Yan v Phelps Memorial Hosp.
2021 NY Slip Op 34318(U)
September 30, 2021
Supreme Court, Westchester County
Docket Number: Index No. 70292/2018
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MARISOL YAN & JUANA MARTINEZ,

Plaintiff,

Decision and Order
Index No. 70292/2018
Seq # 3

-against-

PHELPS MEMORIAL HOSPITAL and SECURITY AT PHELPS,

Defendants,

----------x

The following papers were read on a motion for an order dismissing the complaint:

Notice of Motion/Statement of Material Facts/Affirmation/Exhibits A-S
Affirmation in Opposition/Counter Statement of Material Facts/Exhibits 1-12
Reply Affirmation

Upon the foregoing papers, it is ordered that the motion to dismiss is granted.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs commenced this action on December 12, 2018, seeking monetary damages against the defendants with regard to an incident that occurred at Phelps Memorial Hospital on December 11, 2017. The complaint alleges that on December 11, 2017, Marisol Yan ("Yan") was experiencing excruciating back pain that radiated down her leg. She was out of her medication and went to the Phelps Memorial Hospital ("Phelps") emergency room with her mother, Juana Martinez ("Martinez").

As per the hospital records, Yan was triaged at 6:55 a.m. She was evaluated and at approximately 8:16 a.m., she was given acetaminophen, a 5% lidocaine patchthe and

Toradol (Ketorolac Tromethamine, which were not her usual medications prescribed by her doctor. Yan states in her complaint that she requested to speak with a psychologist because she was having suicidal thoughts, she spoke with a psychologist/psychiatrist and was cleared for discharge.

The hospital notes indicate that at 9:55 Yan was feeling more comfortable with the medications given, but then at or about 10:30 she complained that she was still having pain and 10mg/325 mg of percocet was ordered for her, which she took after having something to eat. At 11:37, Yan's pain intensity was recorded at 4. The records indicate that at or about 12:31, discharge was attempted with instruction for follow up and pain management, but Yan emphatically and adamantly declined to leave and requested a neuro/ortho surgical doctor. The notes indicate that Yan was repeatedly advised that the services she required were not offered at the hospital and that her discharge instructions included followup and pain management. Yan alleges that she respectfully asked to be given twenty minutes for the pain to resolve. At 13:19, the notes indicate that Yan was still refusing to leave and refusing to let the registered nurse take out a saline lock.

The hospital records indicate that at 14:06, Yan was escorted out of the room by security and a nurse manager; that she ambulated to the waiting room with steady gait; she screamed and yelled at the nursing staff and security, stating that she was not going to leave; and when the police arrived, she agreed to have her IV lock discontinued.

Yan alleges that, although Martinez went outside of the room and told the security personnel that they were going to leave the hospital, but they were just waiting for Yan to feel better, the security barged into the room and grabbed Yan by both arms, under her armpits and pulled her out of the room. She alleges that she pleaded with them to stop, but

they continued to pull her into the hallway and she fell to the floor. Yan asserts that as she was being pulled by her arms, she felt something pop in her right shoulder. She states that Martinez called the police and after the police arrived, her IV was removed and she was allowed to get dressed. Yan alleges that Martinez recorded the incident with her cell phone, but the police asked Martinez to give them her phone so they could delete the video, which they did. The hospital on the other hand asserts that there is not video footage showing that Yan was pulled out of the room by Phelps security and the video footage shows Yan, Martinez, Phelps security and medical staff while she was escorted out of the emergency department. The defendant asserts that the footage shows Yan shoving a female nurse and shouting at a Phelps security guard and the police were called, with Yan walking out of the hospital on her own after the police arrived.

After leaving Phelps, Yan went to Westchester Medical Center, where she was medicated and discharged home, but did not report any shoulder pain. The following day, Yan went to her primary care office at Open Door and reported upper arm pain. Yan returned to Open Door on December 14, 2017, and was seen by Dr. Isentein, who made notes of his conversation with Dr. Patrone in the ER, but did not note any right shoulder pain by Yan. On December 26, 2017, however, Yan returned to Open Door complaining of arm and neck pain on her right side.

On March 5, 2018, Yan returned to Open Door reporting that her shoulder pain had worsened and she was referred to an orthopedist, Dr. Daniel Zelazny, who referred her for an MRI of her shoulder after she she had no relief from a corticosteroid injection. The MRI showed a high grade articular sided partial-thickness tear of the supraspinatus; posterior superior labral tear; increased edema signal noted within teres minor musculature. On

March 12, 2018, Dr. Isenstein stated that an x-ray performed on January 29, 2018 showed severe narrowing of the acromioclavicular joint suggestive of ostecarthritis and was referred to orthopedics for possible further management.

On July 16, 2018, Dr. Zelazny documented that Yan reports continued shoulder pain as well as neck and right upper extremity pain with numbness radiating from the neck to her hand and that he is concerned about her symptoms and exam findings consistent with cervical radiculopathy.

On October 8, 2018, Yan was examined by Dr. Yigal Samocha, an orthopedic surgeon, who reported that Yan had tenderness to palpation in the right paraspinal musculature and some weakness noted of her right rotator cuff musculature, consistent with her tear. He also noted cervical range of motion limitation of 75% of normal and decreased sensation along the right C6, C7, and C8 dermatomal distribution and generalized 5-/5 weakness of the entire right upper extremity. Dr. Samocha noted that Yan had been complaining of the relevant pain since December 2017, noted no particular inciting event or injury, but stated a fairly acute onset of her symptoms. He also noted that Yan had a previous surgery on her right shoulder in 1996.

On December 17, 2018, Dr. Zelazny saw Yan and noted that the MRI documented right should partial tearing and AC joint arthrosis. She had continued neck and shoulder pain and he noted that a cervical spine MRI had been obtained, which prompted ordering of EMG's and nerve conduction studies. Dr. Zelazny stated that Yan's status is post remote shoulder arthroscopy in 1998 by another surgeon and suggested surgical intervention in the form of arthroscopy for a possible rotator cuff debridement versus repair as well as

distal clavicle resection and acromioplasty, but Yan does not wish to proceed with that suggestion.

Yan had the EMG studies done on April 1, 2019, Dr. Samocha noted that Yan continued to complain of severe pain in her right shoulder with radiation into her right upper arm and that the pain has been ongoing since she was restrained by the security guard at Phelps Hospital. Dr. Samocha assessed that Yanhas a partial right rotator cuff tear as well as acromlociavicular arthritis, with C4-5 central disc protrusion with mild cord flattening and mild C5-6 disc degeneration and right upper extremity symptoms, most likely related to her shoulder pathology and much less likely related to cervical radicular syndrome. D. Samocha stated that Yan's pain is likely more related to her shoulder than her neck and recommended follow up with Dr. Zelazny for consideration of surgical intervention for her shoulder. Martinez has joined in the action with a claim for negligent infliction of emotional distress.

The defendants now file this motion seeking an order pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action; pursuant to CPLR 3012(a)(1), dismissing the plaintiffs' complaint for failure to provide a Certificate of Merit; and pursuant to CPLR 3212, granting summary judgment to the defendants, dismissing the claims on the ground that there are no triable issues of fact and that the moving defendants cannot be held liable as a matter of law; and for such other, further and different relief as the Court deems just and proper. The plaintiffs oppose the motion.

DISCUSSION

CPLR 3211 (a)(7)states that:

> [a] party may move for judgment dismissing one or more causes of action against him on the ground that:
>
> (7) the pleading fails to state a cause of action....
> (N.Y. Civ. Prac. L. & R. 3211 [a][7]).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence (*see*, *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory (*Brevtman v Olinville Realty*, LLC, 54 AD3d 703 [2d Dept 2008]; *see also EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, (2005); *Leon v Martinez,* 84 NY2d 83 [1994]).

The defendants assert that the plaintiffs have failed to state a cause of action for medical malpractice and negligence. With regard to medical malpractice, "[i]n order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*see Stukas v Streiter,* 83 AD3d 18, 23 [2d Dept 2011]; *see also Aronov v Soukkary*, 104 AD3d 623]).

In this case, the complaint was filed *pro se* and does not specify the claims being asserted. The defendants argue that the complaint does not detail a claim for medical malpractice, since there is no implication or statement that the medical care provided deviated from the standard of care.

The complaint alleges that medical professionals administered medication that impaired Yan's ability to drive and then forced her to leave the premises and that the defendants owed a duty of care to the plaintiff, requiring the medical professionals to warn the patient of potential risks and side effects of the medication, including advice regarding whether it is safe for the patient to operate a motor vehicle (Complaint ¶ 16). However, there is no alleged injuries associated with the lack of the advice and lack of informed consent with regard to the medication and there is no correlation between any failure of the defendants to warn of the potential risks and/or side effects of the medication and Yan's shoulder and/or neck injuries. Therefore, the Court agrees with the defendants and grants dismissal of any purported medical malpractice claims, based upon failure to state a cause of action.

With regard to negligence, to prevail on a negligence claim, the plaintiff must establish: (1) the existence of a duty owed to the plaintiff; (2) the breach of such duty; (3) and that the breach of the duty was the proximate cause of the injury incurred (*see Engelhart v County of Orange*,16 AD3d 369 [2005]).

Here, the court must view the challenged pleading in the light most favorable to the non-moving party and determine whether the facts as alleged fit within any cognizable legal theory. The Court finds that from its four corners factual allegations are discerned which

taken together manifest a cause of action cognizable at law and therefore, the defendants have failed to show that the pleading does not state a cause of action.

With regard to the defendants' motion to dismiss pursuant to CPLR 3012(a)(1), for failing to file a certificate of merit, even if the action is for medical malpractice, the appropriate remedy for failing to file a certificate of merit is not dismissal of the complaint, but an extension of time for the plaintiffs to comply (*Rabinovich v Maimonides Medical Center*, 179 AD3d 88, 91 [2d Dept 2019]). Further, the plaintiffs' attorney asserts that the action is not a medical malpractice action and therefore, a certificate of merit is not required for an ordinary negligence cause of action.

The Court now turns to that part of the motion seeking an order granting summary judgment to the defendants and dismissal of the complaint. A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "The proponent of a summary judgment motion 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]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The defendants argue that the actions taken by the staff and security at the hospital were within good and accepted security practice and did not breach any claimed duty of care. The defendants submit the affidavit of Walter Signorelli, Esq. ("Signorelli"), an expert

in security and police procedure, who opines within a reasonable degree of security certainty that the allegations against the defendants are without merit. He states that, in the event a patient who is medically discharged refuses to leave the emergency department, or becomes violent with the staff or other patients, it is wholly appropriate and in keeping with good and acepted practice for security to become involved and escort the patient out of the emergency department.

Signorelli states that he reviewed the security tape and it is his opinion that the staff at Phelps acted in a calm and professional manner in escorting the plaintiff off of the premises once she refused to leave after she was medically discharged. He states that the standard requires that attempts be made to verbally persuade the patient to leave and/or de-escalate the situation, but if that does not work, it is appropriate for the security staff to physically remove the discharged patient from the emergency department and it is safer for the patient and others to have several staff members oversee the patient. Signorelli opines that the security at Phelps appropriately attempted to verbally persuade Yan to leave after she was discharged and based on the video footage, the security personnel did not use physical contact.

The plaintiffs also submitted their own expert, Joseph A. Pollini ("Pollini"), also opines to a reasonable degree of certainty that the security at Phelps did not act within the good and accepted standards of security procedure and breached its duty of care when they used physical force to remove Yan from the emergency department room and out of the hospital's premises. Pollini states that Manuel Caixeiro ("Caixeiro"), the Security Director at Phelps testified that Phelps provides training for their security personnel on de-escalation skills and how to get a person to cooperate voluntarily, but there are no written

rules, regulations, policies, protocols, or guidelines as to how a patient is supposed to be removed from the hospital premises. He testified that when a person becomes a threat to themselves or a threat to other staff or they become destructive, the security will request compliance for the person to leave the premises. Caixeiro testified that the security is not supposed to use force unless absolutely necessary and they have to maintain a safe environment during the whole process for that individual, as well as for other staff and visitors.

Pollini opines that Phelps should have written rules, regulations, policies, protocols, or guidelines that address how and when security can remove a person from the premises and the fact that Phelps does not have such regulations is a breach of its duty of care to Yan. Pollini further opines that the use of force is a last resort and force should not be used unless the patient presents a physical threat to others or themselves. He states that in this case, although the defendants' medical records contain comments about Yan refusing to leave the emergency department and classifying her as rude, it does not state that Yan was aggressive or physically threatening against the staff and Yan denied that she ever touched or shoved any of the staff members. Pollini opines that, since Yan testified and the records confirm that her shoulder was injured ever since she was forcibly removed from Phelps, Phelps breached its duty of care to Yan in injurying her shoulder when removing her from the hospital and that breaching its duty of care, is a substantial contributing factor to Yan's injured shoulder and neck. Pollini further opines that even if Phelps security was authorized to use force, which he strongly disagrees that it was, the force used breached Phelps.

Pollini further opines that Yan testified that the reason she did not leave the hospital

when she was discharged was because she had just taken oxycodone, she was still in pain, felt dizzy and did not feel able to drive, which was all ignored by security, who physically forced her to leave th premises, which was a breach ot duty of care.

Upon review of the arguments made and the affirmation submitted, the Court determines that the defendants did not owe a duty of care to Yan because once Yan was medically discharged, expressly asked to leave on multiple occasions and refused to leave the hospital, she would then be considered a trespasser and the hospital no longer had a duty of care or to protect because she was no longer lawfully present on its premises. By Yan's own admission, she was discharged and asked to leave the hospital but refused.

Further, even if Yan is not considered a trespasser, the defendants demonstrated that they did not breach their duty of care. Pollini opines that force should not be used unless the person presents a physical threat to others or themselves. Here, even if the security made physical contact with Yan, the video footage shows Yan pushing into an employee, thereby presenting a physical threat to others, since that employee could have been hurt by Yan's refusal to leave and justifying force. Additionally, Caixerio indicated that Yan was threatening, boisterous, demanding medication and stating that she was not leaving until she received medication. Yan did not dispute this. It was part of the security guard's duties to remove individuals from the premises who were not there lawfully (*Kerzhner v G45 Government Solutions, Inc.*, 160 AD3d 505 [1st Dept 2018]).

With regard to Pollini's assertion that Phelps breached its duty by not having written rules, regulations or policies with regard to the removal of persons form the hospital, such a claim was not in the plaintiffs' complaint or bill of particulars and the plaintiffs offer no statute or case law to show that the lack of written rules and policies is a breach of duty

of care. With regard to the appropriateness of Yan's discharge, Pollini has no expertise on clinical decisions and therefore, his opinion in this regard has no merit. The plaintiffs offered a medical expert, Hervey Sicherman, M.D., who opined with regard to Yan's injuries, but also opined as to the safe removal of a patient. Dr. Sicherman did not provide any expertise in this area and the Court also finds no merit in that part of his opinion. Further, none of the medical records show that Yan was dizzy and did not feel safe to drive at the time of medical discharge as claimed by Yan.

Turning to Martinez's claim The plaintiffs assert that her claim is for negligent infliction of emotional distress, "a cause of action to recover damages for negligent infliction of emotional distress does not require a showing of physical injury but must generally be premises upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety" (*Daluise v Sottile*, 40 AD3d 801, 803 [2d Dept 2007]). 'While physical injury is no longer a necessary element, a cause of action to recover damages for negligent infliction of emotional distress must generally be premised upon conduct which "unreasonably endangers" the plaintiff's physical safety' (*Glendora v Gallicano*, 206 AD2d 456 [2d Dept 1994]). The complaint does not allege any such conduct and Martinez only claims emotional injuries. Martinez also failed to provide any medical documentation to show any mental or emotional trauma.

Accordingly, based on the foregoing, it is

ORDERED that the defendants' motion is granted; and it is further

ORDERED that the plaintiffs' complaint is dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2021

HON. SAM D. WALKER, J.S.C.