

Matter of Heckle v Teng
2013 NY Slip Op 33238(U)
December 18, 2013
Supreme Court, Suffolk County
Docket Number: 10-30449
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 10-30449
CAL No. 13-00989MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-9-13 (#001)
MOTION DATE 10-23-13 (#002)
ADJ. DATE 11-27-13
Mot. Seq. # 001 - MG
002- MG

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KIMBERLY HECKLE, an infant by her mother and
natural guardian, AUDRA ECKHOFF,

Plaintiff,

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NEUROLOGIC MONITORING SYSTEMS, P.C.,
BORIMIR, DARAKCHIEV, M.D., BORIMIR
DARAKCHIEV, M.D., P.C., WILLIAM E.
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M.D., P.C. and GOOD SAMARITAN HOSPITAL
MEDICAL CENTER,

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-11 (002); Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-13; 14-15; 16-17; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants Borimir Darakchiev, M.D. and Borimir Darakchiev, M.D., P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against them is granted; and it is further

ORDERED that motion (002) by defendant, Valerie J. Robertson, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against her is granted.

In this medical malpractice action, Audra Eckhoff, as the parent and natural guardian of the infant, Kimberly Heckle, seeks damages for personal injuries suffered by the infant plaintiff due to the alleged negligent departures from the good and accepted standards of care by the defendants during their care and treatment of the infant, beginning on or about August 22, 2009 through on or about September 25, 2009. Causes of action for negligence and lack of informed consent have been asserted against the defendants, with an additional cause of action asserted against Good Samaritan Hospital premised upon its alleged negligent hiring of staff and employees. It is alleged that when the then fourteen year old infant plaintiff presented to the defendants that she was negligently diagnosed and treated, rendering her a paraplegic with, inter alia, the inability to walk, fecal and urinary incontinence, and bilateral lower extremity pain and numbness and tingling. It is alleged that the defendants failed to properly diagnose and treat the infant plaintiff for a spinal cord injury at T7-T12, disc herniations at T8-T9, T9-T10, and disc bulging at T10-T11, necessitating five surgical procedures, including T8-9 and T9-10 discectomies, decompressive laminectomies, and spinal fusion at T7-12 with instrumentation.

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 motion (001), Borimir Darakchiev, M.D. and Borimir Darakchiev, M.D., P.C. have submitted, inter alia, an attorneys affirmation, memorandum of law; affidavit of Borimir Darakchiev, M.D.; copies of the summons and complaint, their answer and plaintiff's verified bill of particulars; and seven pages from the infant plaintiffs' hospital records from August 22, 2009, and August 23, 2009 through September 25, 2009.

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In support of motion (002), Valerie J. Robertson, M.D. has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, her answer, plaintiff's verified bills of particulars; signed and certified transcripts of the examinations before trial of David Teng, M.D. dated January 26, 2012 and Valerie Robertson, M.D. dated April 2, 2012; a certified partial copy of the record from Good Samaritan Hospital emergency department; memorandum of law; and the expert affirmation of Richard P. Gold, M.D.

Pursuant to CPLR 3212, motions for summary judgment are to be supported with copies of the pleadings. Here, neither of the moving defendants have submitted copies of the answers served by their co-defendants for this court to determine if any cross claims have been asserted. Thus, motions (001) and (002) fail to comport with CPLR 3212. Additionally, only a brief portion of the infant plaintiff's hospital record has been submitted, leaving this court to speculate as to the contents of the entire file. However, counsel for the plaintiff set forth in the responsive papers that plaintiffs do not oppose the motions for summary judgment by defendants Borimir Darakchiev, M.D. and Valerie J. Robertson, M.D., however, the plaintiff opposes the request of defendants' counsel to preserve any rights to the protections afforded by CPLR Articles 14 and 16.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). 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, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

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Upon reviewing the Good Samaritan Hospital emergency department record, it is noted that the infant plaintiff presented ambulatory from home with complaints of lower back pain (10/10) and was seen by defendant Dr. David Teng on August 22, 2009. She had scoliosis and fell at a concert two days prior. She was noted to be limping when walking, and the record indicated that she was observed to be "sitting fine." She complained of numbness in her feet, but offered no complaints of incontinence or weakness. No gross sensory motor deficits were noted, reflex was intact, and there was normal strength and normal sensation on both feet and legs. She had mid lumbar tenderness. X-rays of her hips, bilateral pelvis, lumbar spine, and thoracic spine were obtained. The lumbosacral spine films showed straightening of the normal lumbar lordosis T12 through S1. Normal kyphosis was found in the thoracic spine at T1-T12, with no hemivertebra or butterfly vertebral bodies. She was medicated with morphine, felt better, and was discharged home.

The portion of the Good Samaritan Hospital record admission record sheet dated August 23, 2009 for the admission of the infant plaintiff, Kimberly Heckle, notes the infant was born on June 20, 1995 and was fourteen years of age on the date of admission. Her admitting diagnosis was acute thoracic cord compression, paraplegia, spinal cord injury, e. coli wound infection, UTI (urinary tract infection), oral candidiasis, and morbid obesity. Her discharge summary by Dr. Patrick Reid, dated September 15, 2009, notes that she was admitted with thoracic spinal cord compression secondary to disc compression after falling on her buttocks. Dr. Reid set forth that the infant plaintiff had multiple surgeries including T9-T10 bilateral decompressive laminectomies on August 24, 2009, then removal of T9 through T10 calcified discs on August 25, 2009. She had rod instillation surgery at T8 through T12 on August 28, 2009, plus a wound exploration with Coleman drain placement on September 7, 2009. On September 2, 2009, she had PICC placement, and on September 17, 2009, she had revision of the surgical wound with muscle flap closure for serosanguineous drainage. He continued to set forth some additional care and treatment during the admission. Dr. Reid noted that neurologically, the infant's exams improved. Initially, upon admission, she could not move her lower extremities and had decreased sensation. She was subsequently able to rock her legs, flex her ankles, and wiggle her toes. Sensation was intact. Neurosurgery found the child medically stable to go to a rehabilitation facility.

The operative note of August 28, 2009 set forth that the surgeon was Patrick J. Reid, M.D., assisted by Borimir Darakchiev, M.D. The pre-operative diagnosis was T9-10 complete spinal cord injury. The post-operative diagnosis was T9-10 complete spinal cord injury. The operation performed was T7-T12 posterior lateral arthrodesis (6 segments); T7-T12 posterior segmental instrumentation (6 segments, 4.5 x 35 mm pedicle screws with 38 and 42 mm multi-axial connectors, Striker); autograft; allograft; fluoroscopy (more than 1 hour). Dr. Reid dictated the note and indicated the child was admitted with an acute cord compression secondary to acute T9-10 disk rupture. He stated she regained sensation in her lower extremities after the T9-10 discectomy and subsequent T9-10 decompressive laminectomy on August 23, 2009. Dr. Reid described the surgery performed on August 28, 2009, assisted by Dr. Darakchiev. It is recorded that during the surgery, two small CSF (cerebral spinal fluid) leaks were visible on the left at the T7-8 and T10-11 laminoforaminotomy sites. The wound was irrigated with copious amounts of Bacitracin before lying down Surgicel and fibrin glue to those areas. Due to the length of the procedure and the patient's pre-existing asthma, the decision was made to keep the infant intubated and to transfer her to PICU.

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MOTION (001)

Dr. Darakchiev set forth in a self-serving and conclusory affidavit that the care and treatment provided by him to the infant plaintiff was appropriate and in accordance with the standards of care and treatment then in existence, and that there were no acts or omission by him which caused any injuries to the infant plaintiff.

Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment (*Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 34 [1st Dept], *cf.*, *Beauchamp v City of New York*, 3 AD3d 465, 771 NYS2d 129 [2d Dept 2004]). However, a shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation *Moller v Talluaga*, 255 AD2d 563, 681 NYS2d 90 [2d Dept 1998]). Dr. Darakchiev averred that he is the sole shareholder in Borimir Darakchiev, M.D., P.C. and that he committed no negligent or wrongful acts while rendering professional services on behalf of his corporation.

The plaintiff does not oppose summary judgment being granted to Dr. Borimir Darakchiev, M.D. and Borimir Darakchiev, M.D., P.C.

Accordingly, motion (001) by Dr. Borimir Darakchiev, M.D. and Borimir Darakchiev, M.D., P.C. for summary judgment dismissing the complaint and any cross claims asserted against them is granted.

MOTION (002)

Valerie Robertson, M.D. testified to the extent that she has been licensed to practice medicine in New York State since 2008 and is also licensed in California, Massachusetts and Texas. She was previously licensed in Oregon, was licensed in Louisiana while in school, and was undergoing licensing in Arizona. She became board certified in radiology in 2000. She has had no teaching responsibilities. In 2009, she was employed by Good Samaritan Hospital as a general radiologist. She was not aware of any guidelines from the American College of Radiology with regard to diagnostic studies related to cervical, thoracic, and lumbar spine injury. She read the radiology films taken of the infant plaintiff and explained that when a film is taken by digital image, it is put onto the computer, and appears on the radiology reading list. Information is then entered into the computer, such as the indication for the exam, or for special concerns or clarification. Prior to reading the infant plaintiff's films, she had no conversation with the emergency room physician, Dr. Teng, and reviewed no emergency room records. The "indication" was blank where comments by the physician or nursing would be entered, however "trauma" was listed next to the indication, but did not indicate the type of trauma. She knew it was a bone film, so she assumed that they were looking for a bony fracture or bony dislocation. She did not know of the infant's pain level, history of a fall, scoliosis, or that she had numbness in her feet on August 22, 2009. She reviewed the x-rays of the infant's cervical, thoracic, and lumbar spine, and according to her report, there were no bone fractures or dislocations.

Dr. Robertson testified that an x-ray would not show soft tissue injury, but would show degenerative joint disease, misalignment of the spine, spondylolisthesis, or bony compression fracture. She testified that

she reviewed the digital images of the pelvis first, then the lumbosacral spine, then the thoracic spine. She noted that there was straightening of the lumbar spine suggesting that the infant plaintiff may have some muscular spasm. The intervertebral disc spaces were well maintained throughout the thoracic spine, as indicated by equivalent disc spaces between the levels in the thoracic spine. There was no evidence of degenerative disc disease of the thoracic spine. Dr. Robertson described how she reviewed the digital images, commencing with the lateral digital images first, counting all twelve of the vertebral bodies, noting vertebral shape and alignment, disc spaces, and looking at the neuroforamina for narrowing on the digital images. There were no fractures or compression fractures of the thoracic spine. The disc spaces looked equivalent throughout. She stated that disc dessication and herniated nucleus pulposus would not show up on an x-ray. She did not make any recommendations for further testing or radiological studies, including MRI of the thoracic spine, or CT of the cervical, thoracic or lumbar spine, as there was no bony injury and no evidence such testing was necessary.

Dr. Robertson submitted the affirmation of Richard P. Gold, M.D. in support of her application. Dr. Gold affirms that he is a physician licensed to practice medicine in New York State and has been board certified in diagnostic radiology since 1974. He set forth his education and training and current employment. He set forth the materials and records reviewed, including the x-ray studies of the lumbar, thoracic, and cervical spine, pelvis, and bilateral hips performed at Good Samaritan hospital on August 22, 2009 and read by Dr. Robertson that same day. It is Dr. Gold's opinion within a reasonable degree of medical certainty that Dr. Robertson acted in accordance with good and accepted medical practice in the care rendered to Kimberly Heckle at Good Samaritan Hospital on August 22, 2009, and that the care rendered in no way caused, precipitated, or exacerbated the injuries claimed by the infant plaintiff.

Upon his review of the x-rays, Dr. Gold opined that the films presented to Dr. Robertson revealed no evidence of any spinal cord injury at T7-T12 and no evidence of acute spinal cord compression. He stated that plain x-rays are utilized to detect and evaluate bony abnormalities and injuries, not soft tissue damage or disc herniations or bulging. Thus, Dr. Robertson, he stated, did not fail to timely and properly diagnose the plaintiff with disc herniations at T8-9, T9-10 or disc bulging at T10-11, since such conditions, if present on August 22, 2009, could not be seen on the plain x-ray of the thoracic spine. Dr. Gold continued that the studies ordered by Dr. Teng were based on a clinical indication of trauma, and that it is common knowledge in the medical community that plain films of the spine are not useful in the diagnosis of nucleus pulposus herniation, deviation of the spinal cord, edema of the spinal cord, disc herniation, disc bulging, ligamentous hypertrophy, or facet joint hypertrophy.

Dr. Gold opined that Dr. Robertson was not provided any information on August 22, 2009, clinical or otherwise, which would have or should have reasonably led her to recommend any further radiological studies, including an MRI of the thoracic spine, or the lumbar spine, or a CT scan of thoracic spine. He continued that Dr. Robertson was not required to request any further information for a patient such as the infant plaintiff who had already been fully evaluated by an attending physician in the emergency department, and who had issued orders for diagnostic testing based upon the examination.

Based upon the foregoing, Dr. Robertson has established prima facie entitlement to summary judgment dismissing the complaint on the basis that she did not depart from the standard of care in rendering treatment on behalf of the infant plaintiff and that she did not precipitate or contribute to the injuries claimed by the infant plaintiff.

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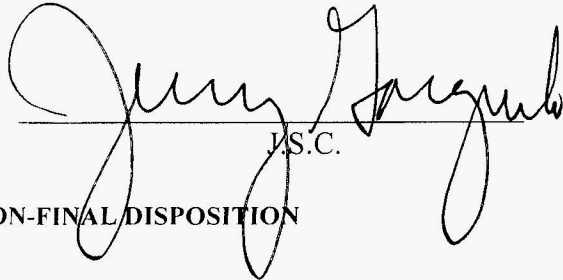
The plaintiff does not oppose Dr. Robertson's motion for summary judgment.

Accordingly, motion (002) is granted and the complaint and any cross claims asserted against Dr. Robertson are dismissed.

Co-defendant David Teng, M.D., solely by affirmation by counsel, rather than by cross motion, opposes motions (001) and (002), and requests that the benefits conferred by Article 14 and Article 16, and General Obligations Law 15-108 be preserved as to him against the moving defendants. Defendant Teng, by counsel, in two separate affirmations, sets forth that no position is taken regarding the merits of the summary judgment motions submitted on behalf of co-defendants Borimir Darakchiev, M.D. and Borimir Darakchiev, M.D., P.C. or Valerie J. Robertson, M.D. However, Teng asserts he is not waiving or relinquishing his rights to any protections afforded by CPLR Articles 14, 16, or General Obligation Law 15-108.

Dr. Teng has failed to submit any evidentiary proof to demonstrate liability as to the Darakchiev defendants or Robertson (see *Dembitzer v Broadwall Management Corp*, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]], and has not preserved any rights referable to CPLR Articles 14 and 16 or General Obligations Law 15-108 (*Drooker v south Nassau Comm. Hosp*, 175 Misc2d 181 (sup. Court, Nassau County 1998)). Thus, even if the application were properly placed before this court, defendant Teng has not demonstrated entitlement to the requests made.

Dated: 12/18/13



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION