

Looby v Saratoga Care Family Health Ctrs.
2009 NY Slip Op 33434(U)
August 25, 2009
Supreme Court, Saratoga County
Docket Number: 2009-0264
Judge: Thomas D. Nolan, Jr.
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STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

JAMES LOOBY,

Plaintiff,

-against-

SARATOGA CARE FAMILY HEALTH CENTERS,

Defendant.

DECISION AND ORDER

RJI No. 45-1-2009-0586

Index No.: 2009-0264

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: WILLIAM V. CANALE
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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, N.Y.

2009 SEP - 1 PM 3: 53

FILED

Plaintiff commenced this action by filing on January 22, 2009. Defendant now moves for an order requiring plaintiff to demonstrate his entitlement to an extension of time, pursuant to CPLR 2004, to serve a certificate of merit as required in an action for medical malpractice.¹ CPLR 3012-a. Plaintiff concedes that he did not attach a certificate of merit to the complaint, but asserts his action is based on ordinary negligence, not medical malpractice. Plaintiff contends that should the court find his claim sounds in medical malpractice, a certificate of merit is still

¹Defendant's motion to dismiss the action for lack of personal jurisdiction over the defendant has been withdrawn based upon plaintiff's post motion service of the summons and complaint upon an appropriate corporate officer of defendant.

not required because he intends to rely on res ipsa loquitur to prove his case. CPLR 3012-a (c).

Background

On January 9, 2007, plaintiff went to defendant's ambulatory surgery facility for arthroscopic knee surgery. Plaintiff alleges, at a preoperative screening and, again, immediately prior to anesthesia, he informed the nurse anesthetist that he previously had experienced vasovagal² reactions to sedation and numbing agents. Plaintiff alleges that despite his warning, the nurse anesthetist directed him to sit upright while she administered the epidural injection. Plaintiff contends that immediately thereafter he lost consciousness, fell forward, and sustained a whiplash injury to his neck. Plaintiff alleges defendant was negligent in administering the anesthesia without taking any precautions in the event he fainted while in an upright position.

The Law

CPLR 3012-a requires a plaintiff to serve a certificate of merit with the complaint in a medical malpractice action, except if plaintiff's attorney certifies he intends to rely solely on the doctrine of res ipsa loquitur to prove malpractice. "The failure to file [a] certificate is a pleading defect, requiring dismissal unless plaintiff can establish a reasonable excuse for the default or a meritorious cause of action". Perez v Lenox Hill Hospital, 159 AD2d 251 (1st Dept 1999); CPLR 3012-a (c). Medical treatment involves questions of medical competence and judgment, whereas ordinary negligence involves the violation of a different duty. Weiner v Lenox Hill Hosp., 88 NY2d 784, 787 (1996); see also Miller v Albany Med. Center Hosp., 95 AD2d 977, 978 (3rd

² A vasovagal attack or syncope is defined as "[t]he common faint, occurring as a response to sudden emotional stress, pain, or injury; characterized by hypotension, pallor, sweating, hyperventilation, bradycardia, and loss of consciousness from excessive vagal effect on the vascular system". Blakiston's Gould Medical Dictionary 1447 (4th ed 1979).

Dept 1983). with the distinction sometimes a subtle one and often “no rigid analytical line separates [medical malpractice and negligence]”. Scott v Uljanov, 74 NY2d 673, 674 (1989). A claim sounds in medical malpractice when the challenged action or omission “constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.” Weiner v Lenox Hill Hosp., *supra* at 788; quoting Bleiler v Bodnar, 65 NY2d 65, 72 (1985). The assessments of the extent of supervision of and the mode of treatment used are integral parts of the process of providing medical care. Scott v. Uljanov, *supra* at 675; see also Angell v State of New York, 278 AD2d 776 (3rd Dept 2000).

Analysis

Again, plaintiff asserts that defendant’s nurse anesthetist in the first place disregarded his disclosed medical history in deciding to how to administer anesthesia to him and then failed to adequately supervise the procedure in light of his proclivity to fainting. Manifestly, plaintiff was injured during the rendition of a specific medical treatment. Moreover, the nurse anesthetist’s treatment involved questions of medical competence and judgment beyond the common everyday experience of the trier of facts. Miller v Albany Med. Center Hosp., 95 AD2d 977, 978 (3rd Dept 1983). In a word, plaintiff’s claim is one of medical malpractice. Moreover, the plaintiff’s version of the facts and his theory of the case, accepted as true for purposes of this motion, do not invite the application of *res ipsa loquitur*.

Yet since there is no evidence that plaintiff commenced this action with anything other than the good faith belief that it was one sounding in negligence, and defendant fails to show any prejudice by any delay in serving the certificate of merit, see Horn v Boyle 260 AD2d 76, 79 (3rd Dept 1999); citing Bowles v State of New York, 208 AD2d 440, 443 (1st Dept 1994); see also


Perez v Lenox Hill Hosp., 159 AD2d 251 (1st Dept 1990), plaintiff ought to be afforded a chance to satisfy §3012-a, rather than having his action dismissed.

Defendant's motion is granted and plaintiff's complaint is dismissed unless within ninety (90) days following the service of a copy of the order with notice of entry, plaintiff complies with CPLR 3012-a.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for the defendant. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: August 25, 2009
Ballston Spa, New York



HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Kathleen A. Marchione

Saratoga County Clerk

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED