

Torres v NYU Hosp. Ctr.
2016 NY Slip Op 31892(U)
October 5, 2016
Supreme Court, New York County
Docket Number: 805119/2013
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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JUSTINA TORRES,

Plaintiff,

Index No. 805119/2013

-against-

Decision and Order

NYU HOSPITAL CENTER, TISCH HOSPITAL,
NYU LANGONE MEDICAL CENTER, K. CHABOS,
R.N., S. ISABELLA, R.N., and John Doe "1" to Jane
Doe "3," the unidentified radiologist, technicians, and/or
physicians supervising the procedure,

Defendants.

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In this medical malpractice action, plaintiff alleges that defendants improperly used an iodine-based contrast dye during her cardiac catheterization although she warned them of a prior allergic reaction to the dye. As a result of this negligence, she alleges, she suffered a severe burn and accompanying rash, resulting in damage to her skin, continued pain, and limitations in her motion in the affected areas. She has sued NYU Hospital Center, Tisch Hospital, NYU Langone Medical Center (collectively, "the NYU defendants"), K. Chabos, R.N., and S. Isabella, R.N., along with the unnamed radiologist, technicians, and physicians involved in the procedure. Currently, the Court consolidates the two motions before it for disposition. In motion sequence number two, the NYU defendants seek summary judgment dismissing the case against them on the grounds that Dr. Claudia Serrano-Gomez, who performed the procedure, is not their employee

and therefore they are not vicariously liable for her actions and that, even if vicarious liability existed, there is no merit to plaintiff's claims. Plaintiff opposes the motion and, in motion sequence number three, seeks to toll the statute of limitations under the relation-back doctrine, allow her to amend the complaint and caption so as to replace "John Doe '10 to Jane Doe '3'" with "Dr. Serrano-Gomez" as a named defendant, and deem the amendment timely. For the reasons below, the Court denies motion sequence two and grants motion sequence number three in part, allowing the amendment but not ruling on the relation back or timeliness issues.

Initially, the Court grants motion sequence number three to the extent of allowing plaintiff to amend the complaint to remove the John and Jane Doe defendants from the caption and add Dr. Serrano-Gomez as a defendant. Plaintiff's expert affirmation is sufficient to show a meritorious claim for the purposes of this motion. Defendants' challenges based on the statute of limitations are of no avail, as that is a waivable defense and must be asserted by Dr. Serrano-Gomez rather than the current parties. For this reason, also, the Court shall not rule on the issue of timeliness or the applicability of the relation-back doctrine, as Dr. Serrano-Gomez has the right to assert and litigate these issues.

Now, the Court turns to motion sequence number two, for summary judgment. Plaintiff first presented to Dr. Serrano-Gomez at her private office on July 9, 2011, complaining that she had suffered from substernal chest pain for the two months following her bout with bronchitis, and that she suffered from dizzy spells, shortness of breath, and other problems. Plaintiff had numerous health problems in addition to this most recent one and was a long time heavy smoker. The doctor noted her prior allergic reaction to a particular contrast dye. In addition,

she scheduled a catheterization for July 11, 2011, and she explained the English-language consent form to plaintiff, a Spanish speaker, in Spanish. The form included a warning about the use of a dye and the potential for an adverse reaction.

On July 11, 2011, plaintiff entered NYU Hospital for the procedure. According to plaintiff, prior to the procedure she repeatedly warned defendants and Dr. Serrano-Gomez about her allergy to contrast dye. The chart indicates that plaintiff received Benadryl and other medications before the dye was injected in order to prevent any allergic reaction by plaintiff. She purportedly went through the procedure without incident and she was released that evening. A few days later, at her July 14 follow-up examination with Dr. Serrano-Gomez, plaintiff complained of various problems including blisters and edema. Dr. Serrano-Gomez discovered large blisters on plaintiff's skin as well as edema and erythema in the skin folds, and she noted that plaintiff had experienced a delayed allergic reaction to the contrast dye and to Norvasc.

In support of their motion for summary judgment defendants submit the affirmation of Dr. Shepard Weiner, M.D. Dr. Weiner asserts that in signing the consent form plaintiff expressly consented to the use of contrast dye and that Dr. Serrano-Gomez explained the form to plaintiff in Spanish although the writing was in English. He asserts that Dr. Serrano-Gomez appropriately noted the allergy and took proper precautions by administering Benadryl and other medications. Although generally these medications are administered earlier and in conjunction with steroids, he states, in this instance steroids were contraindicated due to plaintiff's diabetes. In support of their claim that no vicarious liability lies for the acts of Dr. Serrano-Gomez because she was not their employee, defendants point to the errata sheet to her deposition, which states that, for clarification,

her statement that she worked for New York University Medical Center should read “New York School of Medicine.” In addition, they note that at her deposition the doctor indicated that she first treated plaintiff at her private office as the result of a referral.

Plaintiff counters with the affirmation of Dr. Alexandre Scheer, who states that defendants and Dr. Serrano-Gomez should have injected the medications used as prophylactics twelve to twenty-four hours prior to the surgery instead of one hour beforehand and, contrary to Dr. Weiner’s statement, they should have been used in conjunction with steroids. Further, he states, defendants should have kept plaintiff at the hospital longer than two-and-a-half hours after the surgery, in order to watch for a delayed allergic reaction. In addition to the above, he contends that plaintiff should have received prophylactics at the time of her discharge. The failure to take these measures, he states, proximately caused plaintiff’s injuries. Finally, as to informed consent, he points to ambiguities in the consent form that plaintiff signed, and stresses that given plaintiff’s terror of contrast dye she would not have consented to its use had she understood the form. Plaintiff also argues that, based on her statements at deposition regarding her repeated objection to the use of contrast dye, there is an issue of fact with respect to informed consent. Moreover, plaintiff points out the problems with the form that Dr. Scheer has noted in his affirmation. In addition, she contends that Dr. Serrano-Gomez is an employee of defendants, and in support points to the doctor’s original statement at deposition she later corrected, that she was an employee at the hospital. Plaintiff argues that the consent form states that an employee of defendants translated the consent form, and that Dr. Serrano-Gomez herself translated the form for plaintiff. She cites to NYU Langone’s website, which lists Dr. Serrano-Gomez as a doctor.

In reply, defendants challenge the credentials of plaintiff's expert, Dr. Scheer, stating that his license currently is suspended. They reiterate their earlier arguments regarding their and Dr. Serrano-Gomez' adherence to the standard of care and lack of vicarious liability. They point out that Dr. Serrano-Gomez is listed on the School of Medicine's website as an assistant professor and state this proves the fallacy of plaintiff's argument regarding the doctor's status. Plaintiff was allowed to submit a sur-reply regarding the alleged suspension of Dr. Scheer's medical license. As for Dr. Scheer's medical license, she notes that its suspension was immediately stayed, and that pursuant to a settlement which resolved the investigation Dr. Scheer is on probation during this period and still is licensed to practice medicine.

To prevail on summary judgment in a medical malpractice case, a defendant must show that he or she did not depart from accepted standards of practice or that, even if he or she did, the departure did not proximately cause the patient's injury. Rogues v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). The movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care. Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). Further, it must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). If the defendant makes a prima facie showing, the plaintiff must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit attesting the defendant departed from the accepted standard of care and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Summary

judgment is improper where conflicting expert opinions exist. Elmes v. Yelon, 140 A.D.3d 1009, -- (2nd Dep't 2016). Instead, the conflicts must be resolved by the factfinder. See id.

Plaintiff has shown that pursuant to an agreement with the Office of Professional Misconduct and Professional Discipline, Dr. Scheer is not suspended from the practice of medicine at this time. Instead, the suspension is stayed subject to certain conditions. The disciplinary action does not render his affirmation totally unworthy of belief but it may be a factor in assessing the weight given to his statements. Because the conflicting expert affidavits raise issues of fact, the Court denies the motion for summary judgment. In particular, the experts dispute whether Dr. Serrano-Gomez should have injected the prophylactic medicines earlier and whether she should have injected the medicines in conjunction with steroids. As for informed consent, plaintiff's signature on the informed consent document is not dispositive. See Wilson-Toby v. Bushkin, 72 A.D.3d 810, 811 (2nd Dep't 2010). In light of plaintiff's statements indicating that she continued to tell defendants not to use dye after she signed the informed consent form, there is an issue as to whether she understood the import of the document.

Finally, the Court denies defendants' application for dismissal based on lack of vicarious liability. Defendants are correct that they are not vicariously liable for the acts of a doctor an attending physician who has no other relationship with NYU and that Dr. Serrano-Gomez's status at the NYU Medical School is insufficient to establish liability. In the context of the record, those factors alone are not sufficient to support dismissal of the claim.¹ In light of the lack of direct

¹ Instead, they rely on the correction on the errata sheet by Dr. Serrano-Gomez – which incorrectly states that she works at the “New York School of Medicine” – and the fact that plaintiff first visited Dr. Serrano-Gomez at her private office.

evidence as to the doctor's status, plaintiff's evidence – in particular, the note in the records that an “employee” of the hospital explained informed consent to plaintiff in Spanish and the admission that Dr. Serrano-Gomez was the “employee” –creates an issue of fact as to apparent or actual agency giving rise to vicarious liability.

Accordingly, it is

ORDERED that motion sequence number two is denied; and it is further

ORDERED that motion sequence number three is granted to the extent of granting leave to amend the summons and complaint, adding Dr. Serrano-Gomez as a defendant and removing “John Doe ’10 to Jane Doe ‘3” from the caption; and it is further

ORDERED that the proposed supplemental summons and amended complaint, number 104 on the NYSCEF list for this case, is deemed served on the existing defendants; and it is further

ORDERED that within plaintiff shall serve the newly-added defendant by personal service in accordance with rules set forth in the CPLR; and it is further

ORDERED that the caption shall be amended to read as follows, and the Trial and Motion Support Clerks shall amend the caption accordingly:

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
JUSTINA TORRES,

Plaintiff,

Index No. 805119/2013

-against-


NYU HOSPITAL CENTER, TISCH HOSPITAL,
NYU LANGONE MEDICAL CENTER, K. CHABOS,
R.N., S. ISABELLA, R.N., and DR. SERRANO-GOMEZ,

Defendants.
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All further papers shall use the amended caption.

Dated: *Oct. 5*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.