Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SALLY E. UNGER
Justice

IA Part 24

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NELIDA RODRIGUEZ,

Plaintiff,

-against-

AUSTIN MEDICAL ASSOCIATES, P.C., MARK SILVERMAN, M.D. and DAVID SOSNOWIK, M.D.,

Defendants.

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Index Number 708497/2015

Motion Date 11/18/2021

Motion Seq. #. 6 & 8

The following numbered papers read on this motion seq. no. 6 by plaintiff for summary judgment on the issue of liability against the defendants pursuant to CPLR §3212 and to strike defendants' affirmative defenses, and the motion seq. no. 8 by defendants to dismiss plaintiff's amended complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action and for summary judgment to dismiss the claim of negligence pursuant to CPLR §3212:

	Papers Numbered
Motion Seq. No. 6	
Notice of Motion – Affidavits – Exhibits	EF 116 – 134
Answering Affidavits – Exhibits	EF 207 – 210
Reply Affidavits - Exhibits	EF 211
Motion Seq. No. 8	
Notice of Motion – Affidavits – Exhibits	EF 185 – 205
Answering Affidavits – Exhibits	EF 214 – 221
Reply Affidavits – Exhibits	EF 223 – 225

Upon the foregoing papers, it is ordered that the motion seq. nos. 6 and 8 are consolidated for purposes of this decision and order, and are determined as follows:

The plaintiff commenced this action against the defendants seeking to recover damages for personal injury allegedly sustained when she fell from the examination table while

allegedly under medical anesthesia. As a consequence, the plaintiff was allegedly caused to fall to the ground resulting in injuries to the left side of her face and her left shoulder. Plaintiff's amended complaint alleges two causes of action: first, negligently and carelessly maintained premises; and second, medical malpractice. However, the plaintiff withdrew her second cause of action seeking medical malpractice (*see* NYSCEF Doc. No. 111 and 203).

Plaintiff's Motion for Summary Judgment

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 eliminate any material issues of fact from the case (*see Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez*, at 324). Once this demonstration has been made, however, the burden shifts to the party opposing the motion for summary judgment, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman*, 49 NY2d at 562; *Alvarez*, 68 NY2d at 324).

Plaintiff contends that the defendants were negligent for the alleged incident by virtue of the doctrine of *res ipsa loquitur*. In support of her claim, plaintiff alleges that: (1) she was under anesthesia during the occurrence of her injuries at the defendants' facility; (2) during the plaintiff's procedure, Sosnovik and his assistant, Monica Diaz, were in direct control of the plaintiff and responsible for her well-being while she was under anesthesia; and (3) plaintiff was under medical anesthesia and was unable to contribute to the cause of the subject incident.

To raise a triable issue of fact as to the applicability of *res ipsa loquitur* doctrine, a plaintiff must demonstrate that "(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff" (*Lancia v Good Samaritan Hosp.*, 201 AD3d 913, 162 NYS3d 120 [2nd Dept 2022], quoting *McCarthy v N. Westchester Hosp.*, 139 AD3d 825, 33 NYS3d 77 [2nd Dept 2016]). A plaintiff "need not conclusively eliminate the possibility of all other causes of the injury" (*Lancia*, at 916, quoting *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844 [1997]; *see McCarthy* at 827). "It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence" (*McCarthy*, at 827, quoting *Kambat* at 494). Upon this motion, plaintiff has made an insufficient showing to support such a conclusion.

Plaintiff testified at her deposition that she was unconscious during the procedure, and "[she] woke up with a burning sharp pain on [her] face and [her] left shoulder." She further testified that she does not recall how she got from the procedure room to the examination

room, and she was unconscious when she fell. At his deposition, defendant David Sosnovik, MD, (Sosnovik) testified that before he left the procedure room "[plaintiff] was coming around already." He further testified that it was his habit to "always tell the patient we're done, finished, all done" with the procedure. He testified that he does not recall her response. Sosnovik further testified that plaintiff walked from the procedure room to the examination room. Sosnovik testified that he saw the plaintiff after the procedure in the examination room, and that was the first time he discovered she had cut her cheek.

Based on these facts, the court finds that the plaintiff has failed to demonstrate a prima facie showing for the purposes of this motion, requiring a denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez*, at 324). Plaintiff's injury could have been in the procedure room or the examination room or could have been caused by Sosnovik's employee. It is also alleged that the plaintiff could have caused the injury to herself. Whether the plaintiff was awake or under anesthesia during the alleged incident is unclear and in dispute. The mechanism of the injury to the plaintiff is also unclear, and as such, there are issues of material fact (*see Zuckerman* at 562; *Alvarez* at 324). Moreover, "since the doctrine of res ipsa loquitur is a rule of evidence, which merely provides a permissible inference of negligence, rather than a presumption, its application as a basis for an award of summary judgment is inappropriate" (*Martinez v City of NY*, 292 AD2d 349, 738 NYS2d 383 [2nd Dept 2002]). Accordingly, that branch of plaintiff's motion for summary judgment on the issue of liability against the defendants is denied.

While plaintiff is not required to show she is free of comparative fault in a summary judgment motion on the issue of liability, the court finds that plaintiff fails to eliminate any material issues of fact as to comparative fault (*see Shvydkaya v Park Avenue BMW Acura Motor Corp*., 172 AD3d 1130, 100 NYS3d 320 [2nd Dept 2019]). The court need not consider the sufficiency of defendants' opposition papers, because plaintiff fails to establish her prima facie entitlement as a matter of law as against them (*see Zuckerman* at 562; *Alvarez* at 324). Although plaintiff moves to strike the defendants' remaining affirmative defenses, she fails to present any arguments and fails to recite any source of information to form the basis of her motion to strike the defendants' remaining affirmative defenses. Accordingly, that branch of plaintiff's motion to strike defendants' affirmative defenses is denied.

Defendants' Motion for Summary Judgment

The court will next address defendants' motion for summary judgment. "The distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two" (*Kaziyeva v Temana Assoc., Inc.*, 206 AD3d 983, 168 NYS3d 851 [2nd Dept 2022], quoting *Weiner v Lenox Hill Hosp*., 88 NY2d 784, 650 NYS2d 629 [1996]; *see Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 13 NYS3d 226 [2nd Dept 2015]; *Halas v Parkway Hosp., Inc.*, 158 AD2d 516, 551 NYS2d 279 [2nd Dept 1990]). "A claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient"

(*Kaziyeva* at 984, quoting *Weiner* at 788; *see Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 113 NYS3d 198 [2nd Dept 2019]). "By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the . . . failure in fulfilling a different duty, the claim sounds in negligence" (*Kaziyeva* at 984, quoting *Weiner* at 788). "The 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" (*Halas* at 516-517).

Defendants contend that the plaintiff's alleged negligence/malpractice claim stems from the care and treatment rendered following the administration of Propofol anesthetic. Sosnovik testified to his office policies and protocols involving the care and treatment of patients following a procedure involving anesthesia and the plaintiff's mental status was evaluated and monitored by non-party Dr. Gregg Szerlip, an anesthesiologist and non-party Monica Diaz, a medical assistant. Defendants further contend that the alleged negligence arose out of plaintiff being a patient of defendant Austin Medical Associates, P.C., in connection with her medical treatment, that it is substantially related to the medical procedure and is not something a common person without medical training can do.

In opposition, plaintiff argues that the action concerns defendants' failure to exercise ordinary and reasonable care to restrain, supervise and exercise care for a patient's safety in an adequate manner which constitutes common-law negligence. Plaintiff therefore contends a jury can assess the negligence involved in the plaintiff's fall based on common everyday experience.

This Court finds that the allegations do not involve medical diagnosis or treatment and there is no allegation that plaintiff's fall was the result of an inadequate medical assessment (*see Kaziyeva* at 984-985). Moreover, the core issue does not implicate questions of medical competence or judgment linked to the treatment of the plaintiff (*id*., *Weiner* at 788). Rather, this action concerns the alleged failure to exercise ordinary and reasonable care to ensure that no unnecessary harm befell the patient (*see Halas* at 517). The conduct complained of, i.e., the failure to exercise care for plaintiff's safety while she was on the examination table, may be readily assessed on the basis of the common everyday experience of the trier of facts (*id*.). As such, this Court finds that the action sounds in ordinary negligence rather than medical malpractice. Defendants have failed to demonstrate the absence of material fact with regard to negligence, and accordingly, that branch of the motion for summary judgment is denied (*see Alvarez* at 324).

Failure to State Cause of Action

"On a motion pursuant to CPLR §3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts

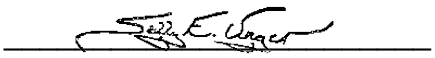
as alleged fit within any cognizable legal theory" (*Melio v John T. Mather Mem. Hosp.*, 165 AD3d 645, 84 NYS3d 549 [2nd Dept 2018], quoting *Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 77 NYS3d 424 [2nd Dept 2018]). A party may move for judgment dismissing one or more causes of action asserted against them on the ground that the pleading fails to state a cause of action (See CPLR 3211[a][7]).

Defendants contend that plaintiff withdrew the cause of action sounding in medical malpractice and thus her amended pleadings fail to state a cause of action. However, plaintiff's first cause of action alleges, in ¶30, that the defendants were negligent in their maintenance of the premises. The same cause of action also alleges, in ¶36, that "said accident and resulting injuries to the plaintiff were caused solely and wholly by reason of carelessness, recklessness and negligence of the defendant, without any negligence of the plaintiff contributing thereto." Accepting the facts as alleged in the complaint as true and according the plaintiff "the benefit of every possible favorable inference" (*Melio at* 646), the complaint sufficiently alleges a cause of action to recover damages for negligence against the defendants (*see Melio* at 646). As such, defendants' motion to dismiss for failure to state a cause of action is denied.

Leave to Amend Bill of Particulars
To the extent that plaintiff seeks leave to amend her bill of particulars, she does not interpose a cross motion for such relief, and as such the request is denied without prejudice (CPLR 2215; *see Willets Point Contr. Corp. v DMV of NY*, 227 AD2d 411, 642 NYS2d 63 [2nd Dept 1996]).

Conclusion
Accordingly, plaintiff's motion for summary judgment on the issue of liability against the defendants, and to strike defendants' affirmative defenses is denied; and defendants' motion to dismiss plaintiff's amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and for summary judgment to dismiss the claim of negligence pursuant to CPLR 3212 is also denied.

Dated: August 18, 2022



SALLY E. UNGER, A.J.S.C.