FILED Apr 08 2013 Bronx County Clerk

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

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Laura Faustini Annuziata and
Robert Annunziata *Plaintiffs*

Index No. 301864/10

-against-

Quest Diagnostics Incorporated ,
Westchester-Bronx OB/GYN Group, P.C.
Neil H. Melnick, M.D., Neil C. Goodman,M.D., and
Daniel R. Miller, M.D. **Decision and Order**

Defendants

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The following papers numbered 1- 8 read on : 1) motion by defendant Quest Diagnostics Incorporated for summary judgment; 2) cross-motion by defendant Neil H. Melnick, M.D. for an order denying Quest's motion , and 3) cross-motion by plaintiff for an order pursuant to CPLR 3124 compelling Quest to fully respond to the Notice of Discovery

PAPERS	NUMBERED	
Notice of Motion -Affirmation - Exhs	1	
Affirmation in Opposition - Goodman/Miller	2	
Affirmations in Reply - Exhs. 1-3	3,4	
Notice of Cross-Motion - Affirmation in Support Exhs. A-C/Melnick	5	
Affirmation in Reply to Cross-Motion	6	
Notice of Cross-Motion - Affirmation in Support - Pltfs./.Memo of Law	7	7A
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Upon the forgoing papers, the motion and cross-motions are decided as set forth below.

Facts and Procedural Background

Plaintiffs commenced this action seeking damages resulting from the failure to timely and properly diagnose and treat plaintiff Laura Faustini Annuziata's cervical cancer. Her husband has interposed a derivative claim.

Plaintiffs allege that Quest Diagnostics Incorporated ("QDI") was negligent : 1)[1] "by failing to properly and accurately prepare the subject tissue sample"; 2) " by failing to properly and accurately read the subject tissue sample" ; 3) "by failing to employ competent and appropriately trained personnel to read and interpret the subject tissue sample"; 4) "by failing to employ appropriate and adequate technology to avoid the erroneous read and interpretation of the subject tissue sample"; 5) "by failing to properly and adequately employ a plan for error reduction" ; 6) "by rendering an inaccurate, mistaken and erroneous interpretation"; 7) "by issuing an inaccurate, mistaken and erroneous pathology report containing inaccurate, mistaken and erroneous information"; 8) "by failing to properly and adequately supervise its agents, servants and/or employees "; 9) "by failing to properly and adequately implement , maintain, and/or supervise quality assurance" , and 10) "by failing to exercise the requisite degree of reasonably prudent persons under the same or similar circumstances ." [Verified Complaint ¶ 14].

In March 2010, with its answer, QDI served a Demand for a Verified Bill of Particulars that included the following .

5. Set forth a general statement of the technology the answering defendant

[1] For the sake of clarity the court has enumerated all the claims as asserted in the fourteenth paragraph.

allegedly failed to employ to read and interpret the subject tissue sample.

6. Set forth a general statement of the plan for error reduction that the answering defendant allegedly failed to employ.

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8 a. Set forth a general statement of the acts and omissions by which plaintiff claims the answering defendant is negligent in failing to employ competent personnel.

8 b. Set forth a general statement of the acts and omissions by which plaintiff claims the answering defendant is negligent in failing to employ appropriately trained personnel.

9. State whether or not any claim is made as to improper or defective equipment and, if so, identify the equipment and state the defective conditions.

In their response, plaintiffs alleged that QDI was vicariously liable for the erroneous report of the named technician who analyzed plaintiff's tissue sample [Verified Bill of Particulars ¶ 13], and responded to the specific demands set forth above as follows.

5. This demand in unintelligible.

6. Plaintiff objects to said demand on the grounds that it seeks information that is evidentiary in nature.

8a. . . . .failed to employ competent personnel in that said personnel mistakenly , inaccurately and erroneously read plaintiff's tissue sample

8b. .... failed to employ appropriately trained personnel in that said personnel were not capable of accurately and correctly reading plaintiff's tissue sample.

9. Not applicable.

By prior decision and order of this court, those claims against QDI sounding in medical malpractice were dismissed as time-barred on the defendant's cross- motion pursuant to CPLR 3211(a)(5). To the extent that QDI addressed the claim of negligent hiring and sought its dismissal on documentary evidence (CPLR 3211(a)(1)) for the first time in its reply papers, the court declined to grant the further relief requested .

Motions and Contentions of the Parties

1) QDI now moves for an award of summary judgment dismissing the entire complaint on the grounds that those remaining claims against it purportedly sounding in negligence do not contemplate a duty distinct from QDI's duty to render adequate medical treatment by properly analyzing tissue samples and issuing an accurate cytological report, and as such, the claims sound in medical malpractice, and by virtue of this court's prior decision, are time barred.

Defendant argues that the claim of negligent hiring set forth in the bill of particulars is in fact, a claim of medical malpractice, because it does not allege a breach by QDI of a general duty to hire competent technicians, but, alleges that QDI was negligent in employing the specific technician who evaluated plaintiff's Pap smear, who they further allege was neither competent nor appropriately trained to do so.

QDI maintains that dismissal of any negligent hiring claim is warranted as well because : 1) the pleadings are facially insufficient, lacking any allegation that QDI knew

or should have known of the employee's propensity to misread Pap tests, and 2) on the record here, there is no issue of fact that QDI possessed such requisite prior knowledge.

In addition, QDI argues that this claim must be dismissed as a matter of law as case authority precludes the assertion of an additional claim for negligent hiring/retention cause of action , when , as here, the gravamen of the complaint is posited on the theory of a defendant's vicarious liability for the negligent conduct of an employee that was committed in the course of his/her employment.

With respect to the other claims comprising the remainder of the fourteenth paragraph of the complaint, QDI maintains that allegations of inadequate supervision, and those relative to quality assurance and error reduction contemplate no duty to plaintiff distinct from the duty of care in the rendition of medical diagnosis and treatment and as such, the claims are time-barred.

Plaintiffs maintain that the claims asserting QDI's failure to employ appropriate technology, and/or to implement adequate error reduction plans, and/or quality assurance, and negligent hiring and supervision sound in ordinary negligence speaking to separate , independent duties owed by QDI , that "do not bear any relationship to the rendition of medical care" (Affirmation in Support of Cross-Motion ¶ 14), and were here, timely asserted . It is also argued that defendant has failed to meet its prima facie burden

to prove as a matter of law its defense to these claims.

Procedurally, it is argued that the supporting affidavits were attested to without the state, and are not accompanied by certificates pursuant to CPLR § 2309 (c), and as such, are inadmissible .

Substantively, plaintiffs contend that QDI's own submissions raise issues of fact as to whether it was negligent in permitting a cytotechnologist unlicensed in this state, to interpret the tissue sample .

Finally, plaintiffs argue that facts essential to oppose the motion may exist but cannot be stated due to the defendant's failure to fully respond to discovery demands. Those demands include documents setting forth the number of slides reviewed by QDI'S cytotechnologist in the ninety days preceding her review of Mrs. Annunzaita's Pap test; QDI policies /protocol then applicable relative to the qualifications of cytotechnologists , and the number of slides permitted to be reviewed by each technician , as well as QDI protocol relative to error reduction and/or quality assurance pertaining to the review of slides .

In addition, it is argued that QDI has failed to provide records required to be maintained for Department of Health inspection pursuant to 10 NYCRR § § 58-1.12 (d) (2) - (4).

2) **Plaintiff cross-moves** for an order compelling QDI to fully respond to Plaintiffs' Notice of Discovery and Inspection dated June 30, 2011 by providing the items above-described.

3) **By cross-motion defendant Neil H. Melnick, M.D.** seeks the denial of QDI's motion as untimely, having been noticed seventy days after the expiration of the forty-five day deadline set forth in the order of this court (Green, J.) dated November 16, 2011.

The co-defendant also argues that the evidence submitted in support of the motion raises issues of fact as to whether QDI employed an individual for work duties for which she was neither qualified nor licensed by this state to perform. The affidavit of defendant's Cytology Department Manager is argued to lack probative value as conclusory, and otherwise unsupported by admissible evidence. In addition, it is maintained that QDI fails to come forward with any evidence addressing the claims relative to failures of supervision, error reduction, and quality assurance protocol.

It is maintained that the duties to: employ competent and appropriately trained personnel to read and interpret the subject PAP test; to use adequate technology to avoid erroneous findings; to implement plans for error reduction and quality assurance, and to adequately supervise employees are duties that "fall outside the ambit of medical malpractice." [Affirmation in Support of Cross-Motion ¶ 20].

By affirmation, **defendants Neil C. Goodman and Daniel Miller** also oppose the motion incorporating by reference the affirmations of plaintiffs and co-defendant Melnick.

In reply, **QDI** argues that the motion is timely as this court granted extensions of time upon QDI's request for same [Affirmation in Reply to Co-Defendants Goodman/Miller ¶ ¶4, 7], and it is well within the court's discretion to extend time for making such a motion, especially when, as here, the note of issue has yet to be filed.

Concerning any 3212 (f) arguments raised in opposition, defendant argues that the discovery sought is not germane to a determination of QDI's knowledge at the time of hiring of the competency and qualifications of the specific lab technician who subsequently performed the Pap test at issue here. QDI asserts that those documents were provided to plaintiffs in the course of discovery.

QDI restates the main contention of the moving papers, that the complaint as asserted does not allege the breach of a general duty of care, but a specific one, i.e., to render proper medical treatment to plaintiff in performing and in reporting the results of a cytological analysis of her tissue specimen, a claim that is time barred.

To the extent that those in opposition argue that the complaint asserts breaches of a broader duty of care, QDI counters that plaintiffs never articulated that duty of care, nor in their pleadings set forth such claims in plain and concise statements in separate paragraphs as is required by CPLR § 3014. In so doing, it is argued they indicated their

intention not to interpose such claims.

Finally, QDI argues that neither plaintiffs nor co-defendants raise any issue of fact to defeat its prima facie showing warranting dismissal of the claim of negligent hiring, as the allegations of violation of Education Law regulations, argued for the first time in the papers in opposition here, were never pleaded, and as such cannot serve to defeat summary judgment (Abolola v. Flower Hospital, 44 A.D. 3d 522 [1st Dept. 2007]). Nor, it is argued, are the regulations, effective 2006, here applicable, either to defendant's out-of-state lab facility, or to the cytotechnologist who was hired in 2005. Finally, QDI maintains that there is no issue of fact to rebut its showing that at the pertinent time, the technician's education and training qualified her to practice cytotechnology in an out-of-state laboratory permitted by New York State Department of Heath to receive specimens for analysis (10 NYCRR § 58-1.5).

Discussion and Conclusions

CPLR 3212 (a) provides in pertinent part, that "any party may move for summary judgment in any action, after issue has been joined; provided however, *that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue.* If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown [emphasis added]."

QDI by different counsel in separate affirmations[2] affirm that, upon application to the court, defendant was granted extensions of time in which to move for summary judgment beyond the December 31, 2011 date set forth in the Compliance Conference Order of November 16, 2011. No court orders are annexed to the affirmations, nor does either affirmation include any details as to the date, or the means by which either the applications were made, or the resulting orders issued. However, in light of counsels' assertions, and the statutory language precluding the imposition by court order of an outer time limit less than thirty days after the filing of the Note Of Issue, an event that has yet to occur in this case, it is the finding of this court that the motion for summary judgment is timely made.

It is the further finding of this court that though not containing certificates of conformity as required by CPLR § 2309 (c) the affidavits of QDI's Cytology Department Manager and of the cytotechnologist who read plaintiff's Pap smear, each notarized by a notary public commissioned in New Jersey, may be considered upon determination of the motion, the absence of such certificates being a mere irregularity, and not a fatal defect (see, Hall v. Elrac, Inc., 79 A.D.3d 427, 428, 913 N.Y.S.2d 37 [1st Dep't 2010]; Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda., 68 A.D.3d 672, 673, 891 N.Y.S.2d 394 [1st Dep't 2009])

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[2]Affirmation of Michael E. Soffer, Esq. ¶ 12 and Affirmation of Jennifer Gutterman, Esq. ¶ 7

It is settled that

> [a] n action to recover for personal injuries or wrongful death against a medical practitioner or a medical facility or hospital may be based either on negligence principles or on the more particularized medical malpractice standard" (see *Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256, 499 NYS2d 52 [1986]). Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies (see *Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235, 236-237, 739 NYS2d 65 [2002]).

Friedmann v. New York Hospital-Cornell Med. Ctr., 65 A.D.3d 850,850-851[1st Dept. 2009]

In differentiating the claims, there is no "no rigid analytical line" (Scott v. Uljanov, 74 N.Y.2d 673, 674, 541 N.E.2d 398, 543 N.Y.S.2d 369 [1989]), however, the established criteria provide that when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but [in] the ... failure in fulfilling a different duty," the claim sounds in negligence (Bleiler v. Bodnar, 65 N.Y.2d 65, 73, 479 N.E.2d 230, [1985]), and conversely, when claims predicated upon a negligent act or omission by a health care provider "constitute medical treatment or bear a substantial relationship to the rendition of medical treatment by a licensed physician [they] constitute [medical] malpractice." (Bleiler op.cit., at 72, ; Weiner v. Lenox Hill Hosp., 88 NY2d 784, 788, 673 NE2d 914

[1996]) [3]

Clearly on this record, there is no issue that the laboratory services provided by QDI including the preparation of plaintiff's tissue sample, and the testing of it, bore a substantial relationship to plaintiff's medical treatment, and that the cytology report rendered by QDI was a crucial component of plaintiff's diagnosis and treatment, and an integral part of the process of rendering medical treatment to her (see, Spiegel v. Goldfarb, 66 A.D.3d 873, 874, 889 N.Y.S.2d 45 [2d Dept. 2009], *lv. app. den.* 15 NY3d 711 [2010]; see also, McDermott v. Torre, 56 NY2d 338,452 , 437 N.E.2d 1108 [1982] ["continuous treatment "doctrine held to be inapplicable to toll malpractice claim against laboratory for erroneous benign report] ; see also, Cummins v. Marchetti, 17 A.D>3d 1160, 794 N.Y.S. 2d 552 [4th Dept. 2005]). [4] As a result, those claims alleging QDI's negligence in

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[3] It is noted that Education Law § 6521 defines the practice of medicine as " diagnosing, treating, operating prescribing for any human disease, pain, injury, deformity or physical condition." (Education Law § 6521) , while Public Health Law § 571(1) defines a clinical laboratory as "a facility for the microbiological, immunological, chemical, hematological, biophysical, cytological, pathological, genetic, or other examination of materials derived from the human body, for the purpose of obtaining information for the diagnosis, prevention, or treatment of disease or the assessment of a health condition or for identification purposes." In pertinent part, Public Health Law § 576-a. provides the following definitions with respect to those specific clinical laboratories examining Pap smears :

(a) "Cytotechnologist". A clinical laboratory professional specializing in the analysis of cytopathology samples, including Pap smears, for cervical cancer and related diseases who meets the qualifications specified by the department.

[4]See also, Calvin v. Schlossman , 74 A.D.2d 265,266, 427 N.Y.S. 2d 632 [1st Dept. 1980] [independent medical laboratory compelled to participate in medical malpractice hearing where it was alleged lab's "culpable conduct , sounding in malpractice , hastened plaintiff's demise."] In pertinent

failing to properly and accurately prepare and/or read the subject tissue sample sound in medical malpractice, and on this record [Verified Complaint ¶ 14 ## 1,2; 6, 7] have been determined to be time barred upon QDI's prior showing that the subject cytology report was issued more than two and one-half years prior to the commencement of this action .

In addition, those claims asserting the failure of QDI to properly and adequately supervise its agents, servants and/or employees also sound in medical malpractice (see, Shajan v. South Nassau Communities Hosp., 99 A.D.3d 786, 952 N.Y.S.2d 448 [2d Dept. 2012], citing authority of Barresi v. State, 232 A.D.2d 962, 963-964 [3d Dept. 1996]); see 1B NY PJI3d 2:149, at 6 (2013)), and were here, untimely interposed [Id. # 8].

However, a claim for negligent hiring, defined in the analogous hospital setting,[5] in Bleier v. Bodnar, op.cit. at 73, citing authority of Lewis v. Columbus Hosp., 1 AD2d 444, 447, [4th Dept. 1956], as a" breach of a duty to use due care in selecting and furnishing " medical personnel by appropriately investigating the character and capacity of its agents, that proximately caused plaintiff's injury, was there found to be "a claim of negligence

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part, the court observed the following .

> The above [statutory] provisions recognize the basic nature of clinical laboratories, and bespeak of medical doctors and laboratories as allies for the prevention and treatment of disease. Although the services of a medical doctor and a laboratory are divisible, they act as collaborators, not antagonists. Their work is interrelated, and as the above-stated policy cogently recognizes, the analysis performed by a laboratory is supplemental to and bears directly upon the course of medical treatment to be provided
>
> Calvin, at 269

[to] be governed by the three-year statute of limitations."

As asserted, plaintiff claims that QDI was negligent in failing to employ competent and appropriately trained personnel to read and interpret plaintiff's tissue sample, [Verified Complaint ¶ 14 # 3]. As delineated in the bill of particulars, it is alleged that QDI was negligent because it employed a technician who rendered an inaccurate report, and who, through inadequate training, was incapable of rendering an accurate one.

It is the finding of this court that defendant has sustained its burden to prove that this claim, though sounding in negligence should be dismissed, as a matter of law pursuant to the authority of Weinberg v. Guttman Breast and Diagnostic Institute, 254 A.D.2d 213, 679 N.Y.S. 2d 127 [1st Dept. 1998][6], as the pleadings here allege that the causative erroneous report for which QDI is to be held vicariously liable, was performed by the cytolotechnologist in the course of her employment with defendant. It is noted as well, that no claim for punitive damages has been asserted (compare, Quiroz v. Zottola 30 A.D.3d 744, 745 [2d Dept. 2012]).

In addition, on this record, defendant has demonstrated that even were there a viable claim asserted, there is no issue of fact that QDI hired or retained the cytologist, who was otherwise qualified by education and training to render the report, with knowledge of her propensity for the causative negligent conduct, i.e., inaccurate Pap test

[6] See also, Zorn v. Mount Sinai Medical Center, 2012 WL 4320575 [S.D.N.Y. 09/20/12]

reporting.

In opposition, neither plaintiffs nor co-defendants come forward with probative evidence to raise a material issue of fact to rebut QDI's prima facie showing on this claim, or that, at the time the report was rendered, the licensing requirements upon which the opposition is in large measure predicated, which were neither pleaded nor set forth in the bill of particulars (see, Abalola v. Flower Hosp., 44 A.D.3d 522, 843 N.Y.S.2d 615 [1st Dept. 2007]), were applicable to cytotechnologists in defendant's out-of-state medical facility.

With respect to the remaining claims asserted, any analysis of whether they sound in negligence or medical malpractice, is somewhat hindered because the specific claims remain no further delineated than as interposed. As above noted, in response to the demand for a general statement of the causative failure to technology claim plaintiffs responded that the demand was "unintelligible" , while no general statement was provided concerning the "error reduction" claim because it was objected to as evidentiary in nature.

One of the factors to be considered is whether a jury's assessment of the alleged acts or omissions could be accomplished without expert testimony on technical scientific issues raised by the claims. Clearly, any consideration of causative culpable conduct arising out of a failure in QDI's laboratory technology, and/or error reduction, and /or

quality assurance protocol would require expert scientific testimony. However, this factor alone is not determinative (see, Weiner v. Lenox Hill, op.cit. at 788-789 [a need for expert testimony signifies only that the technical and scientific nature of the blood-collection process is beyond the ken of the average juror, not that the claim sounds in medical malpractice]; see also, Payette v. Rockelfeller Univ., 220 A.D.2d 69, 73-75, 643 N.Y.S.2d 79 [1st Dept. 1996]). Nor in Weiner, was the fact that the blood collection process was overseen by a physician viewed as controlling.

What was held to be determinative of the nature of the claim was whether " the challenged conduct 'bears a substantial relationship to the rendition of medical treatment' to a particular patient. . . " (Weiner, at 788 , citing *Bleiler v. Bodnar* , op. cit, at 72), the critical factor is the nature of the duty to the plaintiff which the defendant is alleged to have breached.

> When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence.
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> Stanley v. Lebetkin, 123 A.D.2d 854, 507 N.Y.S.2d 468 [2d Dept. 1986]

As such, defects in the collection and/or the screening of a hospital's blood supply, or of organs for transplant (see, Rodriguez v. Saal , 43 A.D3d 272 , 275, 841 N.Y.S. 232 [1st Dept. 2007]) are neither predicted upon an express or implied patient-physician relationship, nor would they involve an analysis of the medical treatment or diagnosis furnished to

the specific patient -plaintiff (see, Rodriguez, *supra* at 275).

It is submitted on this record, the challenged conduct asserted in the remaining enumerated causes of action : a failure to employ appropriate and adequate technology to avoid the erroneous read and interpretation of plaintiff's tissue sample , and the respective failures to properly and adequately employ a plan for error reduction and/or implement , maintain, and/or supervise quality assurance, are not duties, as urged by plaintiffs and co-defendants outside the ambit of medical malpractice, but devolve from the underlying malpractice claim , i.e., that QDI improperly prepared, read, and reported plaintiff's Pap smear, an integral part of the process of rendering medical diagnosis and treatment to her, and , as such are here time-barred.

For the reasons above-stated, the motion of defendant QDI is granted in its entirety and the cross-motions of plaintiffs and the co-defendant Melnick are denied as academic.

This constitutes the decision and order of this court.

Dated : March 28, 2013

Howard H, Sherman