Moll v Huntington Hospital
2007 NY Slip Op 34249(U)
November 9, 2007
Supreme Court, Suffolk County
Docket Number: 0019251/2005
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 19251-05

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/8/07 (#001, 002)
MOTION DATE 6/28/07 (#003)
ADJ. DATES 6/29/07
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - X MotD
Mot. Seq. # 003 - MD

DORISANN MOLL and KENNETH MOLL,

Plaintiffs,

-against-

HUNTINGTON HOSPITAL,

Defendant.

BRODY, O'CONNOR & O'CONNOR
Attys. For Plaintiffs
7 Bayview Ave.
Northport, NY 11768

FUREY, FUREY, LEVERAGE ET AL
Attys. For Defendant
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Hempstead, NY 11550

Upon the following papers numbered 1 to 19 read on this motion to strike answer and motion and cross motion for summary judgment; Notices of Motion/Order to Show Cause and supporting papers 1-3; 9-11; Notice of Cross Motion and supporting papers 4-8; Answering Affidavits and supporting papers 12-13; 14-15; Replying Affidavits and supporting papers 16-17; 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiffs for an Order pursuant to CPLR 3126 striking defendant's answer due to its failure to respond to plaintiffs' Notice of Discovery and Inspection dated January 2, 2007, is denied; and it is further

ORDERED that the cross motion (#002) by defendant for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint or, in the alternative, for an Order dismissing plaintiffs' claim of damages based upon fear of infection and determining that the documents plaintiffs seek are privileged from disclosure pursuant to Education Law § 6527 and Public Health Law § 2805, is granted to the extent that the Court will determine defendant's application to dismiss plaintiffs' claim of damages based upon fear of infection after an in camera review of the documents in order to determine if the documents plaintiffs seek are privileged under the applicable sections of law and in all other respects, denied; and it is further

ORDERED that the motion (#003) by the defendant for a Protective Order pursuant to CPLR 3103 striking plaintiff's Notice of Deposition for defendant's maintenance personnel, is denied; and it is further

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ORDERED that defendant's quality assurance reports of the incident of November 15, 2004 shall be hand delivered to the Court's Chambers located at 1 Court Street, Riverhead, New York on or before **December 7, 2007** in a sealed envelope *by messenger only and shall not be mailed*; and it is further

ORDERED that a compliance conference now scheduled for November 27, 2007 is postponed until **February 12, 2008,** to be held in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York; and it is further

ORDERED that counsel for the plaintiff and defendant shall each serve a copy of this Order upon respective counsel with Notice of Entry within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) thereafter file the affidavits of service with the Clerk of the Court.

This is an action for negligence wherein the plaintiff, Dorisann Moll, allegedly sustained injuries when she stepped out of her bed while an inpatient in defendant hospital and cut her foot on a piece of glass. Plaintiffs served a Notice of Discovery and Inspection upon defendant requesting a copy of an incident report completed by defendant regarding the occurrence. Defendant has not complied with plaintiffs' request and in its cross motion in opposition seeks an Order from the Court indicating that the report is privileged and immune from disclosure because defendant prepared it as required by Education Law § 6527 and Public Health Law § 2805. In further opposition, defendant submits the affidavit of its Chief Operating Officer, Thomas Hoeft.

Defendant also seeks affirmative relief in dismissal of the plaintiffs' complaint or alternately, partial summary judgment in dismissal of plaintiff infectious fear claims and for a protective order against further examinations before trial of its personnel. Plaintiff opposes the motions. Both plaintiff and defendant are in compliance with the evidentiary requirements under the CPLR in bringing and opposing the summary judgment motion to dismiss the complaint (*see* ***Gaeta v New York News,*** 62 NY2d 340, 477 NYS2d 82 [1984]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

CPLR 3101(a) has been liberally construed to require disclosure of "all matter that will assist in the preparation of trial" (***Zappi v Pedigree Ski Shop, Inc.,*** 244 AD2d 331, 664 NYS2d 57 [2d Dept 1997] *citations omitted*). "The words 'material and necessary' are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the issues and reducing delay and prolixity" (***Harrison v Bayley Seton Hosp., Inc.,*** 219 AD2d 584, 631 NYS2d 182 [2d Dept 1995]). However, the Legislature has created statutory exceptions under Education Law § 6527(3) and Public Health Law § 2805-m to the rules of discovery under Article 31 of the CPLR (*see generally* ***Katherine F. v State of New York,*** 94 NY2d 200, 702 NYS2d 231 [1999]).

Although defendant's incident report may be exempt from disclosure pursuant Education Law § 6527 and Public Health Law § 2805, the fact that a hospital places certain documents into a quality assurance file "does not per se render these documents privileged from disclosure (*see* ***Spradley v Pergament Home Ctrs.,*** 261 AD2d 291, 689 NYS2d 510 [2d Dept 1999]). Hospitals are not entitled to a blanket protective order, but rather, they have the burden of establishing that the individual documents sought were prepared in accordance with the relevant statutes (*see* ***Marte v Brooklyn Hosp. Ctr.,*** 9 AD3d 41, 779 NYS2d 82 [2d Dept 2004]). Since defendant's affidavit asserting the privilege is conclusory in nature, the Court directs that the defendant submit the documents regarding the incident to the Court for an in camera review by December 7, 2006. The Court will then determine whether the record is privileged.

CPLR 3126(3) provides that the Court has the discretion to strike a pleading for failure to abide with discovery. The striking of pleadings is an extreme remedy and should not be taken absent a showing of wilful and contumacious actions or bad faith on behalf of the defaulting party (*see* ***Vancott v Great Atl. & Pac. Tea Co.,*** 271 AD2d 438, 705 NYS2d 640 [2d Dept 2000]; ***Davidson v Aetna Cas. & Sur. Ins. Co.,*** 237 AD2d 321, 655 NYS2d 446 [2d Dept 1997]; ***Stathoudakis v Kelmar Contr. Corp.,***

147 AD2d 690, 538 NYS2d 297 [2d Dept 1989]; ***Lull v Breiter,*** 127 AD2d 530, 512 NYS2d 370 [1987]; ***Delaney v Automated Bread Corp.,*** 110 AD2d 677, 487 NYS2d 402 [2d Dept 1985]). Generally, "'wilfulness' can be inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults" (***DiDomenico v C&S Aeromatik Supplies,*** 252 AD2d 41, 52, 682 NYS2d 452 [1998] *citations omitted*). Such remedy, however, should be as "narrowly tailored as possible to the circumstances of the individual case" (***Matusewicz v Jo Jo's Auto Parts,*** 18 AD3d 828, 829, 796 NYS2d 385 [2d Dept 2005], *citation omitted*) because CPLR 3126 is "designed 'to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action'" (***DiDomenico v C&S Aeromatik Supplies,*** *supra* at 49; *accord* ***Matusewicz v Jo Jo's Auto Parts,*** *supra*). A court cannot impose a sanction under CPLR 3126 unless the disobedience by the defaulting party is shown to be wilful and no reasonable excuse for the disobedience can be shown. A party can satisfy their burden of showing wilfulness by showing repeated non-compliance of court orders by the opposing party (*see* ***Kubacka v Town of No. Hempstead,*** 240 AD2d 374, 657 NYS2d 770 [2d Dept 1997]; ***Garcia v Kraniotakis,*** 232 AD2d 369, 648 NYS2d 156 [2d Dept 1996]).

Further, it is well settled that the nature and degree of the penalty imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see* ***Herrera v City of New York***, 238 AD2d 475, 656 NYS2d 647 [2d Dept 1997]). Although courts favor the resolution on the merits of an action whenever possible (*see* ***Espinal v City of New York,*** 264 AD2d 806, 695 NYS2d 610 [2d Dept 1999]), a court may strike the pleadings or any part thereof as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information that the court finds should have been disclosed upon notice" (***Devito v J&J Towing, Inc.,*** 17 AD2d 624, 794 NYS2d 74 [2d Dept 2005]).

Here, defendant has been reluctant to provide the requested discovery based upon its asserted claim of privilege. Therefore, the Court does not find defendant's action to rise to the level where the draconian sanction of striking one's pleading becomes applicable (*see* ***E.W. Howell v S.A.F. La Sala Corp.,*** 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; *compare* ***Alizo v Alizo,*** 300 AD2d 515, 752 NYS2d 553 [2d Dept 2002]; ***Vatel v City of New York,*** 208 AD2d 524, 617 NYS2d 61 [2d Dept 1994]). Accordingly, the motion by plaintiff to strike defendant's pleading is denied.

CPLR 3212(b) sets forth the summary judgment standard. Summary judgment will be granted if, upon on all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a primary facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of a fact from the case (*see* ***Zuckerman v City of New York,*** 49 NY2d 557, *supra* ; ***Sillman v Twentieth Century-Fox Film Corp.,*** 3 NY2d 395, 165 NYS2d 498 [1957]) or an issue of fact is even arguable since it deprives a party of his day in court (*see* ***Henderson v City of New York,*** 178 AD2D 129, 576 NYS2d 562 [1st Dept 1991]; ***Andre v Pomeroy,*** 35 NY2d 361, *supra*).

Issue finding rather than issue determination is the key to the procedure (*see* ***Weiner v Ga-Ro Die Cutting, Inc.,*** 104 AD2d 331, 479 NYS2d [2d Dept 1984]; *affd* 65 NY2d 732, 492 NYS2d 29 [1985]; ***Sillman v Twentieth Century-Fox Film Corp.,*** 3 NY2d 395, *supra*). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even arguable, summary judgment must be denied (*see* CPLR 3212[b]; ***American Home Assurance Co. v Amerford Intl. Corp.,*** 200 AD2d 472, 606 NYS2d 229 [1st Dept 1994]; ***Dauman Displays, Inc. v Masturzo,*** 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990]; *lv den* 77 NY2d 939, 569 NYS2d 612 [1991]; ***Freeman v Easy Glider Roller Rink, Inc.,*** 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]; ***Phillips v Kantor & Co.,*** 31 NY2d 307, 338 NYS2d 882 [1982]; ***Rotuba Extruders, Inc. v Ceppos,*** 46 NY2d 223, 413 NYS2d 141 [1978]; ***Stone v Goodman,*** 8 NY2d 8, 200 NYS2d 627 [1960]; *rearg den* 8 NY2d 934, 204 NYS2d 1025 [1960]).

CPLR 3212(b) also requires that in order for a court to grant summary judgment, the court must determine if the movant's papers justify, as a matter of law, that his cause of action or defense has merit. The evidence submitted in support of the motion must be viewed in the light most favorable to the non-movant (*see* ***Akseizer v Kramer,*** 265 AD2d 356, 969 NYS2d 849 [2d Dept 1999]; ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,*** 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

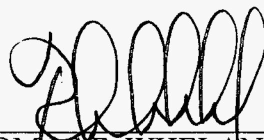
Here, the defendant has failed to sustain its burden. It is undisputed that plaintiff cut her right foot on a piece of glass which she stepped on in her hospital room and it was surgically removed. After reviewing the deposition testimonies of plaintiff and defendant's witnesses, the Court finds that the testimony is conflicting (*see* ***Kolivas v Kirchoff,*** 14 AD3d 494, 787 NYS2d 392 [2d Dept 2005]). It is not for the court to determine issues of credibility on a motion for summary judgment (*see* ***Williams v Bonowicz,*** 296 AD2d 401, 745 NYS2d 58 [2d Dept 2002]; ***Ferrante v American Lung Assn.,*** 90 NY2d 623, 655 NYS2d 25 [1997]; ***Air Flow Taxi Corp. v C.I.T., Corp.,*** 258 AD 857, 15 NYS2d 965 [4th Dept 1940]; *rearg. den., lv. to app. den.,* 258 AD 1030, 17 NYS2d 1002 [4th Dept 1940]; ***Bernstein v Kritzer,*** 224 AD 337, 231 NYS 97 [1928]); or where the facts are in dispute and where conflicting inferences may be drawn from the evidence or where, as here, in the instant matter, there are issues of credibility (*see* ***Dolitsky v Bay Isle Oil Co.,*** 111 AD2d 366, 489 NYS2d 580 [2d Dept 1985]). Additionally, defendant did not present any credible evidence that it had neither constructive nor actual notice of any glass on the floor of the room (*see* ***Baptiste v 1626 Meat Corp.,*** ____ AD3d ____, ____ NYS2d ____ [1st Dept 2007]; ***Soto-Lopez v Board of Mgrs. of Crescent Towers Condominium,*** ____ AD3d ____, 843 NYS2d 444 [2d Dept 2007]).

In support of its application for partial summary judgment to dismiss plaintiffs' claim of fear of acquired infection, defendant has submitted evidentiary proof that plaintiff has not sustained any type of infection or infectious insult as a result of the incident which occurred three years ago based upon plaintiff's own deposition testimony (*see* ***Ayotte v Gervaio,*** 81 NY2d 1062, *supra*; ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, *supra*; ***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, *supra*). Plaintiffs have not submitted any opposition to this application and lack of opposition is tantamount to consent (*see* ***Hermitage Ins Co. v Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]; ***Tortorello v Larry M. Carlin***, 260 AD2d 201, 688 NYS2d 641 [1st Dept 1999]). Accordingly, defendant is granted partial summary judgment dismissing plaintiff's claim of damages as set forth in her complaint based upon a fear of infection.

Defendant's motion for a protective order regarding further depositions of its housekeeping personnel is denied. Plaintiff has demonstrated a sufficient need for further discovery of the housekeeping personnel as they would be the most obvious people who are responsible for the cleaning of plaintiff's room (*see* ***Baptiste v 1626 Meat Corp.,*** ____ AD3d ____, *supra*; ***Soto-Lopez v Board of Mgrs. of Crescent Towers Condominium,*** ____ AD3d ____, *supra*; ***Gold v Zito & Zito Maintenance Co., Inc.,*** 247 AD2d 582, 668 NYS2d 502 [2d Dept 1998]).

Accordingly, the motions and cross motion are decided as herein indicated. This constitutes the Order and decision of the Court.

DATED: 11/9/07



THOMAS F. WHELAN, J.S.C.