

Parrilla v Buccellato
2013 NY Slip Op 32718(U)
September 24, 2013
Sup Ct, Kings County
Docket Number: 500001/08
Judge: Bert A. Bunyan
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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of September, 2013

P R E S E N T:

HON. BERT A. BUNYAN,
Justice.
-----X

MIRIAM PARRILLA, as Administratrix of the
Estate of RAMON PARRILLA-TORRES,

Plaintiff,

- against -

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JOHN BUCCELLATO, M.D. and
THE BROOKLYN HOSPITAL CENTER,

Defendants.
-----X

The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3, 5 _____
Reply Affidavits (Affirmations) _____	4, 6 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant The Brooklyn Hospital Center (TBHC) moves for an order, pursuant to CPLR 2221, granting it leave to renew that portion of this court's order, dated June 29, 2011, which denied that branch of TBHC's cross motion seeking summary judgment dismissing the complaint of plaintiff Miriam Parrilla, as Administratrix of the Estate of Ramon Parilla-Torres (decedent), as against it and, upon renewal, granting summary judgment in its favor.

FILED
KINGS COUNTY CLERK
2013 SEP 27 AM 7:35

Background and Procedural History

Decedent arrived at TBHC by ambulance on January 5, 2006, at 8:07 a.m., with shortness of breath complaints. A triage nurse classified decedent as “non-emergent” and he was seen by Dr. Kevin O’Rourke, a resident, at 8:40 a.m. in the Emergency Department. Defendant Dr. John Buccellato, a TBHC employee and attending Emergency Department physician, saw decedent at 9:30 a.m. and received decedent’s test results for troponin and CPK levels at 10:05 a.m. Dr. Buccellato ordered decedent transferred to the Critical Care Unit (CCU) because the test results indicated that decedent’s complaints were cardiac in nature.

However, decedent was not physically transferred to the CCU, but was admitted to the Cardiac Special Care Unit (CSCU) at 10:20 a.m. While he physically remained in the Emergency Department at this time, his care was transferred to the CSCU team, headed by Dr. Sarath Reddy, also an employee of TBHC. After the transfer, Dr. Buccellato was no longer responsible for decedent’s care. Under the care of the CSCU, decedent suffered two “code blues” at 1:45 p.m. and 5:50 p.m., respectively. He did not recover from the second “code blue” and was pronounced dead at 6:07 p.m.

Thereafter, plaintiff commenced this action to recover damages for medical malpractice and wrongful death. Plaintiff initially sued five doctors and TBHC. Stipulations of discontinuance and the absence of service of some of the previously named defendants resulted in the court’s January 19, 2011 order amending the caption of this action to its present form. Plaintiff filed a note of issue on June 1, 2010, after which Dr. Buccellato moved for summary judgment and TBHC cross-moved for summary judgment. Dr. Buccellato’s motion was denied in that same January 19, 2011 order. TBHC’s cross motion was granted, in part, and denied, in part, in a decision and order dated June 29, 2011.

In that decision, the court held that TBHC could not be sued under a theory of vicarious liability for the alleged malpractice of Dr. Reddy where (1) Dr. Reddy was never made a party to the action, and (2) the time to commence any action against Dr. Reddy had already expired under the applicable statute of limitations. The court, as a result, dismissed any causes of action against TBHC for vicarious liability resulting from any alleged malpractice committed by Dr. Reddy. The court, however, denied that portion of TBHC's summary judgment cross motion seeking dismissal of any vicarious liability claims against it relating to any actions undertaken by Dr. Buccellato, finding that questions of fact exist as to whether Dr. Buccellato departed from acceptable standards of medical care with respect to his treatment of decedent.

Dr. Buccellato appealed the January 19, 2011 order denying his summary judgment motion. Plaintiff likewise appealed from that portion of the June 29, 2011 order granting TBHC's summary judgment cross motion dismissing any vicarious liability claims relating to Dr. Reddy's alleged malpractice. On May 15, 2012, the Appellate Division, Second Department reversed this court's January 19, 2011 order and granted Dr. Buccellato's summary judgment motion dismissing the action against him, holding that "plaintiff's experts failed to raise a triable issue of fact as to whether [the failure to order a cardiology consult once the results of the EKG arrived], which resulted in a delay of about an hour in referring the decedent to the cardiac care service, was a proximate cause of the decedent's death" (*Parrilla v Buccellato*, 95 AD3d 1091, 1093 [2012]).

On October 31, 2012, TBHC, based on the above-mentioned Appellate Division decision, brought this motion to renew and dismiss all causes of action against it. In opposition, plaintiff argued that the Appellate Division decision only referred to Dr. Buccellato's treatment and, therefore, her claims of vicarious liability for the care and

treatment by the nursing staff of TBHC, provided after decedent's transfer from Dr. Buccellato's care to the CSCU, are still viable. Plaintiff also noted that her appeal of the decision dismissing the action against TBHC for vicarious liability, based on the alleged malpractice by Dr. Reddy, had yet to be decided by the Appellate Division.

On January 9, 2013, the Appellate Division, Second Department reversed this court's June 29, 2011 order granting summary judgment in favor of TBHC and dismissing any claims relating to Dr. Reddy's treatment and care of decedent, holding that the failure to name an individual doctor (in this case, Dr. Reddy) "does not compel dismissal of the plaintiff's vicarious liability claim against the hospital" (*Parrilla v Buccellato*, 102 AD3d 664, 664 [2013] quoting *Shapiro v. Good Samaritan Regional Hosp. Med. Ctr.*, 55 AD3d 821, 823). Subsequent to this latest Appellate Division decision, both parties submitted supplemental responses and reply affirmations addressing the issues raised in that Appellate Division decision.

Discussion

"A motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law" (*Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2009]). The two appellate decisions in this matter constitute a change in the "law of the case" which this court "must apply" (*People v Evans*, 94 NY2d 499, 502 [2000]). Accordingly, TBHC's motion to renew is granted.

TBHC requests that all claims against it for vicarious liability based upon the care given to decedent by Dr. Buccellato be dismissed. Since the Appellate Division has granted summary judgment dismissing the complaint against Dr. Buccellato, all causes of action against TBHC based upon vicarious liability relating to Dr. Buccellato's actions are likewise dismissed. Further in keeping with the Appellate Division decision, which concluded that

plaintiff failed to demonstrate that the alleged one hour delay in referring decedent to the CSCU was a proximate cause of decedent's death, all causes of action based upon alleged failures by TBHC's staff during the period decedent was under Dr. Buccellato's care are also dismissed.

TBHC also requests that all remaining causes of action be dismissed against it. Plaintiff counters that the second Appellate Division decision restores her causes of action against TBHC for vicarious liability based on alleged departures by Dr. Reddy. Plaintiff further argues that there has been no ruling by any court on alleged departures by TBHC employees (e.g. the nursing staff) from the time decedent was admitted to the CSCU under Dr. Reddy's care to decedent's passing.

In support of its original cross motion for summary judgment, TBHC did not proffer its own expert testimony, but instead relied upon the expert affirmation of Dr. Gregory Mazrin that co-defendant Dr. Buccellato submitted in support of his own motion for summary judgment. That affirmation only opined on Dr. Buccellato's care and does not discuss, in any way, Dr. Reddy's care or any other care given to decedent after he was transferred to the CSCU. Furthermore, TBHC did not argue in its cross motion for summary judgment that there were no departures by Dr. Reddy from good and accepted standards of medical practice. Instead, TBHC argued that plaintiff's failure to name Dr. Reddy as a party-defendant prior to the expiration of the applicable statute of limitations precluded any vicarious liability claims against it relating to any alleged malpractice committed by Dr. Reddy. The Appellate Division, however, expressly rejected this argument in its January 9, 2013 decision.

"On a motion for summary judgment in a medical malpractice action, a defendant . . . has the initial burden of establishing either the absence of any departure from good and

accepted medical practice or that the plaintiff was not injured thereby” (*Larsen v Loychusuk*, 55 AD3d 560, 561 [2008]). TBHC, by failing to submit any evidence that Dr. Reddy did not depart “from good and accepted medical practice,” has not set forth a prima facie case entitling it to summary judgment (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]).

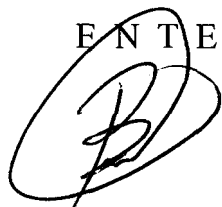
TBHC, nonetheless, proffers two arguments why summary judgment should be granted dismissing the entire action as against it. First, TBHC argues that this court, in its decision and order of June 29, 2011, “clearly ruled that there was no independent, non-vicarious liability on the part of TBHC apart from the care which was the responsibility of the attending physicians.” In support of this argument, TBHC refers to a portion of that order wherein the court expressly stated: “TBHC thus presents acceptable evidence that it did not depart from good and accepted standards of care in the medical community regarding decedent, and that nothing it did or failed to do caused decedent’s injuries.” TBHC’s reliance of this quote is clearly misplaced. The quote is from the section of the decision discussing Dr. Buccellato and in no way opines on decedent’s care by any other persons. Furthermore, the quote is in the context of stating that TBHC, through the use of Dr. Buccellato’s expert, set forth a prima facie case that shifted the burden to plaintiff to demonstrate that Dr. Buccellato had departed from good and accepted medical practice. TBHC’s protestation that the above passage exonerates TBHC, in any way, shape or form, strains credulity and is utterly devoid of merit.

TBHC’s second argument is that dismissal of the entire action against it is warranted based upon the express language of the Appellate Division’s May 15, 2012 decision. In this regard, TBHC notes that the Appellate Division expressly stated that “the remaining allegations of malpractice cited by plaintiff’s experts were conclusory and failed to

differentiate between the act and omissions of the different providers.” Moreover, TBHC argues that the Appellate Division held that plaintiff’s experts failed to raise triable issues of fact concerning causation with respect to the alleged delay in treatment. These remaining contentions are spurious. The Appellate Division’s May 15, 2012 decision was solely concerned with decedent’s treatment by Dr. Buccellato, and by extension, TBHC employees, during the period decedent was under Dr. Buccellato’s care. Insofar as the Appellate Division found fault with plaintiff’s experts, it must be noted that plaintiff’s experts only opined as to the treatment provided to decedent prior to his transfer to the CSCU. The propriety of Dr. Reddy’s treatment was never before any court as that issue was never presented by TBHC in connection with its original cross motion and subsequent appeals. Accordingly, it is

ORDERED that TBHC’s motion to renew is granted and upon renewal all causes of action concerning TBHC’s liability for the care of decedent from his arrival at the hospital until his transfer to the CSCU are dismissed and all other causes of action may proceed.

The foregoing constitutes the decision and order of the court.

E N T E R,


J. S. C.

HON. BERT A. BUNYAN
JUDGE N.Y.S. SUPREME COURT

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