FILED Feb 19 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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ALEXANDRA FELIX, as Administrator of the Goods, Chattels and Credits which were of FRANCISCO FELIX, deceased,

Plaintiff(s)

- against -

INDEX NO: 305351/10

MONTEFIORE MEDICAL CENTER,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Defendant Montefiore Medical Center moves this Court for summary judgment and an order dismissing plaintiff's claims for lack of informed consent and for negligent hiring, credentialing and supervision. Plaintiff opposes only that portion of the motion seeking to dismiss the claims for negligence supervision. As such, Montefiore's motion seeking the dismissal of the causes of action for lack of informed consent and negligent hiring and credentialing is granted. The Court notes that there is an additional cause of action sounding in medical malpractice.

Decedent presented to the Montefiore Emergency Room on December 1, 2009 with complaints of fever, cough, nausea and vomiting. He was diagnosed with sepsis and pneumonia and his plan of care included IV fluids and antibiotics. A chest x-ray revealed congestive heart failure. An x-ray taken later that evening

revealed bilateral perihilar infiltrates and possible superimposed mild congestive heart failure. He was admitted to the hospital.

Early December 2, 2009, Dr. Christopher Ibrahim examined decedent and noted some shortness of breath. Continued antibiotic treatment, oxygen and monitoring of vital signs were recommended. On December 3rd Mr. Felix was found on the floor of his bathroom after attempting to ambulate without assistance. He was treated with a nebulizer and an arterial blood gas was ordered. Despite these efforts, Mr. Felix did not improve and the rapid response team was called. Mr. Felix was intubated secondary to respiratory failure and a head CT was ordered. He was examined by Critical Care Physician Dr. Dundaie. It was recommended that he be transferred to the MICU once a bed became available. A further examination by Dr. Ibrahim noted worsening infiltrates and Dr. Ibrahim's diagnosis was sepsis. He broadened the antibiotic coverage.

At about 1:38 p.m. on December 3rd decedent was observed without a pulse. Although ACLS was initiated the decedent expired while awaiting an MICU bed. He tested positive for influenza type A and the autopsy report noted that the cause of death was secondary to complications of hypertension and atherosclerotic cardiovascular disease.

Montefiore argues that where employees, such as Doctors Ibrahim and Dundaie, are acting within the scope of their employment, the employer is liable under a theory of respondeat superior only, and no claim may proceed against the

employer for negligent hiring or retention. Since plaintiffs are relying on the doctrine of respondeat superior with respect to any employees of Montefiore the causes of action for negligent hiring and retention must be dismissed. A fortiori, the cause of action for negligent supervision must also be dismissed. Movant cites Weinberg Talavera v. Arbit, 18 A.D.3d 738, (2nd Dept. 2005) which cites Weinberg v. Guttman Breast & Diagnostic Institute, 254 A.D.2d 213 (1st Dept. 1998) wherein the Court held that generally, where an employee is acting within the scope of his employment and the employer is liable for the employee's negligence under a theory of respondent superior, no claim may proceed against the employer for negligent hiring, retention, supervision and training. Movant further argues that plaintiff has cited no cases to suggest that a claim for negligent supervision should be treated any differently from a claim for negligent hiring or retention.

Plaintiff contends that the claim for negligent supervision may not be dismissed because, at the request of counsel for Montefiore, plaintiff discontinued its action against Drs. Ibrahim and Dundaie, based upon the concession by Montefiore that the care and treatment they rendered was within the scope of Montefiore's employment. Plaintiff argues that based on such stipulation an effort to seek a dismissal of plaintiff's allegations of negligent supervision is improper. Quite the contrary, Montefiore's acknowledgment of respondeat superior responsibility for the actions of its physicians requires it. Plaintiff's argument is rejected. Movant provided the Court with case law showing that the New York courts

treat claims for negligent hiring, retention, credentialing and supervision identically. Plaintiff has failed to offer any case law in support of its position.

In Karoon v. New York City Transit Authority, 241 A.D.2d 323 (1st Dept. 1997), the court wrote:

> "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat supervisor, no claim may proceed against the employer for negligent hiring or retention (Eifert v. Bush, 27 A.D.2d 950, affd 22NY2d 681). This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training. (supra, at 951.)"

Accordingly, the plaintiff's claim for negligent supervision is dismissed.

So ordered.

Dated: February 11, 2016

Douglas E. McKeon, J.S.C.