Espinoza v Ippolito
2014 NY Slip Op 32945(U)
August 12, 2014
Supreme Court, Westchester County
Docket Number: 68167/2012
Judge: Charles D. Wood

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JAIME ESPINOZA,

DECISION & ORDER
Index No. 68167/2012
Sequence No. 1

Plaintiff,

- against -

ELIO J. IPPOLITO, M.D.,

Defendant.

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WOOD, J.

The following documents numbered 1-20 were read in connection with plaintiff's motion for summary judgment:

Plaintiff's Notice of Motion, Counsel's Affirmation, Expert Affirmation, Memorandum of Law, Exhibits.	1-12
Defendant's Counsel's Affirmation in Opposition, Exhibits.	13-17
Plaintiff's Counsel Reply Affirmation, Expert Reply, Exhibit.	18-20

In this medical malpractice action, plaintiff alleges that defendant negligently departed from good and accepted standards of medical care and treatment when defendant administered an injection of Depo-Medrol, a steroid medication, from a multi-dose vial, into plaintiff's left arm for poison ivy. Plaintiff commenced this action by the filing of summons and verified complaint on October 19, 2012. Issue was joined by defendant with the service of a verified answer on November 30, 2012. Plaintiff now moves for summary judgment on the issue of liability, based on the theory of res ipsa loquitur, pursuant to CPLR § 3212. Defendant opposes the motion.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a proponent of a summary judgment motion must 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" (Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v. Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v. Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakabovics v. Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v. Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v. New York, 49 NY2d 557, 562 [1980]; see also Khan v. Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v. Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v. Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez at 324).

The requisite elements of proof in a medical malpractice actions are that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (Stukas v. Streiter, 83 AD3d 18,23 [2d Dept 2011]). "In a medical malpractice action...a defendant physician seeking summary judgment

must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Iulo v. Staten Island University Hospital, 106 AD3d 696,697 [2d Dept 2013]). To defeat the defendant's application, the plaintiff must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. In other words, "this means that if the defendant demonstrates only that he or she did not depart from good and accepted medical practice, the plaintiff need only raise a triable issue of fact as to whether such a departure occurred. The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff's injuries" (Stukas v. Streiter, 83 AD3d 18 [2d Dept 2011]). Moreover, in order to successfully oppose a motion for summary judgment dismissing a cause of action sounding in medical malpractice, a plaintiff must submit a physician's affidavit of merit attesting to (depending on the defendant's prima facie showing) a departure from accepted practice and/or containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]; see Arkin v Resnick, 68 AD3d 692,694 [2d Dept 2009]). Conclusory or general allegations of medical malpractice, "unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for summary judgment" (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]; see Alvarez v Prospect Hospital, supra, at 325). Deposition testimony may establish issues of fact that require the denial of summary judgment (Stancil v. Supermarkets General, 16 AD3d 402 [2d Dept 2005]).

To establish proximate cause in a medical malpractice action, "a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was

more probable than not that the injury was caused by the defendant" (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; see Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Thus, the non-moving party only needs to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (Stukas at 24-25). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, "the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances survival or cure, as long as the jury can infer that it was probable that some diminution in the (plaintiff's) chance of a better outcome had occurred" (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]). Further, summary judgment "is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...such credibility can only be resolved by a jury" (Feinberg v Feit, 23 AD3d 517, 519 [2d Dept 2005] quoting Shields v Baktidy, 11 AD3d 671, 672 [2d Dept 2004]; see generally Darwick v Paternoster, 56 AD3d 714, 715 [2d Dept 2008]; Adjetey v. New York City Health and Hospitals Corp., 63 AD3d 865 [2d Dept 2009]).

Further, it is well settled that in order to invoke the doctrine of res ipsa loquitur ("the thing speaks for itself"), plaintiff must show that 1) the injury is of a kind that does not occur in the absence of someone's negligence, (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendants, and (3) the injury is not due to any voluntary action on the part of the injured plaintiff (Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 [2006]). "Neither the plaintiff' s failure to specifically plead res ipsa loquitur nor the allegation

of specific acts of negligence along with a general allegation thereof by way of the complaint as amplified by the Bill of Particulars, constitutes a bar to the invocation of res ipsa loquitur where the facts warrant its application" (Weeden v Armor Elevator Co., Inc., 97 AD2d 197, 201 [2d Dept 1983]). Res ipsa loquitur permits an inference of negligence to be drawn when the nature of the accident is such that it would ordinarily not happen without negligence (Bodnarchuk v. State of New York, 49 AD3d 581, 582 [2d Dept 2008]). The Second Department explains that "since the doctrine concerns circumstantial evidence which allows, but does not require, the fact finder to infer that the defendant was negligent, res ipsa loquitur evidence does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted. Rather, only 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 and the defendant's response so weak that the inference of defendant's negligence is inescapable"Simmons v Neuman, 50 AD3d 666, 667 [2d Dept 2008]). Moreover, courts have held that the applicability of the doctrine of res ipsa loquitur is appropriate in those cases where the doctor had full control of the instrumentality which caused plaintiff's injury in an area remote from the operative site while the patient was unconscious (anesthetized) (Mack v. Hall Hosp., 121 AD2d 431, 433 [2d Dept 1986]); or where a foreign object is left in the body of a patient after an operative procedure is completed (Pipers v Rosenow, 39 AD2d 240[2d Dept 1972]). The principle does not state a separate theory on which a plaintiff may recover for injury, but is a "common-sense application of the probative value of circumstantial evidence" (Abbott v Page Airways, Inc., 23 NY2d 502, 512 [1969]). It is well settled that when the doctrine of res ipsa loquitur is invoked, "it creates a prima facie case of negligence sufficient for submission to the fact finder, who may, but is not required to, draw a

permissive inference of negligence" (Bodnarchuk v State, 49 AD3d 581, 582 [2d Dept 2008]).

Here, the record shows that on August 29, 2012, plaintiff went to defendant's office in Tarrytown, presenting with a poison ivy rash on his legs. Defendant treated plaintiff by injecting plaintiff's left upper arm with Depo-Medrol. The next morning, plaintiff was admitted to Phelps Memorial Hospital and was diagnosed with a staphylococcus aureus infection ("Staph") at the injection site. Plaintiff remained in the hospital for four weeks, where he developed necrosis of the soft tissue and cellulitis in his left arm. Plaintiff claims that this resulted in the permanent impairment of his left arm.

To support his motion, plaintiff offers the expert affirmation of Dr. Steven Rich, board certified in internal medicine and geriatric medicine, who bases his opinion on hospital records, photos of plaintiff's surgical scar, and litigation documents. Dr. Rich opines that under the known circumstances of this matter, an infection as sustained by plaintiff does not occur in the absence of one or more departures by the administering physician. He considered that defendant claims that there was no redness or break in the skin at the injection site, and no sign of infection at the time of the injection. According to Dr. Rich, Staph is a common bacteria on the surface of the skin, but that reasonable and accepted medication maintenance and injection protocols are designed to prevent this type of infection. Dr. Rich concludes that defendant departed from reasonable and accepted medical practice in his injecting plaintiff with Depo-Medrol from a multi-dose vial on August 29, 2012, and that such departure was a substantial factor in causing the injuries to plaintiff. Specifically, Dr. Rich claims that defendant's initial departure was his failure to maintain proper records with respect to the multi-dose vial of Depo-Medrol that he used to inject plaintiff. In addition, defendant failed to maintain records of the usage of the multi-dose medication vial. Further, where plaintiff's infection was immediate following the

injection and was known to defendant by the next morning, he should not have discarded the vial that he used without obtaining a proper evaluation of the sterility, or lack thereof. Moreover, Dr. Rich believes that given the rapidity and severity of the Staph infection of the injection site following the injection, the inference is inescapable that defendant: failed to discard the subject multi-dose vial by 28 days after first use; allowed the medication in the subject vial to become contaminated prior to administering the dose to plaintiff; failed to maintain the medication according to manufacturers's instructions; failed to disinfect the top of the vial cap immediately prior to puncturing the cap with the syringe used to administer the medication to plaintiff; failed to use a new sterile syringe and needle to withdraw the mediation; and failed to properly disinfect the injection site prior to injection.

Plaintiff argues that defendant possessed complete and exclusive control over the syringe and other instrumentalities used in the injection and resultant infection of plaintiff's left arm. In addition, plaintiff asserts that there is no evidence of contributory negligence on his part, inasmuch as defendant has not plead, alleged, or implied a logically or factually substantiated theory of intervening negligence which could exculpate defendant's conduct. Further, plaintiff cites that there was no indication of any prior infection or contamination at the site of the injection prior to the injection. Thus, plaintiff concludes that there was no possibility that he contracted the infection but through defendant's negligent and contaminated administration of Depo-Medrol into plaintiff's left arm.

In opposition, defendant offers the opinion of Dr. Hirschwerk, an attending physician at North Shore University Hospital and Long Island Jewish Medical center, licensed to practice medicine in New York State, and board certified in infectious disease and internal medicine for over 10 years. Based upon Dr. Hirschwerk's review of plaintiff's medical records, and litigation

data, he opines that plaintiff could have contracted and suffered from Staph in the absence of a deviation from the standard of care by defendant. He explains that since the bacteria is common, if there is a break in the skin, the bacteria can enter the body through even the smallest opening and an infection can develop. Even if a physician takes all the precautions known, these precautions do not and cannot completely eliminate the possibility of infection. Although plaintiff did not have redness or other signs of infection on his arm, Staph is nevertheless almost always present on the skin without any signs or symptoms. Further, defendant's expert speaks as to the specific precautions that may have prevented plaintiff's injuries, but even if proper precautions were taken, Staph may have still occurred.

Based upon the arguments presented and the record before the court, the standard for res ipsa loquitur has not been met. Here, plaintiff was not undergoing surgery, and was not anesthetized. The first element to invoke res ipsa loquitur, which is the event must be of a kind that ordinarily does not occur in the absence of someone's negligence, has been dispelled and questioned by defendant's expert, creating an issue of fact. The second element requires that the event must be caused by an agency or instrumentality within the exclusive control of defendant. This cannot be established, as once plaintiff left defendant's office he had an open site on his skin, and there is a question of fact as to whether plaintiff remained in a sterile environment once he left defendant's office. Moreover prior to the injection, the Staph bacteria could have entered the plaintiff's body through other means. The record shows that plaintiff was not under the exclusive control of defendant for several hours following the injection or prior to the injection. Lastly, the third element of res ipsa loquitur, that the event must not have been due to any voluntary action or contribution on the part of plaintiff has not been established. Defendant successfully raised a factual dispute, as to whether plaintiff contributed to his own infection and

injury. Plaintiff could have scratched his own skin, came into contact with another who had bacteria on his or her skin. Thus, in the instant matter, it has not been proven by admissible evidence that but for defendants' negligence, plaintiff would not have developed Staph. Since there are remaining questions of fact as to each element of the res ipsa loquitur doctrine, it is therefore determined that the conflicting expert opinions with regard to departures from the good and accepted standards of medical care and treatment, and proximate cause of the plaintiff's claimed injuries in this matter, preclude summary judgment from being granted. The motion papers submitted have presented a credibility battle between the parties' experts and issues of credibility are properly left to a jury for its resolution (Barbuto v. Winthrop University Hospital, 305 AD2d 623 [2d Dept 2003]).

Accordingly, based on the foregoing, it is

ORDERED, that plaintiff's summary judgment motion with respect to the res ipsa loquitur claim is denied; and it is further

ORDERED, that defendant shall serve a copy of this order with notice of entry upon plaintiff within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that the parties are directed to appear at a settlement conference on Sept. 30, 2014 **at** 9:15 **a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.**

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: August 12, 2014
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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