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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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JOHN DAVOUDI,

Plaintiff,

-against-

ORTHOPAEDIC ASSOCIATES OF MANHASSET P.C. and JOHN DOE X-RAY TECHNICIAN,

Defendants.

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TRIAL/IAS PART 13

Index No.: 608677-16
Submission Date: 10-4-18
Motion Sequence: 001

DECISION & ORDER

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Upon the foregoing papers, the motion by defendant ORTHOPAEDIC ASSOCIATES OF MANHASSET P.C. ("defendant" or "OEM") for an Order pursuant to CPLR §3212: (a) granting summary judgment dismissing all of the claims in their entirety which consist of two causes of action sounding in negligence and negligent hiring with prejudice against the defendant OEM; and (b) directing the Clerk of the Court to enter judgment accordingly, is determined as set forth below.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in an accident that occurred on October 7, 2015 at the offices of OEM. Plaintiff alleges that an x-ray technician employed by defendant, s/h/a JOHN DOE X-RAY TECHNICIAN and later identified as Steven Levitt[1], instructed him to sit on a rolling stool which rolled out from under him and caused him to fall. The instant action was commenced on November 8, 2016 by the filing of the Summons and Verified Complaint (*Mot. Exh. A*). In his Verified Complaint, plaintiff asserts two causes of action – the FIRST sounding in negligence, and the SECOND

[1] No answer or other appearance was filed by or on behalf of this defendant.

sounding in negligent hiring, training and retention. Issue was joined as to OEM by the filing of a Verified Answer on February 2, 2017.

Defendant moves for summary judgment on the grounds that: (i) defendant was not negligent, insofar as defendant did not breach its duty to keep the premises in a reasonably safe condition; (ii) the claim of negligent hiring, training and retention, is legally infirm.

In support of its motion, defendant submits, among other things: (i) the transcript of the deposition of plaintiff, conducted on October 19, 2017 (*Mot. Exh. E*); (ii) the transcript of the deposition of Steven Levitt, conducted on January 24, 2018 (*Mot. Exh. F*); and (iii) the medical records pertaining to plaintiff's treatment at OEM (*Mot. Exh. G*). Plaintiff also submits a Physician's Affirmation dated July 11, 2018 by Jeffrey H. Richmond, M.D., F.A.C.S., which must be disregarded because it is not in admissible form. As a party to this action, Dr. Richmond may not rely upon an un-notarized affirmation in lieu of an affidavit. CPLR §2106; *Law Offices of Neal D. Frishberg v Toman*, 105 AD3d 712 (2d Dept. 2013); *Wells Fargo Bank, N.A. v Cean Owens, LLC*, 110 AD3d 872 (2d Dept. 2013); *Schwartz v Sayah*, 83 AD3d 926 (2d Dept. 2011); *Pisacreta v Joseph A. Minniti, P.C.*, 265 AD2d 540 (2d Dept. 1999).

The medical records reflect a history of orthopaedic care and treatment at OEM dating back to February 2013, including a left total knee arthroplasty in July of 2014. Included in the records is a report covering the examination of plaintiff on October 7, 2015, the date of the accident, by orthopaedist Bruce A. Seideman, M.D. According to the report, plaintiff, then 78 years old, presented with a chief complaint of pain in the right thigh and right knee. The report details the history of his present illness:

> "The onset of the symptoms was sudden and not related to an injury. Pain is severe with a rating of 10/10. He describes the symptoms as dull and aching. The symptoms do not differ between day or night.Additional symptoms include numbness, weakness and sleep disturbances. Since the onset, the symptoms have been worsening. Symptoms are made worse with activity and walking. The symptoms are relieved with medication. Patient is having increasing pain in his right knee and would like to consider arthroplasty he is also very happy with his left knee. He also had some pain in his thigh and he pinches in his upper thigh area as the area of his pain. Patient has had cortisone injection to the knee without relief. Patient has utilized NSAID medication for over 3 months without adequate relief. Patient has knee pain that interferes with ADIs, increases with weight bearing and increases with initiation of activities."

Upon examination and review of the x-rays taken that day, Dr. Seideman diagnosed advanced right knee osteoarthritis. The report indicated that Dr. Seideman discussed a right total knee arthroplasty with plaintiff, and plaintiff agreed to the procedure. The report also acknowledged the occurrence of plaintiff's fall on that day.

At his deposition, plaintiff described the events leading up to the accident. Plaintiff testified that:

- He arrived at defendant's offices in the afternoon of October 7, 2015 with his son for a scheduled pre-surgical appointment. He was having a lot of pain in his right knee. He was walking with a cane.

- A young woman with blond hair brought him into an examination room. He changed into a gown. The same young woman then escorted him to the x-ray room. The x-ray room was approximately 30-40 steps away, and he walked there using the cane.

- When the x-ray was finished, the x-ray technician escorted him down the hallway toward the examination room. The x-ray technician told him, "This is your room," but it was not the same room as he was in prior to the x-ray. Plaintiff went inside.

- In plaintiff's own words: "There was a chair with wheels without a back. I told him, 'If I sit on this, I am going to fall down.' Then he left. He laughed and left. And it was high, about 2 feet, it was high. As soon as I sat on it, I fell down" (*Mot. Exh. E, p.67*).

The x-ray technician, Steven Levitt, provided a somewhat different account. Mr. Levitt testified: "I was walking back to the examination room, he was walking slow, I got called over by an employee to go talk about a surgery, you know, the exam rooms are close to her cubicle, so I know I had time to talk to her because he was walking so slow, and the next thing I know, he was on the floor" (*Mot. Exh. F, pp. 32-33*). According to Mr. Levitt, Mr. Levitt was walking in front of plaintiff, and plaintiff was walking "way behind me". When he heard a "thump" indicating that someone had fallen, he found plaintiff on the floor. According to Mr. Levitt, "He [plaintiff] went to the wrong exam room" (*Mot. Exh. F, p. 36*).

Negligence

Defendant maintains that it cannot be held liable for plaintiff's injuries, because it did not breach any duty to maintain the premises in a reasonably safe condition. Defendant asserts that

any risk posed by sitting on a rolling, backless chair was open and obvious, and admittedly known by plaintiff before he sat down on it. Accordingly, defendant argues, there was no duty to warn. Moreover, insofar as there was no evidence that the chair was defective, the chair was not inherently dangerous. Thus, defendant argues, the action must be dismissed, because defendant cannot be held liable for injuries allegedly caused by a condition that was open and obvious and not inherently dangerous.

In opposition, plaintiff asserts that defendant's argument is irrelevant, insofar as plaintiff's claim against defendant is not based on a theory of premises liability. Rather, as asserted in the Verified Complaint and Bill of Particulars, plaintiff's claim is predicated upon allegations that defendant and defendant's employee violated their duty of care by failing to assist plaintiff to the examination room and to ascertain his safety prior to leaving him. On defendant's own version of the facts, plaintiff argues, defendant abandoned plaintiff in the hallway to go talk to another employee, allowing plaintiff to walk unattended into the wrong examination room and to lower himself onto a chair that was not appropriate or intended for his use. Plaintiff contends that this was negligence, particularly in view of plaintiff's age, his presenting with orthopaedic issues in the right knee, his apparent difficulty in walking, and his use of a cane. Defendant's own protocol for determining whether a patient needs assistance in transporting between the exam room and the x-ray room requires consideration of such factors as whether the patient is using a device to walk, what injuries they have, whether they are with a family member, and what body part is affected and presented for treatment and x-ray (*Mot. Exh. F, pp. 19-22*).

In reply, defendant argues for the first time that the claim articulated in plaintiff's opposition papers amounts to a claim of medical malpractice, not ordinary negligence. Accordingly, defendant asserts that, insofar as plaintiff has neither pleaded medical malpractice nor filed a timely notice of medical malpractice, and insofar as plaintiff has not alleged any other basis for a claim of ordinary negligence, the action must be dismissed.

As a general rule, Courts will not consider issues raised for the first time in reply papers. *Burlington Ins. Co. v Guma Const. Corp.*, 66 AD3d 622 (2d Dept. 2009); *Forest River, Inc. v Stewart*, 34 AD3d 474 (2d Dept. 2006). Even if the Court were to consider the argument, however, the Court is not persuaded that plaintiff's allegations sound in malpractice rather than negligence.

"[T]he 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

.... [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 ... By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty, the claim sounds in negligence." *Weiner v Lenox Hill Hosp.*, 88 NY2d 784 (1996) (internal citations and quotation marks omitted). See also *B.F. v Reproductive Medicine Associates of New York, LLP*, 136 AD3d 73, 80 (1st Dept. 2015).

"The issue devolves to whether medical judgment is required or not; where the underlying claim arises from the failure to follow a medical order previously made or to apply standards of ordinary care, then it is negligence, without regard to whether expert testimony is deemed helpful to the resolution. However, where the conduct involves a standard established by means of the exercise of medical judgment, then it is malpractice." *Martuscello v Jensen*, 134 AD3d 4 (3d Dept. 2015) (internal citations omitted). See also *B.F. v Reproductive Medicine Associates*, 136 AD3d at 80; *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 978 (3d Dept. 1983).

Numerous New York cases have dealt with the fact pattern of a patient suing for injuries sustained in a fall at a hospital during the course of medical treatment. The distinction between those claims deemed to be malpractice, and those deemed to be negligence is not clearly delineated. From the reasoning of the decisions, it appears that a claim sounds in malpractice when it challenges a physicians' assessment of a patient's medical condition and its impact on falling risk and the need for assistance or supervision. See, e.g., *Scott v Uljanov*, 74 N.Y.2d 673 (1989); *Martuscello,* 134 AD3d at 12; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966 (4th Dept. 1994); *Fox v White Plains Med. Ctr.,* 125 AD2d 538 (2d Dept. 1986); *Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 A.D.2d 254 (1st Dept.1986). A claim sounds in ordinary negligence when the patient's risks were recognized and no special skill or knowledge was required to assess the harm in leaving him or her unsupervised. See, e.g., *Friedmann v New York Hospital–Cornell Medical Center*, 65 A.D.3d 850 (1st Dept.2009); *Halas v Parkway Hosp.*, 158 A.D.2d 516 (2d Dept.1990); *Papa v Brunswick Gen. Hosp.*, 132 AD2d 601 (2d Dept. 1987). The difficulty lies in determining into which category a particular fact pattern falls.

At bar, the matter is more straightforward. The essence of plaintiff's claim is not that defendant improperly assessed plaintiff's medical condition or the degree of supervision required. Rather, the gravamen of plaintiff's claim is that defendant's employee, recognizing the risk, undertook to assist plaintiff to return safely to the examination room, but did so in a negligent manner.

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On this issue, the Court finds that defendant fails to establish *prima facie* entitlement to judgment as a matter of law. Defendant's submissions do not eliminate issues of fact as to whether defendant's employee was negligent in failing to stay with plaintiff until he was safely seated in the examination room, and whether such alleged negligence was the proximate cause of plaintiff's injuries. See *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). Accordingly, the Court need not consider the sufficiency of the opposing papers. *Id.*

Negligent Hiring, Training and Retention

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation,* 147 AD3d 739, 741-742 (2d Dept. 2017), quoting *Talavera v. Arbit*, 18 A.D.3d 738, 738 (2d Dept. 2005); *see Quiroz v. Zottola*, 96 AD3d 1035 (2d Dept. 2012).

At bar, defendant asserts that it is subject to liability on the basis of *respondeat superior* and thus cannot also be held liable for negligent hiring, retention, supervision or training of Steven Levitt. Further, defendant argues that there is no evidence supporting the claim. Plaintiff does not oppose this branch of the motion.

* * *

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that the branch of the motion seeking summary judgment on the FIRST cause of action sounding in negligence is *denied;* and it is further

ORDERED, that the branch of the motion seeking summary judgment on the SECOND cause of action sounding in negligent hiring, training and retention is *granted.*

This constitutes the Decision and Order of this Court.

Dated: December 6, 2018
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

ENTERED

DEC 11 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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