Jensen v Weissberg
2016 NY Slip Op 32659(U)
December 13, 2016
Supreme Court, Suffolk County
Docket Number: 08-29798
Judge: W. Gerard Asher

TSHORT FORM ORDER

INDEX No. 08-29798
CAL. No. 15-01478MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-14-15 (004)
MOTION DATE 7-12-16 (005)
MOTION DATE 8-30-16 (006)
ADJ. DATE 8-30-16
Mot. Seq. # 004- MG
005 - MD
006 - XMD

----------X

CHRISTINE JENSEN,

Plaintiff,

- against -

DAVID J. WEISSBERG, M.D. and HUNTINGTON HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment/protective order ; Notice of Motion/ Order to Show Cause and supporting papers 1-46; 59-70 ; Notice of Cross Motion and supporting papers 75- 82; Answering Affidavits and supporting papers 47- 56; 71-74; 83-85 ; Replying Affidavits and supporting papers 57- 58 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (seq. 004) and (seq. 005) of defendant Huntington Hospital, and the cross motion (seq. 006) of plaintiff Christine Jensen are consolidated for the purposes of this determination, and it is further

ORDERED that the motion (seq. 004) of defendant Huntington Hospital for summary judgment dismissing the complaint against it is granted, and this action is severed as against it; and it is further

ORDERED that the motion (seq. 005) of defendant Huntington Hospital for a protective order is denied; and it is further

ORDERED that plaintiff's cross motion (seq. 006) for an order and deeming the facts set forth in the May 19, 2016 notice as admitted is denied.

Plaintiff Christine Jensen commenced this action against defendants to recover damages for injuries allegedly sustained as a result of negligent care and treatment and lack of informed consent. By her bill of particulars, plaintiff alleges that Huntington Hospital was negligent in hiring and supervising its medical staff, and failed to provide medical staff who possessed sufficient skill and knowledge to treat plaintiff. Plaintiff further alleges that Huntington Hospital is vicariously liable for the conduct of defendant Dr. David Weissberg. The complaint, as pertinent to the instant motion, alleges that the medical staff at Huntington Hospital failed to properly treat a wrist fracture when plaintiff presented to its emergency department on March 18, 2007.

Huntington Hospital now moves for summary judgment dismissing the complaint against it on the grounds that Dr. Weissberg did not treat plaintiff in the emergency department on March 18, 2007, and that he is not an employee of the hospital. Further, the hospital argues that its medical staff did not depart from accepted medical practice in treating plaintiff and that its treatment was not a proximate cause of plaintiff's alleged injuries. In support of the motion, the hospital submits copies of the pleadings, the verified bill of particulars, the transcripts of deposition testimony by plaintiff, Dr. Weissberg, and nonparty Dr. David Angelillo, the affidavit of Dr. Philip Robbins, and plaintiff's hospital and medical records.

At her deposition, plaintiff testified that on March 18, 2007, she slipped and fell on her driveway and injured her left wrist. She testified that she drove herself to Huntington Medicenter, a walk-in medical care facility located near her home, and that its medical staff performed an x-ray examination and told her to go to Huntington Hospital and see Dr. Weissberg. Plaintiff testified that she drove herself to the emergency department of Huntington Hospital and was treated by a nurse and a physician. She testified that the physician ordered an x-ray examination, manipulated her wrist, placed her lower arm in a splint and gave her instructions for care. She testified that she did not see Dr. Weissberg that day in the emergency department, but the next day she contacted him and scheduled an appointment for March 20, 2007. Plaintiff testified that she presented to Dr. Weissberg's office on March 20, 2007 and on April 5, 2007. She testified that on the April 5th visit, Dr. Weissberg performed an x-ray examination and told her that "things changed" and he referred her to another doctor for surgery.

Dr. Weissberg testified that he is a board certified orthopedist, and that he met plaintiff on March 20, 2007, when she presented to his office with a splint on her left wrist. He testified from his notes, as he testified that he has no recollection of plaintiff. Dr. Weissberg testified that he obtained plaintiff's medical history which indicated that she had fallen two days prior and sustained a fracture to her left distal radius. He testified that he performed an x-ray examination, and that he noted in her chart "excellent reduction" and "good alignment." Dr. Weissberg described the type of splint that plaintiff was wearing and explained why he did not place her wrist in a cast. He testified that a cast increases the

risk of swelling, and may cause a loss of reduction and neurovascular compromise. He testified that the sugar-tong splint, which was used on plaintiff, provides stable fixation while allowing for swelling which occurs during the first 72 hours of a fracture. Dr. Weissberg testified that when plaintiff presented for a follow up examination on April 5, 2007, an x-ray of plaintiff's left wrist revealed a dorsal collapse with a 40 degree tilt, so he referred her to Dr. Ellstein, a surgeon.

At his deposition, Dr. David Angelillo testified that he became a licensed physician in 2005, and that he was employed with Peninsula Hospital Center in 2007. He testified that he participated in a residency program that required him to periodically rotate with Huntington Hospital, and, that he does not recall treating plaintiff or even if he was working at Huntington Hospital on March 18, 2007. He testified, however, that upon reviewing plaintiff's chart created at Huntington Hospital, that plaintiff presented to the emergency department with a distal radius fracture. Dr. Angelillo testified that he performed a closed reduction and placed a "sugar-tong splint" on plaintiff's wrist to immobilize it. He testified that he instructed plaintiff to follow up with Dr. Weissberg in one to two days. Dr. Angelillo testified that the splint he utilized was standard for distal wrist fractures as it can accomodate for tissue swelling.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Bing v Thunig***, 2 NY2d 656, 163 NYS2d 3 [1957]; ***Seiden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the hospital. However, "an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing" (***Smolian v Port Auth. of N.Y. & N.J.***, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]). Under a theory of apparent or ostensible agency, a hospital may be vicariously liable for the malpractice of a physician, who is not an employee of the hospital, if a patient reasonably believes that the physicians treating him or her were provided by the hospital or acted on behalf of the hospital (***Hilsdorf v Tsioulias***, 132 AD3d 727, 17 NYS3d 655 [2d Dept 2015]; ***Loaiza v Lam***, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2015]). Liability may also be imposed upon a hospital for its own negligence

in failing to properly review an independent physician's qualifications before according him or her use of the hospital's facilities (***Boone v North Shore Univ. Hosp. at Forest Hills***, 12 AD3d 338, 784 NYS2d 151 [2d Dept 2004]; ***Megrelishvili v Our Lady of Mercy Med. Ctr.***, 291 AD2d 18, 739 NYS2d 2 [1st Dept 2002]; ***Sledziewski v Cioffi***, 137 AD2d 186, 528 NYS2d 913 [3d Dept 1988]).

To impose liability upon a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (***Senatore v Epstein***, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; ***Poter v Adams***, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a prima facie showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in his or her treatment of the patient, or that any departure was not a proximate cause of plaintiff's injuries (*see* ***Lau v Wan,*** 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]).

By stipulation of the parties dated July 7, 2015, so ordered by the undersigned, the plaintiff withdrew her claim alleging negligent hiring by the hospital. Thus, with respect to the hospital, there is a claim of vicarious liability for the actions of Dr. Weissberg and the hospital staff, and a claim for a lack of informed consent. The transcripts of the deposition testimony establish that Dr. Weissberg did not treat plaintiff at the hospital on March 18, 2007. Therefore, the hospital has established, prima facie, its entitlement to judgment in its favor on this claim.

The hospital has also established, prima facie, that it is entitled to summary judgment in its favor on the cause of action alleging lack of informed consent. The requisite elements of such cause of action are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (***Spano v Bertocci***, 299 AD2d 335, 337-338, 749 NYS 2d 275 [2d Dept 2002]). For the claim to be actionable, the defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of the plaintiff's physical integrity (***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Here, none of the elements have been fulfilled.

With respect to the liability of the hospital for the conduct of its nursing staff and other medical personnel, the affidavit of Dr. Philip Robbins, a board certified orthopedic surgeon, is submitted. In his affidavit, Dr. Robbins states that he reviewed the pleadings, the bill of particulars, the transcripts of deposition testimony, plaintiff's hospital and medical records, and the x-ray images of plaintiff's wrist. Dr. Robbins opines with a reasonable degree of orthopedic certainty that the treatment and care plaintiff received at the emergency room of Huntington Hospital was in accordance with acceptable orthopedic practice and was not a cause of plaintiff's injuries. He states that the x-ray examination taken at

nonparty Huntington Medicenter indicated plaintiff sustained a compressed angulated fracture of the left wrist, and that the x-ray image from the x-ray examination performed at Huntington Hospital after the reduction indicated that there was proper alignment and it was performed correctly. Dr. Robbins opines that the standard of emergency room care for wrist fractures with swelling is to apply a soft splint and not to immobilize it with a cast, as a cast could cause vascular compromise due to the swelling which can occur for several days after the trauma. He opines that the treatment rendered by the hospital staff, including the examination, the reduction of the fracture, the method of stabilization and the recommendation of follow-up care, was in accordance with acceptable medical practice and was not a cause of plaintiff's injuries.

Here, the hospital established, prima facie, its entitlement to summary judgment dismissing the claim that its staff was negligent it by proffering, among other things, the affidavit of Dr. Robbins, who opines that Dr. Angelillo's treatment of plaintiff was in accordance with medically accepted standards of practice, that such treatment did not constitute a departure from same, and was not a proximate cause of plaintiff's injuries (***Garcia v Richer***, 132 AD3d 809, 18 NYS3d 401 [2d Dept 2015]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]).

In opposition, plaintiff submits an affirmation of her counsel wherein he attempts to refute the opinion of Dr. Robbins by offering his own medical opinion, and submits articles he apparently obtained from the internet. In order to defeat defendant's motion, "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" (***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 565, 884 NYS2d 131 [2d Dept 2009], *quoting* ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]). Conclusory allegations that are unsupported by competent evidence are insufficient to defeat summary judgment (***Brinkley v Nassau Health Care Corp.***, 120 AD3d 1287, 993 NYS2d 73 [2d Dept 2014]). Furthermore, it is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). Accordingly, the motion of defendant Huntington Hospital for summary judgment dismissing the complaint against it is granted.

Finally, having granted its motion for summary judgment dismissing the claims against it, Huntington Hospital's motion for a protective order and plaintiff's cross motion for an order deeming certain facts as admitted by the hospital are denied, as moot.

Dated: Dec. 13, 2016

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION