

**Checo v Gonzales**

2012 NY Slip Op 31651(U)

June 20, 2012

Supreme Court, New York County

Docket Number: 105571/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

BONILLA CHACO, VLADIMIR,  
ETAL.

INDEX NO. 105571/09

MOTION DATE 4/3/12

- v -  
MARGUERITA GONZALEZ, M.D.,  
ETAL.

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 30 were read on this motion to/for dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-24</u>
<u>25-27</u>
<u>28-30</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED BY AGREEMENT  
WITH THE ACCOMPANYING AFFIDAVITS DECISION  
and Order **FILED**

JUN 27 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/20/12

JB  
**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  
VLADIMIR BONILLA CHECO, An Infant, By His  
Parent and Natural Guardian, MARICRUZ CHECO,  
and MARICRUZ CHECO, Individually,

Plaintiffs,

Index No. 105571/09

-against-

**Decision and Order**

MAGUERITA GONZALES, M.D., TIMOTHY J.  
RAFAEL, M.D., BETH ISRAEL MEDICAL CENTER,  
LARISA VOROBYEVA, M.D., XIMENA  
MATAMALA, M.D., HARLEM HEALTH CENTER and  
THE NEW YORK HOTEL TRADES COUNCIL  
AND HOTEL ASSOCIATION OF NEW YORK CITY  
HEALTH CENTER, INC.,

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

**FILED**  
JUN 21 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

In Motion Sequence Number 004, defendant New York Hotel Trades Council & Hotel Association of New York City, Inc., Health Center, Inc. s/h/a Harlem Health Center and the New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. ("NYHTC") moves, by order to show cause, for an order granting it summary judgment, pursuant to C.P.L.R. Rule 3212, and dismissing all claims and cross-claims against it with prejudice. By telephone conference with the court on June 19, 2012, NYHTC withdrew the second branch of its motion seeking partial summary judgment, and the parties agreed that in this motion, NYHTC seeks summary judgment only as to plaintiffs' claim that it is vicariously liable for the alleged negligence of Ximena Matamala, M.D. Plaintiffs Vladimir Bonilla Checo and Maricruz Checo oppose the motion.

In this case sounding in medical malpractice, plaintiffs allege injuries resulting from the delivery of infant-plaintiff Vladimir Bonilla Checo on February 7, 2007, and the prenatal and postnatal care of plaintiff-mother Maricruz Checo. Plaintiffs allege that NYHTC is vicariously liable for the alleged malpractice of Dr. Matamala, M.D., Harlem Health Center, and its employees and agents.

In 2002, Ms. Checo began treating at Harlem Health Center, a union-sponsored clinic operated by NYHTC. Ms. Checo testified that, as an employee of the Hotel Pennsylvania and a member of the New York City Hotel Workers' Union, she was required to receive medical care at Harlem Health Center. During the first two trimesters of her pregnancy, from approximately June 2006 through November 2006, Ms. Checo was treated by John Paciuc, M.D., at Harlem Health Center. Sometime in October 2006, after expressing dissatisfaction with Dr. Paciuc, Ms. Checo began treating with Dr. Matamala. Ms. Checo stated in her deposition testimony that she complained to the nurses at Harlem Health Center about Dr. Paciuc and that "one of the nurses told me that [Dr. Paciuc] is always in a bad mood, that there was another female doctor there, that she was very good, [and] that if I wanted that I could switch to her[.]" Ms. Checo then requested an appointment with Dr. Matamala, the physician to whom the unidentified nurse made reference. On December 4, 2006, Ms. Checo had her first appointment with Dr. Matamala. During her deposition, Ms. Checo stated that she understood that if she wanted Dr. Matamala to care for her for the remainder of her pregnancy, she would have to deliver her child at Beth Israel Medical Center ("BIMC").

NYHTC moves for summary judgment to dismiss the vicarious liability claim on the

grounds that Dr. Matamala was not employed by Harlem Health Center; that Dr. Matamala informed plaintiff that she was employed by BIMC; and that plaintiff specifically chose to retain Dr. Matamala prior to treating with her. As a proponent of a summary judgment motion, NYHTC has the burden of proving, as a matter of law, that it is not vicariously liable for Dr. Matamala's alleged negligence. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To accomplish this, NYHTC must demonstrate the absence of any material issues of fact as to whether Ms. Matamala was acting as its agent. Id. If this burden is met, then it is incumbent upon plaintiffs to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012).

Generally, a medical facility cannot be held vicariously liable for the malpractice of a treating physician who is not an employee of the facility. See Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 79 (1986). However, courts have recognized "apparent or ostensible agency," also known as "agency by estoppel," as a "predicate for medical malpractice liability." Id.; citing Hannon v. Siegel-Cooper, 167 N.Y. 244 (1901). The theory of ostensible agency "has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic[.]" Hill, 67 N.Y.2d at 80-81. Where treatment is rendered to a patient by a non-employee of a medical facility, whether plaintiff can establish ostensible agency turns on whether the medical facility held the physician out as having authority to act on behalf of the facility and whether the patient accepted the services of the physician based on the relationship between the agent and the principal. See Saravola v. Brookdale Hosp. & Med. Ctr., 204 A.D.2d 245,

245-46 (1st Dep't), app. denied, 85 N.Y.2d 805 (1995); Dragotta v. Southampton Hosp., 39 A.D.3d 697, 698-99 (2d Dep't 2007).

There is no dispute that Dr. Matamala was not an actual employee of Harlem Health Center. The issue is whether NYHTC may be held vicariously liable on the theory of ostensible agency. NYHTC argues that there are no issues of fact that it cannot be held vicariously liable for the acts and omissions of Dr. Matamala because it did not hold Dr. Matamala out as its agent and Ms. Checo did not reasonably believe that Dr. Matamala was acting as its agent, based on Ms. Checo's deposition testimony that Dr. Matamala told Ms. Checo that she worked at BIMC. Additionally, NYHTC asserts that Ms. Checo sought out Dr. Matamala and requested to treat with her exclusively. In opposition, plaintiffs argue that there remain issues of facts as to whether NYHTC is vicariously liable for Dr. Matamala because Ms. Checo sought treatment from Harlem Health Center, in accordance with her health insurance, and was referred to Dr. Matamala by a nurse at Harlem Health Center. Plaintiffs contend that Ms. Checo never testified that she knew that Dr. Matamala worked at BIMC and not at Harlem Health Center, and that NYHTC's portrayal of Ms. Checo's testimony is a misrepresentation.

NYHTC has failed to fulfill their burden of eliminating all issues of fact, precluding them from summary judgment. The court finds unavailing NYHTC's argument that agency by estoppel is inapplicable in this case because Ms. Checo independently chose to retain Dr. Matamala prior to her treatment with Dr. Matamala at Harlem Health Center. Although Ms. Checo testified that she requested to be referred to Dr. Matamala, she also testified that she only made the request

upon the suggestion of an unidentified nurse at Harlem Health Center, after expressing dissatisfaction with Dr. Paciuc. Without the nurse's referral, Ms. Checo may not have been aware of Dr. Matamala. There is nothing to suggest that Ms. Checo conducted any independent research on Dr. Matamala or knew anything more about Dr. Matamala besides the fact that she was less "moody" than Dr. Paciuc. Further, Ms. Checo treated with Dr. Matamala exclusively at Harlem Health Center, and not at BIMC. Also, Ms. Checo had a pre-existing relationship with Harlem Health Center, as NYHTC concedes, and Ms. Checo was treated by Dr. Matamala only because of her affiliation with Harlem Health Center. In such situations, courts have generally found that issue of facts exists as to the issue of control and ostensible agency. See Welch v. Scheinfeld, 21 A.D.3d 802, 808-809 (1st Dep't 2005); Santiago v. Archer, 136 A.D.2d 690, 691 (2d Dep't 1988); Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 81 (1986); Mduba v. Benedictine Hosp., 52 A.D.2d 450 (2d Dep't 1976).

There are also unresolved issues of fact as to whether Ms. Checo could not have reasonably believed that Dr. Matamala was acting as Harlem Health Center's agent because Dr. Matamala "told" Ms. Checo that she "worked at BIMC." A review of Ms. Checo's deposition testimony indicates that NYHTC's account of Ms. Checo's statement about where Dr. Matamala worked was presented out of context. In response to a question about when she started becoming dissatisfied with Dr. Matamala's care, Ms. Checo testified that it was when Dr. Matamala told her that she would have to deliver her child at BIMC if she wanted Dr. Matamala to treat her. Ms. Checo was then asked, "[b]ut you can't tell me as you sit here today when Dr. Matamala told you that she only worked at Beth Israel and not at the 59th Street hospital; right?" Ms. Checo responded,

"No." Later in the line of questioning, Ms. Checo was asked whether she ever requested to be switched to a doctor who would deliver her baby at the 59th Street hospital, and she responded: "I did not tell Dr. Matamala that I wanted to switch again. What I did was, I asked her if she worked at [the 59th Street hospital] . . . And she said, no, that she worked at [BIMC]." The term "worked," in this context, is wholly ambiguous, and it is unclear that Ms. Checo understood it to mean "employed." Also, Ms. Checo did not expressly state that she knew that Dr. Matamala did not work for Harlem Health Center. As issues of fact remain, summary judgment is denied. Accordingly, it is hereby

ORDERED that the motion is denied; and it is further


ORDERED that the parties shall appear for their previously scheduled conference on July 10, 2012, at 10:00 a.m.

Dated: June 20, 2012

ENTER:

**FILED**

JUN 21 2012

  
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JOAN B. LOBIS, J.S.C. NEW YORK  
COUNTY CLERK'S OFFICE