SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

----------X

BIN LIANG,

Plaintiff,

- v -

NATURO-MEDICAL HEALTH CARE, P.C.,JOHN DOE

Defendant.

----------X

INDEX NO. 151083/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

In February 2018, plaintiff Bin Liang commenced the instant action against Naturo-Medical Health Care P.C. and one of its acupuncturists,[1] wherein she asserts that their negligence caused her to fall from a treatment bed and suffer severe injuries. In motion sequence 001, defendant contends that, rather than asserting a cause of action for negligence, plaintiff's allegations sound in medical malpractice, which she failed to plead and which warrants dismissal pursuant to CPLR 3211; alternatively, should the Court deny that branch of the motion, defendant contends that there are no issues of fact, and it is entitled to summary judgment as a matter of law pursuant to CPLR 3212. In opposition, plaintiff asserts that (1) its cause of action in fact sounds in negligence, (2) if the court does not find as such, the Court should grant her cross motion to serve an amended complaint to assert a cause of action for medical malpractice *nunc pro tunc* (NYSCEF doc no. 40), and (3) in terms of summary judgment, there are outstanding issues of fact precluding such an award. For the following reasons, both branches of defendant's motion are denied.

BACKGROUND

On September 15, 2017, plaintiff visited defendant's health care facility for physical therapy and acupuncture treatment for her existing neck and shoulder pain. According to her testimony (NYSCEF doc. no 33, Liang's EBT transcript), one of defendant's doctors performed the prescribed course of physical therapy, which was conducted on one of defendant's treatment beds. After completing such therapy, plaintiff did not complain about any symptoms that might have been caused by the therapy itself. Thereafter, she received the acupuncture treatment. (*Id.* at 68.) In her testimony, plaintiff described how the acupuncturist removed the needles from her body, explained to her that she could leave on her own accord, and then immediately left. (*Id.* at 68-71.) Plaintiff explained that she considered the acupuncture treatment to have been completed

[1] Defendant "John Doe" is the as-of-yet unidentified acupuncturist who treated plaintiff.

once the acupuncturist left her bedside. Soon after she, plaintiff tried to dismount from the bed but began experiencing dizziness and fell to the floor. (*Id.* at 71, 75.)

Doctor Tsai Chao, a doctor employed by defendant, testified that the facility has physical therapist, an acupuncturist, and a therapy assistant. (NYSCEF doc. no. 35 at 14, Chao's EBT Testimony.) Ordinarily, patients who are physically capable are allowed to get on or off the bed without help by using a stepstool that would be in the vicinity of the treatment bed being used (*id.* at 52); where patients who are incapable of doing as such are involved, the therapy assistant would provide aide or assistance. (*Id.*) Rong Ming Liu—the therapy assistant on duty at the time—described being told to help plaintiff down from the bed, but she wanted to wait some time because she needed to breathe. (NYSCEF doc. no. 34 at 36, Lui's EBT Testimony.) He further testified that plaintiff informed him that because she was lying down for a long time, she was dizzy. (*Id.* at 36.) Accordingly, Lui left to give her more time and to attend to other patients[2] until approximately three minutes later when he heard the sound of the fall and the therapist rush to her. (*Id.* at 35-36.) Plaintiff does not allege that she either waited for Liu to return or called for anyone else to assist her before attempting to dismount the bed.

Approximately five months later, plaintiff commenced the instant action, alleging that the accident and the resulting injuries were cause by defendant's negligence. As described above, defendants now move to dismiss under CPLR 3211—arguing plaintiff has not plead the appropriate cause of action, medical malpractice—and, failing that, for summary judgment under CPLR 3212. Plaintiff opposes both branches of the motion.

DISCUSSION

Defendant's Motion to Dismiss—Ordinary Negligence versus Medical Malpractice

Defendant's motion to dismiss pursuant to CPLR 3211 is based on the premise that all of the alleged breaches of duties found in plaintiff's Bill of Particulars and memorandum of law sound in medical malpractice. These include the allegations that defendant failed (1) to assist and/or supervise plaintiff dismounting from the examination table after being informed that she was dizzy; (2) to maintain the step stool in a position allowing plaintiff to safely get on/off the examination table; (3) to provide an adequate nursing staff to care for plaintiff; and (4) to promulgate, enforce, or follow appropriate rules, regulations, procedures with respect to the standards of care for patients like plaintiff. (NYSCEF doc. no. 25 at 4, def. memo of law, citing NYSCEF doc no. 31 at ¶2, plaintiff's bill of particulars and NYSCEF doc. no. 41 at ¶3, 13.) The Court is not persuaded as to allegations (2), (3), and (4).

The Court of Appeals has explained that the distinction between medical malpractice and negligence is subtle, owing to the fact that medical malpractice is a species of negligence. (*Weiner v Lenox Hill Hosp.* 88 NY2d 784, 787-787 [1996].) This distinction is blurred even more where hospitals and other medical facilities (like defendant's) are concerned because these facilities "in a general sense [are] always furnishing medical care… [but] not every act of negligence toward a patient would be medical malpractice." (*Id.*, quoting *Bleiler v Bodnar*, 65

[2] Described in more detail *infra*, defendants admit in their statement of material facts that Liu returned to other patients after being told that plaintiff needed more time in the bed. (NYSCEF doc. no. 24 at ¶9.)

NY2d 65, 73 [1985].) The Court of Appeals further explained that the critical factor, what separates the two, is the nature of the duty owed to plaintiff: where the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a license physician" it is medical malpractice; by contrast, where the challenged conduct of a health care facility constitutes a failure to fulfil a different duty, the claim sounds in negligence. (*Id.*; *see also Scott v Uljanov*, 74 NY2d 673, 675 [1989] [holding that a challenge to the hospital's assessment of the supervisory and treatment needs of its patient constitutes medical malpractice].) In terms of assessing the nature of the duty owed and its "substantial relationship" to medical treatment, the First Department has held that courts must look to whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by a lay person or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of fact. (*Xenias v Mount Sinai Health Sys. Inc.*, 191 AD3d 454, 455 [1st Dept 2021], citing *Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 93-94 [2d Dept 2019].)

After applying this assessment, the Court concludes that three of plaintiff's claims sound in ordinary negligence. The allegation that defendant provided inadequate or insufficient nursing staff for plaintiff's needs relates to staffing choices and is not significantly related to plaintiff's specific medical treatment. (*See Tracy v Vassar Bros Hosp.* 130 AD3d 713, 715 [2d Dept 2015] [holding that allegations that the hospital failed to supervise and develop procedures for regulating the number of surgeries its doctor performed in a given day sound in ordinary negligence because none of the allegations implicate questions of medical competence or judgment].) Likewise, the allegation that defendant did not promulgate or enforce adequate rules and procedures to ensure plaintiff (or other similarly situated patients) received an adequate standard of care are administrative in nature and do not pertain to plaintiff's course of treatment. The allegation that defendant did not provide a step stool or a similar object within distance of plaintiff's examination table does not implicate questions of medical competence or judgment either. Rather, such allegations appear to be more analogous to a negligence/premise liability theory than to medical malpractice. For these reasons, plaintiff has established all three of these allegations are properly categorized as ordinary negligence claims.

As to the allegation that defendant failed to assist or supervise plaintiff after she complained of dizziness, the Court finds that it sounds in medical malpractice. As plaintiff argues, from a certain perspective, it might appear that Liu, regardless of medical training or lack thereof, should not have left to assist other patients after she complained of dizziness, that Lui's decision to not wait near plaintiff or administer to her needs at that moment violated a common-sense expectation that did not implicate the application of medical science or art. (NYSCEF doc. no. 41 at ¶20-21.) Put slightly differently, the argument that Liu's conduct can be assessed based on common everyday experience contains some amount of truth to it. However, this argument loses focus of the "significant relationship" between the challenged conduct and plaintiff's medical treatment. It is only because the acupuncturist left immediately after administering the treatment and without conducting an evaluation of plaintiff's medical state (*see* NYSCEF doc. no. 33 at 65) that the dizziness that plaintiff complained of could not be directed at the acupuncturist but instead had to be communicated to Liu as the therapy assistant. That defendant "failed to assist or supervise" plaintiff when she was getting off the table is inseparable from the treatment itself, which allegedly caused plaintiff's dizziness, and the acupuncturist's lack of care.

The circumstances here are analogous to those in *Scott v Uljanov*. There, an intoxicated plaintiff sought treatment in a hospital, his doctor allegedly did not supervise his course of treatment closely enough, and as result of such inattention, the plaintiff fell from an elevated bed. On these facts, the Court of Appeals concluded that the hospital's wrongdoing must be characterized as medical malpractice. (74 NY2d at 675.) It determined that the plaintiff's allegations challenged the hospital's "assessment of the supervisory and treatment needs" of the plaintiff, and that such conduct based on this assessment "constituted an integral part of the process of rendering medical treatment to him. (*Id.*) Here, it is the same: plaintiff is challenging *both* the acupuncturist's care—the assessment that plaintiff was capable of leaving on her own accord—and Liu's assessment that he could leave her bedside even as she complained of dizziness. (*See also Smee v Sisters of Charity Hosp.*, 210 AD2d 966, 967 [4th Dept 1994] [holding that a challenge to a hospital's assessment of a plaintiff's need for supervision, or lack thereof, constituted medical malpractice].)

The issue of whether this allegation, or any of the others, sound in medical malpractice is not, as defendant contends, dispositive of whether the complaint or any allegations therein should be dismissed pursuant to CPLR 3211. While the case law that defendant cites might establish the differences between the two causes of action, none of said case law is within the context of a CPLR 3211 (a) (7) motion[3] and none suggest that the Court is obligated to dismiss this action. Indeed, ordinarily on a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the courts' only function is to determine whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) Accordingly, since defendant has not established a ground upon which dismissal is warranted and has suggested to the Court that plaintiff in fact stated a cause of action for medical malpractice, the Court will not dismiss the complaint.

The Court instead grants plaintiff's cross motion for leave to serve an amended complaint *nunc pro tunc*. Under CPLR 3025 (b), a party may amend his or her pleading at any time by leave of the court and such leave "shall be freely given upon such terms as may be just." Here, plaintiff has demonstrated that no prejudice will come to defendant and the original complaint was timely served even under the two-and-a-half-year statute of limitations for medical malpractice actions. (*See Tinajero v Bd. Of Educ.*, 94 AD2d 564, 565 [2d Dept] ["Appellants cannot claim prejudice or surprise since the medical malpractice causes of action arise from the same facts as those underlying the general negligence cause of action asserted in the original complaint"].)

In opposition to the cross motion, defendant argues that it should be denied because plaintiff has failed to file a certificate of merit in accordance with CPLR 3012-a. However, where a plaintiff has commenced a malpractice action and failed to file the certificate of merit, the appropriate remedy is not dismissal but an extension of time for the plaintiff to comply with the mandates of CPLR 3012-a. (*Rabinovich v Maimonides Med. Ctr.*,179 AD3d at 91.) The Court sees no reason under the circumstances to treat the amended complaint—which now

[3] While defendant does not explicitly base its motion upon plaintiff's failure to state a cause of action under CPLR 3211 (a) (7), its arguments cannot be classified under a different CPLR 3211 (a) ground

explicitly asserts a cause of action for medical malpractice[4]—any different than it would have had plaintiff commenced a medical malpractice action from the beginning. (*See Glasgow v Chou*, 33 AD3d 959, 962 [2d Dept 2006] [holding that trial court properly afforded the plaintiff an opportunity to provide a certificate of merit from a licensed physician, but plaintiff's failure to do so was grounds for dismissal].) Here, although plaintiff failed to submit such a certificate of merit in its cross motion, she has done so in her reply affidavit. (*See* NYSCEF doc. no. 48, Jonathan Hirsch, M.D., Affidavit [asserting patients often experience symptoms of syncope, or a temporary loss of consciousness, such as dizziness after undergoing acupuncture and that these patients should be observed to ensure they do not fall].) As such, granting the cross motion is appropriate, and the Court applies below defendant's summary judgment arguments to the amended complaint that plaintiff has attached in support of its cross motion.

Defendant's Motion for Summary Judgment

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing of entitlement, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].

Defendant asserts that the testimony of Liang, Liu, and Chao demonstrates that as a matter of law it exercised reasonable care throughout plaintiff's treatment and therefore is entitlement to summary judgment. The Court finds otherwise. First, plaintiff has quite clearly demonstrated issues of fact as to whether Liu exercised reasonable care and diligence. Whether plaintiff was first offered assistance by Liu in dismounting the bed before requesting additional time to breathe, or whether plaintiff elected to dismount the bed on her own accord, or whether plaintiff fell due to her own dizziness as opposed to the positioning of the step stool—these questions do not negate the fact that "reasonable care" where a patient has complained of dizziness might include the assigned therapy assistant staying by her side and not leaving her to her own accord. Second, contrary to defendant's assertions, there are issues of fact as to whether the step stool was placed in a position for plaintiff to use. (*See* NYSCEF doc. no. 33 at 75-76 [Plaintiff describing how once she fell, she hit her back and leg on the step stool].)

In counsel's reply affidavit, defendant appears to contend that plaintiff has not demonstrated negligence with respect to adequate staffing policies. It asserts that plaintiff mischaracterizes Liu's testimony, that he did not explicitly say he was attending to other patients in the three minutes after leaving plaintiff. (NYSCEF doc. no. 44 at 3) Yet defendant admits to precisely this in its statement of material fact. (NYSCEF doc. no. 24 at ¶9 ["Mr. Liu then resumed attending to other patients in the treatment area and within approximately three minutes

[4] Plaintiff's amended complaint also outlines additional causes of action for negligent hiring and supervision of its staff. The Court finds that these "relate back," under CPLR 203 (f), to the original complaint, as plaintiff included in her Bill of Particulars the allegation of defendant's "negligent supervision…failing to provide adequate or sufficient nursing staff to care for plaintiff."

of doing so, heard the sound of someone hitting the floor"].) Moreover, the reason for his absence seems of little consequence to plaintiff's allegations: the absence of an assistant in and of itself, regardless of explanation, raises issues of fact as to whether defendant's facility was adequately staffed. Lastly, there is simply no reason to believe plaintiff mischaracterized the testimony as defendant believes. The above-described issues of fact preclude the Court from awarding defendant summary judgment.

Accordingly, it is hereby

ORDERED that defendant Naturo-Medical Health Care P.C.'s motion to dismiss pursuant to CPLR 3211 and motion for summary judgment pursuant to CPLR 3212 are denied; and it is further

ORDERED that plaintiff Bin Liang's motion to amend the complaint pursuant to CPLR 3025 is granted; and it is further

ORDERED that plaintiff and defendant shall appear at 60 Centre Street, Courtroom 341 at 10:00 a.m. on February 28 for a status conference with the Court; and it is further

ORDERED that counsel for plaintiff shall service a notice of entry on all parties within ten (10) days of entry of this order.

This constitutes the decision and order of the Court.

2/17/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE