

<b>Hodges v Mount Sinai Hosp.</b>
2019 NY Slip Op 30028(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 158304/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

FREDERICK HODGES,

Index No. 158304/2013

Plaintiff

- against -

DECISION AND ORDER

MOUNT SINAI HOSPITAL and DR. LOUIS M.  
ALEDORT,

Defendants

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover damages for medical malpractice, battery, and negligent infliction of emotional distress, arising from defendant Mount Sinai Hospital's inaccurate entries of plaintiff's HIV status in its records of his treatment at the hospital and from defendant Aledort's examination of plaintiff. Defendants separately move for summary judgment, C.P.L.R. § 3212(b), dismissing the complaint, and for their costs and disbursements. Defendants do not allege any cross-claims against each other. For the reasons explained below, the court grants their motions.

II. PLAINTIFF'S CLAIM FOR MEDICAL MALPRACTICE BASED ON LACK OF INFORMED CONSENT

Plaintiff's medical malpractice claim based on his lack of informed consent arises from his visit with Dr. Aledort January 24, 2013, when Dr. Aledort examined plaintiff's genitals and inquired into his sexual activity. A medical malpractice claim

based on lack of informed consent requires evidence that (1) Dr. Aledort did not disclose the benefits and risks of treatment and alternatives to treatment that a reasonable medical practitioner would have disclosed and (2) that, if adequately informed, a reasonable person in plaintiff's position would have chosen not to receive the treatment. N.Y. Pub. Health Law § 2805-d(1) and (3); Orphan v. Pilnik, 15 N.Y.3d 907, 908 (2010); Balzola v. Giese, 107 A.D.3d 587, 588 (1st Dep't 2013). To demonstrate the adequacy of the disclosed information requires expert opinion. Orphan v. Pilnik, 15 N.Y.3d at 908; Katz v. Sen, 111 A.D.3d 438, 438 (1st Dep't 2013). See C.P.L.R. § 4401-a.

Although Dr. Aledort did not specifically recall his examination of plaintiff, Dr. Aledort testified that he usually advised patients that he would examine their genitals as part of his routine examination. Dr. Aledort's customary practice may establish that Dr. Aledort informed plaintiff according to that customary practice as long as Dr. Aledort consistently and completely controlled his repeated and deliberate practice. Rivera v. Anilesh, 8 N.Y.3d 627, 634-35 (2007). See Galetta v. Galetta, 21 N.Y.3d 186, 197 (2013); Kindelan v. Society of N.Y. Hosp., 277 A.D.2d 75, 76 (1st Dep't 2000). Dr. Aledort testified that, as a hematologist, he always conducted complete physical examinations of his many new patients over the course of his 50 years of practicing medicine and described how he advised his patients before performing the examination that he would examine their genitals. He also explained that plaintiff's history of

sexually transmitted diseases and uncertain HIV status, which may manifest themselves in warts, lesions, swelling, and discoloration on the genitals, warranted an examination of that area and an inquiry into plaintiff's sexual activity.

Plaintiff's testimony is consistent with Dr. Aledort's customary practice: after a medical assistant escorted plaintiff to an examination room and asked him to undress, plaintiff inquired whether he was to remove all his clothes, received confirmation that he was to do so, and complied. Plaintiff did not object to Dr. Aledort's physical examination or to his inquiry into plaintiff's sexual activity, nor request an explanation for any part of the examination or inquiry.

Dr. Aledort's expert, Dr. Kenneth Hymes, found that Dr. Aledort's practice, both his comprehensive physical examination and his questions or advice regarding plaintiff's sexual activity, did not deviate from accepted medical practice. Dr. Aledort thus presents sufficient evidence that he adequately informed plaintiff of the physical examination that included examination of plaintiff's genitals. DePass v. Mohrmann, 157 A.D.3d 535, 535 (1st Dep't 2018); Hartt v. Kramer, 155 A.D.3d 560, 560 (1st Dep't 2017); Ramos v. Weber, 118 A.D.3d 408, 409 (1st Dep't 2014); Colletti v. Schiff, 98 A.D.3d 887, 888 (1st Dep't 2012). Dr. Aledort informed plaintiff of his questions by the questions themselves, to which plaintiff was free to refuse an answer or to respond by requesting an explanation why the information was relevant to a diagnosis. Any remarks by Dr.

Aledort beyond diagnostic purposes or medical advice were simply gratuitous remarks, did not constitute medical treatment requiring informed consent, and consequently did not constitute medical malpractice.

Plaintiff glosses over the requirement for expert opinion to demonstrate the inadequacy of Dr. Aledort's disclosure regarding his examination of plaintiff's genitals, denying that Dr. Aledort gave any forewarning at all of his intended examination. Nevertheless, plaintiff still must demonstrate that a failure to provide any disclosure or forewarning is a deviation from accepted medical practice, especially when, unlike a procedure in which the patient is under sedation or his mobility is restricted, the patient simply may object to or move away from the procedure. Moreover, since plaintiff never objected or moved away once he realized what the examination entailed, he fails to show that, had he been so informed before the examination, he would have refused to undergo the examination. N.Y. Pub. Health Law § 2805-d(3); Orphan v. Pilnik, 15 N.Y.3d at 908; Balzola v. Giese, 107 A.D.3d at 588. Because plaintiff failed to present either this evidence or a medical expert's affidavit of a deviation from accepted medical practice to rebut Dr. Aledort's evidence, the court must dismiss plaintiff's medical malpractice claim based on lack of informed consent. DePass v. Mohrmann, 157 A.D.3d at 535-36; Ramos v. Weber, 118 A.D.3d at 409; Katz v. Sen, 111 A.D.3d at 439; Balzola v. Giese, 107 A.D.3d at 588-89.

### III. PLAINTIFF'S CLAIM FOR BATTERY

Plaintiff also claims that Dr. Aledort's examination constituted battery, which requires evidence of offensive touching without consent. McRedmond v. Sutton Place Rest. & Bar, Inc., 95 A.D.3d 671, 674 (1st Dep't 2012); Nicholson v. Luce, 55 A.D.3d 416, 416 (1st Dep't 2008). See Cagliostro v. Madison Sq. Garden, Inc., 73 A.D.3d 534, 535 (1st Dep't 2010); Smiley v. North Gen. Hosp., 59 A.D.3d 179, 180 (1st Dep't 2009). Intent to harm need not be shown to establish battery. McRedmond v. Sutton Place Restaurant and Bar, Inc., 95 A.D.3d at 674; Hughes v. Farrey, 30 A.D.3d 244, 247 (1st Dep't 2006).

The parties agree that the court may consider the medical records of plaintiff's examinations and treatment presented in support of or in opposition to defendants' motions as authentic and admissible for purposes of determining the motions. Although Dr. Aledort's touching in the manner plaintiff described may furnish a basis for battery, Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 362 (1st Dep't 2005), medical records of plaintiff's past physical examinations show that they included repeated examinations of his genitals and thus, under those circumstances, a touching that was inoffensive. Gray v. Macy's E., Inc., 25 A.D.3d 475, 476 (1st Dep't 2006). See VanBrocken v. Erie County Med. Ctr., 96 A.D.3d 1394, 1395 (4th Dep't 2012). Plaintiff does not claim that Dr. Aledort's examination was somehow offensive compared to the prior examinations.

Most significantly, plaintiff presents no evidence that he

objected to Dr. Aledort's examination or even questioned the reasons for it. As set forth above, he acceded to the request to remove all his clothing without objection or further question. He therefore fails to demonstrate the complete lack of consent necessary to establish battery in the context of medical examination and treatment. Messina v. Alan Matarasso, M.D., F.A.C.S., P.C., 284 A.D.2d 32, 35 (1st Dep't 2001); Oates v. New York Hosp., 131 A.D.2d 368, 369 (1st Dep't 1987); VanBrocken v. Erie County Med. Ctr., 96 A.D.3d at 1394. See Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362; Smith v. St. Joseph's Hosp., 210 A.D.2d 36, 37 (1st Dep't 1994).

IV. PLAINTIFF'S CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In an order dated April 8, 2014, the court (Hagler, J.) dismissed all plaintiff's claims against Mount Sinai Hospital, with leave to replead a claim for negligent infliction of emotional distress against the hospital. Plaintiff's claim for negligent infliction of emotional distress arises from his treatment at Mount Sinai Hospital where on May 9 and November 30, 2012, he noticed medical records that erroneously described him as HIV positive.

To sustain a claim for negligent infliction of emotional distress, plaintiff must show Mt. Sinai Hospital's (1) breach of a duty owed to plaintiff (2) that unreasonably endangered him or caused him to fear for his safety. Ferreyr v. Soros, 116 A.D.3d 407, 407 (1st Dep't 2014); Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v. Povich, 11

A.D.3d 120, 130 (1st Dep't 2004). The hospital's negligent conduct must be atrocious, utterly intolerable, and so outrageous and so extreme as to exceed all bounds of decency. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 592; Lau v. S&M Enters., 72 A.D.3d 497, 498 (1st Dep't 2010); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d 506, 508 (1st Dep't 2009); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362.

As plaintiff points out, New York Education Law § 6530(32), 8 N.Y.C.R.R. § 29.2(a)(3), and 10 N.Y.C.R.R. § 405.10(a)(1) require physicians and hospitals to maintain accurate records. Plaintiff fails to demonstrate, however, that Mount Sinai Hospital's breach of its duty to maintain accurate records endangered his safety or caused him to fear for his safety. Bour v. 259 Bleecker LLC, 104 A.D.3d 454, 455 (1st Dep't 2013). See Kornicki v. Shur, 132 A.D.3d 403, 404 (1st Dep't 2015).

Plaintiff testified that the erroneous record entry caused him to question his HIV negative status, become uneasy, and worry that he was HIV positive, but he admitted that, based on prior testing, he knew he was HIV negative and did not believe he was HIV positive.

Plaintiff relies on a record of one of his regular group therapy sessions October 23, 2012, after the first erroneous entry, at which he expressed his distress and depression about the inclusion of an HIV diagnosis in his medical chart, but not fear for his safety or about being HIV positive. Moreover, when he returned to his group therapy session December 4, 2012, only a

few days after he noticed the second erroneous entry, he did not raise any concern about it and appeared "more relaxed and less depressed than before." Aff. of Susan L. Papacostas Ex. T, at 4.

Aside from the element of fear, plaintiff's knowledge that he was HIV negative, despite Mount Sinai Hospital's erroneous record indicating otherwise, undermines his claim of emotional trauma from the erroneous record of his HIV status. Bostwick v. Christian Oth, Inc., 91 A.D.3d 463, 464 (1st Dep't 2012). See Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008); Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 591. While plaintiff testified that it caused him to question whether he was HIV negative, plaintiff acknowledged that his prior physician, Dr. Sergey Khaitov, referred plaintiff to Dr. Aledort, a hematologist, because of a low white blood cell count, which may be associated with HIV status, and the hematologist then was to confirm his status, which was in fact negative.

In any event, the absence of atrocious, intolerable, or outrageous conduct is fatal to plaintiff's claim for negligent infliction of emotional distress. Kornicki v. Shur, 132 A.D.3d at 403; Hernandez v. Central Parking Sys. of N.Y., Inc., 63 A.D.3d 411, 411 (1st Dep't 2009); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d at 508; Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362. See Ferreyr v. Soros, 116 A.D.3d at 407; Phillips v. New York Daily News, 111 A.D.3d 420, 421 (1st Dep't 2013). Mount Sinai Hospital's conduct in maintaining plaintiff's records, even if negligent, does not rise to the

extreme level required. Kornicki v. Shur, 132 A.D.3d at 403; Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d at 508; Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362. The error in plaintiff's records was not a misdiagnosis of HIV status that was publicized to persons not bound by the privacy attendant to medical records and that thus may sustain a claim for infliction of emotional distress. See Harvey v. Cramer, 235 A.D.2d 315, 316 (1st Dep't 1997); Schulman v. Prudential Ins. Co. of Am., 226 A.D.2d 164, 164 (1st Dep't 1996). Although Mt. Sinai Hospital does not show that it corrected the error in the record after plaintiff first noticed the error, he does not dispute that the hospital did correct the second error in the record and did not ignore his complaint or engage in a multifaceted breach of its duty, which in combination may establish extreme and outrageous conduct. See Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 591-92.

V. CONCLUSION

Since plaintiff fails to rebut defendants' defenses to each of his claims, the court grants their motions for summary judgment, dismisses the complaint, and awards costs and disbursements to defendants as taxed by the Clerk upon their submission of a bill of costs. C.P.L.R. §§ 3212(b), 8201(2), 8301(a), 8401. The Clerk shall enter a judgment in accordance with this decision.

DATED: January 4, 2019

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LUCY BILLINGS, J.S.C.

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