

Rivera v City of New York

2014 NY Slip Op 30109(U)

January 15, 2014

Sup Ct, New York County

Docket Number: 400660/08

Judge: Douglas E. McKeon

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

PRESENT: Douglas E. McKeon
Justice Supreme Court
Justice

PART 38

Efrain Rivera

INDEX NO. 400660/08

- v -

MOTION DATE _____

The City of New York and New York
City Health & Hospitals Corp.

MOTION SEQ. NO. (002) & (003)

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motions and cross-motion are decided as per the annexed Memorandum Decision.

FILED

JAN 16 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/15/14

Douglas E. McKeon
Douglas E. McKeon
Justice Supreme Court 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

-----X
EFRAIM RIVERA,

Plaintiff,
-against-

THE CITY OF NEW YORK and NEW YORK
CITY HEALTH & HOSPITALS CORPORATION,
Defendants.

MEMORANDUM DECISION
FILED
Index No.: 400660/08

JAN 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. DOUGLAS E. MCKEON:

Defendants New York City Health and Hospitals Corporation (“HHC”) and City of New York (“the City”) seek summary judgment dismissing the complaint. Plaintiff cross-moves to strike defendant HHC’s answer for spoliation of evidence. The motions are decided as follows:

On February 21, 2007, at or around 6:18 A.M., the plaintiff was brought to the Emergency Room at Brookdale after having sustained an amputation of the tip of the fifth finger on the right hand. The plaintiff arrived without the amputated part. The mechanism of injury is undetermined, there being a question as to whether it was a gunshot wound or a knife wound. After plaintiff was examined and found to be stable, he was released from the ER so that he could attempt to locate the amputated fingertip. He found it under a car and returned to the hospital at 8:05 A.M. with the amputated portion of his finger.

Plaintiff was subsequently transferred by ambulance to Bellevue, a designated replantation center, where he arrived at 1:36 P.M. According to defendant HHC, it was determined that replantation could not be achieved. This was discussed with plaintiff, after which the finger tip was discarded as medical waste. Plaintiff was scheduled for a complete amputation the next morning, but either when he discovered the finger tip was discarded, or when he changed his mind and wanted to attempt replantation, he left the hospital against

medical advice and went to see Dr. O. Alton Barron at St. Lukes-Roosevelt Hospital on February 23, 2007, where completion of the amputation was performed. Plaintiff claims that HHC was negligent and careless in losing plaintiff's severed fingertip. Plaintiff alleges that the City was negligent in so far as the New York City Police Officers ("NYPD") were negligent for occasioning approximately a two-hour delay between the time the tip was severed and when plaintiff retrieved the amputated part.

HHC's position is supported by the affirmations of treating physicians Dr. Michael Stratcher, an Orthopedic Surgeon at Brookdale and Dr. Inna Leybell, an Emergency Medicine physician at Bellevue Hospital; it is also supported by expert physician Dr. Robert Strauch, board certified in Orthopedic Surgery.

Dr. Stratcher is the hand surgeon who treated plaintiff at Brookdale immediately after the injury. After examination and inspection of the severed fingertip under a microscope, he concluded that plaintiff had a severely damaged and unusable amputated part. He opined that replantation was not a viable option as the severed portion of the finger was crushed, avulsed and contaminated. Dr. Leybell, who was a resident on the hand service in the Bellevue ER at the time of this incident, judged that the risks of attempted replantation, including the risks of infection, loss of function and the need for additional surgery, outweighed any benefit of replantaion. She contacted more senior physicians who concurred with her judgment. Dr. Leybell affirmed that after a meeting with plaintiff, his family and two senior hand surgeons, and agreeing that surgery was indicated, continuing to maintain the severed portion of the finger was unnecessary, and that it was the practice of the hand service to have the ER staff discard the portion of the finger as medical waste.

Dr. Strauch opined that HHC did not depart from good and accepted medical care in its evaluation and care of plaintiff, including the decision not to attempt to reattach the fingertip,

which had been recovered and brought to Bellevue on ice. He affirmed that the care rendered by HHC conformed at all times to the standard of good and accepted medical care, including the decision not to attempt to reattach the fingertip. He explained that reattachment was not a viable option because, among other factors, of the severity of the damage to the amputated part, the location of the amputation, the particular finger that was injured.

HHC argues that this is not a case where the finger was inadvertently lost and any damage alleged by the plaintiff was not proximately caused by the care of defendant HHC. As the fingertip was not usable for replantation, intentionally discarding it cannot be a cause of the damages plaintiff claims. *See Bullard v. St. Barnabas Hospital*, 27 AD3d 206 (1st Dep't 2006).

The City argues that plaintiff has not met his burden of proving a prima facie case in that he failed to show that the City's negligence was a substantial cause of the events that produced the injury. Plaintiff's claim that the NYPD's prevention of him initially returning to the crime scene (after he voluntarily left it) to retrieve his fingertip fails to allege anything greater than a possible cause of his injury. Dr. Stratcher examined the finger when plaintiff returned to Brookdale. He found that the finger was not suitable for amputation because of the "crush component," noting that both the fingertip and the stump were severely damaged and there was avulsion on both the stump and the fingertip, and that the nerve endings were compromised on both parts.

In opposition, plaintiff claims that the deterioration of the condition of the fingertip was caused by the NYPD's refusal to allow plaintiff to timely retrieve his finger at the time of injury and that this, along with the "spoliation" of the severed fingertip, prevented the successful reattachment of the severed portion of plaintiff's finger. He argues that an issue of fact exists because there is no way of knowing if the fingertip had been iced between the time it was located

and the time it was examined at Bellevue and therefore it is not clear that, as a matter of law, the outcome of re-implantation would have been unsuccessful.

The Court finds that both of the moving defendants have made prima facie showing of entitlement to judgment as a matter of law on the grounds that they were not negligent and that any alleged negligence was not a proximate cause of plaintiff's injuries. The evidence submitted on those motions, particularly the expert evidence, demonstrates that the severed finger tip was severely damaged and unuseable since the severed portion was crushed and avulsed, and in light of the location of the injury. Therefore, regardless of whether the severed portion of plaintiff's finger was brought more expeditiously to the hospital and regardless of whether the hospital retained the tip, the defendants are not liable.

In opposition, plaintiff failed to raise a triable issue of fact. Regardless of whether this action sounds in medical malpractice or pure common law negligence, expert evidence is necessary on the issues of both negligence and causation (as evidenced by defendants' submissions). Plaintiff, however, failed to submit any expert evidence in opposition to these motions. At bottom, plaintiff offers nothing more than speculation regarding the negligence of the defendants as well as with respect to the causal connection between their alleged negligence and plaintiff's injuries. *Garvin v. Rosenberg*, 204 AD2d 388 (2d Dep't 1994). *See Derdarian v. Felix Contracting Corp.*, 51 NY2d 308, 314 (1980).

The Court notes too, "where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was a result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury." *Bernstein v. New York*, 69 NY2d 1020, 1031 (1987); *citing Ingersoll v. Liberty Bank*, 278 NY 1, 7 (1938).

Plaintiff cross-moves to strike defendant's answer based on spoliation of evidence, namely plaintiff's severed fingertip. This Court finds that the statute and case law pertaining to spoliation does not apply here. *See* CPLR 3126; *Ortega v. City of New York*, 9 NY3d 69 (2007); *Kirkland v. New York City Housing Authority*, 236 AD2d 170 (1st Dep't 1997); *Kirschen v. Marino*, 16 AD3d 555 (2d Dep't 2005). Thus, plaintiff's cross-motion is denied.

Upon a full review of the submitted papers, this Court determines that defendants' motions are granted and they are entitled to summary judgment. Plaintiff's cross-motion is denied.

This constitutes the Decision and Order of the Court.

DATED: New York, New York
January 15, 2014



Douglas E. McKeon, J.S.C.

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