

Cohen v New York Univ.
2010 NY Slip Op 30974(U)
April 19, 2010
Supreme Court, New York County
Docket Number: 113982/06
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Index Number : 113982/2006
COHEN, DONALD
vs
NW YORK UNIVERSITY
Sequence Number : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed in this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

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

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 19, 2010

[Signature]
HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X

DONALD COHEN,

Plaintiff,

INDEX NO. 113982/06

-against-

NEW YORK UNIVERSITY, NEW YORK UNIVERSITY
SCHOOL OF MEDICINE FOUNDATION, INC., NEW
YORK UNIVERSITY MEDICAL CENTER, NEW YORK
UNIVERSITY FACULTY PRACTICE RADIOLOGY,
JOHN DOE, the unidentified owner and/or
operator of the MRI equipment, and Jane
Doe, the unidentified owner and/or
operator of the MRI equipment,

Defendants.

-----X

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Plaintiff moves for an order pursuant to CPLR 3212 granting
him partial summary judgment on the issue of liability.

Plaintiff also seeks an order directing New York University, New
York University School of Medicine Foundation, Inc., New York
University Medical Center and New York University Faculty
Practice Radiology (defendants or "NYU" collectively) to supply
additional discovery and an order striking their affirmative
defense of culpable conduct. Defendants oppose the motion and
cross-move for summary judgment dismissing the complaint in its
entirety based upon the statute of limitations and lack of
causation. For the reasons stated below, the motion is denied
and cross-motion is granted.

I. Procedural Background

Plaintiff commenced this action on September 28, 2006, alleging that he suffered burns during the course of a Magnetic Resonance Imaging (MRI) examination at NYU on September 30, 2003 (complaint, ¶ 37). Plaintiff's prior counsel was permitted to withdraw by this court's order dated October 22, 2008 and the case was scheduled for a status conference on December 4, 2008. The action was dismissed by the court's order dated December 4, 2008 pursuant to 22 NYCRR 202.27 for plaintiff's failure to appear at the scheduled conference. This dismissal was vacated by the court's order dated February 19, 2009, on condition that plaintiff file an affidavit of merit within 45 days. The court found the affidavit of merit of Dr. Berg insufficient. Plaintiff moved to reargue, and on June 4, 2009, the court issued an order granting reargument and finding that Dr. Berg's affidavit was "sufficient to support a medical malpractice cause of action." Plaintiff and defendants are now each moving for summary judgment. subsequently brought the instant motion for partial summary judgment.

II. Parties' Contentions

Plaintiff alleges that he was under the care of Dr. Ifeoma Okoronwa for herniated discs and stenosis to his back resulting

from a fall in July 2000 (plaintiff's affidavit, ¶ 4) and that Dr. Okoronwa referred him to NYU for periodic MRI examinations. He further alleges that, on September 30, 2003, he went to NYU for an MRI in connection with his back condition, that he was told to lie still during the examination and given a rubber ball to squeeze to alert the radiology technician if there was a problem (*id.*, ¶ 7). He further contends that approximately 15-30 seconds into the procedure, he felt a burning sensation on his right hand and his outer thighs, that he repeatedly squeezed the rubber ball and called out for help, but that no one came (*id.*, ¶¶ 9-10). He also asserts that the burning sensation subsided, but that it would intensify each time the machine went into a noisy cycle (*id.*, ¶ 11). He states that he was in the machine from the waist up, that he could not move in the confined space of the machine and that his right thumb was not touching his thigh (plaintiff EBT, at 35-36). He also contends that he advised a radiology doctor and a technician of the incident and that a report (the occurrence report) was filled out that evening. He asserts that he suffered two to three inch scars on his right thumb, his right thigh and his left thigh (*id.* at 85). Finally, he says that he subsequently went to NYU for MRIs for his back on March 2, 2004 and July 15, 2006.

Plaintiff contends that a properly conducted MRI should not cause burns (Berg affidavit, ¶¶ 3, 4), that the MRI technician should properly supervise the procedure by being vigilant for signals of distress from the patient (*id.*, ¶ 8) and that the failure to stop the procedure promptly constituted a departure from the proper standard of care (*id.*, ¶¶ 8, 10).

Defendants assert that the safety procedure for an MRI is that the patient is told to lie still and avoid crossing limbs (Pierre EBT, at 22-25; Fischetti EBT, at 27). They further contend that the patient is provided a rubber ball to squeeze to alert the technician if there is a problem during the procedure (*id.*, at 31; Pierre EBT, at 27-28) and that the technicians are at the console outside the room during the procedure (*id.* at 29). They further state that burning can occur when limbs are crossed during the procedure, since a loop is created leading to a buildup of energy (Fischetti EBT, at 28).

An occurrence report was filled out the evening of plaintiff's accident, but each technician sees many people and neither remembered this incident (*id.* at 38; Pierre EBT, at 71-72). The occurrence report states that a doctor was "asked to evaluate patient post MIR scan; complaint = blister on rt thumb and thigh." The doctor reported that "both 3-4 mm; looked like a [illegible] fluid filled lesion. Patient explained he felt pain

during exam. However, he never notified tech. Patient called his doctor and I spoke to Doctor "O" on phone. Explained patient was fine. Patient instructed to return to office next day." At his deposition, plaintiff testified that in addition to burns on his right thumb and right thigh, his left thigh was burned, and that he has scars two to three inches in size.

Defendants also assert that an MRI creates images of the body through the use of varying oscillating magnetic fields which create a map of the scanned tissue (Kanal affidavit, ¶ 6). They state that the MRI machine does permit movement which can distort images, thus requiring instructions to lie still during the procedure (*id.*, ¶ 10) and that injury can occur due to contact with the inner bore of the machine and by a closed loop resulting from limbs in physical contact with each other (*id.*, ¶¶ 10,12). Defendants further contend that a two to three inch burn would not be possible since the heat could not build up over such a large surface area (*id.*, ¶¶ 12, 13, 18, 19) and that it would have been impossible for both thighs to be in contact with the MRI's inner bore (*id.*, ¶ 20) and consequently, plaintiff's injury could not have been caused by the MRI.

Defendants also state that advising a patient not to cross their feet and giving them a rubber ball to squeeze so that the technician can be notified of any distress is the appropriate

standard of care (*id.*, ¶ 21). They further state that a burning sensation within seconds of the scan's commencement is not consistent with the mechanism of an MRI burn (*id.*, ¶ 22). Finally, they assert that MRI scans are discrete tests with the radiologist supplying the result to the patient's physician who ordered the test without expectation of any future relationship (*id.*, ¶ 23).

III. Discovery

Plaintiff's application to compel discovery is denied as moot, since defendants have adequately supplied responsive non-privileged discovery (Defendants' cross motion, Exhibits L, M).

IV. Res Ipsa Loquitur

Plaintiff seeks partial summary judgment as to liability, based upon the doctrine of res ipsa loquitur, claiming that, since the accident occurred and the MRI was under defendants' exclusive control, defendants are liable as a matter of law.

A plaintiff relying on res ipsa loquitur must show that: (1) the accident is the type that ordinarily does not occur in the absence of negligence; (2) the injury was caused by an agent or instrumentality within the defendants' exclusive control; and (3) the injury was not due to any voluntary action on plaintiff's part (*States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]). Res ipsa loquitur merely permits an inference of negligence, but does

not compel such an inference (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). However, even if unrefuted, "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment" (*id.* at 209; *Simmons v Neuman*, 50 AD3d 666, 667 [2nd Dept 2008]).

Plaintiff alleges, in essence, that defendants must have been negligent since the accident occurred. According to defendant's expert, Dr. Kanal, even if the accident occurred as a result of the MRI, as plaintiff alleges, it was due to his own conduct in crossing his limbs. This is not the sort of inescapable conclusion of negligence that would justify granting plaintiff summary judgment under the doctrine of res ipsa loquitur. Moreover, since the record indicates that plaintiff's own conduct in the MRI could have contributed to causing or exacerbating his injury, plaintiff has not satisfied the elements necessary for applying the doctrine of res ipsa loquitur.

Thus, plaintiff's motion for partial summary judgment on the issue of liability is denied. Similarly, plaintiff's motion to strike defendants' affirmative defense of culpable conduct is denied, since the affidavit of defendants' expert raises an issue as to whether plaintiff caused or exacerbated his injury by his own conduct of crossing his limbs during the procedure.

V. Statute of Limitations

CPLR 214-a provides a statute of limitations for medical malpractice of two years and six months from the date of the alleged wrongful act or omission, in contrast to the three year statute of limitations for negligence (see *O'Donnell v. Siegel*, 49 AD3d 415 [1st Dept]). Since plaintiff commenced this lawsuit on September 28, 2006 for an MRI performed on September 30, 2003, any claim for malpractice is time-barred, but a claim for negligence is timely.

Plaintiff contends that his complaint seeks compensation for negligence as well as medical malpractice. Notably, plaintiff's counsel, in seeking to vacate the dismissal of this action, asserted that plaintiff had "a meritorious claim against Defendants based upon Defendants' medical malpractice in burning him during a routine MRI procedure"

The distinction between medical malpractice and negligence has been called subtle since medical malpractice is a form of negligence (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787 [1996]). Where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a physician, the claim sounds in medical malpractice (*id.* at 788; *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]).

For example, a hospital's failure to equip a patient's bed with bed rails in compliance with a doctor's order raises a question of negligence, whereas a failure to use bed rails where there is no doctor's order generally raises a question of medical malpractice (see *Coursen v. New York Hospital-Cornell Medical Center*, 114 AD2d 254 [1st Dept 1986]; see also *Fox v. While Plains Medical Center*, 125 AD2d 538 [2nd Dept 1986] [improper assessment of plaintiff's condition and degree of supervision needed, particularly with regard to ability to ambulate post-operatively, is a question of medical malpractice, not negligence]).

The analysis of the Court of Appeals in *Bleiler v Bodnar*, *supra*, is particularly instructive. In that case, a doctor and a nurse who assisted plaintiff in the emergency room, "were both charged with having failed to take a proper medical history - a crucial element of diagnosis and medical treatment." *Id.* The Court of Appeals held that the doctor's "alleged failure to elicit all information pertinent to treatment could unquestionably constitute medical malpractice," and that "[t]he conclusion is no different with respect to the emergency room nurse, functioning in that role as an integral part of the process of rendering medical treatment to a patient." *Id.*

Relying on that analysis, this court concludes that plaintiff's claims sound in malpractice. An MRI is a diagnostic procedure administered by a trained technician and must be administered according to certain procedures, which in this case was performed on plaintiff to evaluate his disc herniation and stenosis consequent to his fall in July 2000. Since the purpose of an MRI is to aid in diagnosis which is a "crucial element" of rendering medical treatment to a patient, it clearly bears a substantial relationship to the rendition of medical treatment. (*Bleiler v Bodnar, supra; see also Spiegel v Goldfarb, 66 AD3d 873 [2nd Dept 2009]*).

Thus, as plaintiff's claims based upon the MRI procedure are governed by the statute of limitations for medical malpractice, they are time-barred, unless plaintiff can establish a toll by virtue of continuous treatment.

VI. Continuous Treatment

Under the continuous treatment doctrine, the statute of limitations for a medical malpractice action is tolled when a course of treatment which includes the alleged wrongful acts or omissions has run continuously and is related to the same original condition or complaint (see *Allende v New York City Health & Hosps. Corp., 90 NY2d 333, 338 [1997]*; *Clayton v. Memorial Hospital for Cancer & Allied Diseases, 58 AD3d 548 [1st*

Dept 2009])). The underlying rationale is that a patient should not have to interrupt corrective medical treatment in order to bring a timely claim (*Prinz-Schwartz v Levitan*, 17 AD3d 175, 177 [1st Dept 2005])). Generally "where a diagnostic service ... renders discrete, intermittent, medical services, this will not be considered continuous treatment" (*Elkin v Goodman*, 285 AD2d 484, 486 [2nd Dept 2001]; see also *McDermott v. Torre*, 56 NY2d 399 [1982]; *Davis v. City*, 38 NY2d 257 [1975]); *Kaufman v. Fulop*, 47 AD3d 682 [2nd Dept 2008])).

The affidavit of defendant's expert, Dr. Kanal, establishes that plaintiff had no expectation of future treatment with respect to the MRI, and plaintiff submits no competent proof to raise a material issue of fact as to the continuity of treatment by defendants, as opposed to a series of discrete diagnostic procedures (see *Elkin v Goodman*, *supra*; *McDermott v. Torre*, *supra*; *Davis v. City*, *supra*; *Kaufman v. Fulop*, *supra*).

Thus, as no basis exists for tolling the statute of limitations, defendants are entitled to summary judgment dismissing the complaint as time-barred.

VII. Lack of Causation

Even if plaintiff had timely commenced this action, defendants would still be entitled to summary judgment dismissing the complaint, for lack of causation.

To establish a prima facie case of medical malpractice, plaintiff must show a deviation or departure from accepted medical practice, and that such deviation or departure proximately caused his injury (see *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306-307 [1st Dept 2007]).

Defendant's expert, Dr. Kanal, explains that under the circumstances here, a patient in an MRI could have been burned in only one of two ways: by contact with the inner bore of the scanner or by crossing limbs. Plaintiff's expert agrees with that explanation, and plaintiff relies on his deposition testimony speculating that he could have come into the contact with the inner bore of the scanner, since he was in the MRI machine from the waist up. Plaintiff, however, does not explain how his thighs could have been burned if his legs were not inside the MRI machine. Furthermore, at his deposition, plaintiff admitted that his right thumb was not touching his thigh, so the buildup of radiation and heat could not have occurred through contact of that nature. Thus, even assuming without deciding that defendants departed from accepted medical practice in not responding to plaintiff's squeezing the rubber ball and calling out, plaintiff has not produced any competent evidence showing or suggesting that such departure was the proximate cause of his injury. Absent evidence of causation, plaintiff cannot establish

a prima facie case of medical malpractice, and the complaint must be dismissed.

Based on the foregoing, the court concludes that defendants are entitled to summary judgment dismissing the complaint, on the grounds that plaintiff's malpractice claims are time-barred, and even if those claims were timely, the essential element of causation is lacking.

Accordingly, it is

ORDERED that the motion by plaintiff Donald Cohen for partial summary judgment and other relief is denied in its entirety; and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is granted, the Clerk is directed to enter judgment dismissing the complaint in its entirety, with costs and disbursements as taxed by the Clerk, upon submission of an appropriate bill of costs.

Dated: April 19, 2010

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