

**Salazar v Advanced Urology, P.C.**

2008 NY Slip Op 33417(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 111895/06

Judge: Milton A. Tingling

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

PRESENT: **HON. MILTON A. TINGLING**

PART 44

Index Number : 111895/2006

**SALAZAR, STALIN**

vs.

**ADVANCED UROLOGY, P.C.,**

SEQUENCE NUMBER : # 004

SUMMARY JUDGMENT

INDEX NO. 11189506

MOTION DATE 4/2/08

MOTION SEQ. NO. #004

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

read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
DEC 22 2008  
COUNTY CLERKS OFFICE  
NEW YORK

Dated: 12/15/08

*mat*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

SUPREME COURT OF STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 44

-----X  
STALIN SALAZAR and MARIANELLA SALAZAR,

Plaintiffs,

-against-

Index No.: 111895/06

ADVANCED UROLOGY, P.C., JON O. MARKS,  
M.D., STEVEN BERMAN, M.D., and GALE KURTA,

Defendants.

**FILED**  
DEC 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----  
MILTON A. TINGLING, J.:

Plaintiff, Stalin Salazar (Salazar),<sup>1</sup> who works in the building in which Advanced Urology, P.C., a medical practice, is located, alleges that he was exposed to infectious diseases, including the human immunodeficiency virus (HIV), after he was stuck with a hypodermic needle (the needle) that the defendants improperly disposed of in ordinary trash.

Defendants, Berman and Marks, both physicians, the professional corporation of which they are shareholders and officers (Advanced Urology), and their now-former employee, Kurta, move for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Plaintiffs cross-move for partial summary judgment, as against Advanced Urology, on the issue of negligence. They also move for an order, pursuant to CPLR 3124, compelling defendants to produce certain discovery.

The complaint contains causes of action labeled as for negligence (first cause of action), intentional infliction of emotional distress (second cause of action), negligent infliction of emotional distress (third cause of action), loss of services (fourth cause of action) and a demand for punitive damages. In his complaint, Salazar alleges that the needle was improperly discarded by

-----  
<sup>1</sup>Marianella Salazar, plaintiff Stalin Salazar's wife, sues derivatively. References in this decision to "plaintiff" are to Stalin Salazar.

the defendant urological medical practice, and the individual defendants, into an ordinary trash bag. Plaintiff further alleges that he was stuck with the needle, which protruded from the trash bag, when he walked by the bag on February 25, 2006. It is undisputed that the subject trash bag was not in Advanced Urology's offices at the time of the alleged needle stick incident, but in a room in the building in which trash from both that office and other building tenants is routinely collected. Plaintiff claims that after he was stuck with the needle, he placed it in defendants' custody in reliance on their representation that they would arrange for the infectious disease testing of it, and promptly inform him of the test results. Plaintiff further claims that thereafter, defendants knew that he was experiencing distress about possible exposure to infectious disease, but that despite his repeated efforts to obtain information about testing from them, they failed and refused to provide it.

Plaintiff posits that, prior to April 5, 2006,<sup>2</sup> defendants had the needle tested for infectious diseases but have not, to this day, provided those test results to him, or did not then have the needle tested, but told him that they had done so. Plaintiff also contends that defendants later sent the needle to a facility in Texas with instructions to test it for contact with drugs and/or poisons, but not infectious disease, and that this testing rendered further testing on the needle impossible. Plaintiff alleges that defendants' negligence in disposing of and testing the needle and their refusal and failure to provide information to him about the testing caused his injuries.

Defendants characterize plaintiff's claim as for fear of contracting acquired immune deficiency syndrome (AIDS phobia) and maintain that summary judgment is warranted because: (1) plaintiffs have not established Salazar's exposure to HIV or infectious disease from the needle; (2) the record does not establish extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress; and (3) none of the individual defendants discarded the

---

<sup>2</sup>The date stated in the complaint is April 5, 2005, presumably a typographical error.

needle or rendered medical services to Salazar. Defendants also argue that plaintiff is not entitled to punitive damages.

In support of their motion, defendants point to the undisputed fact that Salazar has tested negative for infectious disease, including HIV, and argue that the record is devoid of objective evidence that plaintiff was actually exposed to an infectious agent as a result of the alleged needle stick. Defendants submit the affidavit of a physician who opines, based on review of the record, that the subject needle was not infected with HIV, or any other infectious disease (Hartford Aff., Exh. G, Glatt Aff., at 2). Defendants also submit the affidavit of Ernest D. Lykissa, PhD, who swears that his laboratory received and screened the syringe and needle for infectious bacterial, fungal and viral agents, such as Hepatitis A, B, C and HIV. Lykissa states that the test results revealed that the needle and syringe were not infected with such agents, and that "no pathological or toxic harm could result" from the instrument (Harford Moving Aff., Exh. F, at 2).

The two defendant physicians also each submit an affidavit stating that they did not discard or dispose of the needle. They further swear that the brand and type of needle with which Salazar alleges he was stuck is used at Advanced Urology solely to mix medications, and never to inject patients directly. Both doctors state that they did not mix medications for at least two weeks prior to February 25, 2006, and that their trash is removed several times weekly. Kurta swears that she does not engage in medical procedures as part of her job and did not discard the needle.

In opposition, plaintiff submits an affidavit in which he swears that he brought the needle to Advanced Urology on the next working day after the needle stick incident, which was Monday, February 27, 2006. Plaintiff avers that he expressed to Marks and Kurta his extreme concern that he may have been infected with a disease as a result of the incident, and that Marks informed him that the medical practice treats patients with HIV and other sexually transmitted diseases. Plaintiff

further avers that Marks and Kurta agreed to promptly send the needle for testing to determine whether it had come in contact with, or was carrying, infection.

Plaintiff states that he spoke with Kurta seven days later, on March 6, 2002, at which time she told him “that the needle was out for testing, and that they didn’t have a result yet, because [t]hat takes time” and that he should come back next week (Kelner Moving Aff., Exh. B, at 1). Plaintiff states that he returned on March 13, 2006 and advised Kurta that he was on a cocktail of medications to help prevent his contracting disease and AIDS, and that she told him that they were waiting for results, and to come back in two weeks. Plaintiff swears he returned later that week, and that Kurta “gave me the same story as before” (*id.* at 2). Plaintiff states that on March 20, 2006, he again returned and reiterated to Kurta that he was upset and scared, but that she disregarded his demand to speak with a doctor, represented that defendants were still waiting for a result, and told him that he should come back in a month. Salazar swears that each time he spoke with Kurta he indicated his worry, which increased with passing time and her responses to his requests. Salazar states that the more times he was put off by defendants, the more concerned he became, because he could not understand how, if the needle had been sent to a laboratory for testing, as Kurta had represented, there were no test results. Plaintiff swears that he thought that defendants were hiding something from him about the test results, a belief he still holds.

Plaintiff states that he was forced to retain a lawyer in order to get test results, and that defendants thwarted the accurate testing of the needle. Defendants have provided evidence that the needle was sent out from the Advanced Urology office on April 4, 2006. It is undisputed that plaintiff’s counsel was not provided with information from defendants about testing until April 2006, and plaintiff’s counsel swears that he was not provided with the full test report or the identity of the person who had conducted the testing until May 22, 2006 (Kelner Moving Aff., at 7). The

testing report, a very short document, indicates that the needle was received on April 10, 2006.

Regarding testing, it states:

“Test Type: Unknown Substance Drug Scan      Result: Non-Detected

Comments:      Rinsed needle and syringe multiple times and still  
detected nothing”

(Kelner Moving Aff., Exh. E, at 3).

Plaintiff’s counsel further swears that on May 23, 2006, Lykissa, during a telephone conversation:

“stated to us that he had washed the needle with a series of ‘organic solvents,’ including alkaline, and various acidic and basic solutions. He indicated that by virtue of his methodology, the needle had been rendered unsuitable for testing. He also stated that, when it received the needle, it appeared to be empty.

He admitted that he [had] been asked only to test for what solution had been in the needle, and not for infectious disease”

(Kelner Moving Aff., at 23). Lykissa has submitted a responsive affidavit denying that he made these statements and that the testing performed rendered the needle unsuitable for further testing. Lykissa also swears that he was asked to test for infectious disease.

Lykissa avers that his laboratory’s testing revealed that no foreign matter had ever entered into either the needle or syringe, and that, consequently, it is impossible that any fluid had been in, and then emptied, from them (Harford Reply Aff., Exh. E ¶¶ 3-5).<sup>3</sup> Plaintiff, at his deposition, testified that the syringe or needle contained yellow fluid (Pl. Mov. Aff., Exh A, at 35), and he submits a picture that he states demonstrates that it did. Plaintiff also submits a printout of the website for the company to which defendants sent the needle, contending that it demonstrates that

---

<sup>3</sup>Plaintiff’s counsel swears that Lykissa’s contention that he did not flush the needle is a “disingenuous, potentially perjurious, change of course” (Kel Aff. in Further Support, at 14, n 2).

the company is not an accredited laboratory, but a litigation support company.<sup>4</sup> It is undisputed that plaintiff's counsel has been in possession of the needle since May 2006.

Salazar submits the affidavit of his psychiatrist, Howard D. Issacs, MD, whom he first visited on June 13, 2007. Issacs opines to a reasonable degree of medical certainty that the alleged needle stick incident and plaintiff's subsequent interactions with the employees of Advanced Urology, "in which he was denied information and believes he was deceived, contributed to his having suffered" post-traumatic stress syndrome and a major depressive disorder (Kelner Moving Aff., Exh. L, at 4-5). Issacs swears that he has prescribed psychiatric medication for plaintiff.

Plaintiff submits defendants' testimony, arguing that it demonstrates that their safety practices were lax and increased the likelihood that a needle would be improperly discarded. Specifically, plaintiff points to Kurta's testimony that she had not received special training regarding OSHA regulations or medical office safety, and that she would review the OSHA manual on an as-needed basis only. Plaintiff also asserts that defendants' testimony indicates that Advanced Urology's staff had no organized practice of inspecting sharps containers, inadequate monitoring systems to ensure that the last medical assistant out of the office cleaned the examination or treatment rooms, and that the medical assistants responsible to inspect these rooms to ensure that nothing had been left out on counters or the floor, were not instructed to clean the floors. Although he is not an Advanced Urology employee, plaintiff contends that there were no written guidelines to address employee needle stick incidents.

It is undisputed that defendants referred plaintiff to a physician on February 27, 2006 for care. As a prophylactic measure to prevent plaintiff from contracting HIV and other infectious

---

<sup>4</sup>While defendants' attorney, in a footnote, states that Lykissa's laboratory is accredited, he does not indicate the basis for this statement.

diseases, he was prescribed medication, which, he testified, caused him to experience side effects, including nausea. At his deposition, held on April 26, 2007, plaintiff testified that he had tested negative for HIV on several occasions, including in November 2006.

*Defendants' Motion for Summary Judgment*

“The circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety” (*Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 585 [2d Dept 2006] [citation and quotation marks omitted]). “The factual situations giving rise to such claims must demonstrate an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious” (*Harris v State of New York*, 187 Misc 2d 512, 513 [Ct Cl 2001], quoting *Johnson v State of New York*, 37 NY2d 378, 382 [1975] [internal quotation marks omitted]). In emotional distress cases involving a plaintiff's fear of contracting disease, for policy reasons, including fear of spurious claims (*see Ordway v County of Suffolk*, 154 Misc 2d 269, 271 [Sup Ct, Suffolk County 1992]), courts require a rational basis for fear as demonstrated by objective evidence indicating that the fear is genuine.

“AIDS-phobia actions are based on the common-law tort of negligent infliction of emotional distress” (*Harris*, 187 Misc 2d at 513). As AIDS phobia is the fear of possibly contracting a disease in the future, courts require plaintiffs who have not tested HIV positive to come forward with proof that, due to a defendant's negligence, they were actually exposed to HIV “through a scientifically accepted method of transmission of the virus . . . [quotation marks and citation omitted]” (*Ornstein v New York City Health and Hosps. Corp.*, 10 NY3d 1, 6 [2008]; *Siegrist v State of New York*, 15

Misc 3d 1129[A], at \*2, 2007 NY Slip Op 50909[U], *affd* \_\_\_AD3d \_\_\_, 2008 NY Slip Op 07901 [2d Dept 2008]). Where defendants demonstrate that the source of the allegedly transmitted body fluid or material was not HIV positive, and plaintiff is unable to raise a fact issue as to her actual or probable exposure to HIV, courts have dismissed cases (*see Siegrist v State of New York*, \_\_\_AD3d \_\_\_, 2008 NY Slip Op 07901 [2d Dept 2008][affirming lower court's grant of summary judgment to defendant where plaintiff failed to offer evidence of actual exposure to HIV]; *Kelly v Our Lady of Mercy Med. Ctr.*, 279 AD2d 290 [1st Dept 2001] [finding plaintiff's expert's assertion that 25% of patients in Bronx hospitals were HIV positive insufficient to raise issue of fact of actual exposure where hospital demonstrated, inter alia, that no patient on plaintiff's floor for month preceding incident had been treated for HIV or AIDS]; *O'Neill v O'Neill*, 264 AD2d 766 [2d Dept 1999] [stating that evidence established that source of body fluid was not HIV positive]; *Bishop v Mount Sinai Med. Ctr.*, 247 AD2d 329, 331 [1st Dept 1998] [granting defendant's motion for summary judgment where plaintiff was cut with unidentified object from hospital dumpster containing kitchen-area waste]; *Kaufman v Physical Measurements*, 207 AD2d 595 [3d Dept 1994] [finding no objective evidence in record to substantiate plaintiff's contention that he had been exposed to HIV]).

“An exception to this [actual exposure] standard (or an alternative route to establishing liability) has been contemplated by several courts when considering whether a defendant's interference with the injured party's ability to prove the actual presence of HIV can excuse or in some fashion satisfy the requirement to establish actual or probable presence of the virus” (*Harris*, 187 Misc 2d at 515). In *Fosby v Albany Mem. Hosp.* (252 AD2d 606 [3d Dept 1998]), despite that defendants eventually demonstrated that the needle had not been used, the Court found that “special circumstances” demonstrating the genuineness of the claim were presented by the hospital's

unexplained refusal to provide the plaintiff with information regarding the needle's prior use, its 18-month delay in getting the needle to a laboratory for testing, and where the plaintiff was advised by defendant to consider the needle infectious and undergo HIV testing at various intervals. In *Harris* (187 Misc 2d at 516), the court interpreted *Kelly* (279 AD2d 290) as suggesting that special circumstances necessary to guarantee the genuineness of a claim for mental distress may be found where information is unreasonably withheld from a patient (*but compare Siegrist*, 15 Misc 3d 1129[A], *supra* [finding that the unavailability of the potential exposure source for testing and defendant's advice to undergo HIV testing and treatment alone were not special circumstances]).

The parties do not dispute that plaintiff has not tested positive for HIV, or that a needle stick is a scientifically accepted channel of transmission of infectious disease. Defendants argue, however, based on their own affidavits, and those of their experts, that plaintiff's negligent infliction of mental distress claim should be dismissed because there was no HIV-infected matter in the needle, and thus that plaintiff was not actually exposed to HIV.

Plaintiff argues that defendants' conduct after the alleged needle stick incident demonstrates that special circumstances exist in this case, and that his claim is genuine. Plaintiff states that defendants were aware of his worry and fear that he had contracted AIDS and that he was taking medication to prevent HIV infection, but still, despite their representations of prompt testing and Kurta's representation that she had sent out the needle, concealed information from him and delayed obtaining test results. Plaintiff contends that he was deeply frightened by the defendants' ominous unexplained silence.<sup>5</sup> He further contends that defendants drained the fluid from the syringe and needle, or that after they left the needle in an office cabinet for weeks, it no longer

---

<sup>5</sup>Salazar does not state how long he was deeply frightened, but testified that at a certain point, after some time had passed, he was only a little afraid. Accordingly, it appears that, at a certain point, by his own words, plaintiff's claim of fear of contracting AIDS dissipated.

contained fluid for testing. Plaintiff's counsel's sworn statements about his telephone conversation with Lykissa clearly are intended to cast doubt about the testing of the needle, and the condition in which it was left thereafter.

It is well established that summary judgment must be denied where there is even arguably a question of fact (*Leighton v Leighton*, 46 AD3d 264, 265 [1st Dept 2007] [“(s)ummary judgment is a ‘drastic remedy’ that should only be employed where no doubt exists as to the absence of triable issues”]). Also well established is that this court is required, on this motion, to consider the evidence submitted in a light most favorable to plaintiff, drawing all reasonable inferences in his favor (*Fravezzi v Koritz*, 295 AD2d 290 [1st Dept 2002]; *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

It is undisputed that Advanced Urology treats people with sexually-transmitted diseases and those living with HIV, and told plaintiff so after the needle stick incident.<sup>6</sup> There is also evidence in the record that defendants may have left the needle and syringe in a drawer or cabinet for about five weeks before sending it out for testing. In addition, while plaintiff does not dispute that defendants did provide information to him about how similar needles were used in their medical practice, there is no indication that they informed him of an investigation they apparently undertook to determine how the subject needle might have been used (*see Kelner Mov. Aff.*, Exh. F, at 74; *see also Harris*, 187 Misc 2d at 515 [finding defendant failed to meet prima facie summary judgment burden where it did not provide all known facts about the needle and disposal circumstances]). Certainly, the testing report submitted here yields little information about the testing done.

---

<sup>6</sup>Plaintiff states that Marks testified that needles similar to the subject needle were used to inject medications into a patient's bladder, but the supporting testimony cited reflects that such syringes were used to inject medications into another syringe or catheter. Plaintiff also states that Kurta testified that the needle might have been used to “inject ‘DSMO’ into a patient on Friday” (*Kelner Moving Aff.*, at 13 [citing to Exh. F, at 74]). In fact, she testified that one patient had a DSMO treatment for which a needle such as the subject needle could have been used. She did not, however, discuss whether that treatment entailed injection directly into a patient.

Thus, while it is not clear that what may have been a two-to-three month delay before plaintiff's counsel was provided with the test report on the needle would constitute special circumstances, without more, plaintiff asserts more here. Plaintiff's sworn affidavit as to the underlying factual events, including Kurta and Marks's promises and representations, must be assumed true for purposes of defendants' motion (*Wendling v 136 E. 64th St. Assoc.*, 128 AD2d 419 [1st Dept 1987]; see e.g. *Shands v Escalona*, 44 AD3d 524, 524 [1st Dept 2007]). Drawing inferences in a light most favorable to plaintiff, including plaintiff's sworn statements about the needle stick incident, the fluid he states he saw in the needle,<sup>7</sup> the statements he swears defendants made that the needle was sent out, when it may not have been, and that it would be tested promptly (*Kelner Moving Aff.*, Exh. A, at 35), the delay in sending out the needle, the report that states that it was rinsed and plaintiff's counsel's sworn testimony about Lykissa's statements to him, there are fact questions here precluding a finding, as a matter of law, that special circumstances do not exist. Defendants' assertion that the court should find that their delay in sending out the needle is reasonable, as a matter of law, is unpersuasive.

In addition, plaintiff has produced an expert affidavit stating that he is suffering from PTSD and major depressive disorder as a result of the alleged needle stick incident and subsequent events, and not solely from the fear of contracting AIDS in the future. Defendants' moving analysis is predicated on characterizing plaintiff's injuries as consisting only of AIDS phobia, and the relationship between plaintiff's fear of contracting AIDS and his alleged medical conditions have not been adequately addressed by the parties. Furthermore, while defendants desire that the court infer that plaintiff's claim is not genuine based on the timing of his initial visit to Issacs for

---

<sup>7</sup>Defendants state that the photograph of the needle taken by plaintiff depicts a completely empty syringe. Plaintiff testified that the needle contained fluid, however, and submits another photograph to demonstrate that there was fluid in the needle.

treatment, the court will not draw this factual inference in the moving party's favor on this motion and record.

Finally, defendants have not demonstrated that they are entitled to summary judgment dismissing the complaint on plaintiff's negligence claim, as plaintiff has testified that he endured physical injury, including side effects from medication (*see McLarney v Community Health Plan*, 250 AD2d 310 [3d Dept 1998]). Accordingly, on this record, plaintiff's causes of action for negligence and negligent infliction of mental distress should go forward. Defendants are not without redress, however, in the event that the evidence at trial does not support plaintiff's claim, or in the event of an excessive jury award unsupported by evidence (*Ornstein*, 10 NY3d at 10).

Plaintiff's claim for intentional infliction of emotional distress is not supportable. Crediting plaintiff's version of events, defendants' conduct is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983], quoting Restatement [Second] of Torts § 46, Comment d). It is undisputed that defendants told plaintiff that the needle was not of the type used to inject patients, immediately arranged for him to see an infectious disease specialist with whom plaintiff was still treating when his deposition was conducted, and either agreed to send, or sent of their own volition, the needle for some type of testing. The record does not reveal evidence of conduct evincing the kind of wanton depravity, maliciousness, or campaign of harassment characteristic of this type of claim.

Defendants' motion to dismiss plaintiff's claim for punitive damages is also granted. In *Munoz v Poretz* (301 AD2d 382, 384-385 [1st Dept 2003] [internal quotation marks and citations omitted]), the First Department stated:

“punitive damages are not available for ordinary negligence. In order to recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives. Plaintiffs have failed to establish that there is anything unusual or extraordinary about defendants' conduct which warrants punitive damages. In terms of moral culpability, this case is not singularly rare.”

There is no evidence in the record of type of moral culpability or egregiousness necessary to impose punitive damages in a negligence case.

*Individual Defendants' Motion for Summary Judgment*

Defendants also, in the alternative, request summary judgment in favor of the individual defendants based on the affidavits they have submitted. They further argue that Business Corporation Law (BCL) § 1505 shields the individual defendants from liability.

While shareholders and employees of a corporation are not vicariously liable for a corporation's torts, neither are they shielded by BCL § 1505 for their own tortious acts or participation in the commission of a tort. To the extent that the allegations in the complaint speak of the individual defendants' negligence in actually discarding the needle, each defendant has demonstrated that he or she did not do so, and plaintiff raises no fact question on this issue.

Plaintiff also argues, however, that there are triable fact issues as to the individual defendants' liability in connection with the incident. Specifically, he argues that the physician defendants, as principals, and Kurta, as an employee/agent of Advanced Urology, may be held personally liable on the theory that an officer or agent who participates in the commission of a tort is individually liable regardless of whether he or she acted on behalf of corporation. He also argues that the defendant physicians abdicated their responsibility as principals to supervise Advanced Urology's safety procedures, including by delegating management of safety practices to Kurta, who

has no background qualifying her for such work.<sup>8</sup> Plaintiff contends that the evidence reflects that the needle originated from the defendants' office and that the defendants permitted lax safety practices and violated OSHA regulations, thereby giving rise to a clear likelihood that a needle would be discarded in violation of medical waste statutes.

Defendants concede that medical waste, including hypodermic needles, may not be disposed of in ordinary trash, but argue that there is no evidence that anyone they supervised disposed of the needle, and provide expert affidavits stating that they did not violate OSHA regulations. Leaving aside the issue of whether the individual defendants had a duty to plaintiff to comply with OSHA regulations,<sup>9</sup> plaintiff does not submit an expert affidavit demonstrating such a violation and his mere unsupported assertions or conclusions about defendants' compliance therewith does not defeat summary judgment (*Maiorano v Price Chopper Operating Co.*, 221 AD2d 698, 699 [3d Dept 1995] [{"(m)ere conclusions based upon surmise, conjecture, speculation or assertions are without probative value" in opposing summary judgment]; see *Black v Loomis*, 236 AD2d 338 [1st Dept 1997]). Plaintiff has raised an issue of fact, however, as to the defendant physicians' training and supervision of subordinates (see *Yaniv v Taub*, 256 AD2d 273 [1st Dept 1998]), and Kurta's conduct and involvement, and summary judgment is denied.

*Plaintiff's Cross Motion For Summary Judgment*

Plaintiff moves for summary judgment in his favor, arguing that the evidence reflects that the needle originated in defendants' office and was improperly discarded. In support, plaintiff points to evidence that he found the needle, which was a brand used by defendants, in a bag of the

---

<sup>8</sup>Berman swears that Kurta was Advanced Urology's "safety manager" (Harford Reply Aff., Exh I, ¶7).

<sup>9</sup>OSHA governs employer/employee relationships, and it is undisputed that none of the defendants were plaintiff's employer (see *Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept], lv dismissed 7 NY3d 864 [2006]).

type that he specifically identified as from Advanced Urology, which contained its mail, in the building in which the medical practice is located.

Summary judgment on a general negligence case based on circumstantial evidence is, and “should be a rare event” (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 206 [2006] [discussing *res ipsa loquitor*]). Plaintiff’s entitlement to summary judgment based on the theory of *res ipsa loquitor* is not established where there are fact questions concerning the exclusive control element of that doctrine. While this element does not require that “the possibility of other causes . . . be altogether eliminated [citation omitted],” in a *res ipsa loquitor* case, “within reason all explanations for the injury other than the defendant’s negligence” must be eliminated (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [1986]). Marks testified that it was likely that the medical practice used the type and brand of the needle, but also testified that it is a common brand (*Kelner Moving Aff.*, Exh. J, at 71-72). Furthermore, where the needle was found in an garbage facility or room that defendants do not control, and which plaintiff admits was accessible to the building’s residents (*see Kelner Aff. in Further Support*, at 3), in a building in which defendants are not the only medical practice, and where third parties have access to the Advance Urology office (*see Harford Reply Aff.*, Exh. I, ¶¶ 3-6), the exclusive control element is not established. In addition, plaintiff alleges that his injuries were caused by a combination of the needle stick incident and defendants’ conduct thereafter,<sup>10</sup> and as discussed above, there are factual questions as to that conduct that necessitate denial of plaintiff’s cross motion for summary judgment. The conclusions necessary to establish negligence and causation in this case require the drawing of many inferences, a task properly

---

<sup>10</sup>Plaintiff has merely raised an issue of fact as to whether special circumstances may exist here. As he has not tested negative for HIV, and it appears that he cannot demonstrate that the needle contained HIV-infected material, whether he will ultimately be entitled to recovery is not, at this juncture, clear.

accorded the trier of fact, making summary judgment inappropriate.<sup>11</sup> Finally, while the merit of defendants' arguments of open and obvious danger and plaintiff's contributory negligence appear questionable under the circumstances here, the court need not reach these arguments, as it has decided the motion on other grounds.

*Plaintiff's Motion to Compel*

Plaintiff asserts that Kurta was terminated from Advanced Urology over a year after the alleged needle stick incident because, upon information and belief, she was intoxicated on the job. Plaintiff seeks an order compelling documents concerning Kurta's job performance and the circumstances of her termination, as well as her continued deposition, and the deposition of another witness concerning Kurta's termination. In opposition, Berman swears that Kurta left Advanced Urology for reasons having nothing to do with what plaintiff claims happened to him, or circumstances that existed in or before February 2006, and that there were no incidents or reports of Kurta having an alcohol or substance abuse problem in or before February 2006.

Prior to the filing of this motion, plaintiff served on defendants a notice of discovery and inspection for documents concerning Kurta's termination, to which this court ordered the defendants to respond (Kelner Moving Aff., Exh. O [discovery conference order of December 5, 2007]). Defendants did respond, objecting to the items demanded, but nonetheless providing responses to several of them. Plaintiff has not made clear what additional documents he seeks. Furthermore, the first item of plaintiff's document demand does not seek a document, but is a question, and defendants' objection to that item was not improper.

---

<sup>11</sup>The court notes that while plaintiff's counsel swears that the needle was retrieved from the *bottom* of a garbage bag (Kelner Aff. in Further Support, at 3-4), the court has been unable to locate evidentiary support in the record for this assertion.

In addition, a CPLR 3124 motion is appropriate where a party fails to respond, or provides an inadequate or improper response to a written, served, discovery demand. Leaving aside the issue of the relevance of the information plaintiff seeks, and that plaintiff did not state a basis for his belief about Kurta's termination, the record simply does not reflect that plaintiff served a demand, or even sent a letter, concerning the depositions sought, and the motion is denied.<sup>12</sup>

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that the second cause of action of the complaint and plaintiff's request for punitive damages are dismissed as against all defendants; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion to compel is denied; and it is further

ORDERED that the remainder of the action shall continue.

Date: 12/15/08

ENTER:

mart  
J.S.C.

**FILED**  
DEC 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

<sup>12</sup>Counsel's affidavit of good faith, in addition to lacking detail, such as dates of conversations, also does not state that such a demand was served.