

Hampton v City of New York
2021 NY Slip Op 32327(U)
May 18, 2021
Supreme Court, Bronx County
Docket Number: Index No. 28392/2020E
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
EDWARD HAMPTON,

Plaintiff,

-against-

CITY OF NEW YORK, et. al.,

Defendants.
-----X

Index No.: 28392/2020E

DECISION/ORDER

Present:

HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Dismiss:

Papers Numbered

Notice of Motion,	
Affirmation in Support and Exhibits	<u>1</u>
Memorandum of Law.....	<u>2</u>
Affidavit of Dr. Urban.....	<u>3</u>
Amended Memorandum of Law.....	<u>4</u>
Memorandum of Law in Opposition.....	<u>5</u>
Affirmation in Opposition.....	<u>6</u>
Memorandum of Law in Reply	<u>7</u>

Motion by defendants, New York City Health & Hospital Corporation s/h/a New York City Health & Hospitals Corp., and Dr. Munaf Al Moadhen (“NYCHHC”), pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiff’s complaint with prejudice as against NYCHHC, is resolved as follows:

This action stems from an injury plaintiff sustained while he was running from plainclothes NYPD officers, who he alleges, did not identify themselves, which caused plaintiff to believe he was being robbed at gunpoint. On April 22, 2020, prior to midnight, plaintiff presented to Lincoln Emergency Department via ambulance with an injury to his left knee. Plaintiff’s medical record indicates he fell while trying to escape the police. Specifically, that plaintiff stated “he was running away form the police. Then he tripped over trash and hit his knee.” (Sic). Plaintiff was examined at Lincoln, x-rays were taken, a CT scan was taken, and plaintiff, after refusing an inpatient transfer to Hospital for Special Surgery (“HSS”), was discharged home with his wife, with a knee immobilizer, crutches, ibuprofen 600-800mg for

pain, and the telephone number to call and go to the trauma clinic at HSS the following day with the specific doctor plaintiff was to see. Plaintiff's Lincoln hospital record indicates that plaintiff's imaging radiographs and CT of left knee "suggestive of L tibial plateau fracture." The hospital record notes that due to the Covid-19 pandemic, Lincoln is not performing orthopedic surgeries at that time. Plaintiff's record notes he had not consumed alcohol and he uses marijuana recreationally. Plaintiff's wife signed the discharge instructions.

Plaintiff served a notice of claim and an amended notice of claim which allege the following claims as against NYCHHC to wit: Lincoln falsely recorded that plaintiff fell while running from the police to protect the NYPD and to discriminate against an African American patient, that Lincoln either intentionally or negligently misplaced plaintiff's CAT scan, Lincoln misrepresented in plaintiff's medical record that he used marijuana recreationally, he was not given pain killers, despite requesting them, and that at because Lincoln did not send him in an ambulance to HSS, he was unable to get an appointment there for several days, and therefore his surgery to both his fractured tibia and broken femur was delayed.

Plaintiff's summons and complaint alleges the following as against NYCHHC to wit: medical malpractice for doctoring the medical records, for losing the CT scan, for failure to stabilize plaintiff's leg, for falsely certifying that he was stable and had no acute injury, and for failing to provide pain killers (seventh cause of action), negligent, reckless or intentional misrepresentation for downplaying plaintiff's injuries and doctoring the record, for wanting him to seem like an undeserving criminal, who deserved abuse, which would reflect poorly on him in an action against the police, and by discharging him prematurely, would break the chain of causation from the arrival at Lincoln until he obtained proper medical care (eighth cause of action), discrimination in public accommodations pursuant to New York Executive Law §296-2(a), in discriminating against plaintiff because he was a Black man and provided intentionally substandard care (ninth cause of action), and lastly, failure to stabilize and transfer pursuant to 42 U.S.C. §1395dd, in failing to stabilize and transfer plaintiff from Lincoln to HSS, but instead told him to call an Uber and did not provide him with any medical records (tenth cause of action).

NYCHHC moves arguing that as every decision Lincoln made with respect to plaintiff's care and treatment was directly impacted by the Covid-19 pandemic, part of its Covid-19

response, and its required compliance with the City and State directives involving the same, NYCHHC is immune from suit pursuant to Public Health Law §§ 3080-3082, further, plaintiff's complaint fails to state a cause of action for fraud/misrepresentation, violations of Executive Law §296-2(a), and violations of 42 U.S.C. §1395dd (EMTALA).

Public Health Law §3082 grants civil and criminal liability to health care providers who arranged for/provided health care services during the Covid-19 emergency, so long as those services had been impacted by the pandemic and rendered in good faith. (Public Health Law §3082(1)(b) & c)). Public Health Law §3082 was deemed to have been in full force and effect on or after March 7, 2020. (*Matos v. Brian Bobby Choing, M.D.*, Cite).

In support of their motion to dismiss plaintiff's medical malpractice cause of action, NYCHHC submits the affidavit of William P. Urban, M.D., the Chief of Orthopedic Surgery at Lincoln. Dr. Urban states that Lincoln was prohibited from performing elective surgeries on April 22, 2020, under penalties of having its operating certificate revoked. Lincoln was a designated Covid-19 treatment facility and was required to divert all available resources to the Covid-19 pandemic. Lincoln's orthopedic staff had been reassigned to deal with the Covid-19 response and Lincoln referred non-emergent patients to HSS, which was one of the only facilities performing elective orthopedic surgeries in New York City. Dr. Urban reviewed plaintiff's medical records and states that plaintiff was ultimately diagnosed with a left tibial plateau fracture (Schatzker type 5) and per Lincoln's response to the Covid-19 outbreak, plaintiff was offered an inpatient transfer to HSS. Plaintiff opted to go as outpatient and a consult was scheduled for April 23, 2020 between 9:00-10:00 a.m. Dr. Urban avers that plaintiff's injury was not threatening to life or limb and he did not require immediate surgery. A brief delay in performing an open reduction and internal fixation on the left tibial plateau would not result in the loss of the patient's life or limb, would not impact the success of the surgery, the patient's expected recovery, or the patient's future prognosis. If Lincoln had performed surgery on the plaintiff's leg, Lincoln would have been in violation of the Governor's and Mayor's orders.

Plaintiff argues in opposition that NYCHHC was grossly negligent, however, a review of plaintiff's pleadings indicates that plaintiff did not plead gross negligence in his complaint or notice of claim. As such, plaintiff cannot now raise it for the first time in opposition to

NYCHHC's motion. Plaintiff states that he will no longer pursue his claims that plaintiff should have underwent an operation at Lincoln, however, maintains that the lack of accurate record keeping, including the temporary loss of plaintiff's CT scan results, delayed and exacerbated his injury. In light of plaintiff's option to have an inpatient transfer to HSS and plaintiff declining the same, and HSS's ability to perform a CT scan, if they needed one prior to surgery, the Court finds this argument unpersuasive. The Court notes that plaintiff does not attach to his pleadings a certificate of merit required in a medical malpractice action that indicates plaintiff's counsel consulted with a physician and that there is a reasonable basis for the commencement of the medical malpractice portion of this action. (CPLR §3012-a).

Accordingly, as the decisions regarding the treatment rendered to plaintiff were directly affected by Lincoln's emergency response to the Covid-19 pandemic, and its required compliance with the City and State's directives, the NYCHHC defendants are immune from suit for the medical care provided to plaintiff. Further, the Governor's Executive Order No. 202.10, confers absolute immunity for the purported failure to maintain accurate records during the Covid-19 pandemic. As such, plaintiff's claims sounding in medical malpractice are dismissed.

NYCHHC argues that plaintiff fails to state a cause of action sounding in fraud/misrepresentation, alleged violations of Executive Law §296-2(a), and alleged violations of 42 U.S.C. §1395dd (EMTALA).

Plaintiff does not allege any of the elements of a fraud/misrepresentation claim. Plaintiff alleges that inaccuracies (running from police and recreational marijuana use) were placed in his medical record to make him appear to be an undeserving criminal, worthy of abuse, and to make any action against NYPD weaker. Plaintiff must have asserted "a misrepresentation or a material omission of fact which was false, and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137 [2017]). Plaintiff has not asserted such allegations here. While plaintiff does allege that inaccuracies were entered into his medical record, that is the extent of what he plead. There are no allegations of purpose, justifiable reliance, and injury. As such, plaintiff's claims for fraud/misrepresentation are dismissed for failure to state a cause of action.

Plaintiff similarly fails to state a cause of action for violations of Executive Law §296-2(a). Plaintiff alleges that he was provided substandard care at Lincoln because he was a black man. Executive Law §296-2(a) provides that it is an unlawful discriminatory practice for any person...owner,... agent, ...employee, ...in a place of public accommodation... because of race...directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities, or privileges thereof.” Plaintiff fails to allege what accommodations, advantages, facilities, or privileges that were refused or withheld. Plaintiff was admitted to the emergency room, examined, treated, and was discharged with crutches, a knee immobilizer, and directions for treatment at HSS the following day. In opposition to NYCHHC’s motion, plaintiff points to widespread discrimination in the United States healthcare system, however, points to no specific instances where he was discriminated against in relation to Lincoln. Plaintiff posits that the information put in his chart related to the police and drug use were as a result of him being black, however, this does not state a cause of action pursuant to Executive Law §296-2(a). Accordingly, plaintiff’s claims related to violations of Executive Law §296-2(a), are dismissed.

Lastly, plaintiff alleges that NYCHHC failed to stabilize and transfer him from Lincoln to HSS pursuant to 42 U.S.C. §1395dd (EMTALA). Lincoln could not perform surgery on plaintiff per the Governor’s and Mayor’s orders. Per the affidavit of Dr. Urban, plaintiff’s condition was not emergent, and a brief delay in performing an open reduction and internal fixation on the left tibial plateau would not result in the loss of the patient’s life or limb, would not impact the success of the surgery, the patient’s expected recovery, or the patient’s future prognosis. Lincoln’s duty plaintiff under EMTALA ended when Lincoln stabilized his leg via knee immobilizer, provided him with crutches that he could ambulate with during his admission to the Emergency Department there. Moreover, while plaintiff disputes this, plaintiff’s medical record indicates that plaintiff refused the transfer to HSS, so alternately an outpatient appointment was provided to him with the number to HSS, the doctors name, and a date and time for arrival to the orthopedic clinic. “EMTALA was designed to prevent hospitals from either turning down or “dumping” indigent patients, and is not a measure intended to require hospitals to provide long-term, non-emergency care for uninsured patients.” (*Espinosa v. Montifiore Med. Ctr.*, 185

A.D.3d 474 [1st Dept. 2020]). Accordingly, plaintiff has failed to state a cause of action pursuant to 42 U.S.C. 1395dd and plaintiff's tenth cause of action is dismissed.

Based on the foregoing, NYCHHC's motion is granted and this matter is dismissed as against New York City Health & Hospital Corporation and Dr. Munaf Al Moadhen.

NYCHHC is directed to serve a copy of this order, with notice of entry, upon plaintiff within 30 days of the entry date.

This constitutes the decision and order of the Court.

Dated: 5/10/21
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.