

Cimino v Syosset Hosp.
2018 NY Slip Op 34257(U)
October 30, 2018
Supreme Court, Nassau County
Docket Number: Index No. 605956-18
Judge: Robert A. Bruno
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----X
JOANN F. CIMINO,

TRIAL/IAS PART 13

Plaintiff,

Index No.: 605956-18

Submission Date: 8-21-18

Motion Sequence: 001

-against-

SYOSSET HOSPITAL, NORTHWELL HEALTH, INC.,
NORTHWELL HEALTH, INC. d/b/a SYOSSET,
HOSPITAL, SYOSSET HOSPITAL d/b/a
NORTHWELL HEALTH, INC., ROUSSEAU
REGINALD, M.D., NORTH AMERICAN PARTNERS
IN PAIN MANAGEMENT, LLP and NORTH
AMERICAN PARTNERS IN ANESTHESIA, LLP.,

DECISION & ORDER

Defendants.
-----X

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Upon the foregoing papers, the motion by defendants ROUSSEAU REGINALD, M.D. ("Dr. ROUSSEAU"), NORTH AMERICAN PARTNERS IN PAIN MANAGEMENT, LLP and NORTH AMERICAN PARTNERS IN ANESTHESIA ("NAPA") (collectively, the "Moving Defendants") for an Order (i) pursuant to CPLR §3211(a)(7), dismissing the first and third causes of action in plaintiff's Verified Complaint which allege negligence and gross negligence respectively on the grounds that they fail to state a cause of action because they are legally redundant and duplicative of the second cause of action for medical malpractice; and (ii) pursuant to CPLR §3211(a)(7), dismissing the plaintiff's Verified Complaint in its entirety as against the defendant NAPA for failure to state a cause of action on the grounds that Dr. ROUSSEAU was neither an employee nor partner of NAPA when he allegedly rendered care to

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the plaintiff and therefore NAPA never owed the plaintiff a duty that could have been breached; is determined as set forth below.

At the outset, the Court notes that the branch of the motion seeking to dismiss the Verified Complaint in its entirety as against NAPA has been withdrawn pursuant to counsel's letter of June 19, 2018, in view of the execution by all parties of a Stipulation of Discontinuance dated June 13, 2018.

This action arises out of the care and treatment rendered to plaintiff by defendants on March 23, 2018. Plaintiff alleges that, among other things, defendants negligently injected an epidural cervical steroid into her spine, resulting in severe and permanent injuries including right side paralysis, and that defendants attempted to cover-up the malpractice by informing plaintiff and her family that she had a stroke. The Verified Complaint (*Mot. Exh. A*) states three causes of action against all defendants. The FIRST is designated as a cause of action for Negligence, and is predicated upon the following allegations of wrongful conduct:

- "a. Negligently injected an epidural cervical steroid into Plaintiff's spine;
- b. did not properly care for the Plaintiff;
- c. failed to timely give Plaintiff medications;
- d. failed to provide diligent care;
- e. hindered Plaintiff's ability to succeed at therapy;
- f. failed to follow its own Policies & Procedures;
- g. failed and omitted to make a timely diagnosis of Plaintiff's condition;
- h. failed and omitted to undertake timely and proper tests, examinations, procedures, studies and/or surgery;
- i. failed and omitted to undertake timely and proper tests, examinations, procedures, studies, surgery, pre- and post-surgical care, and, in general, in rendering medical care, attention, treatment and/or care to the Plaintiff,
- j. failed and omitted to understand the clinical analysis, laboratory analysis, history, physical examination, complaints, pains, signs and/or symptoms so that a proper and timely diagnosis could be made and/or a proper course of treatment could have been provided;
- k. failed and omitted to conform to the accepted standards of care and skill in giving advice, treatment, prescriptions, examination, information, services, surgery, pre- and post-surgical care, attentions, studies, laboratory and/or radiological examinations and/or facts to Plaintiff;

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1. failed and omitted to use reasonable care in the Plaintiff's medical care, attention, services, treatment, diagnosis and other medical services rendered on behalf of the Plaintiff;
- m. misdiagnosed Plaintiff as having a stroke;
- n. misrepresented to the family that Plaintiff had a stroke;
- o. failed to timely treat Plaintiff's improper injection;
- p. attempted to cover up negligence done to Plaintiff;
- q. delayed notification of family in furtherance of cover up; and
- r. purposeful misinformed Plaintiff concerning what was done to her in furtherance of cover up."

Verified Complaint ¶ 93 (*Mot. Exh. A*).

The SECOND is designated as a cause of action for Medical Malpractice, and is predicated upon allegations that defendants:

"were negligent in its care rendered for and on behalf of the Plaintiff in; negligently failing and neglecting and carelessly failing and neglecting to heed Plaintiff's condition; in negligently and carelessly departing from good and accepted medical practice in the treatment rendered upon Plaintiff; in failing to perform indicated procedures and/or improperly said indicated procedures; in negligently failing to take proper history and physical examination of Plaintiff's medical condition prior to instituting treatment; in negligently departing from good and accepted hospital practice and procedures in services rendered to Plaintiff; in failing to timely diagnose and treat Plaintiff; in failing to recognize Plaintiff's true condition; in failing to timely treat and realize the consequences of the complications associated with Plaintiff's condition; in carelessly and negligently performing routine and/or required testing; in failing to perform routine and/or required testing; in failing to possess knowledge and skill to properly treat Plaintiff's condition; in attempting to cover up Defendants negligence and in otherwise being careless and negligent."

Verified Complaint ¶ 104 (*Mot. Exh. A*).

The THIRD is designated as a cause of action for Gross Negligence, and is predicated upon allegations that:

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- “109. The defendants acted in so carless [sic] a manner as to show complete disregard for the rights and safety of Plaintiff.
- 110. The defendants lacked sufficient staff to care for Plaintiff.
- 111. Each defendant intentionally acted or failed to act knowing that its conduct was likely or will result in injury and/or damage.
- 112. Defendants attempted to cover up their negligence.
- 113. Defendants delayed treatment due to attempting to cover up their negligence.
- 114. Defendants purposely told a misdiagnose to Plaintiff in an attempt to cover up their negligence.
- 115. The defendants acted in so reckless a manner or failed to act in circumstances where an act was clearly required so as to indicated disregard of the consequences of its actions or inaction.”
- 116. The defendants' conduct, as outlined above, was willful and in reckless disregard.”

Verified Complaint ¶¶ 109-116 (*Mot. Exh. A*). Based upon these allegations, plaintiff seeks an award of punitive damages.

The Moving defendants seeks to dismiss the FIRST and THIRD Causes of Action pursuant to CPLR §3211(a)(7), based upon their contention that the causes of action are legally redundant and duplicative of the SECOND Cause of Action for Medical Malpractice.

Plaintiff opposes the motion, arguing that each of the FIRST and THIRD Causes of Action alleges conduct that involves ordinary care and has nothing to do with medical diagnosis and treatment. In particular, plaintiff cites allegations that defendants “did not properly care for the Plaintiff”; “failed to provide diligent care”; “hindered Plaintiff’s ability to succeed at therapy”; “failed to follow its own Policies & Procedures”; “failed and omitted to use reasonable care in the Plaintiff’s medical care, attention, services...”; “attempted to cover up negligence done to Plaintiff”; “delayed notification of family in furtherance of cover up”; “purposeful misinformed Plaintiff concerning what was done to her in furtherance of cover up”; and “lacked sufficient staff to care for Plaintiff”. At most, plaintiff argues, the complaint was inartfully drafted, and improperly intermingled claims of medical malpractice and ordinary negligence. According to plaintiff, however, that should not result in dismissal insofar as plaintiff has asserted facts falling with a cognizable legal theory distinct from medical malpractice.

It is well settled that “on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every

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possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Detringo v South Island Family Medical, LLC*, 158 AD3d 609 (2d Dept. 2018), citing *Leon v Martinez*, 84 NY2d 83 (1994). See also *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 (2016); *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 (2005); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus.” *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). See also *Vasomedical, Inc. v Barron*, 137 A.D.3d 778 (2d Dept. 2016); *Zellner v. Odyll, LLC*, 117 A.D.3d 1040, 1041 (2d Dept. 2014).

“Generally, the complaint need only contain statements sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action.” *Detringo*, 158 AD3d at 609, quoting CPLR 3013 (internal citations and quotation marks omitted).

Determination of the instant motion turns on whether or not the claims asserted in the FIRST and THIRD causes of action are distinct from, or tantamount to, claims of medical malpractice. “[T]he distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two . . . Nevertheless, this Court has recognized that although a hospital in a general sense is always furnishing medical care to patients, not every act of negligence toward a patient would be medical malpractice. . . Thus, a claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. . . By contrast, when the gravamen of the 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.” *Weiner v Lenox Hill Hosp.*, 88 NY2d 784 (1996) (internal citations and quotation marks omitted). See also *B.F. v Reproductive Medicine Associates of New York, LLP*, 136 AD3d 73, 80 (1st Dept. 2015). In reaching this determination, courts look to whether the acts or omissions complained of involve a matter of medical science requiring expert testimony concerning the standard of care, or whether the alleged negligent act may be readily determined by the trier of the facts based upon common knowledge. See *B.F. v Reproductive Medicine Associates*, 136 AD3d at 80; *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 978 (3d Dept. 1983).

At bar, the Court finds that several of the allegations in the FIRST and THIRD causes of action are vague and conclusory, and thus are insufficiently particular to give notice of the acts or omissions complained of. Several mirror the claims of malpractice set forth in the SECOND cause of action. Nonetheless, at least one or more of the allegations in each of the challenged

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causes of action relate to a breach of duty separate and distinct from the duty to provide medical care and treatment.

Plaintiff alleges, in essence, that defendants either negligently, recklessly or deliberately misinformed plaintiff regarding her medical condition (i.e., told her that she had a stroke, rather than telling her that her physician had negligently injected an epidural cervical steroid into her spine), and that this delayed and impaired plaintiff's proper treatment. To the extent that plaintiff alleges that this misinformation was deliberate and part of an effort to cover up prior malpractice, it may constitute a claim separate and distinct from the alleged malpractice. See *Simcuski v Saeli*, 44 NY2d 442 (1978). The exposure to liability would not be based upon errors of professional judgment, but upon the commission of an intentional tort. See *LaBrake v Enzien*, 167 AD2d 709 (3d Dept. 1990). Moreover, the claim is one that could be determined by the trier of fact based upon common knowledge and without reference to expert testimony. See *B.F. v Reproductive Medicine Associates*, 136 AD3d at 80; *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d at 978.

To be actionable as a cause of action separate and distinct from the alleged malpractice, a cause of action predicated on concealment of malpractice must allege: (i) that the concealment was achieved through subsequent¹ affirmative misrepresentations, as opposed to mere non-disclosure; and (ii) that the damages caused by the concealment are different from those caused by the malpractice. See *Simcuski v Saeli*, 44 NY2d 442 (1978); *Atton v Bier*, 12 AD3d 240 (1st Dept. 2004); *Harkin v Culleton*, 156 AD2d 19 (1st Dept. 1990). Plaintiff must allege an available, efficacious remedy or cure for the injuries caused by the alleged malpractice that he or she was diverted from undertaking in consequence of the alleged concealment. *Carofino v Forester*, 450 FSupp2d 257 (SDNY 2006) (applying New York law); *Luciano v Levine*, 232 AD2d 378 (2d Dept. 1996); *Harkin v Culleton*, 156 AD2d at 25.

Affording the Verified Complaint a liberal construction, accepting all facts as alleged to be true, and according plaintiff the benefit of every possible inference, the Court finds that the FIRST and THIRD causes of action barely, but adequately, allege the elements of a cognizable claim for purposes of surviving a motion to dismiss on the pleadings. At minimum, plaintiff

¹ A plaintiff pleading a claim of fraud which relies upon the same misrepresentations that form the basis of the malpractice claim may only proceed on the malpractice claim. See, e.g., *B.F. v Reproductive Medicine Associates*, 136 AD3d at 81-82 (fraud claims based upon defendants' misrepresentations regarding screening of egg donors were duplicative of medical malpractice claim based upon defendants' failure to obtain informed consent); *Rizk v Cohen*, 73 NY2d 98 (1989) (fraud claim based upon defendant's alleged advice to plaintiff that there was nothing wrong was duplicative of medical malpractice claim based upon mis-diagnosis).

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alleges subsequent affirmative misrepresentations, which concealed a physician's malpractice, and delayed and impaired proper treatment of the original injuries caused by the malpractice.²

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is


ORDERED, that the Moving Defendants' motion to dismiss the FIRST and THIRD causes of action is *denied*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: October 30, 2018
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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² Although plaintiff does not specify the treatment that was delayed or impaired as a result of defendants' alleged misrepresentations, the allegations support an inference that treatment was available (physical therapy is mentioned), and plaintiff is entitled to the benefit of such inference in opposition to a motion to dismiss. In this context, the burden of proof lies with the Moving Defendants, who fail to establish either that the alleged post-procedure misrepresentations did not occur or that they did not result in additional injury to plaintiff.