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

PRESENT: Lobis PART 6

Index Number : 401674/2008
MIDGETT, ARTHUR J.
vs
BETH ISRAEL MEDICAL CENTER
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 4-7-09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-9
Answering Affidavits — Exhibits	10-11
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 5/15/09

J.S.C.

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

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

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ARTHUR J. MIDGETT,

Plaintiff,

Index No. 401674/08

-against-

Decision and Order

BETH ISRAEL MEDICAL CENTER,

Defendant.

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

Defendant Beth Israel Medical Center ("defendant" or the "Medical Center") brings this motion for an order, pursuant to C.P.L.R. Rule 3211(a)(7), dismissing the complaint for failure to state a cause of action, and, pursuant to C.P.L.R. Rule 3212, granting defendant summary judgment on the ground that there is no issue of fact requiring determination by a jury. Plaintiff Arthur J. Midgett, proceeding pro se ("plaintiff"), opposes the motion.

Plaintiff's pleadings allege that he was forced by defendant to give a blood sample on March 19 and 20, 2008, and sets forth that his claims are for assault and conspiracy. Plaintiff commenced this action by the filing of a summons and complaint on July 14, 2008. Defendant appeared in this action by its service of a verified answer on or about October 3, 2008. On or about October 7, 2008, plaintiff served a response to defendant's demand for a bill of particulars, whereby he alleges that on March 19 and 20, 2008, a physician "called security guards" on him; that those who drew his blood on those dates conspired to do so against his will; and, that the result was an assault on plaintiff's person. He claims that he was forced to have his blood drawn and that the security officers were called to manipulate and humiliate him and cause him fear. Plaintiff also cites

the New York State Patients' Bill of Rights. See Pub. Health Law § 2803(1)(g); 10 N.Y.C.R.R. § 405.7.

On March 16, 2008, plaintiff, a walk-in patient, presented to the Medical Center with increased religious preoccupation and thoughts of killing himself. His past medical history included a diagnosis of schizophrenia, cocaine abuse, and occasional alcohol use. Plaintiff voluntarily admitted himself to the psychiatric unit. That evening, plaintiff permitted a nurse to draw his blood and collect his urine for laboratory analysis. The results from the blood work indicated that plaintiff had an abnormally high white blood count and creatinine levels. Thereafter, on March 17, 18, and 19, plaintiff refused to allow anyone to draw his blood. Defendant explained the importance of allowing the blood work, but plaintiff refused based on his belief that he was anointed by God and that drawing his blood would make him weaker. Plaintiff remained delusional and religiously preoccupied, claiming that he was God. On March 18, when he refused to provide samples, plaintiff asked the nurse to get his files from Bellevue Hospital. On March 19, 2008, plaintiff was examined by a physician. Plaintiff reported to the examining physician that he "is anointed and [therefore] has increased [white blood counts, blood pressure, and cholesterol]." The physician notes that plaintiff presented with a chronically elevated white blood count and newly elevated creatinine levels; that plaintiff had a chronically elevated white blood count for at least one year; and, that plaintiff's prior records from Bellevue should be obtained "as [patient] states he had [work-up] there." The physician further notes that the increased creatinine levels are likely due to "pre-renal cause." The examining physician asks for a re-check of plaintiff's SMA-7, magnesium, and phosphorus levels, and asks to encourage plaintiff's oral intake. A later note on March 19 by Dr. Liran indicates that plaintiff

> has been refusing lab work because he believes that certain lab values are high because he was ordained by God and that taking blood would weaken him. However, given high [white blood counts] and higher than baseline creatinine, drawing blood to check progression is necessary and urgent for [patient's] medical care. Therefore, given the urgency, [patient] may not refuse the blood draws. [Patient] does not have capacity to make medical decisions, as he does not understand risks vs. benefit of treatment.

On March 19, after plaintiff's repeated refusals to provide a blood sample for analysis, defendant converted plaintiff's status from "voluntary" to "involuntary," under Mental Hygiene Law § 9.27. Two physicians—Melinda S. Lantz, Unit Chief, and Dennis Lin, M.D., plaintiff's attending physician—certified that plaintiff was considered a danger to himself in support of his conversion to involuntary status. An administrator also signed an application for involuntary admission. Plaintiff was given a "Notice of Status and Rights, Conversion to Involuntary Status." It is not clear from the Medical Center's records whether plaintiff's records from Bellevue Hospital were ever obtained prior to defendant's conversion of plaintiff's status. After his conversion to involuntary status, plaintiff's blood was drawn that same day; the nurse's notes indicate that blood was drawn with assistance from security. Upon testing, the blood showed an elevated white blood count.

On March 20, notes from an examining physician indicate that plaintiff was calmer. His creatinine levels had normalized; this was attributed to better nutrition and hydration. Plaintiff's white blood count was still noted as "chronically elevated." A hematology consult was ordered, and again the physician asked to "[p]lease obtain old records from Bellevue." That same day, plaintiff became agitated when approached for a blood draw, but was "compliant when security [was]

present." The blood draw was ordered for a leukemia and lymphoma panel to rule out blood disorders. Plaintiff's delusions and preoccupation with religion continued. Plaintiff remained an involuntary admittee until March 25, when he was converted back to voluntary status. On April 4, 2008, plaintiff was discharged to home with a diagnosis of B-cell chronic lymphocytic leukemia; he did not believe his diagnosis, as he attributed the blood results to his being anointed by God. Plaintiff was discharged with instructions to follow up with a psychiatrist and hematologist within three months.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994), citing C.P.L.R. § 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Id., at 87-88 (citations omitted). However, "allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." Kaisman v. Hernandez, ___ A.D.3d ___, 2009 N.Y. Slip Op. 3096 (1st Dep't Apr. 23, 2009), citing Kliebert v. McKoan, 228 A.D.2d 232 (1st Dep't 1996), lv. denied 89 N.Y.2d 802 (1996).

Plaintiff pro se raises a claim in his complaint that he denotes as "conspiracy." A claim for civil conspiracy cannot be maintained. New York law does not recognize a cause of action for civil conspiracy. See, Legion Lighting Co., Inc. v. Switzer Group, Inc., 171 A.D.2d 472, 473 (1st Dep't 1991).

Plaintiff also alleges a civil assault. "A civil assault 'is an intentional placing of another person in fear of imminent harmful or offensive contact. . . .'" Charkhy v. Altman, 252 A.D.2d 413, 414 (1st Dep't 1998), citing United Natl. Ins. Co. v Waterfront N. Y. Realty Corp., 994 F.2d 105, 108 (2d Cir. 1993). Accepting plaintiff's allegations as true, and "affording [plaintiff] the benefit of all favorable inferences to which [he is] entitled," (Schrank v. Lederman, 52 A.D.3d 494, 496 [2d Dep't 2008], citing Leon, supra, at 88), plaintiff has properly pled a cause of action for civil assault. He alleges that defendant acted to cause him fear, and did in fact cause him to be in fear, of an imminent harmful or offensive contact, i.e., the drawing of his blood against his wishes. Given that a question exists as to whether it was within plaintiff's right to object to having his blood drawn (see infra, p. 6), plaintiff's cause of action for civil assault shall not be dismissed at this time. Plaintiff's complaint, on its face, makes out a cognizable claim for civil assault.

Alternatively, defendant claims that no triable issues of fact exist and seeks judgment as a matter of law. Defendant claims, by affidavit of two employees, Dennis Lin, M.D., and Omer Liran, M.D., that plaintiff agreed to and allowed the blood drawing when security was present, and that plaintiff was not threatened with harm. Plaintiff, in contrast, claims he was assaulted and forced to give blood against his will. It is not for the court to determine, as a matter of law, whose account of the events is more credible. The existence of issues of credibility requires denial of defendant's motion. Further, in moving for summary judgment, defendant asserts that there is no evidence that defendant acted with an intent to place plaintiff in fear of imminent harm. "Intent involves the state of mind with which an act is done" (N.Y. P.J.I. 3:2 [2008]), and is an issue best left to the trier of fact.

The court also notes that 14 N.Y.C.R.R. § 527.8(c)(4)(i) sets forth that, "[e]xcept in emergency circumstances . . . patients on involuntary status may not be given a medical procedure or course of treatment over their objection without court authorization." "Treatment" is defined as "diagnostic procedures or therapeutic actions on behalf of a patient, including . . . extraction of bodily fluids for analysis . . . ." § 527.8(a)(7). As to what constitutes an "emergency," the statute sets forth that "[f]acilities may give treatment . . . to any inpatient, regardless of admission status or objection, where the patient is presently dangerous and the proposed treatment is the most appropriate reasonably available means of reducing that dangerousness. Such treatment may continue only as long as necessary to prevent dangerous behavior." § 527.8(c)(1). Plaintiff alleges in his opposition papers that no emergency situation existed that would have vitiated his right to object to his blood being drawn for laboratory analysis. Plaintiff further calls into question the legality of defendant's conversion of his status from voluntary to involuntary, in setting forth that he was not provided with the notice of the status change until days after the two blood draws in question and that neither doctor performed a psychiatric examination. Given that material issues of fact exist as to the circumstances of plaintiff's conversion to involuntary status, and as to whether an emergency situation existed that would have given defendant the authority to override plaintiff's rights under 14 N.Y.C.R.R. § 527.8, summary judgment must be denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted in part, to the extent that plaintiff's cause of action denoted as "civil conspiracy" is dismissed; and it is further

ORDERED that the action in all other respects continues.

The parties are scheduled to appear for a preliminary conference on June 2, 2009, at 3:00 p.m., in Part 6, courtroom 345 at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: May 15, 2009

JOAN B. LOBIS, J.S.C.