Fasano v Peralo
2020 NY Slip Op 34641(U)
September 14, 2020
Supreme Court, Orange County
Docket Number: Index No. EF012223-2018
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CONNOR FASANO,

Plaintiff

-against-

JOHN R. PERALO, M.D., ORANGE REGIONAL MEDICAL CENTER, GREATER HUDSON VALLEY HEALTH SYSTEM, INC., HORIZON FAMILY MEDICAL GROUP, HORIZON MEDICAL GROUP, P.C. and HMG GOSHEN SURGERY,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF012223-2018

Motion Date: August 7, 2020
August 20, 2020

The following papers numbered 1 to 14 were read on Plaintiff's motion for summary judgment, and the cross motion of defendants John R. Peralo, M.D., Horizon Family Medical Group, and Horizon Medical Group, PC s/h/a HMG Goshen Surgery for summary judgment:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition (ORMC & GHVHS) / Exhibits - Expert Affirmation 3-4

Notice of Cross Motion - Affirmation / Exhibits - Expert Affirmation 5-7

Affirmation (Plaintiff) in Reply / Opposition to Cross Motion - Expert Affirmations (2) ... 8-10

Reply Affirmation 11

Affirmation in Opposition (ORMC & GHVHS) - Expert Affirmation 12-13

Reply Affirmation 14

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Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

A. Procedural Background

This is an action for medical malpractice and lack of informed consent in connection with a surgery in the course of which a large laparotomy pad was left inside anaesthetized plaintiff Connor Fasano. Based on the doctrines of *res ipsa loquitur* and *respondeat superior*, Plaintiff moves for summary judgment against all Defendants – (1) his private attending surgeon, John Peralo, M.D., (2) the surgeon's employer, Horizon Family Medical Group, and Horizon Medical Group, PC s/h/a HMG Goshen Surgery (collectively, "Horizon"), and (3) the hospital entities that provide nursing staff for the surgery, the Orange Regional Medical Center and Greater Hudson Valley Health System, Inc. (collectively, "ORMC"). Plaintiff also seeks dismissal of ORMC's affirmative defense that Plaintiff himself was contributorily at fault. Dr. Peralo and Horizon cross move for summary judgment dismissing all claims against them.

B. Pertinent Facts

The basic facts are not in dispute. Plaintiff was anaesthetized and unconscious for abdominal surgery. Dr. Peralo utilized fifty-five (55) laparotomy pads ("lap pads") during the course of the surgery. Nursing staff incorrectly reported that all 55 lap pads were accounted for when in fact a large pad, measuring approximately 14 inches by 14 inches, was still inside Plaintiff's abdomen. Dr. Peralo did not locate this lap pad and failed to remove it before concluding the surgery. Dr. Peralo asserts that he reasonably relied on nursing staff's count, and did not depart from accepted medical practice in failing to locate and remove the lap pad that was still inside Plaintiff. ORMC proffers no explanation or excuse for the nursing staff's error.

C. The Doctrine of *Res Ipsa Loquitur* Is Applicable

"In New York it is the general rule that submission of the case on theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements:

(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Only when these essential elements have been established, after the plaintiff has first demonstrated the nature of the instrumentality which caused the injury and its connection with the defendant [cit.om.], does a prima facie case of negligence exist [cit.om.]." *Dermatossian v. New York City Transit Authority,* 67 NY2d 219, 226-227 (1986).

1. The First Element Is Satisfied

Res ipsa loquitur is applicable where, as here, a surgeon unintentionally leaves a lap pad, sponge or other foreign body inside a patient. *See, Kambat v. St. Francis Hospital,* 89 NY2d 489 (1997); *James v. Wormuth,* 21 NY3d 540, 546 (2013). As the Court of Appeals observed in *Kambat:*

> Widespread consensus exists...that a narrow category of factually simple medical malpractice cases requires no expert to enable the jury reasonably to conclude that the accident would not happen without negligence. Not surprisingly, the oft-cited example is where a surgeon leaves a sponge or foreign object inside the plaintiff's body [cit.om.]. As explained by Prosser and Keaton in their classic treatise:
>
> > "There are, however, some medical and surgical errors on which any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care. *When an operation leaves a sponge or implement in the*

> *patient's interior,* ... the thing speaks for itself without the aid of any expert's advice."
>
> (Prosser and Keaton, Torts §40, at 256-257 [5th ed] [emphasis added].}
>
> Manifestly, the lay jury here did not require expert testimony to conclude that an 18-by-18 inch laparotomy pad is not ordinarily discovered inside a patient's abdomen following a hysterectomy in the absence of negligence. Thus, plaintiff's undisputed proof that this occurred satisfied the first requirement of res ipsa loquitur.

Kambat, supra, 89 NY2d at 496-497.

Here, then, Plaintiff's undisputed proof that a 14 by 14 inch laparotomy pad was found inside his abdomen post-surgery satisfies the first element of the doctrine of *res ipsa loquitur.*

2. The Second Element Is Satisfied As To All Defendants

Construing the element of "exclusive control", the *Dermatossian* Court wrote:

> The exclusive control requirement, as generally understood, is that the evidence "must afford a rational basis for concluding that the cause of the accident was probably 'such that the defendant would be responsible for any negligence connected with it.'" (2 Harper and James, Torts §19.7, at 1086...). The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence (*see,* Prosser and Keaton, Torts §39, at 248-251 [5th ed.]; [cit.om.]. The requirement does not mean that "the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." (2 Harper and James, Torts §19.7 at 1086).

Dermatossian, supra, 67 NY2d at 227.

The requirement of "exclusive control" is satisfied where the defendants – like the surgeon and hospital nursing staff here – together exercised concurrent control over the operating room, the medical procedures, the equipment used to perform them, and the plaintiff himself. *See, Antoniato v. Long Island Jewish Med. Ctr.,* 58 AD3d 652, 655 (2d Dept. 2009); *DiGiacomo v. Cabrini Med. Ctr.,* 21 AD3d 1052, 1054 (2d Dept. 2005); *Rosales-Rosario v.*

Brookdale Univ. Hosp. and Med. Ctr., 1 AD3d 496, 497 (2d Dept. 2003); *Gerner v. Long Island Jewish Hillside Med. Ctr.*, 203 AD2d 60, 61-62 (1st Dept. 1994); *Fogal v. Genesee Hospital*, 41 AD2d 468, 474-475 (4th Dept. 1973); *Matlick v. Long Island Jewish Hospital*, 25 AD2d 538 (2d Dept. 1966).

3. The Third Element Is Satisfied

The third element requires no discussion. At all relevant times Plaintiff was anaesthetized and unconscious, and hence the occurrence cannot have been due to any voluntary action or contribution on his part.

D. Plaintiff's Motion For Summary Judgment

Quoting the United States Supreme Court on the meaning of *res ipsa loquitur*, the Court of Appeals in *George Foltis, Inc. v. City of New York*, 287 NY 108 (1941) observed:

> "Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff." *Sweeney v. Erving*, 228 U.S. 233, 240...

Foltis, supra, 287 NY at 119. While acknowledging that '[t]here may be cases where the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable if not rebutted by other evidence" (*id.*, at 121), the *Foltis* Court held that:

> [E]vidence which under the rule of res ipsa loquitur satisfies the plaintiff's duty of producing evidence sufficient to go to the jury does not create a full presumption and is ordinarily not sufficient, even where the defendant produces no evidence in contradiction or rebuttal, to entitle the plaintiff to the direction of a verdict.

Id., at 120. In *Morejon v. Rais Construction Company,* 7 NY3d 203 (2006), the Court of Appeals reaffirmed *Foltis* and held:

> [O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable.

Morejon, supra, 7 NY3d at 209.

1. As To Dr. Peralo and Horizon

In moving for summary judgment, Plaintiff relied entirely on the doctrine of *res ipsa loquitur* and proffered no expert medical proof. Dr. Peralo, in opposition, proffered expert medical proof rebutting the inference of negligence arising from Plaintiff's evidence. More specifically, Dr. Peralo's expert evidence raised issues of fact (1) whether his reliance on the nursing staff's lap pad count was reasonable (*see, Cianfrocco v. St. Luke's Mem. Hosp. Ctr.,* 265 AD2d 849, 850 [4th Dept. 1999]; *Gravitt v. Newman,* 114 AD2d 1000, 1001 [2d Dept. 1985]); and (2) whether his failure to detect the presence of the lap pad in Plaintiff's abdomen following surgery was not a departure from accepted standards of medical care (*see, LaPietra v. Clinical & Interventional Cardiology Associates,* 6 AD3d 1073, 1075 [4th Dept. 2004]; *Blackburn v. Baker,* 227 AD 588, 589-590 [3d Dept. 1929]). Moreover, as there is no evidence that the hospital nursing staff's lap pad count was a task requiring "close supervision and instruction" by Dr. Peralo, he cannot be held vicariously liable for negligence on the part of hospital nurses not in his employ. *See, Banks v. Barkoukis,* 231 AD2d 598, 598-599 (2d Dept. 1996). *See also, Blackburn v. Baker, supra,* 227 AD at 590.

Therefore, Plaintiff's motion for summary judgment as against Dr. Peralo and Horizon must be denied. *See, id.*

2. As to ORMC

In response to Plaintiff's motion, ORMC acknowledged that the lap pad count was its nurses' responsibility, and that the nurses owed Plaintiff a duty of care in carrying out this task. Moreover, there is undisputed evidence that hospital nursing staff breached this duty by giving an inaccurate lap pad count which failed to account for the pad that was left in Plaintiff's abdomen. ORMC proffers no explanation or excuse of any kind for the erroneous lap pad count. However, its medical expert opines that Plaintiff's physical condition was such that there was no medical reason why Dr. Peralo could not have conducted an examination sufficient to locate the 14 by 14 inch lap pad which remained inside Plaintiff before concluding the surgery.

As noted above, summary judgment in a ***res ipsa*** case is warranted "only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." *Morejon, supra,* 7 NY3d at 209. However, in at least one case a plaintiff has been awarded summary judgment where the hospital failed to raise any issue of fact as to its nursing staff's negligence in making an erroneous sponge count. *See, Cianfrocco v. St. Luke's Mem. Hosp. Ctr., supra,* 265 AD2d 849, 850 (4th Dept. 1999). Here, too, on the record before the Court the inference of the hospital nursing staff's negligence with respect to the pad count is overwhelming and inescapable.

However, Dr. Peralo also owed Plaintiff a duty to remove foreign objects from his body before concluding surgery, and evidence including the indisputable existence of a 14 by 14 inch lap pad in Plaintiff's abdomen post-surgery as well as the opinion of ORMC's expert raises

issues of fact with respect to negligence on Dr. Peralo's part in failing to discover the large lap pad. In consequence, there remain triable issues of fact as to (1) the comparative fault of Dr. Peralo and hospital nursing staff, and (2) whether the nurses' negligence was a substantial factor in causing injury.

Therefore, Plaintiff's motion for summary judgment as against ORMC is granted to the limited extent that the nurses responsible for the lap pad count – for whose conduct ORMC is vicariously liable – are deemed negligent as a matter of law. In addition, Plaintiff's motion for dismissal of ORMC's affirmative defense of Plaintiff's comparative fault is granted as unopposed. In all other respects, Plaintiff's motion as against ORMC must be denied.

E. Dr. Peralo's Motion For Summary Judgment

Dr. Peralo's showing that his reliance on the nursing staff's lap pad count was reasonable and that his failure to detect the presence of the lap pad in Plaintiff's abdomen following surgery was not a departure from accepted standards of medical care was sufficient to demonstrate the existence of triable issues of fact, but not to establish his right to summary judgment in the face of the indisputable fact that despite his duty to remove foreign objects from Plaintiff's body he left a 14 by 14 inch lap pad in Plaintiff's abdomen. *See, Kambat v. St. Francis Hosp., supra; Bell v. Agarwal,* 55 AD3d 1310 (4th Dept. 2008); *Critelli v. Long Island Jewish – Hillside Med. Ctr.*, 115 AD2d 632 (1985).

As the Court of Appeals observed in *Kambat*:

> Defendants' evidence that they used due care...merely raised alternative inferences to be evaluated by the jury in determining liability (*see, Sweeney v. Erving...*). The undisputed fact remained in evidence that a laparotomy pad measuring 18 inches square was discovered in decedent's abdomen: "[f]rom this the jury may still be permitted to infer that the defendant's witnesses are not to be believed, that something went wrong with the

> precautions described, that the full truth has not been told" (Restatement [Second] of Torts §328D, comment n). Thus, the inference of negligence could reasonably have been drawn "upon 'a commonsense appraisal of the probative value' of the circumstantial evidence," and it was error to refuse plaintiffs' request to charge res ipsa loquitur...

Kambat, supra, 89 NY2d at 497.

Citing *Kambat,* the Court in *Bell v. Agarwal, supra,* held that in the face of the defendant physician's evidence that her reliance on the nurses' sponge count was good and accepted medical practice, plaintiff's evidence that the sponge was left in her abdomen during surgery was in and of itself sufficient to raise an issue of fact with respect to the defendant's negligence. *Id.,* 55 AD3d at 1310-11. Similarly, the Second Department in *Critelli* held that the defendant physician "failed to negate, as a matter of law, the inference of negligence that may be drawn as a result of his failure to observe and remove a laparotomy pad, measuring 100 to 144 square inches, which he had placed in the plaintiff's abdomen during surgery," and that summary judgment was properly denied "despite the fact that plaintiff did not submit an affidavit of a medical expert." *Id.,* 115 AD2d at 632.

The foregoing authorities compel the denial of Dr. Peralo/Horizon's motion for summary judgment based on Dr. Peralo's undisputed failure to discover and remove the 14 by 14 inch lap pad in Plaintiff's abdomen and the doctrine of *res ipsa loquitur*, even though Plaintiff submitted no expert medical evidence. However, these Defendants established *prima facie* that Plaintiff's claims with respect to (1) a prior surgery and (2) lack of informed consent are without merit, and Plaintiff in opposition has failed to demonstrate the existence of any triable issue of fact. Accordingly, the motion for summary judgment on these aspects of Plaintiff's case is granted.

It is therefore

ORDERED, that Plaintiff's motion for summary judgment as against defendants John Peralo, M.D., Horizon Family Medical Group and Horizon Medical Group, PC s/h/a HMG Goshen Surgery is in all respects denied, and it is further

ORDERED, that Plaintiff's motion for summary judgment as against defendants Orange Regional Medical Center and Greater Hudson Valley Health System, Inc. is granted to the extent that (1) the said Defendants are deemed negligent as a matter of law, and (2) their Third Affirmative Defense of comparative negligence is hereby stricken, and the motion is otherwise denied, and it is further

ORDERED, that the cross motion of defendants John Peralo, M.D., Horizon Family Medical Group and Horizon Medical Group, PC s/h/a HMG Goshen Surgery for summary judgment is granted to the extent that (1) all claims relating to the surgery prior to that wherein the laparotomy pad was left in Plaintiff's abdomen are dismissed, and (2) Plaintiff's claim of lack of informed consent is dismissed, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: September 14, 2020 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE