Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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RALPH R. MASSEY, as Guardian Ad Litem for JASON A. MASSEY,

Plaintiff,

Index No: 5624/03
Motion Date: 6/16/08
[Transfer from Ritholtz, J.]

-against-

THE JAMAICA HOSPITAL, FRANK PAUL, M.D., MADHU B,. MALHOTRA, M.D., ISAK ISAKOV, M.D., and "JOHN DOE" (name being fictitious and unknown As that of the patient perpetrator),

Defendants.

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The following papers numbered 1 to 18 read on this motion by defendant Isakov for an order dismissing plaintiff's complaint, pursuant to CPLR §§ 3012-a and 3126(3), for failing to timely serve a certificate of merit and provide discovery, respectively, or in the alternative, precluding plaintiff from introducing at trial evidence of all items which have not been produced, and granting defendant Isakov costs for preparation of the instant motion; and on these cross-motions by defendants Paul and Jamaica Hospital, for an order dismissing plaintiff's complaint, pursuant to CPLR §§ 3012-a and 3126(3), for failing to timely serve a certificate of merit and provide discovery.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notices of Cross-Motions-Affidavits-Exhibits.....	6 - 16
Affirmation in Opposition.....	17 - 18

Upon the foregoing papers, it is hereby ordered that the motion and cross-motions are resolved as follows:

This is an action for personal injuries allegedly sustained by plaintiff Jason Massey ("plaintiff") on June 6, 2002, as a result of a physical altercation with a patient occurring in the common area of the psychiatric ward of defendant Jamaica Hospital ("defendant Hospital") while

plaintiff was a patient at defendant Hospital. Action was commenced against defendant Hospital by filing and service on March 6, 2003, and subsequent thereto, against defendants Paul, Malhotra and Isakov, the attending physicians alleged to have supervised plaintiff on the day of the incident, by service of the pleadings on December 24, 2004. Thereafter, following a multitude of delays and discovery concerns, by order of this Court dated November 2, 2007, the motion by plaintiff for an order setting a discovery schedule was granted to the extent that the parties were directed to appear for a Preliminary Conference, which was held on December 4, 2007. Moreover, the cross-motions by defendants Paul, Malhotra and Jamaica Hospital deeming this matter dismissed and abandoned were denied, as was that branch of defendant Hospital's cross-motion which sought to strike the complaint in the alternative, pursuant to CPLR § 3126, for plaintiff's failure to comply with discovery. Pursuant to the Preliminary Conference order, authorizations were to be provided and the depositions were to be conducted by March 18, 2008, which did not occur. Pursuant to Compliance Conference order dated May 14, 2008, the outstanding discovery was addressed and depositions were scheduled to be conducted through August 13, 2008. The parties were also granted leave to make the instant motions.

Thus, it is upon the foregoing that defendant Isakov moves for an order dismissing plaintiff's complaint, pursuant to CPLR §§ 3012-a and 3126(3), for failing to timely serve a certificate of merit and provide discovery, respectively, or in the alternative, precluding plaintiff from introducing at trial evidence of all items which have not been produced, and granting defendant Isakov costs for preparation of the instant motion. Further, defendants Paul and Jamaica Hospital submit cross-motions for an order dismissing plaintiff's complaint, pursuant to CPLR §§ 3012-a and 3126(3), for failing to timely serve a certificate of merit and provide discovery.[1]

With respect to those branches of the motion and cross-motions for dismissal of the complaint based upon plaintiff's failure to timely serve a certificate of merit, pursuant to CPLR § 3012-a, entitled "Certificate of merit in medical, dental and podiatric malpractice actions," the relevant parts of the statute states:

> (a) In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that:
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> (1) the attorney has reviewed the facts of the case and has consulted

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[1] Pursuant to inquiry by this Court on September 5, 2008, counsel for defendant Isakov indicated that the portions of the motion and cross-motion for discovery have been withdrawn without prejudice to renewal, and the balance of the motion and cross-motions were ripe for determination by this Court. He further indicated that although depositions are still outstanding, a note of issue has been filed and one of the co-defendants has moved to vacate the note, which is returnable on September 22, 2008 before Justice Ritholtz. Consequently, this Court will not address the discovery portions of the motion and cross-motion and will solely determine the branches seeking dismissal for failure to file a certificate of merit.

> with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action[.]

"The rule serves as a mechanism to assure that the attorney, in bringing the suit, has a reasonable basis to believe that a departure or deviation from the accepted standard of medical care has occurred (citation omitted)." Glasgow v. Chou, 33 A.D.3d 959, 962 (2nd Dept. 2006).

Here, plaintiff, who was a patient at defendant Hospital, was engaged in a physical altercation with another patient occurring in the television room/lounge, a common area of the psychiatric ward of defendant Hospital, as the result of a dispute over the television remote control. Plaintiff alleges that he sustained lacerations to his forehead requiring stitches, and a non-displaced fracture to the left side of his mandible which required surgical intervention and the wiring of his jaw. Defendants Hospital, Paul and Isakov (collectively "defendants") contend that plaintiff's claims against them sound in medical malpractice, rather than simple negligence, which mandates the filing of a certificate of merit, the failure of which warrants dismissal of the action. In support of the motion and cross-motions, defendants proffer their respective Verified Bill of Particulars, in which plaintiff asserts that the instant action sounds in negligence and not medical malpractice, and asserts, in pertinent part, the following:

> [T]he security guards, doctors, nurses and their assistants at said hospital, had lost control and/or failed to prevent the activities that cause plaintiff to be injured; the defendant, its agents, servants and/or employees, departments, agencies and those acting under their directions, behest, and control, were negligent in their failure to properly investigate and/or evaluate the results of any investigation of those persons, agents, servants and/or employees hired to operate, manage, control, supervise, guard at and/or run said hospital; in failing to hire efficient and/or sufficient personnel []; in failing to train their employees so as to enable them to control patients and/or other persons in the hospital; in failing to properly supervise the activities provided by and/or at said hospital; in failing to promulgate proper and/or adequate rules and regulations governing proper supervision to be provided and rendered by those agents servants and/or employees hired to operate, manage, control, supervise, guard at and/or run said hospital; in failing to promulgate proper and/or adequate rules and/or regulations governing the proper care, guarding and/or supervision to be provided and rendered to those at said

> hospital; in failing to insure the safety of said patients at the said hospital who had been entrusted into the care of defendants, its agents, servants and employees; in failing to properly monitor and/or supervise activities in which the patients were involved in on the day of the incident; in abandoning the activity within the hospital, more specifically the lounge/TV room and surrounding area that the patients were congregating/assembling []; in failing to properly and adequately evaluate the patients in the said hospital, more specifically the lounge/TV room []; in failing to properly and adequately separate, divide, set apart, keep apart and/or otherwise screen patients in the said hospital, more specifically the lounge/TV room and surrounding area; in failing to provide appropriate and sufficient medical care and treatment to the patients and, more particularly, the plaintiff herein; in failing to take proper precaution when a patient sustains an injury; in causing an exacerbation of the plaintiff's injury in not attending to that injury.

Thus, defendants contend that based upon the foregoing allegations, which are premised upon departures sounding in medical malpractice, plaintiff's complaint must be dismissed for failing to file a certificate of merit, pursuant to CPLR § 3012-a.

"[T]he 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' (citation omitted)." Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784,787-788 (1996). "[This] distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts' (citations omitted)." Glasgow v. Chou, 33 A.D.3d 959, 961 (2nd Dept. 2006); see, Gaska v. Heller, 29 A.D.3d 945 (2nd Dept. 2006). "The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached." Caso v. St. Francis Hosp., 34 A.D.3d 714 (2nd Dept. 2006).

"A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety (citations omitted)." D'Elia v. Menorah Home and Hosp. for Aged and Infirm, 51 A.D.3d 848 (2nd Dept. 2008). "[A]lthough a 'hospital in a general sense is always furnishing medical care to patients [], not every act of negligence toward a patient would be medical malpractice' (citation omitted). Thus, a claim sounds in medical malpractice when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' (citation omitted). By contrast, when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty,' the claim sounds in negligence (citations omitted)." Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784,787-788 (1996); see, Morales v. Carcione, 48 A.D.3d 648 (2nd Dept. 2008);

Rodriguez v. Saal, 43 A.D.3d 272 (1 Dept. 2007); Glasgow v. Chou, supra (2nd Dept. 2006). "Thus, when the complaint challenges the medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice (citations omitted). By contrast, when the 'gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient,' the claim sounds in ordinary negligence (citations omitted)." D'Elia v. Menorah Home and Hosp. for Aged and Infirm, 51 A.D.3d 848 (2nd Dept. 2008).

Here, based upon the record before this Court, it is determined that this action sounds in negligence rather than medical malpractice. Despite defendants' contentions to the contrary, "there have been instances in which the conduct of hospital staff during care and treatment has been held more 'administrative' than medical in nature and thereby measured by ordinary negligence standards (citations omitted)." Miller by Miller v. Albany Medical Center Hosp., 95 A.D.2d 977, 978 (3rd Dept. 1983). The major thrust of plaintiff's complaint is the failure of defendants to supervise and monitor their patients to prevent the types on incidents from occurring, particularly in the psychiatric ward of a facility where the risk of harm may be heightened. Indeed, "in some cases involving institutional failure to supervise inmates or patients, particularly where there was clear notice of the risk of harm, liability has been imposed without reference to professional standards of care (citations omitted). Miller by Miller v. Albany Medical Center Hosp., 95 A.D.2d 977, 978- 979 (3rd Dept. 1983). Further, "[w]hen a risk of harm has been identified through the exercise of medical judgment, a failure to follow through by taking measures to prevent the harm may constitute actionable ordinary negligence (citations omitted)." Papa v. Brunswick General Hosp., 132 A.D.2d 601, 604 (2nd Dept. 1987). Thus, as the "'gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient,'the claim sounds in ordinary negligence (citations omitted)"[D'Elia v. Menorah Home and Hosp. for Aged and Infirm, 51 A.D.3d 848 (2nd Dept. 2008)], and therefore, the motion and cross-motions by defendants Jamaica Hospital, Paul and Isakov, hereby are denied.

Dated: September 8, 2008

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J.S.C.