

London v Brookdale Univ. Hosp. & Med. Ctr.

2020 NY Slip Op 32825(U)

July 23, 2020

Supreme Court, Kings County

Docket Number: 518655/19

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of July, 2020.

P R E S E N T:

HON. RICHARD J. VELASQUEZ,
Justice.

-----X
OMOLOLU LONDON,

Plaintiff,

- against -

THE BROOKDALE UNIVERSITY HOSPITAL AND
MEDICAL CENTER,

Defendants.

-----X

The following e-filed papers read herein:
Nos.¹

DECISION and ORDER

Index No. 518655/19

Seq #001

NYSCEF Doc.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

8-13

Opposing Affidavits (Affirmations) _____

17- 21

Reply Affidavits (Affirmations) _____

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After having heard Oral Argument and upon review of the foregoing papers, defendant Brookdale Hospital Medical Center, incorrectly sued herein as the Brookdale University Hospital Medical Center (BUHMC), moves, in motion (mot.) sequence (seq.) one, for an order, pursuant to CPLR 3211 (a) (5) and 214-a, dismissing the action with

¹ New York State Courts Electronic Filing Document Numbers

prejudice on the grounds that the statute of limitations bars the claim of plaintiff, Omololu London (London).

Background

Filing of the summons and complaint on August 22, 2019 commenced this action. Ms. London alleges that she suffered permanent injury to her right wrist, elbow and shoulder on August 25, 2016 while being transported on a gurney inside defendant's hospital. More specifically, Ms. London alleges that hospital employees failed to fold her arms and secure them on the gurney before transporting her which allowed her arms to protrude to the side and strike a door post.

BUHMC asserts that CPLR 214-a, the two-year six-month statute of limitations for medical malpractice actions governs in this case and that plaintiff's deadline to file her claim after the accident expired February 25, 2019. BUHMC seeks dismissal of this action because the August 22, 2019 filing of Ms. London's complaint occurred nearly six months after the deadline. BUHMC notes that Ms. London's October 28, 2019 bill of particulars clearly alleges that it committed malpractice and departed from good and accepted medical standards in providing care to her when her accident occurred. Further, BUHMC argues that the nature of a defendant's duty constitutes the critical factor in determining whether an action sounds in negligence or medical malpractice, and, here, its duty was substantially related to the medical treatment it provided Ms. London.

In opposition, plaintiff argues that her injuries resulted from ordinary negligence and/or carelessness by a hospital employee, not medical malpractice. She therefore asserts that the three-year statute of limitations in CPLR 214 (5) governs her claim. Ms. London asserts that no expert is required to explain BUHMC's duty to her in this situation;

rather, only common sense is needed to understand her claim. She further argues that her transport on a gurney does not qualify as medical treatment, and such activity comes within the many types of claims against a hospital which do not involve medical malpractice. Ms. London admits that her original bill of particulars erroneously contained language indicating a medical malpractice claim but notes that she served an amended verified bill of particulars on February 4, 2020 to provide clarity. She stresses that her amended bill of particulars explicitly indicates that her claim is not for medical malpractice (see NYSCEF Doc. No. 21 at 6).

BUHMC, in reply, reasserts that the duty it owed Ms. London was substantially related to medical treatment and that her action thus sounds in medical malpractice. It argues that the decision to transfer Ms. London from the emergency room on a gurney versus another means of transport depended on the assessment of her medical status and a determination of the degree of restraint required to keep her safe. It submits that binding precedent exists categorizing a claim against a hospital for injuries caused by insufficient patient restraints/safeguards as an action in medical malpractice rather than ordinary negligence. Hence, it cites *Fox v White Plains Medical Center* (125 AD2d 538 [2d Dept 1986]), where that plaintiff was injured when she fell after attempting to walk to a bathroom after minor surgery during which she was placed under general anesthesia. There, the Appellate Division Second Department found plaintiff's allegation that her accident was caused by the hospital's failure to provide side rails on the patient's bed constituted medical malpractice. BUHMC claims that the medical decision here, as in *Fox*, cannot be readily analyzed on the basis of the a jury's common everyday experiences. BUHMC also argues that, contrary to Ms. London's assertion, her amended

bill of particulars still asserts a medical malpractice claim by referencing its "negligent acts, omissions, deviations and departures from good and accepted medical practice" (*id.* at 2).

Discussion

Generally, "medical malpractice is simply a form of negligence, no rigid analytical line separates the two" (*Scott v Uljanov*, 74 NY2d 673, 674 [1989]). However, it is well settled that

"[t]he distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts"

(*Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1339 [2d Dept 2019] quoting *Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978, [1983]; see also *Robinovich v Maimonides Med Ctr.*, 179 AD3d 88, 93 [2d Dept 2019]).

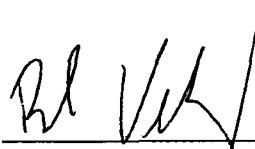
An action sounds in medical malpractice "when the complaint challenges the medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints" (*D'Elia v Menorah Home & Hosp. for the Aged and Infirm*, 51 AD3d 848, 851 [2d Dept 2008] quoting *Scott v Uljanov*, 74 NY2d at 675). In contrast, ordinary negligence exists where the facts do not involve diagnosis, treatment or the failure to follow a physician's instructions (see *Papa v Brunswick General Hospital*, 132 AD2d 601, 603 [2d Dept 1987]; see also *D'Elia*, 51 AD3d at 851).

Consequently, BUHMC misplaces reliance on *Fox* as it is distinguishable from the occurrence herein. *Fox* concerned an allegation that the hospital was negligent because it failed to ensure that that plaintiff's bed had safety rails, which could have proven useful following her surgery. Here, however, the challenged conduct is limited (at this early litigation stage) to simple failure of hospital staff to ensure the patient was positioned in such a way to fit through the route's doorways during her transport. There is no evidence that a physician assessment, diagnosis, decision or instruction was involved in requiring that staff position Ms. London's arms so she safely fit through a doorway. Checking whether a patient's limbs are hanging off the side of a gurney would be required regardless of the patient's condition. In addition, no allegations claim it was a physician's failure to instruct the staff to ensure the patient fit through all the doors encountered, or that the person(s) operating the gurney needed special instruction to manually position or otherwise use straps to safeguard Ms. London's arms. The alleged staff failure to ensure that the gurney itself was safely used and maneuvered through hallways and doorways can certainly be readily assessed on the basis of the trier of facts' common everyday experience(s) (*see Papa*, 132 AD2d at 603-604; *see also Wesolowski v St. Francis Hosp.*, 175 AD3d 1461, 1463 [2d Dept 2019] [as "defendant did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the defendant failed to establish that the plaintiff's claims related to medical treatment . . .]). Plaintiff's action thus presents an ordinary negligence claim subject to the three-year statute of limitations set forth in CPLR 214 (5) and is not time-barred given that she filed her complaint within three years of the alleged occurrence.

Accordingly, it is **ORDERED** that BUHMC's motion to dismiss, mot. seq. one, is denied. (MS#1).

This constitutes the Decision/Order of the Court.

Date: JULY 23, 2020



RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

JUL 23 2020

KINGS COUNTY CLERK
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