

Outram-Evans v Wallach

2007 NY Slip Op 32606(U)

August 15, 2007

Supreme Court, Suffolk County

Docket Number: 0001020/2004

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
HAZELINE OUTRAM-EVANS and STEPHANIE HALL-
VARADY,

Plaintiffs,

-against-

PERRY C. WALLACH, M.D. and PETER BUFFA, M.D.,

Defendants.
-----x

CALENDAR DATE: March 28, 2007
MNEMONIC: MG; XMD; C/Disp

PLTF'S/PET'S ATTORNEY:

Napoli, Bern & Ripka
115 Broadway
New York, NY 10006

DEFT'S/RESP ATTORNEY:

Ivone, Devine & Jensen
2001 Marcus Ave.
Lake Success, NY 11042

Upon the following papers numbered 1 to 27 read on this motion for summary judgment _____;
Notice of Motion/Order to Show Cause and supporting papers 1-12 _____; Notice of Cross-Motion and
supporting papers 13-19 _____; Answering Affidavits and supporting papers 20-27 _____;
Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of
and opposed to the motion it is,

ORDERED that this motion by the defendants, Perry C. Wallach, M.D. and Peter Buffa, M.D., for permission to serve an amended answer pursuant to CPLR §3025(b) asserting an affirmative defense of Workers Compensation and for summary judgment pursuant to CPLR §3212 dismissing both plaintiffs' actions against them is granted and the plaintiffs' action is dismissed. Plaintiffs' cross-motion seeking to strike defendants' answers for failing to appear for depositions and in opposition to defendants' summary judgment motion is denied.

Plaintiffs, Hazeline Outram-Evans and Stephanie Hall-Vardy, are nurses employed by New Island Hospital and instituted this action for personal injuries sustained in an assault by a patient at the hospital located at 4295 Hempstead Turnpike in Bethpage, Nassau County on Long Island, New York. Plaintiffs were working as nurses at the New Island Hospital on May 30, 2003 and were involved in the care and treatment of a patient, Kiernon Ludde (hereinafter Ludde), who was in the hospital as a result of drug intoxication induced by the ingestion of PCP, otherwise known as "angel dust". It is a powerful narcotic known to induce psychotic episodes of violent behavior. Ludde violently attacked the two plaintiffs causing numerous injuries. The defendants were medical doctors working at the hospital that night and the plaintiffs claim that the defendants failed to properly treat, medicate and restrain Ludde, resulting in their injuries due to Ludde's violent assault on them. This lawsuit thereafter ensued.

Defendants now move for permission pursuant to CPLR §3025(b) to amend their answer to assert Workers Compensation as a defense and for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 arguing that Workers Compensation is the plaintiffs exclusive remedy and seeking dismissal of the plaintiffs' action because the defendants did not owe any duty to protect them from this patient who exhibited no prior violent behavior. Plaintiffs oppose the requested relief and cross-move to strike the defendants' answers for their failure to make themselves available for deposition. Perry C. Wallach, M.D. indicates he now practices in Texas.

For the following reasons, the defendants' motion for summary judgment and dismissal of plaintiffs' complaint pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiffs' action is dismissed. The cross-motion by plaintiffs to strike the defendants' answers is denied.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. *Elzer v. Nassau County*, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); *Gaeta v. New York News, Inc.*, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in *Sillman v. Twentieth Century Fox*, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is 'arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. *S.J. Capelin Assoc., v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [*VanNoy v. Corinth Central School, District*, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue

timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. **DiSabato v. Soffee**, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); **Usefof v. Yamali**, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

The issue of whether or not the defendants owe a duty of care to reasonably avoid an injury to the plaintiffs is a question of law to be determined by the court. **Eiseman v. State of New York**, 70 NY2d 175, 187, 518 NYS2d 608 (1987).

The New York Court of Appeals in **Eiseman**, supra, said:

Embedded in the law of this State is the proposition that a duty of reasonable care owed by the tort-feasor to the plaintiff is elemental to any recovery in negligence (see, e.g., **Pulka v. Edman**, 40 NY2d 781, 782, 390 NYS2d 393, 358 NE2d 1019; **Palsgraf v. Long Is. R. R. Co.**, 248 NY 339, 344, 162 NE 99). Foreseeability of injury does not determine the existence of duty (**Strauss v. Belle Realty Co.**, 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 482 .E.2d 34). Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts (**De Angelis v. Lutheran Med. Center.**, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 449 N.E.2d 406). "While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree' " (**Waters v. New York City Hous. Auth.**, 69 N.Y.2d 225, 229, 513 N.Y.S.2d 356, 505 N.E.2d 922, quoting **Tobin v. Grossman**, 24 N.Y.2d 609, 619, 301 N.Y.S.2d 554, 249 N.E.2d 419; see also, **Fazzolari v. Portland School Dist. No. 1J**, 303 Ore. 1, 734 P.2d 1326 [Linde, J.]).

The Eiseman Court went on to say that:

"Liability in negligence may of course rest on some form of written misrepresentation or nondisclosure on the part of defendant by which plaintiff or a third party is misled, resulting in injury or damage to plaintiff. The basis of liability is the fact that the misrepresentation or nondisclosure has led the person to whom it was made to forego action that might otherwise have been taken for the protection of the plaintiff (**Prosser and Keeton**, Torts § 33, at 207 [5th ed]). 'Liability in such cases arises only where there is a duty * * * to give the correct information * * * There must be knowledge

or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally, the relationship of the parties must be such that * * * the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.' (***International Prods. Co. v Erie R. R. Co.***, 244 NY331, 338).”

Here, in the case at bar, the plaintiffs/nurses seek to impose liability for their injuries at the hands of a patient on the defendants/doctors treating the patient for a self induced drug overdose on PCP/angel dust. The plaintiffs argue that the defendants should have admitted the patient to the psychiatric ward. However there was no violent reaction or suggestion that the patient was violent or assaultive in behavior. In a similar case to the facts presented here, the Court in ***Adams v. Elgart***, 213 AD2d 436, 623 NYS2d 637 (2nd Dept. 1995) found that the defendant doctor was not responsible for the assaultive behavior of a patient against a nurse. The Court found “The law is clear that there is no liability on the part of a doctor for an error in judgment” citing ***Bell v. New York City Health & Hosps. Corp.***, 90 AD2d 270, 456 NYS2d 787 (2nd Dept 1982) and ***Bullock v. Parkchester Gen’l Hosp.***, 3 AD2d 254, 257, 160 NYS2d 117 (2nd Dept 1957) aff’d 4 NY2d 894. Here, in the instant case, the patient was admitted the night before and exhibited no violent or assaultive tendencies and, thus, the assault on the two plaintiffs/nurses was neither foreseeable nor expected and could more accurately be described as a spontaneous act. As noted by the ***Adams v. Elgart***, Court, supra, at 438, each plaintiff was more properly classified as a “member at large”, not belonging to a specific class of people to whom the medical doctors owed a duty.

Plaintiffs, in their respective deposition testimonies, noted that prior to the assault by the patient at 5 :00 am on May 30, 2005, the patient was neither abusive, violent nor had exhibited any anti-social behavior. While there was some indication Ludde became agitated and verbally abusive to his mother and that this was reported to Peter Buffa, M.D., it was also noted that Ludde was prescribed Ativan, a sedative, and he voluntarily ingested it and was not uncooperative even during his sponge bath which was administered at some point prior to 3:00 am. The defendants/doctors cannot be held liable for the spontaneous actions of a patient in their care as to employees of the hospital without some indication that the patient was exhibiting behavior which made him a danger to that “class of persons” who would be administering his care, i.e. the nurses and staff of the hospital. The plaintiffs are relegated to the protections afforded to them by the Workers Compensation Law and the defendants’ motion to amend their answer to assert the affirmative defense of the Workers Compensation Law is granted, and upon their motion for summary judgment and dismissal of the plaintiffs’ action pursuant to CPLR §3212, that motion is granted and the plaintiffs’ action is dismissed. There is nothing presented by the plaintiffs establishing that the defendants had any duty of

care directed at them to protect the plaintiffs from the spontaneous actions of a patient in their care. See, **DeAngelis v. Lutheran Medical Center**, 58 NY2d 1053, 462 NYS2d 626 (1983).

As has been stated so many times in the past, mere conclusions, expressions of hope or **unsubstantiated** allegations or assertions are insufficient to defeat a party's request for summary disposition. V. **Savino Oil and Heating Co. Inc. v. Rana Management Corp.**, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); **Dabney v. Ayre**, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, **Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.**, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987).

As the Court noted in **Andre v. Pomeroy**, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (**Millerton Agway Co-op v. Briarcliff Farms**, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

In light of the Court's decision on the question of law presented with regard to a duty of care to the plaintiffs, it is unnecessary to reach the question involving sanctions or penalties for alleged discovery violations for failure of the defendants to make themselves available for depositions.

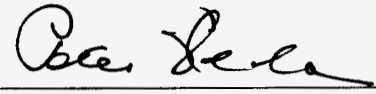
Finally, the claims that the defendants' motion for summary judgment is premature because discovery by way of depositions of the doctors has not been completed is unavailing. A party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts to defeat the motion. **Lambert v. Bracco**, 18 AD3d 619, 795 NYS2d 662 (2nd Dept. 2005); **Romeo v. City of New York**, 261 AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). Here, the issue before the Court is one of law not fact and the plaintiffs have been unable to establish any fact pattern which would raise an issue of fact on the question of a duty of care owed to the plaintiff/nurses to warrant a denial of the motion. **Adams v. Elgart**, supra.

Accordingly, the defendants Perry C. Wallach, M.D. and Peter Buffa, M.D.'s motion for summary judgment and dismissal of the plaintiffs' action against them pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiffs' action is dismissed.

Settle Judgment

The foregoing constitutes the decision of this Court.

Date: August 15, 2007



J.S.C.