

Pagan v LIC Hotel Prop. MH, LLC
2023 NY Slip Op 35251(U)
October 26, 2023
Supreme Court, Bronx County
Docket Number: Index No. 800215/2022E
Judge: Paul L. Alpert
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 26

ANGELO PAGAN, JR.

X

Plaintiff,

Index No.:800215/2022E

DECISION/ORDER

-against-

LIC HOTEL PROPERTY MH, LLC

Defendant

Present:

HON. Paul L. Alpert

X

Paul L. Alpert, J.S.C.

Defendant LIC Hotel Property MH, LLC (“LIC”) moves pursuant to CPLR §3212 for an order awarding summary judgment dismissing the complaint. The motion is opposed by the plaintiff. This is an action for personal injuries arising out of an alleged trip and fall on a sidewalk abutting the premises located at 499 Concord Ave, Bronx NY which is owned by LIC. The plaintiff alleges that on March 14, 2021 he was caused to trip and fall over a defect on the sidewalk causing a fracture to his ankle.

The defendant moves for summary judgment predicated upon statements made in the plaintiff’s hospital records which allegedly states that he was high on PCP at the time of his fall and did not remember how the accident happened. They contend that there are no other witnesses to the accident and therefore plaintiff is unable to prove LIC at fault. LIC argues that the statements contained in the hospital statements are admissible as exceptions to the hearsay rule

and definitively establish that the plaintiff cannot establish a valid claim for negligence. In opposition, the plaintiff argues that any motion for summary judgment is premature as no depositions have been taken. Moreover the plaintiff contends that because the statements in the hospital record are inadmissible hearsay they cannot serve as a predicate to dismiss the complaint.

The court's function on a motion for summary judgment is issue finding and not issue determination (*Sillman v. Twentieth Century Fox Film Corp* 3 N.Y.2d 395). The proponent of a motion for summary judgment 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 (*Winegrad v. New York University Medical Center* 64 N.Y.2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). Summary judgment is a drastic remedy which should only be employed where there is no doubt as to the absence of triable issues (*Andre v. Pomeroy* 35 N.Y.2d 361).

It is well settled that statements made by a plaintiff which are contained in a hospital record are inadmissible hearsay unless the statement is germane to the diagnosis and treatment of the plaintiff's injury (*Marquez v. 171 Tenants Corp.* 2023 WL 6977354; *Grant v. New York City Transit Authority* 105 A.D.3d 445). Moreover, in order to be admissible "any statement contained in the medical records allegedly attributable to the plaintiff does not qualify as an admission unless the individual who recorded it were to testify that it as the plaintiff's statement" (*Mosqueda v. Ariston Dev. Group* 155 A.D.3d 504).

The motion for summary judgment is denied. Assuming arguendo that the statements in the hospital record are admissible, they still would not serve to establish the basis for an award of

summary judgment. The plaintiff has not had the opportunity to be deposed so the court has no way of knowing exactly what his testimony will be. The Court may assume that the plaintiff's testimony at a deposition will be in contradiction to the statements as set forth in his hospital record. The statements contained in the hospital record do not definitively establish that the plaintiff is unable to testify as to the cause of his injuries. At best, at trial, the statements can be used to impeach the plaintiff's credibility. They do not absolve the defendant of liability or require that the defendant be awarded summary judgment. The plaintiff's alleged statement regarding being high on PCP is not germane to the diagnosis and treatment of the plaintiff's injury to his ankle. Moreover there is no evidence submitted which establishes that either of the statements are directly attributable to the plaintiff.

The defendant's argument that the statement is admissible because it was made to an "identifiable author" is not persuasive. The same comments are found in different portions of the record and recorded by different hospital personnel. It is not clear who the "author" of the statement is. At trial the defendant may call one of these "authors" to testify and definitively attribute the statements to the plaintiff. However, for the purposes of this motion the evidence to support an award of summary judgment is lacking. Unless accompanied by other direct evidence, hearsay statements alone cannot support a motion for summary judgment (*AIU Ins. Co. v. American Motorists Ins. Co.* 8 A.D.3d 83). A party seeking summary judgment must show evidence to establish entitlement to such relief and cannot point to gaps in the opponent's proof to obtain such relief (*Torres v. Industrial Container* 305 A.D.2d 136). The defendant's claim that the plaintiff was high at the time of the accident and therefore unable to testify as to the proximate cause of his injury is highly speculative and not supported by any independent

evidence. Similarly the defendant's contention that the statements contained in the emergency call report, which identifies the ambulance operators as responding to a "sick call", renders the statements germane to diagnosis and treatment is also highly speculative. A party seeking summary judgment has the initial burden to come forward with proof of entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital* 68 N.Y.2d 320). If that proof is lacking the burden never shifts to the party opposing the motion and irrespective of the deficiency in the opposing papers the motion must be denied (*Greenidge v. HRH Construction Corp.* 279 A.D.2d 400). The denial of this motion does not foreclose the defendant's ability to attempt to use these statements at trial to impeach the plaintiff. The question of whether these statements are admissible are reserved for the trial Judge.

Accordingly, the defendant's motion for summary judgment is denied.

This shall constitute the decision and order of the Court.

Dated: Oct. 26, 2023



Hon. Paul L. Alpert, J.S.C.