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SHORT FORM ORDER

INDEX No. 10-7803
CAL. No. 12-0029DM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6-1-12
ADJ. DATE 6-6-12
Mot. Seq. # 003 - MG

AMY CHAVES and EDUARDO CHAVES,

Plaintiffs,

- against -

ERIKA J. SMIT, D.D.S., CARL PALMBLAD, D.D.S., and CARL PALMBLAD, D.D.S. d/b/a SMILE MAKERS,

Defendants.

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 11 ; Answering Affidavits and supporting papers 12- 13 ; Replying Affidavits and supporting papers 14-16 ; Other_; it is,

ORDERED that this motion (003) by the defendant, Carl Palmblad, D.D.S. for summary judgment dismissing the complaint as asserted against him on the basis that no doctor-patient relationship existed between him and the plaintiff, that he is not vicariously liable for the acts of Erika J. Smit, D.D.S., and that he did not negligently hire, supervise or retain Erika J. Smit, is granted, and the complaint as asserted against Carl Palmblad, D.D.S. and Carl Palmblad, D.D.S. d/b/a Smiler Makers is dismissed with prejudice.

In this dental malpractice action, the plaintiff, Amy Chaves, alleges that the defendants, Erika J. Smit, D.D.S. and Carl Palmblad, D.D.S., and Carl Palmblad, D.D.S. d/b/a Smile Makers, departed from good and accepted standards of dental practice in the performance of an endodontic root canal procedure by Erika J. Smit, D.D.S. It is alleged that defendant Smit caused an overextended file to extend beyond the anatomical apex of tooth number 14, and failed to advise her of same, causing her to sustain nerve damage, pain and suffering, and embarrassment.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of the instant application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, supplemental summons and amended complaint, defendants' answers, and plaintiffs' verified bill of particulars; unsigned but certified copies of the transcripts of the examination before trial of Amy Chavez dated February 25, 2011, and Erika Smit dated August 11, 2011, both of which were submitted without objection and are considered herein (see ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); and the signed transcript of the examination before trial of Carl Palmblad dated January 13, 2010.

The plaintiffs oppose this motion solely with an attorney's affirmation, unsupported by any evidentiary submissions.

It is undisputed that Erika Smit, D.D.S. was employed in the practice of general dentistry by Smile Makers from 1999. When a patient came to Smile Makers, the patient decided which dentist to see. Amy Chavez was first seen at Smile Makers by Dr. Smit on January 18, 2008, at which time she offered complaints of pain in the left upper quadrant of her mouth, and sensitivity to hot and cold for several weeks, relative to tooth # 14. An x-ray was taken, and a fractured filling with decay was noted, for which a root canal was recommended and treatment commenced that day by Dr. Smit. On the second visit to continue the root canal, the lentulo (an instrument which delivers root canal sealant) separated in the lingual canal of the tooth during the application of the sealant after the canal had been completely cleaned out. The lentulo, after separating, extended beyond the apex of the root and was not removed. The plaintiff was advised to return in two weeks, or at any time, if she developed pain, swelling, or other problem. She was also told that the post and core had to be completed on tooth #14. During the course of the plaintiff's treatment by Dr. Smit, she was not seen at any time by defendant Carl Palmblad, D.D.S.

In 1993, Dr. Palmblad opened up a dentistry practice in the name of Carl Peter Palmblad, D.D.S., conducting his practice under the name of Smile Makers, which was registered in Suffolk County as a d/b/a. Dr. Palmblad was the sole registered owner of Smile Makers. Dr. Smit was employed at Smile

Makers and was issued a 1099 form from Smile Makers at the end of each year. Issuance of a 1099 form reflects earnings realized by defendant Smit as "nonemployee compensation" (see ***Peck v Real Estate Strategies, Ltd***, 2008 NY Slip Op 30748U [Sup. Ct. Nassau County]). She was also paid a percentage for the work she performed on her patients, less salaries for her hygiene support staff and lab bills. Dr. Smit worked out of the Shirley office, and Dr. Palmblad worked out of the Port Jefferson office. Dr. Palmblad testified, and it is undisputed, that he did not render care and treatment to the plaintiff at any time, he did not know the plaintiff, he did not write any notes in her record, and did not review the plaintiff's x-rays.

A physician-patient relationship is created when the professional services of a physician are rendered to and accepted by another for the purposes of medical or surgical treatment (***Zimmerly v Good Samaritan*** Hospital, 261 AD2d 614, 690 NYS2d 718 [2d Dept 1999]); ***Quirk v Zuckerman***, 196 Misc2d 496, 765 NYS2d 440 [Sup. Ct. Nassau County 2003]). A cause of action to recover damages for medical malpractice must be founded upon the existence of a doctor-patient relationship (***Delacy v University Radiology Associates, P.C.***, 254 AD2d 450, 679 NYS2d 151 [2d Dept 1998]). It has been established that no doctor-patient relationship was ever established or existed between the plaintiff and Dr. Palmblad. The evidentiary submissions clearly demonstrate that all the care and treatment rendered to the plaintiff at Smile Makers was by Dr. Smit. Dr. Palmblad did not write in the plaintiff's chart, did not supervise the plaintiff's care and treatment provided by Dr. Smit, never rendered care and treatment to the plaintiff, and none of the care and treatment rendered to the plaintiff was at the direction or order of Dr. Palmblad. Thus, no cause of action may be maintained against defendant Carl Palmblad, D.D.S. for dental malpractice premised upon the theory that Dr. Palmblad negligently departed from the accepted standards of care.

Accordingly, the negligence cause of action asserted against Dr. Palmblad for malpractice is dismissed with prejudice.

Dr. Palmblad also argues that he did not negligently hire, employ, or supervise Dr. Smit in her care and treatment of patients at his facility, and that he cannot be held vicariously liable for the care and treatment rendered to the plaintiff by Dr. Smit. It is noted that the complaint sets forth a cause of action for negligence premised upon each of the defendants' alleged dental malpractice. The complaint does not set forth causes of action asserting that Dr. Palmblad is vicariously liable for the acts or omissions of Dr. Smit, or that he negligently hired or supervised defendant Smit. However, the plaintiff's bill of particulars alleges that Carl Palmblad, D.D.S. is vicariously liable for the actions of defendant Smit, and that he negligently hired, supervised, and retained defendant Smit in his employ.

A bill of particulars, the purpose of which is to amplify the pleadings, limit the proof, and prevent surprise at the trial, may add specific statements of fact to a general allegation in the pleading, but it cannot add or substitute a new theory or cause of action, nor can it change the cause of action set forth in the complaint if it is not part of the pleadings (***Castleton v Broadway Mall Properties***, 41 AD3d 410, 837 NYS2d 732 [2d Dept 2007]); ***B& F Leasing Co, Inc. v Ashton Companies, Inc.*** 42 AD2d 652, 345 NYS2d 687 [3d Dept 1973]; ***Nicolosi v Christopher, as Administratrix of the Estate of john Christopher, Deceased***, 20 Misc2d 641,189 NYS2d 756 [Supreme Court, Westchester County 1959]). The plaintiffs have not cross-moved to amend the complaint to assert causes of action alleging that Dr.

Palmblad negligently hired and supervised defendant Smit, or that he is vicariously liable for the care and treatment rendered by Dr. Smit to the plaintiff. Thus, it is determined that the plaintiffs have not asserted viable causes of action to recover damages based upon negligent hiring or vicarious liability. Accordingly, no causes of action premised upon vicarious liability or negligent hiring and supervision of Dr. Smit by Dr. Palmblad can be maintained by the plaintiffs.

It is further noted that even if these causes of action were properly pleaded, that it is well settled law that where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior and no claim may proceed against the employer for negligent hiring or retention (***Tangalin v MTA Long Island Bus***, 92 AD3d 766, 938 NYS2d 338 [2d Dept 2012]; ***Ashley v City of New York***, 7 AD3d 742, 779 NYS2d 502 [2d Dept 2004]; ***Colville v Ruder Truck Rental. Inc.***, 30 AD3d 744, 817 NYS2d 179 [3d Dept 2006]). Vicarious liability applies to hospitals and physicians (see ***Kavanaugh, a/k/a Gonzales v Nussbaum***, 71 NY 2d 535, 528 NYS2d 8 [1988]; see also ***Parker v 2001 Marcus Ave., LLC***, 60 AD3d 1024, 877 NYS2d 123 [2d Dept 2009]).

Liability in negligence generally rests on a defendant's own fault. Under the doctrine of vicarious liability, liability is imputed to a defendant for another person's fault, based on the defendant's relationship with the wrongdoer. On the theory that the person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences. A classic example is liability of an employer for the acts of its employees within the course of employment, evidencing the public policy foundation of allocating risk to an employer because it is better able than the innocent plaintiff to bear the consequences of employees' torts. By the imputation of liability, an employer is also encouraged to act carefully in the selection and supervision of its employees. The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of employment. Conversely, an employer who hires an independent contractor is not liable for the independent contractor's negligent acts. The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the important consideration (see ***Chuchuca v Chuchuca***, 67 AD3d 948, 890 NYS2d 573 [2d Dept 2009]). The common-law distinction between "servants" and "independent contractors," whose wrongdoing generally did not give rise to liability on the part of those who hired them, is advanced because an employer cannot control the manner in which work is performed by an independent contractor, as it can the work of a servant. In such circumstance, the independent contractor itself is properly chargeable with preventing, bearing, and distributing the attendant risks. The principle that an employer is not liable for the acts of independent contractors remains the general rule (*see* ***Feilberty v Damon***, 72 NY2d 112, 531 NYS2d 778 [1988]).

Here, it has been established prima facie that defendant Smit was hired as an independent contractor pursuant to a contract, and that she was provided 1099 forms pursuant to her agreement with Dr. Palmblad to work as an independent contractor. The plaintiffs raise no factual issue that defendant Smit's employment status was anything but that of an independent contractor. Additionally, no factual issue has been raised under a theory of apparent or ostensible agency upon which to base vicarious liability against Dr. Palmblad, as the unrefuted admissible evidence establishes Dr. Smit was an independent contractor, that she did not act as Dr. Palmblad's agent, and that Dr. Palmblad did not exercise control over Dr. Smit or the results produced (see ***Nilsen v Franklin Dental Health***, 34 Misc3d 1, 2011 NY Slip Op 21362 [Sup. Ct. Appellate Term 2d Dept 2011]; ***Schacherbauer v University Associates in Obstetrics & Gynecology, P.C.***, 56 AD3d 751, 868 NYS2d 146 [2d Dept 2008] citing

Mduba v Benedictine Hosp., citations omitted). Thus, it is determined as a matter of law that Dr. Palmblad is not vicariously liable to the plaintiffs for the acts of Dr. Smit.

In instances where an employer cannot be held vicariously liable for its' employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision. However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see ***Ashley v City of New York***, 7 AD3d 742, 779 NYS2d 502 [2d Dept 2004]); ***Kenneth R. v Roman Catholic Diocese of Brooklyn***, 229 AD2d 159, 654 NYS2d 791 [2d Dept 1997]). The record does not demonstrate that Dr. Smit had a propensity for conduct which caused the plaintiff's alleged injury, and that defendant Palmblad knew or should have known of a such propensity by Dr. Smit when he hired her. The duty to investigate a prospective employee, or to institute specific procedures for hiring an employee, is triggered only when the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee. The theory that a principal has negligently supervised or instructed an independent contractor normally entails work that is supervised by the principal and inherent in the principal's business or work that is accepted in the reasonable belief that the services are being rendered by the principal (see ***Sandra M. v St. Luke's Roosevelt Hospital Center***, 33 AD3d 875, 823 NYS2d 463 [2d Dept 2006]). Defendant Palmblad has demonstrated prima facie that he did not negligently hire, retain, or supervise defendant Smit. The plaintiff has raised no factual issue that there was prior conduct by Dr. Smit which required Dr. Palmblad to further investigate her credentials, or professional dental abilities and experience, or that he supervised, instructed, or controlled the dental care provided to the plaintiff. Thus, a cause of action premised upon Dr. Palmblad's alleged negligent hiring and supervision of defendant Smit is also precluded as a matter of law.

In view of the foregoing, no basis exists upon which to premise causes of action for either vicarious liability or negligent hiring and supervision, even if these causes of action had been properly pleaded or the plaintiffs moved to amend the complaint to assert same.

Accordingly, motion (003) is granted and the complaint as asserted against Carl Palmblad, D.D.S. and Carl Palmblad, D.D.S. d/b/a Smile Makers is severed from the action and is dismissed with prejudice.

Dated: 16 July 2012

J.S.C.

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