O'Connor v Nawaz

2012 NY Slip Op 30176(U)

January 23, 2012

Supreme Court, Suffolk County

Docket Number: 08-44467

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX No. 08-44467
CAL No. 11-01016MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-18-11 (#001)
MOTION DATE 10-27-11(#002)
ADJ. DATE 11-17-11
Mot. Seq. # 001 - MD
002 - XMotD

---X

DEREK O'CONNOR,

Plaintiff,

- against -

ARAIN M NAWAZ, M.D., NORTH SHORE GASTROENTEROLOGY & ENDOSCOPY CENTER, HILLEL SIMCHA TROPE, D.O., STEVEN SAMUEL, M.D., and ST. CHARLES HOSPITAL and REHABILITATION CENTER,

Defendants.

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KH/2

Upon the following papers numbered 1 to 34 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 24, 25 - 30; Replying Affidavits and supporting papers 31 - 32, 33 - 34 ; Other ___; it is,

ORDERED that this motion (seq. #001) by defendant Steven Samuel, D.O., sued herein as Steven Samuel, M.D., for an order granting summary judgment is denied; and it is further

ORDERED that this cross-motion (seq. #002) by defendant St. Charles Hospital and Rehabilitation Center for summary judgment is granted to the extent that it seeks dismissal of the plaintiff's allegations of vicarious liability for the negligence of hospital staff members, and is otherwise denied.

In this medical malpractice action, plaintiff Derek O'Connor alleges that defendants departed from accepted medical practice from September 1, 2003 through November 15, 2006. Plaintiff alleges that defendants failed to timely treat a flare-up of his ulcerative colitis which resulted in extensive surgery to remove his colon on November 8, 2006. He further alleges that as a result of defendants' departures, he developed sepsis, liver failure and portal hypertension, and required several further surgeries and medical management over the next three years.

The record reveals that plaintiff was diagnosed with ulcerative colitis in September 2003, by defendant Arain M. Nawaz, M.D. ("Nawaz") after he underwent a colonoscopy. The plaintiff testified that Nawaz prescribed protonix, however, plaintiff still experienced bloody stools every day. Nawaz then prescribed prednisone which made a slight improvement. In the summer of 2004, plaintiff's condition worsened and he was admitted to Mather Memorial Hospital where he underwent a second colonoscopy which revealed that the colitis had progressed to a larger part of the colon. He received intravenous fluids and, after one week, he was discharged to home. In the fall of 2005, his condition remained the same, and the plaintiff was still experiencing frequent bloody stools. He received a new prescription from Nawaz called purinethol to manage his colitis.

The record further reveals that on October 27, 2006, plaintiff complained of fevers, severe belly pain, nausea and was unable to eat. He presented to Nawaz at his office, who prescribed an antibiotic. On October 31, 2006, he presented to the emergency room at defendant St. Charles Hospital and Rehabilitation Center ("St. Charles"), where he was examined by defendant Steven Samuel, D.O., sued herein as Steven Samuel, M.D. ("Samuel"), who was working the 7:00 a.m. to 7:00 p.m. shift as the emergency room attending physician. The emergency room record reveals that the plaintiff's blood pressure was 160/101, his pulse was 85, and his temperature was 98.6 degrees. Samuel testified that he was employed by Island Medical MD Staffing Emergency Room at St. Charles and was paid by this entity. He stated that he was not an employee of St. Charles. Samuel testified that upon examination, the plaintiff's abdomen was soft, he had normal bowel sounds, the plaintiff complained of faint tenderness in the lower quadrants, and the rest of the examination was benign. He ordered intravenous fluids, morphine, lab tests, and a flat and upright abdominal x-ray. The record reveals that plaintiff received the morphine and underwent the ordered tests. Samuel stated that he reviewed the x-ray and noted that it was unremarkable. He returned to the plaintiff and his mother and advised the plaintiff to undergo a CT scan of the abdomen, which he felt was indicated. After some discussion, the plaintiff and his mother agreed to the test. Samuel then went off duty at the end of his shift at approximately 7:20 p.m.

Defendant Hillel Simcha Trope, D.O. ("Trope") testified that he took over the plaintiff's care from Samuel and reviewed the lab results and the CT scan result. The CT scan revealed diffuse colonic thickening involving the cecum and ascending colon, and that there was no gastrointestinal obstruction, free air or free fluid. He testified that he called Nawaz and reported the findings. The record reveals that the plaintiff's pain had decreased and he was feeling better. Nawaz advised Trope to discharge the plaintiff to home and that he would see the plaintiff in his office in the morning. The plaintiff was discharged at 10:40 p.m. with instructions to see Nawaz in the morning, which plaintiff and his mother agreed to do. Trope stated that it was the custom and practice of the emergency room to fax all test results to the private physician's office after a patient is discharged, and he assumed that the plaintiff's tests were faxed to Nawaz. The record reveals that the plaintiff apparently presented to Mather Hospital emergency room on November 3, 2006, and was admitted. According to the bill of particulars, plaintiff underwent surgery on November 8, 2006, however, there are no records from this admission for the Court's review.

Defendant Samuel now moves, and defendant St. Charles Hospital cross-moves for summary judgment dismissing the complaint.

The requisite elements of proof in a medical malpractice case are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; ***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Zuckerman v New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

Where the physician is not privately retained by the patient and his activities are controlled by the hospital, courts have held hospitals vicariously liable for the malpractice of the doctor notwithstanding any claim that he was an independent contractor (*see* ***Mertsaris v 73rd Corp.***, 105 AD2d 67, 482 NYS2d 792 [2d Dept 1984]; ***Felice v St. Agnes Hosp.***, 65 AD2d 388, 411 NYS2d 901 [2d Dept 1978]; ***Mduba v Benedictine Hosp.***, 52 AD2d 450, 384 NYS2d 527 [3d Dept 1976]).

The evidence submitted by defendant Samuel was sufficient to meet his burden of establishing, as a matter of law, that he did not depart from good and accepted medical practice. In support of his motion, defendant Samuel submits, *inter alia*, the pleadings, the bill of particulars, the deposition testimonies of the plaintiff, the plaintiff's mother, Samuel, and Trope, and the affirmation of his expert Vibhu Narang, M.D. Plaintiff alleges in the bill of particulars that Samuel departed from accepted medical practice in failing to obtain and record a thorough and complete medical history of the plaintiff's symptoms, signs and complaints; in failing to thoroughly and properly record the plaintiff's complaints; in failing to timely and properly recognize the significance of or determine the etiology of plaintiff's complaints of severe abdominal pain, bloody diarrhea and fever; in negligently and carelessly ignoring the plaintiff's presenting signs and symptoms of an acute colon condition; in failing to appreciate the significance of the plaintiff's existing ulcerative colitis condition; in failing to timely and properly rehydrate the plaintiff; in failing to timely and properly monitor and obtain the plaintiff's vital signs; in failing to consult with the plaintiff's treating gastroenterologist regarding the plaintiff's emergency room findings; in failing to appreciate the significance of the plaintiff's medications and their side effects; in failing to properly recognize the significance of the plaintiff's decreased bowel sounds; and in failing to recognize and determine the etiology of, and act upon, the plaintiff's signs and symptoms of toxic megacolon.

As is relevant to the instant motion, the plaintiff testified that he is currently employed by Stony Brook University Engineering as a conference coordinator for 20 hours per week. He is currently attending graduate school. He stated that he was a patient of Nawaz from September, 2003. On October 31, 2006, he presented to St. Charles emergency room. He stated that he and his mother originally went to Mather Hospital, but it was very crowded. He stated that he spoke to a nurse, and saw a doctor, who he said was defendant Trope. A CT scan was ordered by the doctor and was performed in the radiology department. Then he waited for approximately one hour. He did not recall meeting defendant Samuel. He stated that he did not recall the content of the discussions with Trope. He remembered getting morphine for the pain. After his discharge from St. Charles, he went home. He did not recall seeing Nawaz the next morning. On November 3, 2006, he had increased abdominal pains, could not urinate and had more bloody bowel movements. That evening he presented to Mather Hospital and was admitted. He does not recall anything after that except for waking up in ICU a few days later. He then had two surgeries at Mather Hospital and two surgeries at Mount Sinai Hospital.

As is relevant to the instant motion, the plaintiff's mother testified that Nawaz prescribed the purinethol sometime in 2005, but it never made a difference with the plaintiff's symptoms. She stated that the plaintiff began experiencing different symptoms than before early in October, 2006. On October 27, 2006, she stated that Nawaz called in a prescription for an antibiotic. She took the plaintiff to St. Charles emergency room on October 31, 2006 because he wasn't getting better. She stated that the plaintiff saw defendant Trope, who told her about the blood work and CT scan and that they were unremarkable. Upon discharge, plaintiff's mother called Nawaz' office the next morning and was told that there was an opening on November 3, 2006. After seeing Nawaz, the plaintiff began to complain that he could not urinate. Plaintiff's mother called Nawaz back, who told her to take the plaintiff to Mather Hospital.

Dr. Narang avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in emergency medicine. It is his opinion, with a reasonable degree of medical certainty, that defendant Samuel did not depart from good and accepted medical practice in his care and treatment of the plaintiff, nor were any of his actions the proximate cause of the plaintiff's injuries. He states that as the first of the two emergency room physicians who evaluated and treated the plaintiff in the emergency room of St. Charles, he took an appropriate history from the plaintiff, performed an appropriate physical examination, and ordered testing, including a CT scan of the abdomen, at which point his shift came to an end. The history taken by Samuel was completely appropriate. He wrote the plaintiff's medications, that he had a history of ulcerative colitis, that he had a tactile fever, abdominal pain for two to three days, bloody diarrhea, and that his pain was a 4 on a scale of 1 to 10. His orders were also appropriate for the plaintiff's medical status. Samuel's physical examination was also within acceptable standards of care. He noted faint tenderness in the lower quadrants during his abdominal examination, and that the bowel sounds were normal and the rest of the physical examination was benign. The only tests reviewed by Samuel before he went off duty, were the flat and upright x-ray. After further discussions with the plaintiff and his mother, the CT scan was ordered.

Dr. Narang further states that, at the time of the change of shift, the results of the CT scan and lab tests were still pending. Therefore, there was no reason for Samuel to contact Nawaz, since there was nothing of significance to report to him at the shift change. It is Dr. Narang's opinion, with a reasonable degree of medical certainty, that Samuel did not depart from good and accepted medical practice, nor were any of his actions the proximate cause of the plaintiff's injuries. Additionally, Dr. Narang opines that Samuel did not fail to properly inform the plaintiff of the risks and benefits of any of the treatment and there were no complications from any of the treatment rendered by Samuel.

As defendant Samuel made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). In opposition, the plaintiff submits, among other things, an affirmation of his medical expert, whose name has been redacted in accordance with ***Carrasquillo v Rosencrans***, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994). The original unredacted affidavit has been submitted to the Court for inspection under separate cover.[1] The expert states that Samuel departed from accepted standards of medical practice in failing to arrange for the plaintiff's immediate admission to the hospital and in failing to consult with an internist or gastroenterologist regarding the plaintiff's symptoms and medications. He notes that the plaintiff's blood pressure was high on admission and Samuels did not obtain another blood pressure during his physical examination and no further vital signs are documented during the six hours that the plaintiff was in the emergency room. In addition, the expert states that Samuel failed to understand the antimetabolite and immunosuppressive actions of purinethol that were supposed to control the plaintiff's colitis activity. These failures caused the colitis to deteriorate further. The expert states that three days after discharge from St. Charles, the plaintiff was admitted to Mather Memorial Hospital for continued

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[1] The Court has conducted an *in camera* inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

abdominal complaints and was diagnosed with toxic megacolon. He underwent surgery on November 8, 2006 and received an ileostomy. This conflicting opinion precludes a finding of summary judgment (***Viti v Franklin General Hospital***, 190 AD2d 790, 593 NYS2d 840 [2d Dept 1993]).

Turning to the cross-motion, in the bill of particulars, the plaintiff alleges, *inter alia*, that St. Charles is vicariously liable for the negligent acts of its agents, servants, and/or employees, including physicians, nurses, nurse practitioners, physicians assistants, and technicians who rendered care and/or supervised the care and treatment rendered to the plaintiff, and that defendant's employees were negligent in failing to diagnose and treat the plaintiff, in failing to provide proper medical, nursing and ancillary personnel staffing so as to render safe and timely care to the plaintiff, and in failing to ensure that its agents, servants, and/or employees possessed that degree of skill, ability, competence and experience commensurate with those performing the same professional function in the medical community.

St. Charles has failed to demonstrate its *prima facie* entitlement to judgment as a matter of law with regard to its alleged vicarious liability for the acts or omissions of defendant Samuel (*see* ***Mertsaris v 73rd Corp.***, *supra*; ***Felice v St. Agnes Hosp.***, *supra*; ***Mduba v Benedictine Hosp.***, *supra*). However, St. Charles has demonstrated its *prima facie* entitlement to summary judgment with regard to the issue of whether it is vicariously liable for the alleged negligent acts or failures to act by its nursing staff and other employees. In support, St. Charles submits the affirmation of counsel who affirms plaintiff made no discovery demands about staff members, and failed to request any depositions of hospital staff members. Counsel further states that during discovery, St. Charles made a demand for a supplemental bill of particulars requesting the plaintiff to identify the staff members, other than Samuel or Trope, who were negligent or failed to act in the care and treatment of the plaintiff, and the plaintiff responded that he had no knowledge of each and every person who performed such acts and/or omissions other than the named defendants. A review of the bill of particulars reveals that it does not name any hospital personnel involved in the plaintiff's care in the emergency room nor does it specify mistakes committed by the unidentified personnel. Thus, it becomes impossible to determine any merit in plaintiff's case against the hospital (***Batson v La Guardia Hospital,*** 194 AD2d 705, 600 NYS2d 110 [2d Dept 1993]; ***Brusco v St. Clare's Hospital and Health Center***, 128 AD2d 390, 512 NYS2d 675 [1st Dept 1987]). As St. Charles made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). In opposition, the plaintiff's submission of his expert's redacted affirmation is insufficient to raise an issue of fact.

Accordingly, the cross-motion by St. Charles for summary judgment dismissing the complaint is granted to the extent that it seeks dismissal of the plaintiff's allegations of vicarious liability for negligent acts by hospital staff members, and is otherwise denied.

Dated: January 23, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**