

Lockridge v Simhaee
2010 NY Slip Op 33598(U)
December 23, 2010
Supreme Court, Nassau County
Docket Number: 16582/08
Judge: Thomas P. Phelan
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 3
NASSAU COUNTY

JEAN EB JONES-LOCKRIDGE, and,
SHAWN LOCKRIDGE,

Plaintiffs,

ORIGINAL RETURN DATE: 08/30/10
SUBMISSION DATE: 10/29/10
Index No. 16582/08

-against-

ESKANDAR SIMHAE, M.D., a/k/a
JACOB E. SIMHAE, M.D., a/k/a E. JACOB
SIMHAE, E. JACOB SIMHAE, JANE DOE1, and
JANE DOE 2,

Defendants.

MOTION SEQUENCE # 1
XXX

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by defendants, ESKANDAR SIMHAE, M.D., s/h/a ESKANDAR SIMHAE, M.D., a/k/a JACOB E. SIMHAE, M.D., a/k/a E. JACOB SIMHAE, E. JACOB SIMHAE ("Dr. Simhae"), seeking an order pursuant to CPLR 3212 awarding him summary judgment dismissing plaintiffs' complaint is granted.

Plaintiffs commenced the within personal injury action sounding in medical malpractice allegedly arising out of the injection of a flu shot to plaintiff Jean Eb Jones-Lockridge on October 30, 2007. It is alleged that the syringe apparatus had been used on other patients presenting a risk of disease to plaintiff. Plaintiff Jean Eb Jones-Lockridge alleges in her complaint that she suffered severe emotional distress. In her verified bill of particulars, plaintiff Jean Eb Jones-Lockridge alleges that she sustained the following injures:

“unnecessary blood testing for Hepatitis B, C and HIV; Psychological, emotional distress; Multiple blood diseases known and unknown; Future unknown blood diseases; Fear of trust of doctors; Nightmares, fright, shock, anxiety; Sleep disorder;

RE: JONES-LOCKRIDGE, et ano. v. SIMHAE, et al.

Page 2

Post traumatic stress disorder; Loss of enjoyment of life" (Movant's Ex. E).

By stipulation dated March 18, 2010, plaintiff withdrew any claims for damages regarding post traumatic-stress disorder (Movant's Ex. H).

As amplified in plaintiff's verified bill of particulars, plaintiff alleges that the defendant's services and treatment were rendered carelessly, unskillfully and negligently; departed from good and accepted standards of care, treatment and services in the community; deprived plaintiff from good and accepted care, treatment and services; deprived plaintiff of a substantial opportunity for a successful outcome; departed from that degree of care, caution, prudence, skill, professional knowledge and training generally utilized by the providers of the community; failed to gain plaintiff's informed consent; failed to use available alternatives; failed to use proper equipment; failed to use sterile equipment; failed to consult with specialists. Defendant did the above acts without justification and solely to harm plaintiff, thereby causing plaintiffs to sustain emotional, psychological and financial loss and that defendant failed to act and refrained to act in justifiable reliance (Movant's Ex. E). By stipulation dated October 21, 2009, all language sounding in intentional tort and the allegation that defendant failed to act in justifiable reliance was withdrawn.

Defendant Dr. Simhae testified at his deposition that the flu shot was administered by his medical assistant (Movant's Ex. J, p. 7). He was thereafter advised by the Department of Health that they suspected that one syringe was being used with different sterile needles (Id., p. 15). A potential thirty-six patients were involved, including plaintiff, and they were notified of the need for a further flu vaccination and testing for possible hepatitis B and C and HIV infection (Id., pp. 17; movant's Ex. P). Dr. Simhae avers that all thirty-six tests, including plaintiff's, came back negative and that none of his patients ever reported contracting any of these infections (Movant's Ex. O). At his deposition, Mr. Lockridge testified that he also tested negative for hepatitis B and C infection (Movant's Ex. K, pp. 14, 16).

Approximately eleven months after the alleged malpractice incident, on September 21, 2008, plaintiff Jean Eb Jones-Lockridge, in the course of her employment at Mount Sinai hospital, was stuck with a needle that had been used to draw blood from a patient (Movant's Ex. F, pp. 34, 35). Mrs. Jones-Lockridge was wearing gloves at the time, and when she took off the gloves, "there was a spot of blood" (Id., p. 36). Mrs. Jones-Lockridge testified at her deposition that the hospital did a "rapid test on the patient" and that the results were negative for HIV, AIDS and hepatitis B and C (Id., pp. 38, 39). When asked whether she had any fears that the patient would ultimately have HIV, AIDS or hepatitis B or C, she responded "no" (Id., p. 41).

Counsel for defendant submits that the only claim of damages concerning the loss of consortium claim is the difference in frequency of intimacy between the period prior to and after October 2007.

On a motion for summary judgment, it is the proponent's burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (citations omitted)" (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). If this showing is made, however, "the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Dr. Simhae has submitted competent evidence that he did not depart from good and accepted practice by proffering the affidavit of Philip R. Muskin, M.D., a board certified physician in psychiatry. Dr. Muskin avers that plaintiffs' testimony that they still engage in unprotected sexual intercourse with each other, while alleging an AIDS phobia, indicates their lack of concern regarding an infection. Dr. Muskin opines that to a reasonable degree of medical certainty any injury claims of emotional distress stemming from a fear of HIV or AIDS-phobia or hepatitis B or C cannot be maintained and are inconsistent with plaintiffs' conduct and actions (Movant's Ex. A, ¶9). Moreover, Dr. Muskin posits that any fear of HIV and AIDS is unreasonable since there was no actual exposure by Mrs. Jones-Lockridge to the HIV virus. Dr. Muskin further opines that to a reasonable degree of medical certainty all of plaintiff's claimed injuries in the bill of particulars are baseless and not proximately related to any alleged negligence or malpractice on the part of Dr. Simhae.

In the matter *sub judice*, based upon the heretofore referenced deposition testimony coupled with the affidavits submitted and the averments therein contained, Dr. Simhae has demonstrated his *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to plaintiffs to submit competent evidence showing a departure from accepted practice and a nexus between the alleged negligence and plaintiff's injury (*Alvarez v Prospect Hosp.*, *supra*).

Within the particular context of a medical malpractice action, a plaintiff opposing a defendant's motion for summary judgment is required to proffer evidentiary facts sufficient to rebut the defendant's *prima facie* showing that he or she or it was not negligent in order to show the existence of a triable issue of fact (*Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept. 1994]). Allegations of a general and conclusory nature which are not supported by competent and admissible evidence and which do not demonstrate the essential elements of a medical malpractice action are not sufficient to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The essential elements of a medical malpractice action are comprised of the following: (1) a deviation or departure from accepted practice and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358 [2d Dept. 1998]).

In opposition to Dr. Simhae's application, plaintiffs submit their affidavits. Jean Eb Jones-Lockridge avers that she treated with psychologist Helen Pollock over a period of 8 to 10 weeks as a result of emotional distress suffered after she was notified about the reuse of the needle apparatus. Mrs. Jones-Lockridge submits that she and her husband refrained from sexual contact for a period of at least seven months following notification. Mr. Lockridge also avers that he

RE: JONES-LOCKRIDGE, et ano. v. SIMHAE, et al.

suffered emotional distress as he was afraid he may have contracted HIV-AIDS, hepatitis C or other diseases. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment" (*Flanagan v. Catskill Regional Med. Ctr.*, 65 AD3d 563, 565 [2d Dept. 2009]).

Counsel for defendant submits that defendants' fears are unreasonable and cannot be compensated under New York Law without proving actual exposure to the HIV virus. In order to state a cause of action for the negligent infliction of emotional distress based on plaintiffs' fear of contracting AIDS, plaintiffs who have not tested positive for HIV must establish that due to the negligence of another party, plaintiffs were exposed to HIV "through a scientifically-accepted method of transmission and the source of the allegedly transmitted blood or fluid was HIV positive" (*Siegrist v. State of New York*, 55 AD3d 717 [2d Dept. 2008]). This the plaintiffs have failed to do.

Defendant Dr. Simhae is accordingly awarded summary judgment dismissing plaintiffs' claims against him. As Dr. Simhae was the medical doctor sued herein as "JANE DOE1, and JANE DOE 2," plaintiffs' complaint is dismissed in its entirety without costs.

This decision constitutes the order of the court.

Dated: 12-23-10

HON THOMAS P. PHELAN
THOMAS P. PHELAN, J.S.C. XXX

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