

Spinnell v Lamendola

2007 NY Slip Op 33924(U)

December 3, 2007

Supreme Court, New York County

Docket Number: 0106042/2006

Judge: Stanley L. Sklar

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

PRESENT: Hon. Stanley J. Sklar

PART 29

Index Number : 106042/2006
SPINNELL, NATALIE
vs.
LAMENDOLA, JASON, P.T.
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

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

PAPERS NUMBERED

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):

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: 12/2/07

Stanley L. Sklar
STANLEY L. SKLAR 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 29

-----X
NATALIE SPINNELL,

Plaintiff,

Index No.: 106042/07

-against-

JASON LAMENDOLA, P.T.

Defendant.
-----X

SKLAR, J.:

Defendant, Jason Lamendola, P.T., seeks an order dismissing the action as to him pursuant to CPLR§ 3212.

This is an action in which it is claimed that Natalie Spinnell, while undergoing physical therapy administered on September 27th and 30th, 2005 by Lamendola , via an electrical stimulation machine, suffered burns and disfiguring scars. *Complaint §12* Lamendola moves for an order granting him summary judgment on the grounds that the equipment and the office in which he treated Spinnell belonged to a Bruce Paswell (also referred to in some papers as "Paswall"), a chiropractor from whom he rented space. Lamendola also asserted that none of his patients had ever previously suffered burns from the electrical stimulation machine. Lamendola testified that he set the machine to Spinnell's tolerance level for 15 minutes and then in accordance with his practice went to treat another patient. According to Lamendola, when there was about 4 - 5 minutes of time remaining, the patient made a startled noise and asked for help. Lamendola claims that the machine had suddenly increased in intensity, so he promptly shut it down.

A non-party, Jamie M. Bassel, D.C., who also rented space from Paswell and from GEB Medical Management, testified that the machine in issue was to the “best of [his] knowledge” owned by Paswell, that he (Bassel) never had problems with the machine, that he did not recall if the machine had ever been serviced for repairs or maintained from 2002 - September 30, 2005, that a professional calibrated the machine “maybe ever [sic] two to three years perhaps”, that only Paswell was responsible for maintaining the machine and that neither he nor Lamendola had an obligation to maintain the machine.

Lamendola’s counsel urges that since the machine was not Lamendola’s and he had no duty to maintain it and because there was no prior notice that the machine had malfunctioned before September 30th, Lamendola must be granted summary judgment.

The complaint in this action which was personally verified by plaintiff alleges that on September 27th and 30th, 2005, Lamendola used the device for too long a period and at an excessive and inappropriate temperature thereby causing burns and scarring of her back. It further alleges that Lamendola failed to properly monitor the device and failed to “heed plaintiff’s condition of pain” on September 27th and 30th, 2005. It is also alleged that he abandoned, plaintiff while the device was operating and failed to heed her calls for help. She further claims that he failed to properly advise her after she complained of pain, or render proper followup care. Plaintiff also alleged that Lamendola was “otherwise negligent”. *Complaint § 11* These allegations constitute plaintiff’s “medical malpractice” cause of action. Plaintiff’s second cause of action reiterated the allegations of the malpractice cause of action and alleged a battery, and the third cause of action reiterated the allegations of the malpractice cause of action and asserted that Lamendola’s claims constituted negligence. Finally the complaint alleged that Lamendola’s

[* 4]

abandoning her while operating the device at an excessive temperature and amount of time constituted gross negligence.

Lamendola's counsel maintains that plaintiff has failed to allege that Lamendola departed from accepted standards of care. *Cypher aff p8* Defense counsel further claims that Spinnell has failed to provide proof that inspection of the machine revealed a malfunction for which Lamendola was responsible, that Lamendola's use of the machine was improper or that he was responsible for its maintenance. *Id p10*

Following service of his answer and demand for a bill of particulars in July 2006, Spinnell served a bill of particulars, which, in response to a demand for the actual omissions constituting the negligence, simply recited that she would ask the court to take judicial notice of applicable statutes, ordinances and regulations.

Plaintiff's counsel asserts that pursuant to a court order an amended complaint was permitted to be served which added GEB Medical Management, Inc. and Bruce Paswell. There is no claim however that leave was granted to add any additional claims against Lamendola, and the amended verified complaint was essentially the same as to him. A review of the County Clerk's filed in this case reveals that I "so-ordered" a stipulation dated May 17, 2007 granting Spinnell leave to amend the original complaint simply to add the new defendants and to serve that pleading within 30 days.

After being served with the instant motion and before Lamendola served an answer to the amended complaint, Spinnell, represented by her husband, served a "Second Amended Verified Complaint" in which as is relevant it was alleged that Lamendola was negligent in failing to properly monitor and inspect the machine and further asserted that *res ipsa loquitur* applied.

[* 5]

Spinnell thereafter served a supplemental bill of particulars in response to Lamendola's July 2006 demand for Lamendola's alleged acts and omissions which essentially incorporated the specific allegations of the complaint and the two amended complaints.

The motion is denied since Lamendola has failed to meet his prima facie burden of establishing his entitlement to summary judgment by eliminating all material issues raised by the pleadings. Initially it should be noted that Lamendola's counsel did not in his original moving affirmation mention or seek to distinguish among the various causes of action set forth in the original complaint. For example, there was no mention of the battery cause of action or of the gross negligence claim. In addition, no affidavit was provided by Lamendola as to the qualitative sufficiency of his treatment. While he generally discussed what he did, at least on September 30th, he did not opine that it was within accepted physical therapy standards.

Also, Lamendola did not address the allegations of the complaint relating to September 27th. In addition Lamendola did not address the allegations of the original complaint that he failed to provide appropriate followup treatment and care other than to provide EBT testimony to the effect that "[it] didn't look like anything that would require treatment." *Lamendola EBT p69* Lamendola's effort to remedy the deficiencies in his original motion papers by supplying his affidavit for the first time with the reply papers is unavailing, thus his motion is denied.

Neither the original complaint, bill of particulars nor the amended complaint which Spinnell was granted leave to serve to add the additional defendants specifically alleged that Lamendola was negligent with respect to maintaining, inspecting or repairing the machine in issue. Spinnell's attempt to introduce such claims via the second amended complaint was technically improper because she did not claim that when she was granted leave to serve the

amended complaint to add parties, she was granted leave to allege new claims against Lamendola, and it is apparent from the “so-ordered” stipulation that she was not granted such leave. Nonetheless, Lamendola apparently retained the second amended complaint, and has not moved to strike it.. *See McKinney’s Consolidated Laws of NY, Book 7B, Siegel Prac. Commentaries C3025:22; Ias Bicolor Corp v. Mezrahi, 22 AD2d 898 (2nd Dept, 1964)* Lamendola’s counsel merely asserted that if Lamendola’s motion were to be granted, the newly raised claims in the second amended complaint, which post-dated the motion and were thus not the subject of the motion, should be extinguished as well. Because Lamendola’s motion is denied, no motion was made by Lamendola to strike the second amended complaint and because Lamendola evidently retained that pleading, it is still extant.

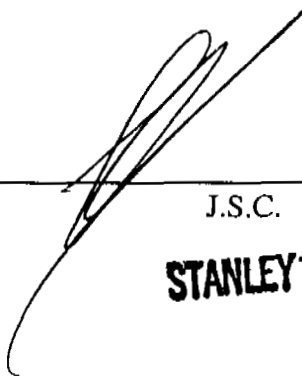
In any event, it is evident that repair and maintenance of the machine would be in issue because these issues were raised at the depositions and because Lamendola’s counsel tried to eliminate any such claim via this motion by stating in effect that the duty to inspect, maintain and repair was not Lamendola’s. While I am not prepared to say now that Lamendola had a duty to maintain, repair and inspect the machine, it may well be that he had the duty to at least find out from Paswell whether the machine was regularly maintained, inspected, repaired and calibrated. While Lamendola testified that he had rented equipment from Paswell, Lamendola did not state that he had no duty to maintain the equipment or to even check to see that Paswell maintained it with appropriate regularity. While Bassel testified that neither he nor Lamendola had the duty to repair or maintain the machines, Bassel did not indicate how he knew what Lamendola’s duties were, nor did he allege that neither he nor Lamendola lacked the duty to even check with Paswell to ascertain whether the machine in issue was being regularly inspected and maintained.

I further observe that it does not appear that claims regarding any duty on Lamendola's part with respect to maintenance repair, inspection, and calibration of the machine in issue would be time-barred.

In light of the foregoing, Lamendola's motion is denied.

Settle order.

Dated: December 3, 2007
60 Centre Street
New York, NY



J.S.C.
STANLEY L. SKLAR