

Doe v Goldweber

2012 NY Slip Op 31471(U)

June 1, 2012

Sup Ct, New York County

Docket Number: 108647/07

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

JANE DOE

- v -

BRIAN GOLDWORTH

INDEX NO. 108847/07
MOTION DATE 4/6/12
MOTION SEQ. NO. 4
MOTION CAL. NO. _____

The following papers, numbered 1 to 22 were read on this motion to/for reargue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-16
17-21
22

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 6/1/12

Joan B. Lobis
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

“JANE DOE,” a Pseudonym Intended
to Protect the Privacy Interests
of the Plaintiff,

Plaintiff,

Index No. 108647/07

-against-

Decision and Order

BRIAN A. GOLDWEBER, M.D., BRIAN A.
GOLDWEBER, M.D., L.L.C., SOMERSET
SURGICAL ASSOCIATES, P.C., FRANK
COHEN, M.D., NORMAN SOHN, M.D.,
MICHAEL A. WEINSTEIN, M.D., ABBE
J. CARNI, M.D., and ABBE J. CARNI, M.D., P.C.,

Defendants.

FILED
JUN 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

-----X

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

Motion Sequence Numbers 004 and 005 are consolidated for disposition. In Motion Sequence Number 004, plaintiff Jane Doe moves, by order to show cause, for an order pursuant to C.P.L.R. Rule 2221, granting her leave to reargue that branch of the prior motion (Motion Sequence Number 002) of defendants Frank S. Cohen, M.D., Norman Sohn, M.D., Michael A. Weinstein, M.D., and Somerset Surgical Associates, P.C. (“Somerset”) (collectively the “Somerset Defendants”), which sought summary judgment dismissal of plaintiff’s cause of action sounding in negligence against Dr. Cohen and Somerset, and which was granted in this court’s decision and order dated December 15, 2011 (the “December 2011 Decision”), familiarity with which is presumed, and upon reargument, denying the aforesaid branch of the Somerset Defendants’ prior motion and reinstating the cause of action sounding in negligence against Dr. Cohen and Somerset. In Motion Sequence Number 005, defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C. (the “Carni Defendants”) move, by order to show cause, for an order granting them leave to reargue that branch of their prior motion (Motion Sequence Number 001) which sought summary judgment dismissal

of plaintiff's causes of action sounding in negligent hiring, supervision, and retention against the Carni Defendants, and which was denied in the December 2011 Decision; upon reargument, granting the aforesaid branch of the Carni Defendants' motion and dismissing plaintiff's causes of action sounding in negligent hiring, supervision, and retention against the Carni Defendants; and severing the action, deleting the Carni Defendants from the caption, and directing the clerk to enter judgment in the Carni Defendants' favor.

Plaintiff's motion for leave to reargue is denied, as her motion is not "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." C.P.L.R. Rule 2221(d).

The Carni Defendants' motion for leave to reargue is partially granted. In the underlying decision, the court declined to dismiss the negligent hiring, supervision, and retention claims against the Carni Defendants on the grounds that an issue of fact existed as to whether the Carni Defendants' knowledge that co-defendant anesthesiologist Brian A. Goldweber, M.D., used multi-dose vials of propofol on more than one patient amounted to knowledge that Dr. Goldweber would break sterile technique. The court now sets forth that it misapprehended the facts and law with respect to the standard in this case for establishing a prima facie entitlement to summary judgment on the claims for negligent hiring, supervision, and retention, and therefore grants limited leave to reargue the underlying motion papers dealing with that branch of the Carni Defendants' motion seeking summary judgment on plaintiff's claims for negligent hiring, supervision, and retention.

The key issue with respect to the claims for negligent hiring, supervision, and retention is whether the Carni Defendants knew or should have known that Dr. Goldweber had a propensity to break sterile technique. Assuming that plaintiff contracted hepatitis due to Dr. Goldweber's negligent administration of anesthesia—which is plaintiff's theory of the case—the negligence alleged is that Dr. Goldweber would reuse syringes when using multi-dose vials of propofol, and would then dose subsequent patients out of the same vials, thereby exposing the subsequent patients to hepatitis that the source patient had. In the underlying motion, the Carni Defendants presented expert opinion testimony from Alan Pollock, M.D., that re-using a multi-dose vial of propofol is not negligent as long as a new syringe is used each time, or in other words, as long as sterile technique is maintained. Dr. Pollock further opined that there was no evidence that, prior to hiring Dr. Goldweber or during his contract, Dr. Carni knew or should have known that Dr. Goldweber was not taking the necessary, universal precautions for maintaining sterile technique. This was sufficient to establish a prima facie entitlement to summary judgment with respect to plaintiff's claims sounding in negligent hiring, retention, and supervision. In opposition, plaintiff's expert Jack Rubenstein, M.D., opined that Dr. Carni should not have hired Dr. Goldweber based on the facts that gave rise to his previously-suspended medical license and his lies regarding such, but his opinion that, “[t]aken as a whole the past incidents clearly indicate . . . improper infection control technique[,]” was conclusory and belied by the facts. Additionally, while plaintiff's other expert, Edward Weissman, M.D., opined that Dr. Goldweber failed use the propofol as directed because he administered anesthesia to more than one patient with propofol from the same vial, Dr. Weissman was not of the opinion that use of a multi-dose vial of propofol itself constituted negligence. Accordingly, upon reargument, the court finds that plaintiff did not sufficiently rebut the Carni Defendants' prima facie showing that they had no reason to know that Dr. Goldweber would break

sterile technique, which is the conduct that caused injury to plaintiff. Plaintiff failed to offer evidence showing that the Carni Defendants were aware of conduct of Dr. Goldweber that was either identical to the conduct that ultimately caused plaintiff's injury or of a slightly different nature that nevertheless made plaintiff's ultimate injury foreseeable. Since there is no dispute that use of a multi-dose vial of propofol is not per se negligent, such use cannot constitute conduct so similar to breaking sterile technique that it could have made plaintiff's ultimate injury foreseeable. See Rochlin v. Alamo, 209 A.D.2d 499, 500 (2d Dep't 1994) (plaintiff whose vehicle was struck in the rear by a vehicle driven and stolen by defendant's employee could not make a negligent hiring claim without proof that defendant was aware of employee's propensity to steal). Cf. T.W. v. City of New York, 286 A.D.2d 243, 245-46 (1st Dep't 2001); Colon v. Jarvis, 292 A.D.2d 559, 561 (2d Dep't 2002). Thus, the Carni Defendants were entitled to summary judgment on the claims for negligent hiring and retention.¹

As to the remainder of the Carni Defendants' motion seeking leave to reargue on other grounds, reargument is denied. Accordingly, it is hereby

ORDERED that the motion of defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C., for leave to reargue that branch of their prior motion which sought summary judgment

¹ The court notes that while plaintiff's pleadings raised claims against the Carni Defendants sounding in negligent hiring, negligent supervision, and negligent retention, neither defendants nor plaintiff argued any distinction between negligent supervision and negligent retention in their underlying motion papers. The parties' arguments focused on whether the Carni Defendants knew or should have known of Dr. Goldweber's propensity for the conduct that caused the injury. There were no arguments from either side focusing on whether the moving defendants breached a duty to instruct, train, educate, or supervise Dr. Goldweber in the context of a separate claim for negligent supervision. To the extent that plaintiff asserted a claim for negligent supervision, she never particularized that such a claim existed outside the context of her claim for negligent retention.

dismissal of plaintiff's causes of action sounding in negligent hiring, supervision, and retention against the Carni Defendants, and which was denied in the December 2011 Decision, is partially granted; and it is further

ORDERED that, upon reargument, the Court vacates that portion of its prior order dated December 15, 2012, denying that branch of Motion Sequence Number 001 seeking summary judgment in favor of defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C., with respect to the merits of plaintiff's causes of action sounding in negligent hiring and negligent supervision/retention, and hereby grants that branch of the summary judgment motion of Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C., as to said causes of action; and it is further

ORDERED that plaintiff's only remaining causes of action, sounding in negligent hiring and negligent supervision/retention, are dismissed as to defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C., and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that plaintiff's motion for leave to reargue (Motion Sequence Number 004) and the remainder of the relief requested by the Carni Defendants' motion are denied.

Dated: June / , 2012

ENTER:


JOAN B. LOBIS, J.S.C.

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JUN 05 2012
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