

Gnapp v Stryker Sales Corp.
2016 NY Slip Op 31794(U)
September 29, 2016
Supreme Court, New York County
Docket Number: 158193/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CHRISTOPHER GNAPP,

Plaintiff,

-against-

INDEX NO.

158193/2015

MOTION DATE

08/24/2016

MOTION SEQ. NO.

001

MOTION CAL. NO.

STRYKER SALES CORPORATION, STRYKER CORPORATION, and STRYKER HOWMEDICA OSTEONICS CORP.,

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7 - 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Stryker Sales Corporation and Stryker Corporation’s (herein “movants”) motion for summary judgment is denied.

Plaintiff originally commenced this action in Supreme Court, Bronx County, on February 10, 2015. (Mot. Exh. A). The parties later stipulated to discontinue that action without prejudice. (Mot. Exh. B). Plaintiff re-commenced the action in New York County Supreme Court by filing a Summons with Notice on August 7, 2015. (Mot. Exh. C). The Complaint was filed on November 4, 2015. (Mot. Exh. H).

The Complaint alleges that a patient-specific Stryker ShapeMatch Cutting Guide (herein “Stryker Cutting Guide”) (which was recalled by the FDA in April of 2013 for software defects), designed, manufactured and sold by the Defendants, was used during Plaintiff’s knee replacement surgery on August 10, 2012. Plaintiff alleges that the software defect in the cutting guide caused his knee implant to be misaligned, resulting in personal injuries and the potential for later revision surgery. Movants filed an Answer on November 24, 2015. (Mot. Exh. I).

Movants now move for an Order for summary judgment pursuant to CPLR §3212, dismissing the Complaint. Movants note that Defendant Stryker Howmedica Osteonics, Corp. has not filed an Answer as it was never served with the Summons and Complaint. Movants contend that inasmuch as the claims against Defendant Howmedica are the same, then the Complaint should be dismissed as against it as well. However, that relief is not requested within the motion, and is therefore not addressed in this decision.

Movants contend that they informed Plaintiff, in an email prior to the commencement of this action, that they did not possess any information which would indicate that a Stryker Cutting Guide was used during the surgery. Movants also stated that if a Stryker Cutting Guide had been used, it would be specifically indicated in Plaintiff's medical records on the implant label sheet. (Mot. Exh. D). Plaintiff provided select medical records from the surgery to Movants and those records indicate that a Stryker Cutting Guide was not used. (Mot. Exh. E). After review of these records, Movants informed Plaintiff, in a letter dated September 9, 2015, that a Stryker Cutting Guide was not used, and requested a Notice of Discontinuance. (Mot. Exh. F).

Movants contend that on November 25, 2015, they served a Request for Admissions, Interrogatories and Document Requests, seeking specific product identifying information regarding the type of cutting guide used during Plaintiff's surgery. As of the date of the motion, Plaintiff had not responded to these requests. As a result, Movants' argue that their Requests for Admissions regarding the product identification are deemed admitted, and a Stryker Cutting Guide was not used. Therefore, because the Complaint relies on a Stryker Cutting Guide as causing Plaintiff's injuries, the Complaint must be dismissed.

Plaintiff opposes the motion arguing that he never received movant's Notice to Admit until receipt of the instant motion on February 16, 2016. There's no affidavit/affirmation of service attached to the documents, nor is there any indication that Movants' Request for Admissions was e-filed. (See NYSCEF e-filing information attached to Aff. In Opp.). Plaintiff thereafter served Movants with his response to the Request for Admissions. (See attachment to Aff. In Opp.).

Further, Plaintiff argues that there exist triable issues of fact as to whether or not a Stryker Cutting Guide was used during his surgery. At this junction, the summary judgment motion is premature because discovery, including document discovery and depositions, have not been conducted.

Movants' contend that their Interrogatories and Requests for Admissions were served to Plaintiff via regular mail on November 25, 2015. (Reply Aff. Exh. A). Movants contend that the envelope was accurately addressed to Plaintiff's counsel and that it was never returned as undeliverable. Movants also argue that another mailing regarding a second set of general discovery requests was sent to Plaintiff on

December 18, 2015. (Reply Aff. Exh. B). Plaintiff never responded and the envelope was never returned as undeliverable. Movants argue that Plaintiff never responded to any of their discovery requests, and that Plaintiff's belated attempt to respond to the requests on March 7, 2016 after receipt of the instant motion, should be ignored by the Court because Plaintiff never requested additional time to respond. For these reasons Movants' request that the Admissions regarding the product identification be deemed admitted and the motion should be granted.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of issues, or where the issue is arguable. (Sillman v. 20th Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387 [1957]; Barrett v. Jacobs, 255 N.Y. 520, 175 N.E. 275 [1931]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318 [1984]). Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [1st Dept. 2004]).

Movants counsel's email to Plaintiff's counsel asserted that the mention of a cutting guide being used in the operative report does not establish the use of a Stryker Cutting Guide. The email goes on to state that "cutting guide" is a term of art, and the exact type of cutting guide used could be determined from the implant label sheet. Movants do not provide the operative report. Movants counsel's later letter to Plaintiff's counsel stated that the implant tracking sheet did not list the specific type of cutting guide used. The letter went on to state that if a Stryker Cutting Guide was used it would be specifically identified by name in the records. The letter also stated that other conventional cutting guides that are not patient-specific are typically not specifically identified in the records. Counsel went on to state that because the implant tracking label form failed to identify the use of a Stryker Cutting Guide, this is the best evidence that it was not used during the Plaintiff's surgery.

Movants have not made a prima facie showing entitling them to summary judgment dismissing the Complaint. Movants rely on the conclusory assertion made by their attorney that the absence of listing a Stryker Cutting Guide on the implant tracking form conclusively establishes that such a device was not used. Further, Plaintiff has provided responses to Movants' Requests for Admissions, however belatedly they may be. Movants' Requests for Admissions are not deemed admitted. Movants argue that the discovery requests were mailed on November 25, 2015, but does not provide any proof of service. Whether or not Plaintiff actually received these discovery demands when allegedly mailed is questionable, and that issue cannot be decided, nor can the information contained in the requests be deemed admitted, in this motion.

For the foregoing reasons, summary judgment is denied.

Accordingly, it is ORDERED, that Defendants Stryker Sales Corporation and Stryker Corporation's motion for summary judgment dismissing the Complaint is denied.

ENTER:

Dated: September 29, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE