

Curry v Martin

2021 NY Slip Op 34262(U)

September 23, 2021

Supreme Court, Bronx County

Docket Number: Index No. 31668/2018E

Judge: Andrew Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 4

Thornton Curry

Plaintiff(s),

-against-

Lola Lee Martin and Mrs. G's
Services LLC

Defendant(s),

Index No. 31668/2018E

Hon. ANDREW COHEN

Justice Supreme Court

The following papers numbered 1 to 54 were read on this motion (Seq. No. 3) for
noticed on _____

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

Motion is Respectfully Referred to Justice:

Dated:

Dated: 9/23/2021

Hon.

ANDREW COHEN, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 4**

**THORTON CURRY, as Administrator of the Estate of
HANNAH CURRY,**

Plaintiff,

**Decision and Order
Index No. 31668/2018E**

-against-

LOLA LEE MARTIN and MRS. G'S SERVICES LLC,

Defendants.

The following papers, numbered 1-3, were considered on the motion for summary judgment:

PAPERS

NUMBERED

Notice of Motion and annexed Exhibits and Affidavits.....	1
Answering Affidavits and Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers, the motion for summary judgment is denied:

Plaintiff's decedent allegedly suffered injuries, while receiving nursing services from the defendants, that included necrosis and ultimately amputation above the knee of the right leg. Defendant Lola Lee Martin (Martin) was a home attendant employed by defendant Mrs. G's Services, LLC (Mrs. G's) and assigned to care for the decedent.

Mrs. G's now moves for summary judgment, pursuant to CPLR 3212, asserting that it is entitled to summary judgment since neither Martin nor Mrs. G's breached any duty owed to the decedent or that a breach of duty was the proximate cause of decedent's injuries. Specifically, their expert, Dr. Suggs opines that decedent's wounds were clinically unavoidable given decedent's comorbidities. Mrs. G's contends that there is no evidence the moving defendant negligently hired an unqualified, unlicensed or inexperienced agent, servant or employee and that Martin was acting within the scope of her employment while treating the decedent. Mrs. G's also contends that plaintiff's claim for res ipsa loquitor must fail because decedent's injuries occurred in the absence of the defendants' negligence and there is no evidence that the injuries were caused by instrumentality within defendants' exclusive control. Finally, Mrs. G's asserts that dismissal of the complaint is appropriate as sanctions for spoliation of evidence.

The complaint and amended complaint allege a cause of action for negligence and a second cause of action for negligent hiring and a third cause of action denominated as "res ipsa

loquitur” was contained in the complaint, which the court assumes that the plaintiff intends to prove the defendant’s negligence via this evidentiary doctrine.

To succeed on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If such a showing is made, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact warranting a trial of the matter (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In support of the motion, Mrs. G’s submitted the affirmation of Dr. William Suggs, M.D. The substance of Dr. Suggs’s affirmation, based upon his experience and a review of plaintiff’s decedent’s medical records, is that the injuries were the result of advanced vascular disease associated with her history of stroke, diabetes, cancer and her status as non-ambulatory. He further opines that amputation was unavoidable and “would have occurred in the absence of any act, negligent or not, by the defendants.”

In opposition to the motion, plaintiff submitted the affirmation of Dr. David A. Mayer, M.D., F.I.C.S. It is Dr. Mayer’s opinion, based upon his experience and reviewed medical records, that while Plaintiff’s decedent’s vascular system was compromised, amputation would not have been required in the absence of negligence. At deposition, the plaintiff testified that he observed a “straight cut” on plaintiff’s decedent’s foot. Dr. Mayer’s opinion is that such a wound is not consistent with a naturally occurring wound for someone in plaintiff’s decedent’s condition. The conflicting expert opinions of Drs. Suggs and Mayer preclude a granting of summary judgment (*See Santiago v Brandeis, M.D.*, 309 AD2d 261 [1st Dept 2003]).

While the moving papers and the opposition spend substantial time discussing a specific allegation of negligence allegedly perpetrated by Martin, the affirmation of Dr. Mayer is sufficient to establish the existence of issues of fact as to whether the negligence of the defendant caused the plaintiff’s decedent’s injuries. Accordingly, Mrs. G’s motion for summary judgment is denied.

With respect to Mrs. G's request for dismissal of the complaint as sanctions for spoliation of evidence, this is also denied. In moving for spoliation sanctions, a party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense (*see VOOM HD Holdings LLC v EchoStar Satellite, L.L.C.*, 93 A.D.3d 33, 45 [1st Dept 2012] [internal quotation marks omitted]). To determine whether sanctions are warranted, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of fairness (*see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]). The burden is on the party requesting sanctions to make the requisite showing (*Duluc v AC&L Food Corp.*, 119 AD3d 450 [1st Dept 2014]). "Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes the sole means by which the defendant can establish its defense, or where the defense was otherwise fatally compromised or defendant is rendered prejudicially bereft of its ability to defend as a result of the spoliation" (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016] [internal citations and quotation marks omitted]). The Court finds that Mrs. G's failed to sustain its burden. Here, Mrs. G's did not show that plaintiff had an obligation to preserve the scissors since there no was evidence plaintiff was contemplating potential future litigation when he brought the scissors to the doctor (*VOOM HD Holdings LLC v EchoStar Satellite, L.L.C.*, 93 AD3d at 43). Moreover, since Mrs. G's claims that Martin never used the scissors on the decedent's foot, it cannot be held that Mrs. G's has been rendered unable to establish its defense as a result of the spoliation.

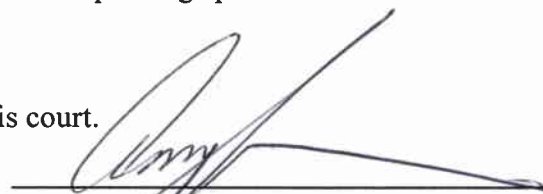
Accordingly, it is

ORDERED, that defendant Mrs. G's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that the portion of Mrs. G's motion requesting spoliation sanctions is similarly denied.

This constitutes the decision and order of this court.

Dated: September 23, 2021



Andrew Cohen, J.S.C.