

Sclafani v Silich

2012 NY Slip Op 30263(U)

February 1, 2012

Supreme Court, Richmond County

Docket Number: 150002/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:150002/07
Motion No.: 006**

**JENNIFER SCLAFANI and
GARY SCLAFANI,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ROBERT J. SILICH, M.D.,
ROBERT J. SILICH, M.D., P.C.,
SUMY HANKYI CHANG, M.D., and
STATEN ISLAND UNIVERSITY HOSPITAL,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law In Support	2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Sumy Hankyi Chang, M.D. (“Dr. Chang”) and Staten Island University Hospital (“SIUH”) move for an order granting summary judgment dismissing the plaintiffs’ complaint. The motion is granted.

Facts

The plaintiff presented to the defendant, Dr. Silich’s office on June 15, 2006 for a surgical evaluation. During that visit Dr. Silich conducted a physical examination and determined that the patient was suffering from a hernia and opined that she was in need of a

surgical repair. The plaintiff underwent a hernia operation performed by Dr. Silich at SIUH on September 20, 2006. During the surgery Dr. Change, a SIUH resident, assisted Dr. Silich with the plaintiff's surgery. At the time of his deposition Dr. Silich testified as follows:

- Q. You had an assistant during this surgery. I think it was a Dr. Chang?
- A. Correct
- Q. Do you know who Dr. Chang is?
- A. Yes.
- Q. Who is Dr. Chang?
- A. Dr. Change at the time was, I believe, a second-year resident in general surgery.¹

- Q. What was Dr. Chang's function during this surgery as a second year resident?
- A. Mainly to observe technique, observe suturing, cutting knots, elevating the - - help to elevate the skin to expose the area of the repair and assist in any way that I thought was necessary.²

The sum and substance of Dr. Chang's testimony during her deposition was that as a second year surgical resident her level of participation would be governed by the surgeon performing the surgery. While Dr. Chang did not immediately recall her level of participation in the plaintiff's surgery, she repeatedly stated that the amount of her participation would be governed by the physician conducting the surgery. In this case, Dr. Silich. Dr. Chang further confirmed that she dictated the post operative report concerning the plaintiff's surgery. That report shows that Dr. Chang dictated the report and it was submitted on September 20, 2006 and authenticated by Dr. Silich on September 22, 2006.

Dr. Silich discharged the plaintiff on the same day as the surgery with post-operative

¹ Silich Transcript page 23.

² Id. page 24.

instructions. During the days between the procedure and the post-operative appointment the plaintiff contacted Dr. Silich on two separate occasions complaining of increased pain. To treat the pain Dr. Silich advised the plaintiff to take additional pain medication and eventually prescribed a stronger medication. The plaintiff attended a scheduled post-operative appointment with Dr. Silich on September 28, 2006.

The plaintiff testified that she did not change the bandages or dressings on the surgical site prior to her September 28, 2006 appointment with Dr. Silich. Upon the removal of the dressing the plaintiff described the surgical site as being black and smelling terrible. Dr. Silich treated the wound with a topical antibiotic ointment. On October 2, 2006 the plaintiff was seen at home by a visiting nurse that believed the surgical wound was infected and referred her to the emergency room at SIUH.

At the SIUH's emergency room Dr. Silich treated the plaintiff and continued to care for her post-operative issues. The record reflects that Dr. Silich saw no evidence of infection and continued to treat the surgical wound with an topical antibiotic ointment. Dr. Silich discharged the patient the same day.

On October 3, 2006 the plaintiff presented to Dr. Cooper who diagnosed her with a deep burn that he would treat with hospitalization to administer IV antibiotics. On the same day the plaintiff discharged Dr. Silich as her private care physician and began treatment with Dr. Cooper. The next evening, October 4, 2006 the plaintiff presented to SIUH and was admitted under the care of Dr. Cooper until November 15, 2006.

Dr. Chang and SIUH now move for summary judgment arguing that the plaintiff's treatment was determined by her private doctors –Drs. Silich and Cooper; and alternatively, that Dr. Chang's actions did not constitute a departure from good and accepted medical practices. The motion is unopposed by the co-defendants, Robert J. Silich, M.D. and Robert J. Silich, M.D., P.C.

Discussion

“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. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . .”³

Here, SIUH and a resident physician, Dr. Chang move for summary judgment. “In general, a hospital cannot be held vicariously liable for the negligence of a private attending physician. . . In addition, a hospital ‘cannot be held concurrently liable with such a physician unless its employees commit independent acts of negligence or the attending physician’s orders are contraindicated by normal practice.’”⁴ Here, the deposition testimony of Dr. Chang and Dr. Silich, as well as the post-operative report authorized by Dr. Silich in support of the defendants motion for summary judgment demonstrate that Dr. Chang carried out the directions of the attending physician, Dr. Silich, and at no time contraindicated Dr. Silich’s orders.

In addition, Dr. Chang and SIUH submit the expert affirmation of Joseph Feinberg, M.D. His affirmation states, without commenting on the quality of management of Dr. Silich, that Dr. Chang provided appropriate support in assisting Dr. Silich during the plaintiff’s surgery. Additionally, Dr. Feinberg states that the course of the plaintiff’s treatment was outlined by her two private attending physicians—Dr. Silich and Dr. Cooper. Thus, there is no indication that Dr. Chang or SIUH failed to obtain the informed consent of the plaintiff prior to her treatment.

³*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

⁴*Martinez v. La Porta*, 50 AD3d 976, [2d Dept 2008].

In opposition, the plaintiff argues that the post-operative report produced by Dr. Chang is lacking at best. The plaintiff's expert states in an affirmation that:

Based on my review of the above records, it is my opinion within a reasonable degree of medical certainty that defendant, Dr. Chang failed to dictate a proper and accurate operative report following Ms. Sclafani's surgery of September 20, 2006. The incoherent, unacceptable, and incomplete operative report fails to mention several aspects of the negligence that occurred and who may have been responsible. With a reasonable degree of medical certainty, the issues of negligence in this matter cannot be resolved absent Dr. Chang's continued participation in the case. Furthermore, the records and depositions in this matter are insufficient to determine whether Dr. Chang may have intentionally omitted or misstated steps in the procedure in which she "assisted" on September 20.

In this case there is no question that the plaintiff was at all times under the care of a private attending physician in the person of either Dr. Silich or Dr. Cooper. Furthermore, Dr. Silich has stated that Dr. Chang acted as his assistant in the plaintiff's surgery and did not act on her own accord. Even assuming that the production of a sub-par postoperative report by Dr. Chang was negligent, the plaintiff's expert affirmation fails to state how it led to the plaintiff's injuries.

The opposition fails to show that Dr. Chang or any of SIUH's employees committed any independent acts of negligence; or that Dr. Chang or any of SIUH's employees contraindicated Dr. Silich's orders. Therefore plaintiffs' opposition fails to rebut the prima facie showing made Dr. Chang and SIUH which entitles both to summary judgment dismissing the complaint.

Conclusion

The motion for summary judgment made by Dr. Chang and SIUH is granted and the plaintiffs' complaint is dismissed as against the movants. In addition, those defendants shall be removed from the caption.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by Sumy Hankyi Chang, M.D. and Staten Island University Hospital is granted and the complaint is hereby severed and dismissed as against those movants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED, that the caption shall be amended to read as follows:

**JENNIFER SCLAFANI and
GARY SCLAFANI,**

Plaintiffs

against

**ROBERT J. SILICH, M.D. and
ROBERT J. SILICH, M.D., P.C.**

Defendants

and it is further,

ORDERED, that the remaining parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, February 6, 2012 at 9:30 a.m.**

ENTER,

DATED: February 1, 2012

Joseph J. Maltese
Justice of the Supreme Court