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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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MARGARET SULLIVAN, AS EXECUTRIX OF THE ESTATE OF TIMOTHY F. SULLIVAN, AND MARGARET SULLIVAN, INDIVIDUALLY,

Plaintiff,

-against-

PAUL A. BELL, M.D., WINTHROP UNIVERSITY HOSPITAL, DR. THOMAS R. O'DONNELL, M.D. and BROOKHAVEN MEMORIAL HOSPITAL,

Defendants.

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TRIAL/IAS PART 17

INDEX # 3977/10

Motion Seq. 1, 2
Motion Date 9.27/10.26.11
Submit Date 11.21.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1, 2
Answering Affidavit 3
Reply Affidavit..... 4,5

Motion by the defendant Winthrop University Hospital for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims against it is

GRANTED.

Motion by the defendant Brookhaven Memorial Hospital for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is **DENIED**.

The plaintiffs in this action seeks to recover damages for medical malpractice, wrongful death and lack of informed consent. The defendant hospitals where the decedent Timothy F. Sullivan was treated seek summary judgment dismissing the complaint against them.

Succinctly stated, the facts pertinent to the determination of these motions are as follows: As the result of a PET scan, the decedent's private attending doctor, the defendant Dr. Bell, recommended an excisional biopsy of the decedent Timothy Sullivan's left tonsil region. Dr. Bell performed a unilateral tonsillectomy at Winthrop University Hospital on March 3, 2008. The decedent was discharged from Winthrop at approximately 11:00 AM. At home, at approximately 11:45 AM, the decedent experienced bleeding at the operative site. He was transported via ambulance to the defendant Brookhaven Memorial Hospital. Dr. DiGioa, a doctor in the hospital's emergency room, discussed decedent's condition with Dr. Bell who advised that an otolaryngology (ENT) consult be done. Brookhaven Memorial Hospital called upon its on-call ENT, the defendant Dr. O'Donnell, to evaluate the decedent. Dr. O'Donnell cared for the decedent and discharged him at approximately 4:30 PM despite his wife's, the plaintiff Margaret Sullivan's, protestations. At approximately 11:30 PM, the decedent's bleeding recurred, an ambulance was again summoned, and he was brought back to Brookhaven Memorial Hospital. The decedent went into respiratory distress and was placed on a ventilator and transferred to the Intensive Care Unit. He died at Brookhaven Memorial Hospital on March 5, 2008.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2d Dept 2004], affd as mod., 4 NY3d 627 [2005], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, supra, at p. 74; *Alvarez v Prospect Hosp.*, supra; *Winegrad v New York Univ. Med. Ctr.*, supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (see, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2d Dept 2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [2d Dept 1990]).

"[H]ospitals are 'shielded from liability when its employees follow the orders of [a private attending physician] unless the latter's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness.' " (*Sela v Katz*, 78 AD 3d 681 [2nd Dept 2010], quoting *Filippone v St. Vincent's Hosp. and Medical Center of New York*, 253 AD2d 616, 618 [1st Dept 1998]; and citing *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 n. 3 [1968]; *Muniz v Katlowitz*, 49 AD3d 511, 513 [2nd Dept 2008]; *Soto v Andaz*, 8 AD3d 470, 471-472 [2nd Dept 2004]).

Winthrop University Hospital's motion is **GRANTED**. It has established that while at Winthrop, the decedent was under the care of his private attending doctor, the defendant Dr. Bell;

that the hospital staff properly followed Dr. Bell's instructions, and in so doing conformed with medical protocol; and that nothing that Dr. Bell did or failed to do was medically contraindicated. The burden accordingly shifts to the plaintiffs to establish the existence of a material issue of fact. The plaintiffs have not opposed Winthrop University Hospital's motion. The complaint and any and all cross-claims against Winthrop University Hospital are dismissed.

"In general, "[a] hospital may not be held [liable] for the acts of a doctor who was not an employee of the hospital, but one of a group of independent contractors." (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2nd Dept 2007], quoting *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). However, "vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel." (*Dragotta v Southampton Hosp.*, supra, quoting *Hill v St. Clare's Hosp.*, supra; *Hannon v Siegel-Cooper Co.*, 167 N.Y. 244 [1901]; *King v Mitchell*, 31 AD3d 958, 959 [3rd Dept 2006]). "[W]here a hospital or clinic holds out an independent contractor to be its agent or employee, it may be stopped from asserting such independent contractor status if the patient has relied on that representation." (*Nilsen v Franklin Dental Health*, 34 Misc 3d 1 [N.Y. Sup. App. Term 2011], citing *Hill v St. Clare's Hosp*, supra). This is because "[p]atients seeking medical help and the plaintiffs seeking redress for alleged malpractice should not be bound by secret limitations contained in private contracts." (*Santiago v Archer*, 136 AD2d 690, 691 [2nd Dept 1988], citing *Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3rd Dept 1976]; *Hannon v Siegel-Cooper Co.*, supra; *Lanza v Parkeast Hosp.*, 102 AD2d 741 [1st Dept 1984]).

> "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on

> behalf of the principal. The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill." *Dragotta v Southampton Hosp.*, supra, quoting *Hallock v State*, 64 NY2d 224, 231 (1984); *Ford v Unity Hosp.*, 32 NY2d 464, 473 (1973); *King v Mitchell*, supra, at p. 959; *Searle v Cayuga Med. Center at Ithaca*, 28 AD3d 834, 836 (3rd Dept 2006).

"There are two elements to such a claim of apparent or ostensible agency." (*Dragotta v Southampton Hosp.*, supra, at p. 699). "To establish the 'holding out' element, the misleading words or conduct must be attributable to the principal." (*Dragotta v Southampton Hosp.*, supra, at p. 699). "To establish the 'reliance' element, the third party must accept the agent's services and submit to the agent's care in reliance on the belief that the agent was an employee of the principal." (*Dragotta v Southampton Hosp.*, supra, at p. 699). "In the context of a medical malpractice action, the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital's behalf." (*Dragotta v Southampton Hosp.*, supra, quoting *Dolan v Jaeger*, 285 AD2d 844, 846 [3rd Dept. 2001]; *Gunther v Staten Island Hosp.*, 226 AD2d 427, 428 [2nd Dept. 1996]).

"In the context of evaluating whether a doctor is the apparent agent of a hospital, a court should consider all attendant circumstances . . . to determine whether the patient could properly have believed that the physician was provided by the hospital (quotations omitted)." (*Sampson v Contillo*, 55 AD3d 588 [2nd Dept 2008], quoting *Contu v Albert*, 18 AD3d 692, 693 [2nd Dept 2005], quoting *Augeri v Massoff*, 134 AD2d 308, 309 [2nd Dept 1987]).

In support of its motion, Brookhaven University Hospital has submitted the affirmation of John Roche. He is Board Certified in Emergency Medicine. Having reviewed the pertinent medical and legal records, Dr. Roche opines to a reasonable degree of medical certainty that there were no departures from accepted standards of care by Brookhaven Memorial Hospital. He notes that the decedent had lab work done which showed normal coagulation, a hemoglobin of 14.3, hematocrit of 41.6 and platelets of 143; that upon examination, Dr. O'Donnell found no active bleeding and the decedent appeared to be stable; and, that Dr. O'Donnell communicated with Dr. Bell before the decedent was discharged at Dr. O'Donnell's recommendation. Brookhaven Memorial Hospital maintains that Dr. DiGioia had no reason to override Dr. O'Donnell's opinion made in consulting with Dr. Bell that the decedent be discharged. Brookhaven University Hospital has not addressed Dr. O'Donnell's conduct: Instead, it maintains that it cannot be held liable for his actions.

The defendant Brookhaven Memorial Hospital has not established its entitlement to summary judgment dismissing the complaint against it. Even though Dr. O'Donnell was not an employee of the hospital, there is a triable issue of fact as to whether Brookhaven Memorial Hospital is vicariously liable for any departures by him under the theory of ostensible agency. At the suggestion of the decedent's private doctor, the defendant Dr. Bell, the decedent went to Brookhaven Memorial Hospital's emergency room seeking emergent medical care. There, the decedent was treated by the defendant Dr. O'Donnell. That "an" otolaryngologist was assigned to the decedent's case at the behest of Dr. Bell does not require a different result. There is no evidence that the plaintiffs or Dr. Bell played any role in choosing Dr. O'Donnell to treat the

decedent: Dr. Bell only requested that "an" otolaryngologist be assigned, and the hospital assigned Dr. O'Donnell (compare, *Schultz v Shreedhar*, 66 AD3d 666 [2nd Dept 2009]).

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 18, 2012

ENTER

HON. JEFFREY S. BROWN, JSC

ENTERED
JAN 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorney for Plaintiff
Fogarty & Duffy, PC
185 Willis Avenue, Ste. 2
Mineola, NY 11501-2674
516-747-7500

Attorney for Defendant Winthrop
Montfort Healy, McGuire & Salley
840 Franklin Avenue
PO Box 7677
Garden City, NY 11530-7677
747-4082

Attorney for Defendant Bell and O'Donnell
Kelly Rode & Kelly, LLP
330 Old Country Road
Mineola, NY 11501
739-0400

Attorney for Defendant Brookhaven
Anthony P. Vardaro, PC
732 Smithtown Bypass, Ste. 203
Smithtown, NY 11787
631-361-9494