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

PRESENT: COBIS Justice PART 6

BENJAMIN CUNNINGHAM

-v-

DAVID NEWMAN, M.D.

INDEX NO. 401018/09

MOTION DATE 9/22/09

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 20 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-13
Answering Affidavits — Exhibits	14-19
Replying Affidavits	20

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED

DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/22/09

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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BENJAMIN CUNNINGHAM

Plaintiff,

Index No. 401014/09

-against-

Decision and Order

DAVID NEWMAN, M.D., JARONE LEE, M.D., ELAN LEVY, M.D., JAMES SPENCER, M.D., ST. LUKE HOSPITAL

Defendant.

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

Motion Sequence Numbers 001, 002, and 003, are hereby consolidated for disposition.

In Motion Sequence Number 001, defendants seek an order dismissing plaintiff's claims of violations of his privacy rights and his rights under the Patient's Bill of Rights, on the basis that he failed to state a cause of action pursuant to C.P.L.R. Rule 3211(a)(7). They seek to dismiss Mr. Cunningham's medical malpractice claim pursuant to C.P.L.R. Rule 3212 on the grounds that there is no triable issue of fact to be presented to the jury. For the following reasons, defendants' motion is granted.

Plaintiff, proceeding pro se, is seeking damages arising out of three (3) visits to the emergency room ("ER") at St. Luke Hospital in August 2008. He presented to the ER at 9:30 a.m. on August 9, 2008, complaining of a penile discharge and swelling of moderate intensity at the discharge site for four (4) days. He was examined by Dr. Michael Laningan, a non-party doctor in this action, who took plaintiff's medical history, noted his current medications, did a physical

examination, and sent plaintiff for a scrotal ultrasound, bloodwork, metabolic study, and urinalysis. Dr. Laningan concluded that Mr. Cunningham was suffering from edema of the penis and cellulitis. He prescribed an antibiotic and told Mr. Cunningham to follow up with urology in two (2) days.

Plaintiff returned to the ER that same night complaining of worsening penile swelling and the presence of a rash that had spread to his back and arms. Plaintiff was examined by Dr. Elan Levy and Dr. David Newman, a resident physician and an ER attending physician, respectively. The doctors reached different clinical diagnoses of a drug-induced rash or scabies, but based on a pre-existing condition of Mr. Cunningham and of the observations during the physical exam, they treated plaintiff for scabies. Plaintiff was given Benadryl, topical creams, and instructions regarding how to use the medicines and other procedures for the treatment of scabies, including washing clothes and linens in hot water.

The following day, on August 10, 2008, plaintiff returned to the ER complaining of increased swelling and edema to the penis and spreading of his rash. Plaintiff was examined by Dr. Newman and Dr. Jarone Lee, a resident physician, who found a large swollen edematous shaft of penis with redness in the bilateral legs area and a macular popular rash to the full back, abdomen and arms. The doctors continued the previous course of treatment and added more creams. A chest x-ray and urinalysis analysis was performed. Plaintiff was told to follow-up the next day with the dermatology department.

Plaintiff alleges that his privacy rights and rights pursuant to the Patient's Bill of Rights were violated during the August 9 and 10 visits. He asserts that he was required to reveal

personal medical and insurance information to the triage nurse in front of other people waiting in the ER. He argues that requiring him to disclose confidential information in this matter violated his rights.[1]

On August 12, 2008, plaintiff visited St. Luke Hospital's dermatology department ("Dermatology"), complaining that rash had spread. Dermatology concluded that he was suffering from a morbilliform eruption and drug hypersensitivity, not scabies. A punch biopsy was ordered and he stopped all current medication. Plaintiff returned one week later, on August 19, 2008. His rash and scrotal edema had improved. The result of his punch biopsy indicated he was suffering from eczema and Dermatology concluded that the rash was likely a drug eruption.

Plaintiff's next visit to Dermatology was on September 9, 2008. Plaintiff had begun taking new medications in addition to other antibiotics. Plaintiff was found to have no residual skin lesions but "a slight p/h on his back." Dermatology believed the morbilliform rash was unlikely drug related and it was of unclear etiology. When plaintiff returned to Dermatology for his last visit, the rash was resolved and there were no new skin lesions. Plaintiff still complained of dry skin. He was diagnosed with a mild xerosis and given lotion. During subsequent visits to his physician, Dr. Olivieri, his skin was normal. Plainitff seeks compensation for the dry skin that he asserts that he suffers from and reimbursement for the loss of property that he destroyed after being told to do so to prevent the spread of scabies.

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[1] Without alleging defamation or a violation of Civil Rights Law § 51 by defendants, plaintiff cannot advance a classic "right to privacy" claim. Thus, his "right to privacy" claim, as defined by New York law, must be dismissed. Plaintiff does have a "right to confidentiality" under the Patient's Bill of Rights and that is likely the right on which he predicates his privacy claim. Thus, for the purpose of this case, the court will consolidate plaintiff's right to privacy claim with his Patient's Bill of Rights claim.

Defendants argue that Mr. Cunningham has failed to state a cause of action for a violation of the Patient's Bill of Rights and violation of his privacy rights. They argue that his only claim is one for medical malpractice because his damage claim flows exclusively from an alleged departure in the standard of care he received from the ER. They argue that plaintiff is seeking to use the Patient's Bill of Rights as a contract, but that he cannot establish an express promise, without which no contract claim can be viable. See Catapano v. Winthrop Univ. Hosp., 19 A.D.3d 355 (2d Dep't 2005). Defendants argue that plaintiff is then precluded from any claim arising out of the Patient's Bill of Rights.

While defendants are correct that plaintiff has not plead an express promise, and therefore the Patient's Bill of Rights cannot be the basis for a claim sounding in contract, it can be the basis of a private cause of action in some limited circumstances. Pub. Health L. § 2803-c. But in most cases, Article 28 of the Public Health Law limits enforcement of the general provisions of § 2800 et seq to actions for injunctive relief initiated by the public health council or the commissioner through the attorney general. Pub. Health L. § 2803-c. A private right of action exists only for patients in certain residential healthcare facilitates. Pub. Health L. § 2801-d. Such facilities are nursing homes or facilities that provide lodging, board and physical care but are different than hospitals. Pub. Health L. § 2801. Plaintiff does not fall within that group of individuals for which a private cause of action exists and he has not established a contract cause of action. Plaintiff's rights are enforced by seeking recourse to the appropriate state agency, action which Mr. Cunningham has already taken. His Bill of Rights and privacy claims arising from his visits to the ER must be dismissed.

In support of their claim for summary judgment on the medical malpractice claim, defendants offer the affirmation of Anthony Mustalish, M.D, a Board Certified Emergency Medical physician. He opines in a non-conclusory fashion that Mr. Cunningham's care was not a derivation from the standard of care. He reviewed the treatment given to Mr. Cunningham and states that the diagnosis of scabies in an emergency department is done on the basis of a patient's history and physical examination, and it is not within the standard of care to do a skin biopsy or take skin scrapings. Dr. Mustalish opines that the care Mr. Cunningham received was within the standard of care.

In order to establish a prima facie case of liability in a medical malpractice cause of action, the plaintiff must prove "(1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was a proximate cause of injury." Perrone v. Grover, 272 A.D.2d 312 (2d Dep't 2000) (citations omitted). For a successful summary judgment dismissal in a medical malpractice case, the defendant needs to demonstrate that treatment was provided in accordance with accepted standards of medical practice through expert evidence. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 327 (1986). The defendant has the burden of making a prima facie case that he is entitled to a dismissal as a matter of law showing, because there is no triable issue of fact regarding the standard of care and there is an absent of proximate cause of injury. Rebozo v. Wilen, 41 A.D.3d 457, 458 (2d Dep't 2007). In the instant case, defendants have met their burden.

The burden shifts to plaintiff to sufficiently demonstrate that there is a material issue of fact that warrants a trial. Alvarez, 68 N.Y.2d at 324. In support of his claim, plaintiff relies on

the determination of the New York State Department of Health ("DOH") that the care at the emergency room did not meet generally accepted standards. The determination of the DOH is insufficient to prove the burden against the movant of a summary judgment motion. In response to a summary judgment motion by a defendant in a medical malpractice proceeding, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury." Domaradzki v. Glen Cove Ob/Gyn Assoc., 242 A.D.2d 282 (2d Dep't 1997) (citations omitted). Plaintiff needs to provide at least some statement of medical expertise in rebuttal. Neuman v. Greenstein, 99 A.D.2d 1018 (1st Dep't 1984). "The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified." Indig v. Finkelstein, 23 N.Y.2d 728, 729 (1968) (citations omitted); see Canter v. Mulnick, 93 A.D.2d 751, 752 (1st Dep't 1983).

In the current case, the DOH's investigation provided a blanket Statement of Deficiencies, claiming, "The ED physician did not perform the necessary testing for scabies before providing the patient with treatment for scabies." The DOH is not the equivalent of an affidavit of a medical expert. The report was a general statement without providing any details or how the DOH came to its determination. Although this information might be enough for a DOH investigation, the court has a higher standard. This statement can be used to support plaintiff's claim, but it is not sufficient to bear the burden to defeat defendants' summary judgment motion.

Defendants presented evidence from their expert Dr. Mustalish. He affirms that plaintiff's injuries were not causally related to any treatment rendered by defendants during his visit to the ER on August 9 and August 10, 2009. Plaintiff, on the other hand, has not provided or attached any medical expert affidavit in support of his claim. Rather, plaintiff's only supporting evidence consists of his blanket allegations and a statement from the DOH, namely, the Statement of Deficiencies. There is no explanation as to what is the standard of care nor how defendants deviated from it. This statement is conclusory and lacks detail and evidence to support plaintiff's conclusion. There is insufficient evidence to show that there is a material issue of fact regarding the standard of care. Therefore, defendants are entitled to summary judgment on plaintiff's malpractice claims.

Motion Sequence Number 002 by plaintiff was a request to enlarge the record, which has been granted. The August 20, 2008 letter from the DOH and the August 25, 2008 letter from St. Luke have been considered and were included in the papers reviewed in connection with Sequence 001, together with the DOH decision and the results of Mr. Cunningham's Freedom of Information Law request. But, enlarging the record to include these documents does not change the analysis above.

Finally, on Motion Sequence Number 003, plaintiff's request to strike Dr. Mustalish's affirmation is denied. There is no legal basis to strike the affirmation. There is no procedure requiring defendants' experts to respond to plaintiff's questions under New York law prior to considering the affirmation. Defendants are entitled to have an expert review Mr. Cunningham's medical records pursuant to authorizations given by him to defendants' attorneys. Once Mr.

Cunningham placed his medical condition into issue by seeking to recover for damages for medical malpractice, defendants were entitled to review medical records with an expert in preparing their defense.

That branch of defendants' motion seeking to dismiss the claims of violations of privacy rights and rights under the Patient's Bill of Rights is granted, and that branch of defendants' motion seeking summary judgment dismissal on the medical malpractice claims is granted. The complaint is dismissed in its entirety and the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: December 22, 2009

JOAN B. LOBIS, J.S.C.