

**Johnson v New York City Health & Hosp. Corp.**

2008 NY Slip Op 32016(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0103382/2003

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

JOHNSON, ANN

INDEX NO. 103382/03

MOTION DATE 6/19/08

MOTION SEQ. NO. 08

MOTION CAL. NO. \_\_\_\_\_

- v -  
N.Y.C. HEALTH HOSPITALS  
CORP., ET AL.

The following papers, numbered 1 to 30 were read on this motion for guardian

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

Answering Affidavits — Exhibits X NOT 9

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-7, 8  
10-15; 27-29  
16-24; 25-26; 30

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  
ACCOMPANYING DECISION AND ORDER

**FILED**

JUL 18 2008

COUNTY OF NEW YORK

Dated: 7/15/08

JBH  
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  
NEW YORK COUNTY: IAS PART 6

-----X  
ANN JOHNSON,

Plaintiff,

Index No. 103382/03

-against-

Decision and Order

NEW YORK CITY HEALTH & HOSPITALS CORP.  
(HARLEM HOSPITAL CENTER), WENDY ANN  
OLIVIER, M.D., THE BROOKLYN HOSPITAL, THE  
BROOKLYN HOSPITAL CALEDONIA CAMPUS,

**FILED**

JUL 18 2008

Defendants.

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NEW YORK

-----X  
JOAN B. LOBIS, J.S.C.:

Plaintiff moves, by order to show cause, for renewal of the motion (Motion Sequence Number 007) for an order appointing plaintiff's daughter, Tawana Johnson ("petitioner"), as the guardian ad litem for plaintiff, originally denied by decision and order dated April 15, 2008 (the "April 2008 Order"). Renewal is hereby granted; the April 2008 Order provided for leave to renew the application upon submission of the proper papers including, but not limited to, a medical affirmation setting forth plaintiff's diagnosis and a medical opinion concerning her ability to participate in the prosecution of her medical malpractice case. Plaintiff's papers now contain the required medical affidavit, as discussed, *infra*. Defendant New York City Health and Hospitals Corporation (Harlem Hospital Center) ("HHC" or "Harlem Hospital") cross-moves for an order, pursuant to C.P.L.R. § 3101(d), precluding testimony by plaintiff's psychiatric expert regarding any departures by HHC, and striking from the complaint the cause of action for lack of informed consent against HHC.

The underlying action is for compensatory damages for injuries sustained by plaintiff as a result of alleged medical malpractice related to a breast reduction surgery on January 31, 2002, and a subsequent emergency room visit to Harlem Hospital on February 6, 2002. As was previously set forth in the April 2008 Order, plaintiff commenced the underlying action in Kings County on January 16, 2003, against defendants Wendy Ann Olivier, M.D., the Brooklyn Hospital, and the Brooklyn Hospital Caledonia Campus. On February 26, 2003, plaintiff commenced a second action in New York County against HHC. Issue was joined, and the two actions were consolidated in this court by order of the Hon. Eileen Bransten on May 25, 2004. Plaintiff filed her Note of Issue on August 30, 2007.

Plaintiff and petitioner seek to have petitioner appointed as plaintiff's guardian ad litem under C.P.L.R. § 1201. Plaintiff's previous application for a guardian ad litem was denied, in part because it lacked an affidavit from a medical expert (see April 2008 Order). On renewal of her petition, petitioner offers an affirmation by a physician (name redacted) duly licenced by the State of New York to practice psychiatry. The physician examined plaintiff on March 19, 2008 and reviewed plaintiff's medical and psychiatric records. The physician states that plaintiff is 47 years old and has a psychiatric history dating back to her early childhood. Plaintiff has been hospitalized numerous times for psychiatric problems including schizophrenia, polysubstance abuse, bipolar disorder, and borderline intellectual functioning. She has a recent history of homelessness, heroin addiction, and schizophrenic affective disorder, and she has received both inpatient and outpatient psychiatric care over the past several years for her psychiatric problems. The physician opines that plaintiff's condition "impedes her ability to protect her rights" and that plaintiff "does not adequately

\* 4 ]

understand the legal proceedings in which she is involved.” The physician also states that plaintiff is “unable to manage the requirements of day to day living and she is mentally ill and chemically dependent.” The physician concludes by opining, to a reasonable degree of medical certainty, that plaintiff requires a guardian ad litem to protect her interests in this, or any, lawsuit.

“A person shall appear by his guardian ad litem . . . if he is an adult incapable of adequately prosecuting or defending his rights.” C.P.L.R. § 1201. The court “may appoint a guardian ad litem at any stage in the action upon its own initiative or upon the motion of . . . [a] relative, friend or a guardian, committee of the property, or conservator.” C.P.L.R. Rule 1202(a). “The courts do not ‘shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants.’” Palaganas v. D.R.C. Indus., Inc., 64 A.D.2d 594 (1st Dep’t 1978), quoting Sengstack v. Sengstack, 4 N.Y.2d 502, 509 (1958). Although plaintiff consents to the appointment of her daughter as her guardian ad litem, defendant Wendy Ann Olivier, M.D. and the Brooklyn Hospital question the degree of plaintiff’s incapacity; defendant HHC, while taking no position as to whether plaintiff needs a guardian, objects to the appointment of plaintiff’s daughter as guardian and questions the role the guardian would play at trial. A hearing is necessary to determine the extent of plaintiff’s mental disability; whether a guardian ad litem shall be appointed; and, if a guardian is necessary, whether petitioner is the proper person to be appointed. See Palaganas, supra. The matter is set down for a hearing to be held in IAS Part 6, at 60 Centre Street, New York, New York, in Courtroom 345, on August 18, 2008, at 11:00 a.m. At that time, both plaintiff and petitioner are directed to appear, and all parties shall bring the necessary documentation to permit a resolution of this issue.

Defendant HHC cross-moves to preclude plaintiff's psychiatric expert from testifying at trial regarding the care rendered to plaintiff at Harlem Hospital. Plaintiff's C.P.L.R. § 3101(d) response sets forth that plaintiff's expert is expected to testify that plaintiff's injuries were "causally related to the failure to properly perform psychiatric evaluation and consultation prior to and after the surgery" and that psychiatric support and follow up was required but not provided to plaintiff.<sup>1</sup> The expert opines in the report (annexed to plaintiff's § 3101(d) response) that plaintiff's "psychiatric condition [when she came to Harlem Hospital] was not properly investigated or assessed in accordance with good and accepted standards of medical practice." HHC claims that, until plaintiff served her expert response on May 2, 2008, HHC had no knowledge of a claim against it for Harlem Hospital's alleged failure to conduct a psychiatric evaluation of plaintiff when she received care there on February 6, 2002.

The notice of claim, served on HHC on April 3, 2002, and the verified complaint, served on HHC in or around February 2003, provide generalized allegations of negligence against HHC. The bill of particulars served on HHC sets forth that Harlem Hospital departed from good and accepted standards of hospital and medical care by, *inter alia*, failing to properly diagnose plaintiff's condition; failing to properly respond to, be cognizant of, or make use of the histories taken or recorded; and, ignoring the medical history and condition of plaintiff. The bill of particulars also states that "Inadequate Consultation was made by Surgeons/plastic surgeons, psychiatrists, Infections [sic] Disease Specialists."

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<sup>1</sup> Plaintiff's § 3101(d) response does not differentiate between the defendants, although it is clear from the pleadings that Wendy Ann Olivier, M.D., performed the breast reduction procedure at Brooklyn Hospital, while Harlem Hospital undertook to treat plaintiff a week later for an alleged wound infection.

HHC was put on sufficient notice that the claims against it for departures related to the treatment of plaintiff's wounds were based, in part, on Harlem Hospital's alleged failure to take plaintiff's psychiatric condition into consideration when treating her wounds, since "plaintiff's bill of particulars adequately provides a general statement 'of the acts or omissions constituting the negligence claimed.'" Kaplan v. Rosiello, 16 A.D.3d 626, 627 (2d Dep't 2005), quoting C.P.L.R. Rule 3043(a)(3). Further, "[p]reclusion for failure to comply with CPLR 3101(d) is improper 'unless there is evidence of intentional or willful failure to disclose and a showing of prejudice.'" Cruz v. Gustitos, 51 A.D.3d 963 (2d Dep't 2008), quoting Gayz v. Kirby, 41 A.D.3d 782 (2d Dep't 2007). HHC has not demonstrated that it was prejudiced by plaintiff's delay in serving her § 3101(d) response, especially in light of the fact that the trial shall be postponed until after the hearing on the need for the appointment of a guardian ad litem. See Gayz v. Kirby, supra, 41 A.D.3d at 782-83. At this time, the court will not preclude plaintiff's psychiatric expert from testifying at trial regarding the care rendered to plaintiff at Harlem Hospital.

Defendant HHC also cross-moves to strike from plaintiff's complaint the claim for lack of informed consent.<sup>2</sup> Defendant HHC argues that plaintiff only received emergency care at Harlem Hospital, and that because New York does not recognize a cause of action for lack of

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<sup>2</sup> HHC failed to set forth in its moving papers the statute under which it was cross moving to strike plaintiff's cause of action for lack of informed consent. The attorney's affirmation in support of the cross-motion sets forth a failure to state a cause of action as the basis for HHC's motion to strike plaintiff's complaint. Additionally, HHC's reply papers clarify that it is not cross moving for summary judgment, but is moving pursuant to C.P.L.R. Rule 3211(a)(7) for plaintiff's failure to state a cause of action. The court will proceed as if HHC had originally moved pursuant to C.P.L.R. Rule 3211(a)(7), which sets forth, in pertinent part, that a party "may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action."

informed consent where the matter involves emergency treatment, plaintiff has failed to state a cause of action.<sup>3</sup> HHC further alleges that no surgery or invasive procedure was performed at Harlem Hospital which would require an informed consent; nevertheless, plaintiff did execute a general consent form on the day she was treated at Harlem Hospital (annexed to HHC's moving papers) for "routine diagnostic and therapeutic procedures. . . [including] blood drawing, external exam of the body, . . . and other routine non-invasive procedure."

The notice of claim filed against HHC does not set forth a claim for lack of informed consent. Plaintiff's verified complaint states that HHC undertook to administer emergency services to plaintiff. Plaintiff's claim for lack of informed consent, as set forth in her verified complaint, alleges that HHC "failed to inform the plaintiff as to the exact nature and extent of plaintiff's condition," failed to inform plaintiff of the risks, complications, consequences, and dangers of the care, treatment and procedures defendants undertook to perform and/or failed to perform, and failed to inform plaintiff as to the alternative methods of treatment. Plaintiff's bill of particulars states, *inter alia*, that HHC did not perform certain tests that were indicated by plaintiff's condition; did not perform certain surgical/operative procedures that were necessary to treat plaintiff's condition; did not administer anesthesia; failed to admit plaintiff; and, failed to treat plaintiff's infection.

Defendant HHC argues that there is no question that plaintiff came to Harlem Hospital's emergency room for emergency medical care. Defendant does not attach plaintiff's

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<sup>3</sup> Plaintiff's only argument in opposition is that defendant's motion to strike is a time-barred motion for summary judgment; however, a motion to dismiss for failure to state a cause of action may be made at any time. See C.P.L.R. Rules 3211(a)(7) and 3211(e).

medical records from Harlem Hospital, but neither does plaintiff in opposition. Although plaintiff claims there are issues of fact as to whether she received only emergency treatment, plaintiff annexes the transcript from her September 30, 2003 deposition, in which plaintiff testified that she was not admitted to Harlem Hospital on February 6, 2002; that she went to the emergency room at Harlem Hospital; that Harlem Hospital did a blood test and urine test and a physical examination; that she was released from Harlem Hospital with a fever, pain, and a prescription; and, that the visit to Harlem Hospital's emergency room lasted a couple of hours.

New York's Public Health Law § 2805-d sets forth, in pertinent part, that the

right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body. . . . For a cause of action therefore it must also be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.

Plaintiff's own description of the treatment she received at Harlem Hospital fails to indicate that she received anything other than emergency treatment there, which treatment cannot form the basis for a claim for lack of informed consent. Pub. Health Law § 2805-d(2); see also Connelly v. Warner, 248 A.D.2d 941, 942 (4th Dep't 1998). Plaintiff has also failed to plead that there was "'some unconsented-to affirmative violation of the plaintiff's physical integrity.'" Martin v. Hudson Valley Assocs., 13 A.D.3d 419, 420 (2d Dep't 2004), quoting Hecht v. Kaplan, 221 A.D.2d 100, 103 (2d Dep't 1996); see also Smith v. Fields, 268 A.D.2d 579, 580 (2d Dep't 2000). Plaintiff has not

asserted that HHC performed a surgery or invasive procedure on February 6, 2002. Plaintiff's lack of informed consent claim appears to result from defendant's failure to treat plaintiff; such failure is not an affirmative act, and cannot form the basis of a claim for lack of informed consent. See Pub. Health Law § 2805(d)(2). Finally, even if it could be found that plaintiff underwent some form of non-emergency treatment or diagnosis at Harlem Hospital, plaintiff failed to plead that "a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed." Pub. Health Law § 2805-d(3). Thus, plaintiff has not adequately pled a cause of action against HHC for failure to obtain plaintiff's informed consent; accordingly, plaintiff's second cause of action as to HHC is dismissed, pursuant to C.P.L.R. Rule 3211(a)(7), for failure to state a cause of action.

The motion and cross motion are decided in accordance with the foregoing. The parties shall appear for a hearing on August 18, 2008 at 11:00 a.m. This constitutes the decision and order of the court.

Dated: July 15, 2008

  
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JOAN B. LOBIS, J.S.C.

**FILED**

JUL 18 2008

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