

Ji Young Chung v Gulrajani

2020 NY Slip Op 32386(U)

July 20, 2020

Supreme Court, New York County

Docket Number: 161117/2018

Judge: W. Franc Perry

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

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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JI YOUNG CHUNG

Plaintiff,

- v -

RAVIRAJ GULRAJANI,

Defendant.

-----X

INDEX NO. 161117/2018
MOTION DATE 06/24/2019
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISSAL.

Plaintiff commenced this action alleging that defendant knowingly and intentionally transmitted genital warts and the Human Papalova Virus (“HPV”) to her. Defendant denies plaintiff’s accusations asserting that it is impossible for him to have knowingly transmitted these conditions because he does not and has not ever had them.

Defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a)(1), on the grounds that the action is barred by documentary evidence, and pursuant to CPLR 3211 (a)(7) asserting that plaintiff’s allegations do not state a cognizable cause of action.

In support of his motion, defendant argues that the complaint relies on bare legal conclusions as to the elements of the causes of action, as those conclusions contradict indisputable scientific principles and fact.

Plaintiff’s first cause of action is negligence. Plaintiff asserts that transmission of a sexual transmitted disease (STD) is grounds to support claims of negligence and fraud. She claims that her negligence cause of action is based on defendant’s transmission of HPV and genital warts to her and that her claim is further supported by the specific facts alleged in the complaint.

The complaint states that plaintiff was a virgin when she first met defendant in July 2017. They first engaged in unprotected sex in December 2017. Prior to that encounter, she had not exhibited any symptoms of, or never had been diagnosed with an STD. The complaint asserts that she asked defendant if he had an STD and he denied having one. They continued to engage in unprotected sex from December 2017 through February 2018.

In January 2018, plaintiff states that she saw a prescription in defendant's apartment and did not know what it was. At that time, she also observed genital warts on defendant's penis, but did not know if they were transmittable. Plaintiff argues that these undisputed facts are sufficient to support the allegations in her complaint and preclude dismissal.

Defendant argues that plaintiff's claims fail to assert facts in support of any element of her claim of negligence. He argues that her claims do not show that he owed a duty to plaintiff, that he breached that duty and that she suffered damages as a result of said breach. Defendant further asserts that the complaint does not show that his alleged negligence was a proximate, or legal cause of the event that produced the harm allegedly sustained by plaintiff.

Defendant further argues that plaintiff's alleged injuries were neither foreseeable nor knowable to him because, as defendant it is a factual impossibility for him to know that he had or has HPV. Defendant avers that, according to Planned Parenthood and the Centers for Disease Control ("CDC"), there is no medical test which can diagnose a male human for HPV. Defendant states that plaintiff's claims are contradicted by the documentary evidence and do not show that his alleged negligence was a proximate or legal cause of the event that produced plaintiff's harm. In addition, defendant asserts that plaintiff's cause of action for fraudulent inducement cannot stand, as that there is no proof that he knowingly misrepresented a material present fact, intended to deceive and induce her to act on it which resulted in an injury.

Defendant further states that plaintiff possesses his HIPPA forms, which show that he has never been diagnosed with either genital warts or HPV. Defendant further states that plaintiff's injury does not exist, as her medical records show that she is not a carrier of the two types of HPV which cause cancer.

Defendant also argues that in New York, it is well settled in cases involving an alleged sexually transmitted disease or infection, that an affirmative legal duty to disclose has only been held to exist in cases where a party's medical records show that the party has been diagnosed with HPV or genital warts. *Maharam v. Maharam*, 123 AD3d 165 [1st Dept. 1986]. Thus, defendant states that if one could not know that one carries around the HPV or genital warts it is impossible for one to foresee the risk of harm of transmitting the HPV or genital warts.

Defendant states that there is no proof that he caused her ailments, as HPV can be spread by means other than sex. According to the American Cancer Society, HPV can also be spread by skin to skin contact with the area of the body infected with HPV and that there may be other ways to become infected that aren't yet clear and that having HPV does not mean that a person will get cancer.

Plaintiff opposes the motion arguing that transmission of a sexual transmitted disease ("STD") is grounds to support claims for negligence and fraud. Specifically, defendant knew that he had genital warts and should have informed her of their possible physical effects to her body. In addition to outlining her non-existent sexual history prior to her unprotected encounters with defendant and the fact that she was never diagnosed with an STD, meet the standard to survive defendant's motion.

Plaintiff also argues that the uncertified medical records submitted in support of defendant's motion do not support the kind of documentary evidence that would support a CPLR 3211(a)(1) motion. Specifically, plaintiff asserts that the documents are not in admissible form and that none of the documents refute any of the claims in the complaint.

When a party brings moves to dismiss a complaint based on documentary evidence, pursuant to CPLR 3222 (a)(1), that motion will only be granted where the documentary evidence refutes the plaintiff's factual allegations, establishing a defense as a matter of law. The documents must flatly contradict allegations or conclusively establish defense as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314 (2002). If the court doesn't find the submissions "documentary", the motion must be denied.

Contrary to movants assertions, plaintiff's allegations state a cognizable cause of action. Plaintiff correctly states that the transmission of an STD does support claims of negligence and fraud. In addition, the items submitted, by defendant, in support of the motion are not such that resolve all of the pertinent issues in this case. Each item; the plaintiff's medical chart of Dr. Wong, defendant's health insurance payment record, and defendant's Urgent Care receipt do not go the heart of plaintiff's claim, which alleges defendant's negligence in the transmission of an STD. The items do not show that defendant did not transmit the HPV virus to plaintiff. In fact, they raise questions as to whether the items are relevant to this case. Although this is not a motion for summary judgment, wherein the court must decide if issues of fact exist warranting a decision by the trier of fact, the items submitted by the movant raise questions about his defense and the arguments made by plaintiff show that dismissal of this complaint is not warranted.

The motion is denied. This is the decision and order of the Court.

7/20/2020

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE