

**Dennis v City of New York**

2020 NY Slip Op 31140(U)

May 1, 2020

Supreme Court, New York County

Docket Number: 151085/2019

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62**

*Justice*

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**INDEX NO. 151085/2019**

CHRISTOPHER DENNIS, DETRA PRICE-DENNIS, AS  
GUARDIAN AD LITEM, for W.P.D.,,

**MOTION DATE 03/05/2020**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF PARKS AND RECREATION, MOUNT  
SINAI ST LUKE HOSPITAL, JOHN DOE 1 THROUGH 100,  
XYZ CORPORATIONS 1 THROUGH 100, ABC ENTITIES 1  
THROUGH 100

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14,  
15, 16, 17, 19

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is decided as follows:

On January 31, 2019, plaintiffs commenced the instant action alleging as follows: On September 21, 2018, the infant plaintiff fell in the Morningside Park Playground causing her to be stuck with a hypodermic needle. Plaintiff Christopher Dennis brought the infant plaintiff to Mount Sinai St. Luke’s Hospital for treatment. Plaintiff also brought the hypodermic needle to the hospital and demanded to have said needle tested for diseases, which the defendant hospital refused to do, alleging that there was no protocol for same. Plaintiffs’ second cause of action alleges that by failing to test said needle, the hospital did perform such medical care in a negligent, grossly negligent and/or reckless manner. Specifically, plaintiff alleges that defendant “failed to follow accepted standards of medical and surgical practice existing at the time and place of treatment, by failing to provide Minor Plaintiff with HIV preventive medication; failing to test the needle to determine any potential exposure to diseases such as HIV and others.” Based upon same, plaintiff’s

third cause of action alleges negligent infliction of emotional distress. Defendant, St. Luke's now seeks dismissal of this action based upon plaintiff's failure to file a certificate of merit as is required by CPLR §3012-a (a)(1)

Pursuant to CPLR 3012-a (a)(1)(a);

In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that: (1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action.

As discussed in *Payette v. Rockefeller Univ.*, 220 A.D.2d 69, 71–72 (1<sup>st</sup> Dept 1996),

“A claim sounds in medical malpractice when the gravamen of the complaint is ‘negligence in furnishing medical treatment to a patient.’ (*Bleiler v Bodnar*, 65 NY2d 65, 73.) ‘Conduct may be deemed malpractice, rather than negligence, when it ‘constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.’” (*Scott v Uljanov*, 74 NY2d 673, 674-675, quoting *Bleiler v Bodnar*, supra, at 72.) In *Spatafora v St. John's Episcopal Hosp.* (209 AD2d 608, 609), the Second Department held that when ‘the incompetence alleged is of a specialized medical nature, deriving from the physician-patient relationship, and substantially related to medical diagnosis and treatment, the action it gives rise to is by definition one for medical malpractice rather than for simple negligence.’ (See, *Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603; *Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256.)”

Here, while plaintiff attempts to characterize its allegations as negligence, gross negligence and recklessness, plaintiff specifically alleges that defendant “failed to follow accepted standards

of medical and surgical practice existing at the time and place of treatment, by failing to provide Minor Plaintiff with HIV preventive medication; failing to test the needle to determine any potential exposure to diseases such as HIV and others.” The issues of whether to provide plaintiff with medication and whether to test a specific needle are specifically related to the medical diagnosis of the specific plaintiff and as such, defendant has established that it is entitled to dismissal of this action.

In opposition, plaintiff cites *Weiner v. Lenox Hill Hosp.*, 88 N.Y.2d 784, 786 (1996). In *Weiner*, the issue on appeal was whether plaintiff’s complaint against a hospital, alleging that the hospital failed to properly test its blood supply from HIV contamination, sounds in medical malpractice or negligence for purposes of selecting the applicable Statute of Limitations. There, in finding that plaintiff’s allegations sounded in negligence and not malpractice, the Court reasoned “The core issue in this case--the adequacy of the Hospital's blood testing and screening procedures--does not implicate questions of medical competence or judgment linked to the treatment of [plaintiff], but turns instead on the Hospital's independent duties as a blood-collection center.” Plaintiff further argues that the failure to supervise and train employees responsible for testing the needle is also a negligence claim. See *Bleiler v. Bodnar*, 65 N.Y.2d 65, 74 (1985).

Plaintiff’s cited cases all refer to negligence not specific to the treatment of a specific patient, but to the duties of a hospital as a whole to screen its blood supply, as a whole, for infectious diseases and the adequacy of a hospital’s hiring procedures, as a whole, respective. At issue in this case is whether the treatment provided (or not provided) to the infant plaintiff was in line with generally accepted medical practice and whether the testing of an individual needle and procedures for same are in line with generally accepted medical procedures. As such, plaintiff’s complaint is required to be accompanied by a certificate of merit pursuant to CPLR §3012-a (a)(1).

As the negligence alleged in plaintiff’s third cause of action for negligent infliction of emotional distress, said claim must also be dismissed.

ORDERED that the motion of defendant Mt. Sinai St Luke Hospital to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

5/1/2020  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER

APPLICATION:

CHECK IF APPROPRIATE:

  

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

  

SUBMIT ORDER

FIDUCIARY APPOINTMENT

  

REFERENCE