

Buque v Santiago

2019 NY Slip Op 32165(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 805205/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARIEL BUQUE,

Plaintiff,

INDEX NO. 805205/12

-against-

ALEXANDRA SANTIAGO, LASER TECHNICIAN
and PALOMAR MEDICAL TECHNOLOGIES, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for negligence and products liability, plaintiff moves for an order pursuant to CPLR 3212 granting partial summary judgment as to liability on her negligence claim against defendant Alexandra Santiago. Plaintiff also moves for an order pursuant to CPLR 3216 striking defendant Santiago’s answer for failing to comply with court-ordered discovery, and an order striking the answers of both Santiago and co-defendant Palomar Medical Technologies, Inc. (“Palomar”) for the alleged spoliation of evidence. Defendants oppose the motion.¹

¹Palomar opposes only the prong of the motion seeking spoliation sanctions as against it. Although Palomar has not moved or cross-moved for any relief, Palomar’s counsel states that the products liability claim against Palomar “should be dismissed,” and that Santiago should be “barred from utilizing any testimony or expert opinion as to the functioning of the hand piece as she has deprived Palomar of the ability to defend itself based upon the failure to produce it at an earlier time in discovery.” Absent a formal motion or cross-motion, the Court will not consider any request for relief by defendant Palomar.

The following facts are not disputed unless otherwise noted. On November 29, 2011, plaintiff first saw former defendant Dr. Thomas Sterry, a plastic surgeon, with respect to a scar on her lower abdomen that had resulted from a surgery in October 2009 for uterine fibroids. Dr. Sterry recommended a Juvederm injection to improve the condition of the scar, and series of laser hair removal treatments. On December 14, 2011, Dr. Sterry injected Juvederm along the scar, and defendant Santiago, a medical office assistant employed by Dr. Sterry, performed the first laser hair removal treatment. On February 6, 2012, defendant Santiago performed the second laser hair removal treatment, and on March 12, 2012, the third treatment. Both the first and second treatments were uneventful, but plaintiff was burned during the third treatment. In his notes from March 12, 2012, Dr. Sterry wrote: "I believe that she has first degree burns on the skin in this area."

On August 1, 2012, plaintiff commenced the instant action against Dr. Sterry and Ms. Santiago, asserting claims for medical malpractice and lack of informed consent. On June 14, 2013, Justice Alice Schlesinger issued an order granting on consent Dr. Sterry's motion to dismiss, and severing and dismissing "all claims sounding in medical malpractice." Annexed to the order is a so-ordered stipulation dated June 5, 2013 directing plaintiff to "serve an amended complaint removing all medical malpractice language within 30 days of today." On June 7, 2013, plaintiff filed an amended summons and amended verified complaint. On July 28, 2014, the parties filed a stipulation discontinuing the action with prejudice as against Dr. Sterry.

Meanwhile, on July 10, 2014, plaintiff commenced a separate action for products liability against Palomar, the manufacturer of the IPL device (intense pulse light laser device) that Santiago used for plaintiff's laser hair removal treatments (Maribel Buque v. Palomar Medical

Technologies, Inc., Supreme Court, New York County, Index No. 156743/14). In January 2015, the two actions were consolidated.

Plaintiff is now moving for spoliation sanctions striking the answers of Santiago and Palomar for failing to preserve and/or produce the IPL device. On a motion for spoliation sanctions, the moving party must establish that the party having control over the evidence possessed an obligation to preserve it at the time it was destroyed, the evidence was destroyed with a “culpable state of mind,” and the destroyed evidence was relevant to the moving party’s claim or defense. Pegasus Aviation I, Inc v. Varig Logistica SA, 26 NY3d 543, 547 (2015) (quoting VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 AD3d 33, 45 (1st Dept 2012); see Duluc v. AC&L Food Corp, 119 AD3d 450 (1st Dept 2014). If the evidence has been “intentionally or willfully destroyed, its relevance is presumed,” but if the evidence has been “destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party’s claim or defense.” Golan v. North Shore-Long Island Jewish Health System, Inc, 147 AD3d 1031, 1032 (2nd Dept 2017).

Plaintiff has failed to sustain her burden to support spoliation sanctions against Palomar or Santiago, as she has not shown that spoliation occurred. See Watson v. 518 Pennsylvania Housing Development Fund Corp, 160 AD3d 907, 909 (2nd Dept 2018). “Spoliation is the destruction of evidence.” Standard Fire Insurance Co v. Federal Pacific Electric Co, 14 AD3d 213, 219 (1st Dept 2004). Here, the record shows that the IPL device at issue has not been destroyed. By letter dated November 1, 2018, counsel for defendant Santiago advised plaintiff’s counsel that the “hand piece at issue, which has been preserved, has been provided and is available for inspection.” The record also shows that shortly after March 12, 2012, Dr. Sterry

sent the device to Palomar for “evaluation,” and that Palomar returned the device to Dr. Sterry in April 2012, noting in its work order that the “complaint” of “excess tissue reaction” was found “not confirmed.” Thus, the branch of plaintiff’s motion for spoliation sanctions against Palomar and Santiago is denied.

The branch of plaintiff’s motion for an order pursuant to CPLR 3126 striking Santiago’s answer for failing to comply with court-ordered discovery, is likewise denied. The “drastic remedy of striking a party’s pleading pursuant to CPLR 3126 for failure to comply with a discovery order . . . is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith.” Watson v. City of New York, 157 AD3d 510, 512 (1st Dept 2018) (quoting Henderson-Jones v. City of New York, 87 AD3d 498, 504 [1st Dept 2011]). “Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses.” Id (quoting Henderson-Jones v. City of New York, *supra*).

Plaintiff objects that Santiago failed to comply with this Court’s discovery orders issued in July and November 2017, and January, April and June 2018, all of which generally directed Santiago to provide responses to plaintiff’s outstanding discovery demands, without referencing any specific demands, including plaintiff’s May 31, 2017 Notice to Produce the IPL device for inspection. As determined above, in a letter dated November 1, 2018, Santiago’s counsel advised plaintiff’s counsel that the IPL device had been preserved and was available for inspection. The letter states as follows:

A search of my files has not found a formal demand for the preservation of the hand piece at issue here, the Palomar Lux R 500. However, in light of your motion, please be advised that the hand piece at issue, which has been preserved,

has been provided and is available for inspection. Please contact my office in order to arrange for any inspection, photographs, etc.

Plaintiff's counsel responded by letter dated November 6, 2018, "reject[ing] your contention that the handpiece is available for inspection," essentially refusing to inspect the device on grounds that his "client has been irrevocably harmed and prejudiced."

Despite Santiago's unexplained 18-month delay in responding to plaintiff's demand for production of the IPL device, and only after plaintiff moved for sanctions and summary judgment against her, the "drastic remedy" of striking her answer is not warranted. Plaintiff asserts that she has demanded production of the IPL device "throughout the course of this litigation" and admits that without an inspection of the device, her defective product claim against Palomar is "fatal." Plaintiff, however, submits no supporting documents as to any demands to produce the IPL device other than her May 31, 2017 Notice to Produce. Moreover, even assuming, as plaintiff asserts, that she demanded production of the IPL device in 2014, after commencing the products liability action against Palomar, any inspection at that time would not likely have yielded any useful evidence as to condition of the device two years earlier when plaintiff was injured. As noted above, the record shows that Dr. Sterry sent the device to Palomar for evaluation shortly after the accident and Palomar returned it to him in April 2012, after finding that his complaint of "excess tissue reaction" was "not confirmed."

Additionally, plaintiff bases her motion to strike on this Court's 2017 and 2018 discovery orders, which were all issued after she served the May 31, 2017 Notice to Produce the IPL device. Plaintiff provides no explanation for her own delay in not seeking discovery sanctions against Santiago for failing to produce the device during the five-year period between

the commencement of the original action in August 2012 and the Notice to Produce the IPL device in May 2017. Instead, plaintiff filed Note of Issue in June 2018 and made the instant motion in September 2018 seeking sanctions and summary judgment against Santiago, believing that a prima facie case could be made out without the need to inspect the IPL device. Significantly, none of the Court's 2017 and 2018 compliance conference orders specifically reference plaintiff's demand for production and inspection of the IPL device.

Under these circumstances, plaintiff has failed to make a sufficient showing that she has been unduly prejudiced by the delay, and the ultimate sanction of striking Santiago's answer is not warranted. Santiago's counsel shall, therefore, produce the IPL device for plaintiff's inspection within 20 days of the date of this decision and order. Plaintiff's request in the alternative for a "missing evidence charge" shall be addressed at the time of trial.

Finally, the branch of plaintiff's motion for partial summary judgment on its negligence claim against Santiago is denied. Summary judgment is a "rare event in negligence cases." Andre v. Pomeroy, 35 NY2d 361 (1974). "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." Ugarriza v. Schmieder, 46 NY2d 471, 474 (1979); accord McCummings v. New York City Transit Authority, 81 NY2d 923, rearg den 82 NY2d706, cert den 510 US 991 (1993). "The question whether defendant's conduct amounts to negligence is inherently one for the trier of fact." Corbally v. Sikras Realty Co, 161 AD2d 107 (1st Dept 1990). And the trier of fact ordinarily determines the issue of proximate cause. See Haibi v. 790 Riverside Drive Owners, Inc, 156 AD3d 144, 147 (1st Dept 2017).

Plaintiff argues there is no issue she suffered “significant burns, scarring and other injuries” as a result of Santiago’s negligence, and it is “clear” she had “no culpability” for comparative negligence. The fact that an injury or accident occurred does not establish negligence. Although the doctrine of *res ipsa loquitur* creates an inference of negligence, plaintiff is not relying on that doctrine, and in any event, in all but “exceptional cases,” *res ipsa loquitur* is an issue for the jury. Morejon v. Rais Construction Co, 7 NY3d 203 (2006); see Romero v. Xcellent Car Wash & Express Lube, 171 AD3d 584 (1st Dept 2019).

Plaintiff further argues that had Ms. Santiago followed Palomar’s guidelines and training, she would not have been injured. Relying on Santiago’s testimony and the testimony of Palomar’s witness, plaintiff asserts that Santiago improperly performed a “test spot” on March 12, 2012, by waiting only one or two minutes after the “test spot” rather than 30 minutes or 48 hours, depending on plaintiff’s skin type, before proceeding with the third laser treatment. Plaintiff further asserts that Santiago did not use “test strips” to perform the test spot and instead used the “full surface area of the hand piece as a test spot.”

In opposition, Santiago points to the testimony of Palomar’s witness, that even if a test spot is performed, it does not guarantee that a reaction will not occur when the procedure is performed. Given the foregoing testimony of Palomar’s witness, issues of fact exist as to whether Ms. Santiago was negligent in the manner in which she performed the test spot, and whether such negligence resulted in injuring plaintiff.

Accordingly it is

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that within 20 days of the date of this decision and order, counsel for defendant Santiago shall produce the IPL device for inspection by plaintiff; and it is further

ORDERED that the parties shall appear for a pre-trial conference on August 1, 2019 at 11:30 am, in Part 11, Room 351, 60 Centre Street.

DATED: July 8, 2019

ENTER:



J.S.C.
HON. JOAN A. MADDEN
J.S.C.