

St. Germain v McMillan

2009 NY Slip Op 32122(U)

September 8, 2009

Supreme Court, Kings County

Docket Number: 22521/07

Judge: M. Randolph Jackson

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At an IAS Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of September, 2009.

P R E S E N T:

HON. RANDOLPH JACKSON,

Justice.

-----X

MARIE M. ST. GERMAIN.,

Plaintiff,

- against -

Index.: 22521/07

GEORGE A. MCMILLAN, M.D., EDDY VINCENT, M.D., DOSHI
DIAGNOSTIC IMAGING SERVICES, P.C., AND NEW YORK
METHODIST HOSPITAL,

Defendants,

-----X

The following papers number 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3, 4 _____
Reply Affidavits (Affirmations) _____	5 _____
_____ Affidavits (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Marie M. St. Germain moves for an order, pursuant to CPLR 3212 (e), granting her partial summary judgment on the issue of medical malpractice liability against defendants George A. McMillan, M.D. and New York Methodist Hospital (NYMH).

Plaintiff commenced the instant action on June 21, 2007. The verified complaint alleges that on March 7, 2007, the then-pregnant plaintiff was admitted to the obstetrics ward of NYMH. Plaintiff, defendant Dr. Eddy Vincent (her usual gynecologist) and Dr. McMillan had previously

arranged for Dr. McMillan to deliver the baby at NYMH. After plaintiff presented to NYMH, Dr. McMillan induced labor and delivered the baby by cesarean section. He also performed tubal ligation at plaintiff's request. Plaintiff's post-operative condition was unremarkable, and she was subsequently discharged on March 12, 2007.

During subsequent visits to Dr. Vincent, however, plaintiff complained of abdominal pain. On June 4, 2007, plaintiff again presented to NYMH complaining of lower abdominal pain. Hospital staff members conducted an X ray examination, which revealed two foreign objects in plaintiff's abdomen. A CT scan was then conducted, showing a laparotomy pad ring and marker strip in plaintiff's abdomen. On June 4, 2007, plaintiff underwent surgery and the objects were removed from her abdomen.

The verified complaint asserts, inter alia, that NYMH, Dr. McMillan and their agents allowed a laparotomy pad to remain in plaintiff's abdomen during the subject delivery by cesarean section and tubal ligation. The complaint further asserts that leaving the laparotomy pad in her abdomen after the subject procedures is tantamount to medical malpractice, which proximately caused plaintiff to undergo an otherwise unnecessary surgery and suffer abdominal scars.

Examinations before trial of the parties have been held, and plaintiff filed a note of issue on May 8, 2009. Plaintiff now seeks partial summary judgment on the issue of medical malpractice liability against NYMH and Dr. McMillan.¹

In support of her motion, plaintiff first argues that there is no reasonable dispute that Dr. McMillan, NYMH and their agents departed from good and accepted medical practice by allowing the subject laparotomy pad to remain in her abdomen after the subject procedures. Plaintiff further

¹ The instant action has been discontinued as against defendant Doshi Diagnostic Imaging Services, P.C. Also, the instant motion does not seek relief against Dr. Vincent, who was not involved in the subject delivery by cesarean section and subsequent tubal ligation.

supports her motion with the affidavit of obstetrician and gynecologist Dr. Louis G. Keith, who opines that, with a reasonable degree of medical certainty, Dr. McMillan, NYMH and their agents departed from good and accepted medical practice by allowing the subject laparotomy pad to remain in plaintiff's abdomen after the subject procedures. Dr. Keith also opines that as a direct and proximate result of these departures, plaintiff underwent an otherwise unnecessary surgical procedure and suffered related scars, and is at high risk for future bowel obstructions and surgical repair thereof.

Plaintiff then notes that the requisite elements of a medical malpractice cause of action are a deviation from accepted medical practice that proximately caused injuries. Here, claims plaintiff, by submitting the affidavit of Dr. Keith, plaintiff has demonstrated prima facie entitlement to judgment as a matter of law.

Plaintiff also notes the doctrine of *res ipsa loquitur*, as applied by the State of New York Court of Appeals in *Kambat v St. Francis Hosp.* (89 NY2d 489 [1997]). Plaintiff asserts that the affidavit of Dr. Keith demonstrates that here, the doctrine of *res ipsa loquitur* applies. For these reasons, concludes plaintiff, the instant motion should be granted and plaintiff should be awarded partial summary judgment on the issue of liability against Dr. McMillan and NYMH.

The court denies the instant motion since plaintiff has not demonstrated prima facie entitlement to judgment as a matter of law. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986];

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). For the movant to prevail, it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]) If the existence of an issue of fact is even arguable, summary judgment must be denied (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [1999]). Indeed, the trial court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). The movant has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of their claim or defense, rather than by pointing to gaps in the opponents' proof (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2003]). Lastly, since plaintiff has failed to demonstrate prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the sufficiency of the opposing papers (*see e.g. Furgang & Adwar, LLP v. Fiber-Shield Indus., Inc.* 27 AD3d 692, 693 [2006]; *Mariaca-Olmos v Mizrhy*, 226 AD2d 437, 438 [1996]).

Plaintiff correctly notes the elements of a medical malpractice action—specifically, that defendants deviated from accepted medical practice and thus caused plaintiff's injuries (*Antoniatto v Long Is. Jewish Med. Ctr.*, 58 AD3d 652, 654 [2009], citing CPLR 4401; *Rhabb v New York City*

Hous. Auth., 41 NY2d 200, 202 [1976]; *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2005]; *Wong v Tang*, 2 AD3d 840 [2003]). However, the authority cited by plaintiff does not support partial summary judgment on the issue of liability. Indeed, in *Kambat v St. Francis Hosp.* (89 NY2d 489 [1997]), noted by plaintiff, the State of New York Court of Appeals considered an appeal in a medical malpractice action spurred by a “an 18-by-18-inch laparotomy pad [that] was discovered in the abdomen of plaintiffs’ decedent following a hysterectomy performed by [the] defendant physician at [the] defendant hospital” (*Kambat*, 89 NY2d at 492), causing decedent’s death. Like the decedent in *Kambat*, plaintiff herein suffered a foreign-object injury that required subsequent surgery. However, and contrary to the argument of the instant plaintiff, *Kambat* does not support the proposition that a plaintiff is entitled to judgment as a matter of law on these facts. Specifically, the Court of Appeals in *Kambat* held that, contrary to the holdings of the trial court and Appellate Division, “*the jury could have inferred negligence* [emphasis added] under the doctrine of res ipsa loquitur, and that defendants’ evidence of due care and alternative causes of the injury did not remove the doctrine from the case . . . [t]he trial court’s refusal to instruct the jury regarding res ipsa loquitur [emphasis added] thus mandates reversal and a new trial” (*id.*, *revg Kambat v St. Francis Hosp.*, 226 AD2d 1063 [1996]).

Here, plaintiff attempts to support her motion for partial summary judgment by noting *Kambat* and the doctrine of res ipsa loquitur. However, the Court of Appeals explicitly noted that:

“[w]here the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant’s relation to it (see, *Abbott v Page Airways*, 23 NY2d 502, 510 [1969]; Restatement [Second] of Torts § 328 D, comments *a*, *b*). Res ipsa loquitur ‘simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence’ (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

“Once a plaintiff’s proof establishes the following three conditions, a prima facie case of negligence exists and *plaintiff is entitled to have res ipsa loquitur charged to the jury* [emphasis added]. First, the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff (*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).”

Indeed, contrary to the instant plaintiff’s suggestion, the holding of *Kambat* does not support granting summary judgment to a plaintiff injured by a foreign surgical instrument, removing the resolution of whether *res ipsa loquitur* applies from the trier of fact (*see e.g. Morejon v Rais Constr. Co.*, 7 NY2d 3d 203, 209 [2006] [“*res ipsa loquitur* evidence does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff’s circumstantial evidence is unrefuted”]; *see also Simmons v Neuman*, 50 AD3d 666, 667 [2008] [affirming denial of partial summary judgment to plaintiff who asserted *res ipsa loquitur*]; *cf. Kramer v Rosenthal*, 224 AD2d 392 [1996] [reversing denial of motion for summary judgment by medical malpractice defendant]).

In short, although the doctrine of *res ipsa loquitur* may apply to the facts of the instant action, “the doctrine is a rule of evidence which merely provides a permissible inference of negligence rather than a presumption . . . [t]herefore, application of the doctrine as a basis for awarding summary judgment is inappropriate” (*Capolongo v Giant Carpet*, 292 AD2d 331, 331 [2002], citing *Dermatossian*, 67 NY2d at 226; *Vaynberg v Provident Operating Corp.*, 269 AD2d 442 [2000]; *Feuer v HASC Summer Program*, 247 AD2d 429 [1998]; *Davis v Federated Dept. Stores*, 227 AD2d 514 [1996]; *see also Martinez v City of New York*, 292 AD2d 349 [2002]). For these reasons, the instant motion by plaintiff Marie M. St. Germain moves for an order granting her partial summary

judgment on the issue of medical malpractice liability against defendants George A. McMillan, M.D. and New York Methodist Hospital is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

**HON. JUSTICE RANDOLPH JACKSON
SUPREME COURT, KINGS COUNTY
CIVIL TERM - PART 11**

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