SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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TYFUN EREN,

Plaintiff,

- v -

CITY OF NEW YORK, NYC DOC, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, MEDICAL PROVIDER JEAN PIERRE A/K/A PIERRE PAUL, JOHN/JANE DOE CORRECTION OFFICERS 1-10, NYC HHC JOHN/JANE DOE MEDICAL PROVIDERS 11-20,

Defendants.

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INDEX NO. 451484/2021

MOTION DATE 12/02/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, defendants' motion, pursuant to CPLR 3212 and CPLR 3211(a)(7), for summary judgment and/or to dismiss for failure to state a cause of action is granted in part and denied in part.

Background

The Parties

This action arises from allegations of negligence and medical malpractice by defendants, the City of New York ("NYC"), New York City Health + Hospitals ("HHC"), Michael Latunji, M.D. ("Latunji"), Michael Davia, M.D. ("Davia"), Peter Wachtel, D.O. ("Wachtel"), Mohammad Ahsan, M.D. ("Ahsan"), and Nana Asare, P.A. ("Asare"), John/Jane Doe correction officers, and John/Jane Doe medical providers, after plaintiff, Tyfun Eren, suffered a bleb leak in his left eye while in custody at Rikers Island in February 2019. NYSCEF Doc. No. 61.

In layperson's terms, a bleb is a blister of fluid on the eye created when the eye is cut open and then sutured shut during surgery for glaucoma. The natural reopening of that blister is called a bleb leak.

Plaintiff's Prior Eye Issues

On January 20, 2007, doctors performed glaucoma surgery on plaintiff's left eye. NYSCEF Doc. No. 124. Post-surgery, a doctor determined plaintiff's visual acuity was "20/400." Id. Plaintiff says that, from 2007 until a second surgery in 2011, he "could see light, [he] could see cars moving by . . . [he] could see things." NYSCEF Doc. No. 129.

On January 11, 2011, plaintiff received a second surgery on his left eye, for a choroidal detachment. NYSCEF Doc. No. 124. Post-surgery, a doctor described plaintiff's visual acuity as "LP," or light perception. Id.

On November 6, 2012, plaintiff received a third surgery on his left eye, again for glaucoma. NYSCEF Doc. No. 124. Plaintiff's medical records list his post-surgery visual acuity as "HM," or "hand motions." NYSCEF Doc. No. 131. Plaintiff states that from 2012 through 2018, he could "still see light" and the shapes of cars and people. NYSCEF Doc. No. 129.

Plaintiff's Incarceration and 2019 Surgery

In October 2018, plaintiff was admitted into the custody of the NYC Department of Corrections at Rikers Island. NYSCEF Doc. No. 115.

On October 31, 2018, plaintiff spoke with a social worker at Rikers Island, who recorded that plaintiff "currently [had] no vision" in his left eye. NYSCEF Doc. No. 126. Plaintiff currently denies that he told the social worker that he had no vision at that time. NYSCEF Doc. No. 129.

On or about February 10, 2019, while incarcerated, plaintiff went to the Rikers clinic and reported redness and pain in his left eye. NYSCEF Doc. No. 130. That day, defendant Latunji, a doctor who worked at Rikers, examined plaintiff, diagnosed him with conjunctivitis, and prescribed him antibiotic eye drops. NYSCEF Doc. No. 127. Plaintiff took the eye drops. NYSCEF Doc. No. 110.

On or about February 11, 2019, plaintiff returned to the clinic and reported that the eye drops did not help. NYSCEF Doc. No. 127. Defendant Davia, another doctor at Rikers, examined plaintiff, noted his history of glaucoma, and directed plaintiff to keep taking the drops. NYSCEF Doc. No. 110.

On or about February 12, 2019, plaintiff returned to the clinic again, asking to go to the hospital. NYSCEF Doc. No. 130. Defendant Ahsan, another doctor at Rikers, examined plaintiff and referred him to an optometrist for a follow-up visit the next day. NYSCEF Doc. No. 110.

Plaintiff alleges his visits to the clinic occurred on February 9, 10, and 11 of 2019, while defendants' medical records say they occurred on the 10, 11, and 12. NYSCEF Doc. Nos. 129, 127.

On February 13, 2019, non-party Dr. Barry Hyman, an optometrist at Rikers, examined plaintiff and reported that his visual acuity in his left eye was "NLP," or "No Light Perception," his conjunctiva was red and injected, and that he possessed a bleb leak. NYSCEF Doc. No. 127. Dr. Hyman then transferred plaintiff to Bellevue Hospital. Id.

On February 15, 2019, plaintiff received surgery to repair the bleb leak. NYSCEF Doc. No. 127. The doctors at Bellevue Hospital informed plaintiff that there was a chance that the leak could not be repaired, and that he might lose his eye. NYSCEF Doc. No. 130. Plaintiff did not lose his eye, but he now reports that his vision in his left eye is "pitch black," and that he sees "nothing." NYSCEF Doc. No. 129.

The Instant Action

On June 2, 2020, plaintiff sued defendants, asserting six causes of action: (1) negligence, against NYC, HHC, and the John/Jane Doe defendants; (2) deliberate indifference to safety/medical needs, against all defendants; (3) failure to intervene, against all defendants; (4) intentional infliction of emotional distress, against all defendants; (5) negligent infliction of emotional distress, against all defendants; and (6) municipal liability under 42 U.S.C. § 1983. NYSCEF Doc. No. 61.

On February 2, 2023, plaintiff and HHC stipulated to discontinue the action against HHC with prejudice. NYSCEF Doc. No. 102.

On December 2, 2023, defendants moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety; or, alternatively, pursuant to CPLR 3211(a)(7), dismissing plaintiff's deliberate indifference, intentional infliction of emotional distress, negligent infliction of emotional distress, and 42 U.S.C. § 1983 claims. NYSCEF Doc. No. 109.

Defendants argue, inter alia, that: plaintiff's vision loss was not proximately related to the alleged negligence and malpractice; defendants were not deliberately indifferent to plaintiff's medical needs; plaintiff fails to state a claim for intentional infliction of emotional distress and negligent infliction of emotional distress; and plaintiff's 42 U.S.C. § 1983 claim is improperly pled and unsupported by the evidence. NYSCEF Doc. No. 110.

In opposition, plaintiff argues, inter alia, that: defendants failed to show prima facie entitlement to summary judgment, and that plaintiff raised issues of fact, including whether defendants departed from good medical practice when they allegedly failed to diagnose plaintiff's bleb leak, and at what point plaintiff lost all vision in his left eye. NYSCEF Doc. No. 36.

In reply, defendants argue that plaintiff's affirmation contains conclusory opinions inconsistent with plaintiff's medical records and, therefore, cannot create disputed issues of fact. NYSCEF Doc. No. 142.

Discussion

Defendants' Motion for Summary Judgment

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

In a medical malpractice action, "a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v Noble, 73 AD3d 204, 206 (1st Dept 2010).

Plaintiff's expert, Dr. Todd Lefkowitz, opines that defendants' misdiagnosis of plaintiff's bleb leak and subsequent delays in treatment constitute a departure from the reasonable standard of care. NYSCEF Doc. No. 138. On the other hand, defendants' expert, Dr. Michael Weiss, opines that the delays in treatment did not depart from the reasonable standard of care, and that the eye drops defendant Latunji prescribed helped prevent plaintiff from developing an eye infection known as blebitis. NYSCEF Doc. No. 131. The difference between these expert opinions presents a triable issue of fact as to whether defendants departed from good and accepted medical practice.

Plaintiff also alleges that his testimony describing his vision prior to the events of the week of February 9, 2019, shows that his vision was consistent with visual acuity of 20/400. NYSCEF Doc. No. 136. In opposition, defendants allege that, from 2012 to 2018, plaintiff's visual acuity was the more severe HM, and they further allege that, from 2018 onwards, plaintiff's vision had deteriorated to NLP. NYSCEF Doc. No. 110. Defendants point to plaintiff's social worker's notes to argue that plaintiff's visual acuity was NLP in 2018, and they argue that plaintiff's February 13, 2019, medical records corroborate that plaintiff's vision was NLP.

However, plaintiff's social worker's notes are not medical records, and, in any event, are not dispositive on plaintiff's visual acuity at the time. While plaintiff's Bellevue Hospital records state that plaintiff had a history of NLP in his left eye, plaintiff's past surgical records do not indicate a history of NLP acuity, but, rather, the less severe HM and LP acuity. Though plaintiff's visual acuity was listed as "NLP" on February 13, 2019, the defendant doctors did not note plaintiff's visual acuity during the visits starting on or about February 10, 2019.

Therefore, it is unclear from the medical records whether plaintiff's visual acuity of NLP predated the week of February 10, 2019. The parties' experts similarly disagree over whether plaintiff's visual acuity of NLP was a pre-existing condition or caused by the alleged departure of the defendants. NYSCEF Doc. Nos. 131, 138.

Thus, the issue of whether defendants' alleged departure was the proximate cause of plaintiff's injury cannot be determined as a matter of law and the difference in these allegations presents a disputed issue of fact.

Therefore, this Court must deny defendants' motion for summary judgment.

Defendants' Motion for Dismissal

Dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert facts that would make out a cause of action. EBC I, Inc v Goldman, Sachs & Co, 5 NY3d 11, 19 (2005).

New York recognizes, and plaintiff pursues here, two separate torts for infliction of emotional distress: negligent and intentional. "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action," and this applies to both negligent and intentional infliction of emotional distress. Wolkstein v

Morgenstern, 275 AD2d 635, 637 (1st Dept 2000); see Fischer v Maloney, 43 NY2d 553, 558 (1978) (holding that liability for intentional infliction of emotional distress may not attach to conduct to which traditional tort liability may attach).

Here, plaintiff's claims for intentional and negligent infliction of emotional distress attach to the same conduct to which his negligence and failure to intervene claims attach. Thus, plaintiff's infliction of emotional distress claims are duplicative, and this Court must dismiss them. Furthermore, infliction of emotional distress claims require outrageous conduct, which is not alleged here.

Claims under 42 U.S.C. § 1983 made by pre-trial detainees such as plaintiff arise under the Due Process Clause of the Fourteenth Amendment. See Darnell v Pineiro, 849 F3d 17, 35 (2d Cir 2017). To establish a claim for deliberate indifference under the Due Process Clause of the Fourteenth Amendment, a plaintiff must establish that "the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk..." Id. To hold a municipality liable under 42 U.S.C. § 1983, a plaintiff must establish that (1) the individual defendants' actions amounted to a constitutional violation; and (2) a policy or custom of the municipality caused the violative conduct. See Monell v Dept. of Social Services of City of New York, 436 US 658 (1978).

Where a non-movant's opposition leaves issues wholly unanswered, the Court should grant summary judgment on those issues. See, e.g., Pommels v Perez, 4 NY3d 566, 574-575 (2005); Kershaw v Hospital for Special Surgery, 114 AD3d 75, 82 (1st Dept 2013) ("the motion court correctly dismissed the second cause of action ... as plaintiff's papers did not address this claim.").

As plaintiff does not address defendants' arguments for dismissal of his negligent infliction of emotional distress, intentional infliction of emotional distress, deliberate indifference, and 42 U.S.C. § 1983 claims, the Court must dismiss them.

Conclusion

The part of defendants' motion for summary judgment is hereby denied, and the part of defendants' motion, pursuant to CPLR, 3211(a)(7), to dismiss plaintiff's second, fourth, fifth and sixth causes of action, alleging deliberate indifference, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of 42 U.S.C. § 1983, is hereby granted, and the Clerk is hereby directed to enter judgment accordingly.

JUN 25 2024 HON. ARTHUR F. ENGORON J.S.C.

6/25/2024
DATE

ARTHUR F. ENGORON, J.S.C.

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