Young v New York & Presbyterian Hosp.
2015 NY Slip Op 30066(U)
January 17, 2015
Supreme Court, New York County
Docket Number: 154161/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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SHIRLEY YOUNG,

Plaintiff,

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL and WEILL CORNELL MEDICAL CENTER,

Defendants.

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DECISION AND ORDER

Index No. 154161/13

HON. ANIL C. SINGH, J.:

Defendants move for an order: 1) dismissing the complaint pursuant to CPLR 3012-a, contending that plaintiff failed to serve a certificate of merit and a notice of medical malpractice pursuant to CPLR 3406; or 2) in the alternative, compelling plaintiff to serve a certificate of merit and a notice of medical malpractice, and further compelling plaintiff to provide a reasonable excuse for the failure to comply with the statute, and an affidavit of merit from a physician. Plaintiff opposes the motion.

The undisputed facts of this personal injury action are as follows.

Plaintiff Shirley Young is a 67-year-old woman who was a patient in the Urgent Care Department at defendant New York and Presbyterian Hospital on February 2-3, 2013. She was experiencing hip and back pain. The patient fell after she got up from her bed to walk to the bathroom, sustaining injuries. A nurse who was in the room failed to assist plaintiff as she walked to the bathroom.

Plaintiff commenced this action by filing a summons and verified complaint on May 6, 2013. The verified complaint alleges a cause of action for negligence, including the doctrine of res ipsa loquitur. The complaint does not explicitly assert a cause of action for medical malpractice.

Defendants filed a verified answer.and a demand for a certificate of merit pursuant to CPLR 3012-a.

On September 16, 2013, plaintiff executed a verified bill of particulars. Paragraph 7 states in part, "There is no allegation of medical malpractice in the complaint" (Motion, exhibit D, p. 2, para. 7).

Plaintiff executed a verified amended bill of particulars on March 21, 2014, reiterating that "there is no allegation of medical malpractice in the complaint" (Motion, exhibit E, p. 3, para. 7).

In a letter to plaintiff's counsel dated May 5, 2014, counsel for defendants wrote, "In accordance with our previous demands, we request that you provide us with a Certificate of Merit for this case as it sounds in medical malpractice" (Motion, exhibit H).

Plaintiff has not provided the requested certificate.

Discussion

CPLR 3012-a imposes the requirement that a "certificate of merit" accompany the initial complaint in medical, dental and podiatric malpractice cases. Accordingly,

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the Court's decision regarding the instant motion hinges on the issue of whether this is, in fact, a medical malpractice case.

Defendants assert that the claims in this action are premised on the level of supervision needed for the patient; whether the safety protocol for the patient in place was proper; and whether a physician should have entered an order for the patient to have constant observation. According to defendants, such decisions necessarily involve medical expertise, medical skill and judgment. Defendants assert that plaintiff's claims sound, therefore, in medical malpractice. As such, defendants contend that plaintiff must serve a certificate of merit, a notice of medical malpractice, and offer a reasonable excuse for the delay, together with an affidavit of merit from a physician, in order to maintain this action.

In response, plaintiff asserts that the gravamen of plaintiff's allegations is that the medical facility was negligent by failing to provide assistance when she got out of bed to go to the bathroom. Plaintiff points out that the complaint and bill of particulars do not make any claims with respect to the medical treatment provided to plaintiff, nor is there an allegation with respect to the level of supervision, nursing care or security. Further, plaintiff asserts that there is no allegation that the medical facility improperly administered pain medication; the claim that the nurse failed to assist the plaintiff walk to the bathroom is neither related to medical treatment nor substantially related to medical treatment rendered by a physician; and when the gravamen of the

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complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty, the claim sounds in negligence.

The test of whether an action sounds in medical malpractice or negligence was summarized in Friedmann v. New York Hospital-Cornell Medical Center, 65 A.D.3d 850 [1st Dept., 2009]). Affirming Judge Alice Schlesinger, the First Department wrote:

> An action to recover for personal injuries or wrongful death against a medical practitioner or a medical facility or hospital may be based either on negligence principles or on the more particularized medical malpractice standard. Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies.

(Friedmann, 65 A.D.3d at 850-851)(internal quotation marks and citations omitted).

In this regard, the First Department's decision in Reardon v. Presbyterian Hosp. in City of N.Y., 292 A.D.2d 235 [1st Dept., 2002], is most instructive. The patient, a heart transplant recipient, fell while being helped down from the examining table by a physician after undergoing a follow-up biopsy at the hospital. The Court held that expert evidence was not required to reach the jury on the question of whether the physician was negligent in helping the patient off the examining table by himself, without the assistance of another hospital employee. The Court wrote:

> Here, plaintiff's claim is not based upon an assertion that an improper

> assessment of her medical condition played any role in determining how to help her off the table. Rather, the essence of the plaintiff's allegations is the failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient.

(Reardon, 292 A.D.2d at 236)(internal quotation marks and citation omitted).

In the instant matter, plaintiff was not undergoing any medical procedure whatsoever when the fall occurred. Simply stated, plaintiff alleges nothing more than that she got up from a bed, slipped and fell on her way to the bathroom.

In short, it is clear to the Court that professional skill and judgment are not needed in light of the straightforward facts alleged. A degree in medicine is not necessary. The mere fact that an accident happened in a hospital does not automatically transform a simple slip-and-fall case into a complex medical malpractice action. Because the allegations of lack of due care can be determined by the jury on the basis of common knowledge, we find that the instant action sounds in simple negligence.

Accordingly, it is

ORDERED that the motion is denied.

The foregoing constitutes the decision and order of the court.

Date: 1/14/15
New York, New York

Anil C. Singh