Ramnarine v PSCH Inc.
2015 NY Slip Op 30881(U)
May 21, 2015
Supreme Court, Queens County
Docket Number: 17959/10
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

LATCHMAN RAMNARINE,

Plaintiff,

-against-

PSCH INC., JASON WALLACE, FRANTZ H. LUBIN, M.D., AND INSTITUTE FOR COMMUNITY LIVING, INC.,

Defendants.

Index No: 17959/10

Motion Date: 2/25/15

Motion Seq. No.: 5

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The following papers numbered 1 to 31 read on this motion by defendants, Institute for Community Living, Inc. (ICL) and Frantz H. Lubin, M.D., seeking, summary judgment dismissing the complaint, and cross motion by defendant, PSCH, Inc., seeking, among other things, summary judgment dismissing the complaint, both pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-9
Answering Affidavits - Exhibits	10-23.
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Plaintiff seeks damages for personal injuries sustained when he was attacked by defendant, Jason Wallace , his roommate in an apartment located in a residential mental health program operated by defendant PSCH. At the time of the assault, Wallace was an outpatient client of ICL's Continuing Day Treatment Program. Plaintiff was not a client of ICL. Plaintiff's Second Amended Verified Complaint, which bears the current caption, contains causes of action for negligence and medical malpractice.

Pursuant to a "so-ordered" stipulation, dated April 19, 2012, J. Ritholtz stayed this action pending the appointment of a guardian ad litem for defendant, Wallace, while

directing that discovery continue. On June 28, 2012, this Court ordered a stay of the action "pending the appointment of a Guardian pursuant to Art. 81 of the Mental Hygiene Law." A guardian ad litem was appointed pursuant to a "so-ordered" stipulation signed March 12, 2013, but no motion to vacate the stays has been made. Consequently, the Court, *sua sponte*, hereby vacates any and all stays entered upon this matter.

As the parties continued discovery during the term of the stay, the instant motion and cross motion will be entertained pursuant to the terms granted by J. Ritholtz in the order dated April 19, 2012.

The instant motion was served in or about September 2014, and the cross motion was served thereafter. Plaintiff's opposition contends, *inter alia*, that the motion and cross motion are untimely and should be denied, pursuant to CPLR 3212 (a), which sets an outside limit on the making of summary judgment motions of "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

While statutory deadlines are to be taken seriously, as they, along with court-ordered time frames, are not options, but are requirements (*see Cadichon v Facelle*, 18 NY3d 230 [2011]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2005]; *Dettmann v Page*, 18 AD3d 422 [2005]), plaintiff filed his note of issue on February 16, 2012, stating same was being filed "over objection inasmuch as discovery is not completed" and a "third-party action was just commenced." In fact, the third-party summons and complaint had not yet been served on defendants ICL and Dr. Lubin when plaintiff filed his note of issue.

For the court to permit the filing of a late motion for summary judgment, movants must demonstrate "good cause" in the form of a "satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Movants have demonstrated that discovery has been ongoing since they appeared in the action and that plaintiff has not been prejudiced by the delay in making these motions. Plaintiff has failed to rebut such contentions. As such, defendants have demonstrated good cause for the late filing of the motions (see *Gonzalez v 98 Mag Leasing Corp.,* 98 NY2d 124 [2000]; *Courtview Owners Corp. v Courtview Holding B.V.,* 113 AD3d 722 [2014]; *Giambona v Hines*, 104 AD3d 811 [2013]). Consequently, plaintiff's opposition to the motion and cross motion, based on violations of the statutory time frame, is denied.

ICL, Dr. Lubin and cross-movant, PSCH, each contends that the complaint should be dismissed against it on the ground that there existed no duty to protect plaintiff from the actions of defendant, Wallace. The question of whether a defendant owes a duty of care to another person is a question of law for the courts (*see Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1 [1988]; *Eiseman v State of New York*, 70 NY2d 175 [1987]; *Malave v Lakeside Manor Homes for Adults, Inc.*, 105 AD3d 914 [2013]). Under

common law, "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control. Certain relationships, however, may give rise to this duty" (*D'amico v Christie*, 71 NY2d 76, 88 [1987]). Courts "have imposed a duty to control the conduct of others where there is a special relationship: a relationship between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third-party's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others" (*Purdy v Public Adm'r of County of Westchester*, at 8; *see Davis v South Nassau Communities Hosp.*, 119 AD3d 512 [2014]).

In the case at bar, the evidence presented sustains the existence of such a "special relationship" between defendant, Wallace, and defendants, ICL, Dr. Lubin and PSCH. There was sufficient evidence to demonstrate ICL and Dr. Lubin's efforts to control Wallace's conduct and demeanor through treatment and medication, and also to necessitate that PSCH protect third persons, i.e., plaintiff, from Wallace's conduct. A duty may arise when a facility "had a certain level of authority and control over its residents" (*Fox v Marshall*, 88 AD3d 131, 137 [2011]). Such level of control may be demonstrated by the facility's determination to house a patient in an accommodation having more restrictions and supervision, or in a less restrictive or supervised accommodation (*see Aiello v Burns International Security Services Corp.*, 110 AD3d 234 [2013]). ICL, Dr. Lubin and PSCH exhibited knowledge of the actions of their "patient/consumer" Wallace with regard to his past psychiatric history, need for medications, interactions with others, and living conditions, in sufficient detail to raise a duty to protect plaintiff from harm at the hands of Wallace. The evidence illustrates that the responsibility of each such entity was not singular and disconnected, but united and shared between them. Said defendants' witnesses, including Dr. Lubin, himself, concurred on the importance of both agencies' input in monitoring Wallace's behavior and medication compliance. The case worker at ICL and the social worker at PSCH would necessarily need to interact to determine questions of Wallace's compliance with the medication regimen and to discuss any indications of "decompensation." Further, information from ICL and Dr. Lubin's assessments would be considered by PSCH in arranging the proper living accommodations and means of dispensing medications for Wallace. The homogeneity of their roles in the caring and treatment of Wallace resulted in a shared duty toward plaintiff herein. To presume otherwise would be to disregard the evidence presented. As such, by failing to exercise reasonable care in the performance of their duties, defendants, ICL, Dr. Lubin and PSCH, may be held liable in negligence for any resulting injury to a third person (*see London v Knoll Laboratory Specialists, Inc.*, 22 NY3d 1 [2013]; *Church ex rel. Smith v Callahan Industries, Inc.*, 99 NY2d 104 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

Dr. Lubin moves to dismiss the medical malpractice cause of action against him on the ground that he had no duty toward plaintiff, as there existed no doctor/patient

relationship between them. Generally, the *sine qua non* of a medical malpractice claim is the existence of a doctor/patient relationship; imposing a duty upon the doctor to properly treat his patient (*see Bazakos v Lewis,* 12 NY3d 631 [2009]), and the element of duty would normally be missing from a claim brought by one who is not that doctor's patient (*see Fox v Marshall,* 88 AD3d 131). Although a doctor's duty has been judicially extended to encompass nonpatients who have a special relationship with either the doctor or the patient (*see McNulty v City of New York*, 100 NY2d 227 [2003]), there exists no special relationship in the instant matter warranting the extension of the doctor's duty to the nonpatient plaintiff (*see Klein v Bialer*, 72 AD3d 744 [2010]). In the absence of a duty to plaintiff in this action, any alleged medical malpractice on the part of Dr, Lubin in his treatment of Wallace is moot. Accordingly, the branch of the motion seeking to dismiss the medical malpractice cause of action against Dr. Lubin is granted.

PSCH cross-moves to dismiss the medical malpractice cause of action against it, alleging that it had no duty to plaintiff, based upon a lack of a doctor/patient relationship with plaintiff or with Wallace, and the fact that PSCH and its employees did not provide medical or psychiatric services to either individual. Plaintiff has failed to sufficiently rebut these allegations. While plaintiff's opposition convincingly demonstrated PSCH's duty to protect plaintiff from harm caused by its allegedly negligent control of Wallace, such evidence did not exhibit any activities which constituted medical or psychiatric treatment having been rendered by PSCH or its employees to either plaintiff or Wallace (*see Avins v Federation Empl. & Guidance Serv., Inc.*, 52 AD3d 30 [1st Dept 2008]). . Accordingly, the branch of the cross motion seeking to dismiss the cause of action for medical malpractice against PSCH is granted.

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063*,* citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Nash v Port Washington Union Free School Dist.*, 83 AD3d 136 [2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2009]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]). In the case at bar, movants and cross movant leave unresolved issues regarding, *inter alia*, the propriety of moving Wallace to the less-supervised housing accommodation and to self-medication status; the efforts made to address the subjects of Wallace's non-compliance with treatment and with his medication regimen; and the paucity of communication between defendants with respect to Wallace, all of which are material to the behavior of Wallace which occasioned the injuries herein.

Consequently, movants and cross movant have failed to tender sufficient evidence

to show the absence of any material issue of fact and the right to judgment as a matter of law (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. v. Medical Center,* 64 NY2d 851 [1985]).

As defendants failed to meet their *prima facie* burden in the first instance, it is not necessary for the court to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Artis v Lucas*, 84 AD3d 845 [2011]; *Iannello v Vazquez*, 78 AD3d 1121 [2010]; *Wade v Allied Bldg. Product Corp.*, 41 AD3d 466 [2007]; *Pijuan v Brito*, 35 AD3d 829 [2006]).

The branch of the cross motion seeking leave to amend third-party plaintiff's bill of particulars, dated July 9, 2013, to add "14 NYCRR 593.6" to the list of regulations allegedly violated by codefendants, is granted. Leave to amend a writing should be freely granted unless the proposed amendment is patently devoid of merit, or unless prejudice or surprise would result to opposing parties directly from the delay in seeking leave to amend (*see Thalle Industries, Inc. v Holubar*, 121 AD3d 671 [2014]; *Confidential Lending, LLC v Nurse*, 120 AD3d 739 [2014]). The proposed amendment is not devoid of merit, and no evidence of prejudice to any party has been forthcoming in opposition.

Accordingly, the branch of the motion by defendants ICL and Dr. Lubin for summary judgment dismissing the negligence causes of action against them is denied. The branch of the motion seeking to dismiss the medical malpractice cause of action against defendant, Dr. Lubin, is granted. The branch of the cross motion seeking summary judgment dismissing the negligence cause of action against defendant, PSCH, is denied. The branches of the cross motion seeking dismissal of the medical malpractice cause of action against defendant, PSCH, and for leave to amend the third-party bill of particulars, are granted.

Dated: May 21, 2015

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J.S.C.