENCY,	:		:	2174 Jackson Avenue
INC.,	:		:	Seaford, New York 11783
	:		:	
	:	Defendant.	:	
-----X	:		:	

Upon the following papers numbered 1 to 31 read on this motion to dismiss the action; Notice of Motion/ Order to Show Cause and supporting papers) 1 - 10; Notice of Cross Motion and supporting papers 11-16; Answering Affidavits and supporting papers 17-18; Replying Affidavits and supporting papers 19-20; Other 21-26; 27-29; 30-31. (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant Brookhaven Home Health Agency for an order pursuant to CPLR 3126 dismissing the complaint for plaintiff's failure to provide a Certificate of Merit and Notice of Medical Malpractice, or in the alternative, an order compelling plaintiff to provide a Certificate of Merit and Notice of Medical Malpractice, opposed by plaintiff Matthew DePerte, is denied.

ORDERED that this motion (003) by plaintiff Matthew DePerte pursuant to CPLR 3025(b) and 3406 for an order granting plaintiff leave to file and serve a verified amended complaint, Certificate of Merit and Notice of Medical Malpractice, opposed by defendant, is granted and plaintiff shall file and serve the amended complaint with a Certificate of Merit and the Notice of Medical Malpractice within thirty days of the date of this order.

This is an action sounding in negligence/medical malpractice wherein this paraplegic plaintiff alleges that on September 29, 2004 he was caused to sustain a fracture injury to his shoulder while being cared for and turned by nurse Nancy McBurnie, an employee of Brookhaven Home Health Agency. The complaint of this action sets forth a cause of action sounding in negligence and is verified by counsel for plaintiff.

Defendant seeks an order dismissing the complaint for plaintiff's failure to serve a Certificate of Merit with the complaint and thereafter failing to serve and file a Notice of Medical Malpractice, or in the alternative, an order directing plaintiff to file and serve the both the Certificate of Merit and the Notice of Medical Malpractice. Plaintiff, by way of a cross motion, seeks to file and serve an amended complaint with a Certificate of Merit and Notice of Medical Malpractice, which proposed amendment adds a cause of action sounding in medical malpractice, pleaded in the alternative to the cause of action sounding in negligence in the original complaint.

CPLR 3012-a(a)(1) provides that, "in any action for medical...malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff declaring that the attorney...has consulted with at least one physician." In *Kolb v Strogg*, 158 AD2d 15, 558 NYS2d 549 [2nd Dept 1990], the Second Department reversed its prior holding and held that *Tewari v Tsoutsouras*, 75 NY2d 1, 550 NYS2d 572 [1989], prohibits the dismissal of a complaint for the failure to file a certificate of merit pursuant to CPLR 3012-a (*see also, DeFelice v The New York Eye and Ear Infirmary et al*, 799 NYS2d 159, 5 Misc 3d 1027A, 2004 NY Misc LEXIS 2613); *Rice v Vandenbossche*, 185 AD2d 336, 338, 586 NYS2d 303 [2nd Dept 1992]). In that plaintiff set forth a negligence cause of action in the original complaint, plaintiff was not required to file and serve a certificate of merit.

Accordingly, that part of motion (002) which seeks to dismiss the complaint based upon plaintiff's failure to serve a Certificate of Merit with the complaint is denied.

Defendant also seeks dismissal of the complaint based upon plaintiff's failure to serve a Notice of Medical Malpractice. In *Tewari v Tsoutsouras*, *supra*, the court concluded that the legislature never contemplated the imposition of such a draconian sanction (dismissal under the circumstances) for noncompliance with NYCPLR 3406(a). The Court further held that the authority to dismiss the action could not be implied, and there was no evidence of prejudice by the delay. (*see also, Ledlie v Moadel*, 167 AD2d 371, 562 NYS2d 446 [2nd Dept 1990].; 22 NYCRR §202.56). Additionally, plaintiff has not disregarded any court directive and did not engage in repeated delays, *Ciafone v New York University Medical Center*, 35 AD3d 780828 NYS2d 149 [2nd Dept 2006]). In that plaintiff set forth a cause of action sounding in simple negligence, plaintiff was not required to file and serve a Notice of Medical Malpractice. Even if the complaint were construed to set forth a cause of action sounding in medical malpractice, dismissal of the complaint would therefore not be permissible under the circumstances that failure to serve the Notice of Medical Malpractice was not intentional, plaintiff did not attempt to cause delay and did not disregard any court directive or engage in repeated delays, and no prejudice has been demonstrated by defendant.

Accordingly, that part of defendant's application which seeks dismissal of the complaint for failure to timely file the Notice of Medical Malpractice pursuant to CPLR 3406(a) is denied.

Plaintiff further seeks an order permitting him to serve an amended complaint which includes a cause of action sounding in medical malpractice, pleaded in the alternative to the simple negligence cause of action.

Pursuant to CPLR 3025(b) a “party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” It is well settled that leave to amend pleadings shall be given freely unless the party opposing the motion can demonstrate prejudice or surprise from a delay, and moreover, when a plaintiff has been guilty of an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion (*Volpe v Good Samaritan Hospital*, 213 AD2d 398, 623 NYS2d 330 [2nd Dept 1995]; *Perricone v City of New York*, 96 AD2d 531, 533, *affd* 62 NY2d 661, quoting *Symphonic Elec. Corp. v Audio Devices*, 24 AD2d 746; *see also*, *Davidian v County of Nassau*, 175 AD2d 908, 909; *Eggeling v County of Nassau*, 97 AD2d 395).

Counsel for plaintiff initially believed this case fit solely within the purview of a negligence cause of action, not a medical malpractice action, and it appears from the papers submitted, defendant cited to case law, and counsel for plaintiff now agrees that from the facts of this case that this action sounds in medical malpractice as well as common law negligence.

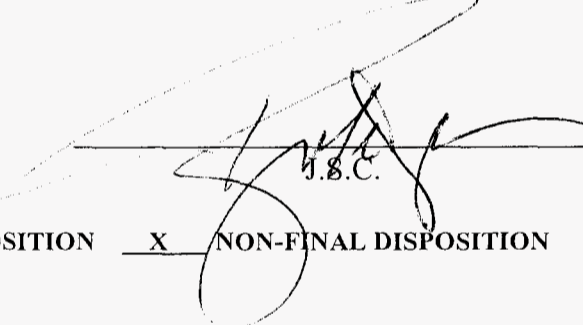
The distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two (*Weiner v Lenox Hill Hospital*, 88 NY2d 784, 650 NYS2d 629 [1996]). Conduct may be deemed malpractice, rather than negligence, when it constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician (*Scott v Ulijanov*, 74 NY2d 673, 543 NYS2d 369 [1989]). A nurse is legally capable of committing malpractice; a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice (*Bieiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, [1985]). The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached. When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence. However, if the conduct complained of may be readily assessed on the basis of common, everyday experience of the trier of facts, and expert testimony is unnecessary for such a review, then the cause of action sounds in negligence (*Rice v Vandenebossche*, 185 AD2d 336, 586 NYS2d 303 [2nd Dept 1992]). In the instant action it is alleged that the nurse was negligent in her care and treatment of this paraplegic plaintiff while turning him when the fracture injury to his shoulder occurred. This act of caring for the patient and turning him is not an administrative or ministerial act, but arose out of an act of patient care and is substantially related to medical treatment. The proper way to turn a patient without causing injury would require expert medical testimony. Accordingly, it is determined that this action sounds in medical malpractice.

Counsel for plaintiff cross moved to amend the complaint to add a cause of action sounding in medical malpractice and contends that he did not know a physician's affidavit would be necessary in support of the motion. Therefore, the Physician's Affidavit and report of Mark S. McMahon, M.D. was submitted in the Reply as omitted in error from the moving papers. Defendants do not object to this and do not allege surprise or prejudice by this application to amend the complaint. However, they argue that the affidavit of plaintiff's physician is conclusory and baseless.

This affidavit of Mark McMahon, M.D. sets forth, *inter alia*, that on May 6, 2004, this right-handed paraplegic patient was injured when his visiting nurse turned him from his back to his right side. He felt sudden pain in his right shoulder, and was taken by ambulance to a hospital where he was x-rayed. The shoulder x-ray revealed a displaced fracture of the anatomic neck of the humerus which required an open reduction with internal fixation with a Rush rod on May 11, 2004. The affidavit of Mark McMahon, M.D. further sets forth an opinion with a reasonable degree of medical certainty that a departure from the accepted standards of medical and nursing care occurred when the visiting nurse turned Mr. Deperte, and this departure was the proximate cause of the right shoulder fracture sustained by Mr. DePerte. It is concluded by this court that this physician's affidavit and report relates the injury sustained by the patient to the turning of the patient by a nurse during her administration of care and treatment to plaintiff and substantially complies with the requirement that legal merit be demonstrated in support of an application to serve an amended complaint (*Leon v Central General Hospital*, 156 AD2d 338, 548 NYS2d 291 [2nd Dept 1989]). Whether this matter was pleaded in negligence or in medical malpractice, the theory of recovery is readily discernible from the allegations in the original complaint, that plaintiff sustained injury while being turned by a nurse during her care and treatment of plaintiff. Prejudice to the defendant has therefore not been demonstrated.

Accordingly, cross motion (003) by plaintiff for an order granting leave for plaintiff to serve the amended complaint, Certificate of Merit, and Notice of Medical Malpractice is granted.

Dated: JUL 17 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION