

Ingenito v Horn

2011 NY Slip Op 31955(U)

June 15, 2011

Sup Ct, NY County

Docket Number: 116201/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 116201/2008
 INGENITO, ANGELA
 vs.
 BACHMAN, IRA
 SEQUENCE NUMBER : 003
 DISQUALIFY COUNSEL

INDEX NO. _____

MOTION DATE 3/15/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-4

X not 5-19

20-26, 27-28

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/15/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
ANGELA INGENITO and ALBERT INGENITO,

Plaintiffs,

-against-

DAVID HORN as Executor of the Estate of
STEWART HORN, M.D., IRA BACHMAN, M.D.
ARNOLD H. BANK, M.D., THYLMA L. SANTA MARIA, MD,
ALL WOMEN'S OB/GYN CARE, P.C. STEWART HORN,
M.D., P.C. and "JOHN DOE #1 through #10", representing
fictitious names for health providers in the employ of defendant,
SOUTH NASSAU COMMUNITIES HOSPITAL, SOUTH
NASSAU COMMUNITIES HOSPITAL,

Defendants.

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

Index No. 116201/08

Decision and Order

FILED

JUN 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 003, 004, and 005 are hereby consolidated for disposition. In Motion Sequence Number 003, plaintiffs move to disqualify Ellenberg and Partners LLP ("Ellenberg") from representing David Horn as executor of the estate of Stewart Horn, M.D., and Ira Bachman, M.D. Defendants David Horn and Dr. Bachman, together with All Women's OB/GYN Care, P.C., (the "P.C."), a gynecological and obstetric practice that was at one time owned by Dr. Horn and Dr. Bachman, oppose the motion and cross-move for an order dismissing the complaint against them on the grounds that the claims are untimely. These defendants also cross-move to dismiss all claims for punitive damages. In Motion Sequence Number 004, plaintiffs move for summary judgment against the P.C. on the issue of liability and for an order dismissing the affirmative defenses of all defendants concerning the statute of limitations. In Motion Sequence Number 005, defendant South Nassau Communities Hospital ("SNCH") moves for an order dismissing the complaint on the grounds that the claims therein are untimely and

dismissing all claims for punitive damages.¹

In this action sounding in medical malpractice, plaintiffs allege that defendants caused a foreign object to become lodged in Ms. Ingenito's perineum. Ms. Ingenito gave birth on three occasions under defendants' care, and after each delivery, a suturing procedure was performed. Plaintiffs allege that a surgical needle was left behind during one of the suturing procedures. Ms. Ingenito seeks damages for physical pain and mental anguish. Mr. Ingenito seeks damages for loss of services.

On July 31, 1993, Ms. Ingenito presented to SNCH to deliver her first child. Dr. Horn delivered the child and performed a right mediolateral episiotomy on Ms. Ingenito. On February 20, 1996, Ms. Ingenito gave birth to her second child at SNCH under the care of Dr. Bachman. After the delivery, Ms. Ingenito required a mediolateral episiotomy. On July 22, 1997, Ms. Ingenito gave birth to her third child. Dr. Bachman induced labor and left the delivery room when his shift was over; Dr. Horn delivered the child. After the birth of this child, Ms. Ingenito suffered from a first degree laceration that Dr. Horn repaired.

According to Ms. Ingenito's examination before trial ("EBT") testimony, after the birth of her third child, she began to feel "a throbbing, squeezing pain" in her lower right pelvic area. Her pain was at level six (on a scale from one to ten) "at one point at that time," but was not constantly at that level. Nevertheless, the pain never became lower than a four or a five. She was able to perform normal daily

¹ By decision and order dated August 13, 2009, the court severed and dismissed claims against defendants Stewart Horn, M.D., P.C., Thylma Santa Maria, M.D., and Arnold H. Bank, M.D.

activities, but used over-the-counter pain medication "pretty frequent[ly]." Around the same time, Ms. Ingenito had a separate and distinct pain during intercourse. In her EBT testimony, Ms. Ingenito described the pain as "a very sharp, stabbing pain" in the area surrounding her vagina. The pain was severe enough to limit her sexual activity with her husband from roughly four times a week to two times a month. According to Ms. Ingenito's EBT testimony, this pain eventually became less severe.

According to the medical records, after four visits at the P.C.'s facility without reporting pain, on August 13, 1999, Ms. Ingenito presented to Dr. Horn complaining of pain; she testified that the pain complained of was the pelvic pain. Ms. Ingenito testified that Dr. Horn examined her and told her that everything was fine. According to the medical records from the next visit on October 2, 2000, Ms. Ingenito presented to Dr. Horn complaining of pain on her lower right side. Three visits later, on November 25, 2002, Ms. Ingenito requested a sonogram. The sonogram was performed on or about January 22, 2003. According to a letter from Alan Lubitz, M.D., of Horizon Medical Imaging, P.C., to a physician for the P.C., the sonogram revealed an ovarian cyst. During roughly the same time period, Ms. Ingenito also visited with her general practitioners. On March 27, 2002, she reported right lower quadrant pain in her pelvis to a general practitioner.

According to Ms. Ingenito's EBT testimony, in July of 2007, she began to experience pain in her lower abdomen that began as pain in her right pelvic area, requiring admission to an emergency room. She testified that a CT scan was performed, but revealed no significant findings. Ms. Ingenito continued to report right, lower quadrant pain to her general practitioners and a pelvic x-ray was ordered in or about April 2008. According to the x-ray report, dated April 9, 2008, there was a metallic density

in Ms. Ingenito's perineum of "size and shape . . . consistent with a suture needle." The x-rays reveal a U-shaped object below her pubic arch. That same day, according to the medical records, Ms. Ingenito presented to Dr. Horn, who told her to repeat the pelvic x-ray. According to Ms. Ingenito's EBT testimony, Dr. Horn recommended a specific radiological facility, setting forth that it would "do a better job" than the facility that performed the initial x-ray.

On April 15, 2008, Ms. Ingenito presented to Dr. Horn at the P.C. In the medical records, Dr. Horn set forth that the surgical needle was present for 11 to 15 years, but "has not bothered" Ms. Ingenito. He offered her the options of removing the needle surgically or leaving it in place. According to the medical records, plaintiff opted against surgical intervention to which Dr. Horn agreed, "since this is asymptomatic for all these years."²

Plaintiffs commenced this action with the filing of a summons and verified complaint on or about December 4, 2008. All of the moving defendants herein answered and asserted affirmative defenses based on the statute of limitations. Although the note of issue has not yet been filed, substantial discovery has been completed.

The statute of limitations in a medical malpractice action is two and one half years, and runs from "the act, omission or failure complained of[.]" C.P.L.R. § 214-a. However, if the action "is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such

² At her EBT, Ms. Ingenito testified that she wanted Dr. Horn to remove the needle, but that he told her to leave it alone.

discovery, whichever is earlier." Id.

On a motion to dismiss on statute of limitations grounds, the initial burden is on the defendant to show that the alleged malpractice took place more than two and one-half years beyond the statute of limitations. Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405 (2d Dep't 2007); Cavaluzzi v. Beyers, 306 A.D.2d 429 (2d Dep't 2003). When that burden is met, the burden then shifts to the plaintiff to affirmatively establish that the "foreign object" exception applies or raise "an issue of fact as to whether [the] exception applies." Texeria, 43 A.D.3d at 405 (2d Dep't 2007); Cavaluzzi, 306 A.D.2d at 429.

Here, there is no dispute that any malpractice by defendants would have occurred more than two and one-half years before this action was commenced. The burden thus shifts to plaintiffs. In anticipation of plaintiffs' arguments, defendants assert that Ms. Ingenito was aware of facts since 1997 that would have reasonably led to the discovery of the foreign object. Defendants maintain that had she sought out a medical opinion about her chronic pain in her right pelvis and the pain she experienced during intercourse, the foreign object would have been discovered sooner. In opposition to defendants' motions and in support of their own motion to dismiss the affirmative defenses, plaintiffs maintain that Ms. Ingenito's pain, although chronic, was not debilitating to the level that would require her to seek out more medical advice than she already had. Plaintiffs further maintain that Ms. Ingenito reported the pain to her physicians as well as Dr. Horn, who performed an examination and determined that Ms. Ingenito was healthy. They argue that it would be unfair to hold Ms. Ingenito to a higher standard than a medical professional. Plaintiffs argue that there was no outward sign that Ms. Ingenito was carrying a foreign body, like a lump. Therefore, she could not have reasonably known what was causing her pain.

Ultimately, both sides can make reasonable arguments that are supported by the evidence as to why Ms. Ingenito could or could not have discovered the foreign object in her perineum sooner. Plaintiffs can reasonably contend that Ms. Ingenito could not have discovered the foreign object any sooner than she did, because, inter alia, even her doctors failed to connect her pain to the foreign object. Defendants can reasonably contend that Ms. Ingenito could have discovered the foreign object sooner had she, inter alia, sought a second opinion and reported her painful intercourse. It is for the jury to determine which argument is more credible. Therefore, that branch of the cross-motion by Mr. Horn, Dr. Bachman, and the P.C. to dismiss on statute of limitations grounds; that branch of plaintiffs' motion seeking to dismiss defendants' statute of limitations defenses; and that branch of defendant SNCH's motion to dismiss on statute of limitations grounds are denied.

Turning to plaintiffs' summary judgment motion on the issue of liability, plaintiffs are relying on the theory of res ipsa loquitur to establish the P.C.'s negligence. Under that theory, a fact finder may "infer negligence merely from the happening of an event and the defendant's relation to it." Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494 (1997). To rely on the doctrine of res ipsa loquitur in a medical malpractice case, a plaintiff must show that "(1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendant[']s exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff." Antoniano v. Long Island Jewish Med. Ctr., 58 A.D.3d 652, 654 (2d Dep't 2009). If the plaintiff establishes a right to summary judgment, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the

plaintiff's circumstantial proof is so convincing the defendant's response so weak that the inference of defendant's negligence is inescapable." Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006).

In support of their motion for summary judgment, plaintiffs offer the affirmation of David E. Rivadeneira, M.D., who is board certified in surgery and colon and rectal surgery. Dr. Rivadeneira opines "without reservation" that the foreign object revealed in Ms. Ingenito's x-ray is a "common variety 'SH' (Small Half-circle) type needle" commonly used to suture lacerations. Dr. Rivadeneira further states that given Ms. Ingenito's medical history, the only plausible explanation for the surgical needle's location in her perineum is that it resulted from either one of the epsiotomies after her first two deliveries or the laceration repair following her third delivery.

In opposition, the P.C.'s relies on the affidavit of Stanley Rosenfeld, M.D., who is board certified in radiology. Dr. Rosenfeld opines that there is no way for any radiologist to determine that the admittedly "metal foreign object" in Ms. Ingenito's perineum is a surgical needle. He sets forth that there are numerous metal objects that look similar to foreign object in Ms. Ingenito's perineum, including sewing needles, staples, and material used to construct furniture. According to Dr. Rosenfeld, he has seen patients with such items in their bodies with "no idea the object was there or how it could have come to be there." Dr. Rosenfeld further asserts that scar tissue forms around foreign objects after an extended period of time. Dr. Rosenfeld asserts that Ms. Ingenito's x-ray does not capture the progress of any scar tissue, ostensibly making it impossible to date the presence of the foreign object.

Plaintiffs' expert's opinion that the object in Ms. Ingenito's perineum is a surgical needle is conclusory. He fails to set forth how he can confidently identify the object in Ms. Ingenito's perineum

as a surgical needle. There is no discussion on the size and shape of the object in Ms. Ingenito's perineum. Furthermore, the expert's affirmation contains no comparison between the object on the x-ray and surgical needles. The conclusory affirmation is insufficient to meet plaintiffs' prima facie burden for summary judgment. Cf. Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 497 (1997) (as part of their case at trial, the plaintiffs established grounds for a res ipsa charge by offering evidence that pads similar to the laparotomy pad found in the plaintiff-decedent were used during the plaintiff-decedent's surgery); Swezey v. Montague Rehab & Pain Management, P.C., 59 A.D.3d 431, 434 (2d Dep't 2009) (two of the named defendants established prima facie case for summary judgment by comparing the size and shape of the acupuncture needle removed from the plaintiff to one that they used during the plaintiff's treatment, and the plaintiff failed to raise an issue of fact in opposition). Having failed to establish a prima facie case for summary judgment, that branch of plaintiffs' motion for summary judgment is denied, "regardless of the sufficiency of the opposing papers." Silverman v. Perlbinde, 307 A.D.2d 230, 231 (1st Dep't 2003) (citation omitted).

Turning to the issue of punitive damages, defendants maintain that punitive damages are only available when the plaintiff can demonstrate evil motives or otherwise morally culpable conduct. Defendants contend that the record reveals no such conduct and the claims for punitive damages should be dismissed. In opposition, plaintiffs set forth that, after he learned of the April 2008 pelvic x-ray, Dr. Horn attempted to conceal the fact that a surgical needle was in Ms. Ingenito's perineum. Plaintiffs further assert that Ms. Ingenito "will testify" that Dr. Horn withheld the results of the second x-ray for "weeks if not months" and that the medical records from April 15, 2008 were fabricated. Plaintiffs do not point to any EBT testimony nor offer an affidavit from Ms. Ingenito in support of this position. Plaintiffs also contend that since defendants' move to "dismiss" the punitive damages claims, the court need only

determine if a cognizable claim for punitive damages exists. Plaintiffs set forth that Dr. Horn's attempt to conceal information states a claim for punitive damages.

Defendants do not explicitly state the statutory grounds for the relief they seek, but they seem to be moving to dismiss the punitive damages claims under the summary judgment standard by arguing that no facts exist to support a punitive damage award. Plaintiffs oppose the motions under the C.P.L.R. Rule 3211(a)(7) standard, under which "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." EBC I. Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005) (citation omitted). Even crediting plaintiffs' argument that the court should evaluate the motions under the C.P.L.R. Rule 3211(a)(7) standard, the court may still consider evidentiary material on a Rule 3211(a)(7) motion in order to determine if "a material fact as claimed by the plaintiff . . . is not a fact at all." Rietschel v. Maimonides Medical Center, 83 A.D.3d 810 (2d Dep't 2011), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); see also Katebi v. Fink, 51 A.D.3d 424, 425 (1st Dep't 2008). Under both standards, plaintiffs' claims for punitive damages fail.

Punitive damages are not intended to compensate a plaintiff, but instead serve to punish the wrongdoer and deter that individual and those in a similar situation from engaging in the same behavior in the future. Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 489 (2007). More than mere negligence or carelessness is required to permit a punitive damages claim. Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 A.D.3d 106, 113 (4th Dep't 2007); Rey v. Park View Nursing Home, Inc., 262 A.D.2d 624, 627 (2d Dep't 1999); Gruber v. Craig, 208 A.D.2d 900, 901 (2d Dep't 1994). In a malpractice action, punitive damages are "not recoverable unless the conduct is wantonly dishonest,

grossly indifferent to patient care, or malicious and/or reckless.” Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep’t 2007). Here, the record does not reveal any conduct that can be construed to be grossly indifferent, wantonly dishonest, malicious or reckless. Plaintiffs’ counsel’s affirmation setting forth Ms. Ingenito’s potential testimony is insufficient to demonstrate facts that would support punitive damages, because “[a]n attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance.” Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455, 456 (2d Dep’t 2006) (citations omitted). Furthermore, even plaintiffs’ expert fails to allege that defendants engaged in conduct that would support a punitive damage award. See Figueroa v. Flatbush Women’s Services, Inc., 201 A.D.2d 613, 613-14 (2d Dep’t 1994). Therefore, the claims for punitive damages must be dismissed.

With regard to the disqualification motion, plaintiffs argue that Ellenberg is barred by the rules of professional conduct from representing both Mr. Horn and Dr. Bachman. Plaintiffs argue that joint representation here creates a clear conflict of interest in that the only way for these defendants to escape liability is to blame the each other for the presence of the surgical needle. In opposition, Ellenberg sets forth that Mr. Horn and Dr. Bachman have “clearly and adamantly expressed their desire to be jointly represented.” Ellenberg further asserts that plaintiffs have failed to identify any defense strategy that could not be pursued jointly. The firm argues that defendants can deny their culpability without having to blame each other, because the burden of proof at trial is on plaintiffs and it is possible that the foreign object in Ms. Ingenito’s perineum is not a surgical needle. Annexed to the motion are affidavits from Mr. Horn and Dr. Bachman. Both defendants set forth that they understand plaintiffs’ proof against them and the doctrine of res ipsa loquitur. They further state that their counsel has explained to them plaintiffs’ argument that Mr. Horn and Dr. Bachman have conflicting interests in that in order to escape liability, one must blame the other. Even so, both defendants maintain that they wish to be jointly represented, because

they believe that it would have an adverse affect on the jury to see them represented by different attorneys.

Under Rule 1.7(a) of the Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0), in pertinent part, a lawyer may not represent two or more clients if a reasonable attorney would conclude that such representation would require to the lawyer to advocate for one client at the expense of the other. The rule exists because joint representation can inhibit zealous advocacy and "is fraught with the potential for irreconcilable conflict." Greene v. Greene, 47 N.Y.2d 447, 451-452 (1979). The mere fact that two co-defendants do not plan to implicate each other does not eliminate a conflict. See Sidor v. Zuhoski, 261 A.D.2d 529, 530-531 (2d Dep't 1999); Shaikh ex rel. Shaikh v. Waiters, 185 Misc. 2d 52, 54-55 (Sup. Ct. Nassau Co. 2000). Indeed, where a co-defendant could prevail by implicating the other a conflict exists. See Sidor 261 A.D.2d at 531. Nevertheless, a lawyer may represent two co-defendants with potentially conflicting defenses if

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7(b). The decision to disqualify "rests within the sound discretion of the trial court." Olmoz v. Town of Fishkill, 258 A.D.2d 447 (2d Dep't 1999).

There is a potential conflict between Mr. Horn and Dr. Bachman in that one could blame the other for the presence of the surgical needle. However, Ellenberg may still provide reasonably "competent and diligent representation" without this defense. Several dispositive issues remain that can

be argued jointly, i.e., whether the statute of limitations bars this action, whether the foreign object is a surgical needle, and whether plaintiffs have any damages. Furthermore, there are no cross-claims between Mr. Horn and Dr. Bachman. Lastly, both clients have provided affidavits setting forth that they are aware of the issues in the case and the potential for conflict, and yet want Ellenberg to continue to represent them. The waiver is sufficient under the circumstances herein (see In re Ravitch, 82 A.D.3d 126, 131 [1st Dep't 2011])³, and plaintiffs' motion to disqualify is denied. Accordingly, it is hereby

ORDERED that those branches of the cross-motion by defendants Mr. Horn's, Dr. Bachman's, M.D., P.C. (Motion Sequence Number 003) and that branch of defendant SNCH's motion to dismiss all claims for punitive damages are granted (Motion Sequence Number 005); and it is further

ORDERED that that branch of the cross-motion by Mr. Horn, Dr. Bachman, and the P.C. to dismiss on statute of limitations grounds (Motion Sequence Number 003); that branch of plaintiffs' motion seeking to dismiss defendants' statute of limitations defense (Motion Sequence Number 004); and that branch of defendant SNCH's motion to dismiss on statute of limitations grounds (Motion Sequence Number 005) are denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of

³ Although In re Ravitch referenced the former disciplinary rule concerning conflicts, the rule is sufficiently similar to the pertinent parts of Rule 1.7(b) as applicable to the circumstances herein. Under the former rule, dual representation was allowed "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each [client] consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and the risks involved." HRH Const. LLC v. Palazzo, 15 Misc. 3d 1130(A) (Sup. Ct. N.Y. Co. 2007), quoting Disciplinary Rule 5-105(C).

liability against P.C. (Motion Sequence Number 004) is denied; and it is further

ORDERED that plaintiffs' motion to disqualify (Motion Sequence Number 003) is denied;
and it is further

ORDERED that the parties are directed to appear for a status conference on June 28, 2011,
at 10:00 a.m.

Dated: June 15, 2011



JOAN B. LOBIS, J.S.C.

FILED

JUN 16 2011

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