SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

ALBERTA GILLIAM,

Plaintiff

- v -

CENTRAL PARK WOMAN'S IMAGING, P.C., and CENTRAL PARK WOMAN'S IMAGING - NEW YORK RADIOLOGY PARTNERS,

Defendants..

INDEX NO 159093/2012

MOTION DATE 11/12/14

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 6 to 25 were read on this petition to confirm arbitration award.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	6-17
Answering Affidavits – Exhibits	18-23
Replying Affidavits	24-25

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 1/23/14

JOAN B. LOBIS, *J.S.C.*

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:.....MOTION IS ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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ALBERTA GILLIAM,

Plaintiff,

Index No. 159093/2012

-against-

Decision and Order

CENTRAL PARK WOMAN'S IMAGING, P.C. and CENTRAL PARK WOMAN'S IMAGING - NEW YORK RADIOLOGY PARTNERS,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Central Park Woman's Imaging, P.C., and Central Park Woman's Imaging-New York Radiology Partners ("Central Park") move, in pertinent part, for an order dismissing Plaintiff's complaint pursuant to section 214-a of the Civil Practice Law and Rules. Plaintiff Alberta Gilliam opposes the motion. For the following reasons, the motion is denied.

This action arises from Alberta Gilliam's treatment at Central Park Woman's Imaging on April 2, 2010. The action was commenced by filing a summons and verified complaint on December 20, 2012. The Verified Bill of Particulars was served in November 2013, and Defendants, in their reply, withdrew the portion of the motion requesting an order compelling Plaintiff to serve responses to Discovery Demands and the Verified Bill of Particulars.

On April 2, 2010, Ms. Gilliam went to Defendants' facility for a mammogram. Following the mammogram, she immediately began to experience hive-like rashes or chemical burns on the areas of her breasts that came into contact with the imaging machine. Ms. Gilliam alleges that

Central Park left cleaning solution on the imaging machine that caused her to experience the rashes or chemical burns.

Defendants now move to dismiss Plaintiff's complaint for failure to commence this case within the statute of limitations for a medical malpractice action. The statute of limitations for a medical malpractice action is two years and six months from the date of the injury. C.P.L.R. 214-a. Plaintiff alleges that the injury occurred on April 2, 2010, and filed the Summons and Complaint on December 20, 2012. Central Park argues that dismissal is appropriate because over two years and six months passed from the date of injury until the action was commenced.

In opposition, Plaintiff states that she alleged that she sustained injuries through the negligence of Central Park, in that by themselves, their servants, agents and/or employees failed to maintain, manage, operate and repair the imaging machine in a safe and diligent manner. Plaintiff claims that this is not a medical malpractice action but simply a pure negligence action as the alleged negligence was that Defendants left cleaning solution on the imaging machine. Negligence has a statute of limitations of three years, which would mean that the Plaintiff was within the statute of limitations when commencing the action. Plaintiff avers that the acts of negligence were not related to medical treatment but related to proper cleaning and maintenance. Plaintiff asserts that the Court should apply its holding in Bernard v. Goldweber, 34 Misc. 3d 1223 (N.Y. Cty. Sup. Ct. 2012), that failure to maintain sterile equipment and a disease-free environment constitutes negligence and not medical malpractice.

Defendants, in reply, argues that the Plaintiff's claim involves the exercise of

professional judgment, and, therefore, the action sounds in medical malpractice. Defendants argues that actions involving burns during surgery are medical malpractice actions. See e.g. Kabalan v. Hoghooghi, 77 A.D.3d 1350 (4th Dep't 2010); Simmons v. Neuman, 50 A.D.3d 666 (2nd Dep't 2008). Defendants argues that the technician needed special skill and training to both use the imaging machine and perform the mammogram so that the only issue is whether the technician properly exercised professional training, skills and judgment in performing the mammogram. Defendants contends that the Plaintiff will have to offer expert testimony that the solution used was improper and that it was used improperly. Because of the need for expert testimony, Defendants asserts that this is a medical malpractice action.

"[M]edical malpractice is simply a form of negligence, [and] no rigid analytical line separates the two[.]" Scott v. Uljanov, 74 N.Y.2d 673, 674 (1989). While a health care provider "in a general sense is always furnishing medical care to patients . . . clearly not every act of negligence toward a patient would be medical malpractice." Bleiler v. Bodnar, 65 N.Y.2d 65, 73 (1985). 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. Id.; Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 788 (1996); Rodriguez v. Saal, 43 A.D.3d 272, 275 (1st Dep't 2007). The determinative question is "whether the challenged conduct bears a substantial relationship to the rendition of medical treatment to a particular patient." Weiner, 88 N.Y.2d at 788 (internal citation and quotation marks omitted); Wahler v. Lockport Physical Therapy, 275 A.D.2d 906, 907 (4th Dep't 2000).

The Court is not persuaded that failure to wipe away cleaning solution constitutes

medical malpractice. The conduct in question does not bear a substantial relation to the rendition of medical treatment. Defendants cite to a number of medical malpractice cases where burns occurred during surgery but in each case the burns had a substantial relationship to the rendition of medical treatment as opposed to the failure to maintain a sterile environment. In any medical setting, there is a need to have a clean and sterile environment. The duty to maintain such an environment is an altogether different duty than to provide proper medical treatment, though the two duties may both be present. See Bernard, 34 Misc.3d at 1223. Using cleaning solution or disinfectant on any machine does not require medical training of any kind. Defendants assert that specialized training is required to clean the machine, but specialized training and medical training are not one and the same. Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the parties appear for a preliminary conference on February 18, 2014 at 2:30pm.

Dated: Jan 23, 2014

ENTER:

JOAN B. LOBIS, J.S.C.