

Prucha v Good Samaritan Hosp. Med. Ctr.
2016 NY Slip Op 32299(U)
November 22, 2016
Supreme Court, Suffolk County
Docket Number: 10-8282
Judge: Daniel Martin
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SHORT FORM ORDER

INDEX No. 10-8282CAL. No. 16-00138MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:Hon. DANIEL MARTINMOTION DATE 5-17-16ADJ. DATE 6-14-16

Mot. Seq. # 014 - MG

MARGARET PRUCHA and RICHARD L.
STERN AS CHAPTER 7 TRUSTEE OF THE
BANKRUPTCY ESTATE OF MARGARET
AND CHARLES PRUCHA,

Plaintiffs,

- against -

GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, STEPHANIE LOVELL-ROSE, M.D.,
JASON IDELSON, D.O., WILLIAM SIERRA,
RPAC, CHEMIN MALONE, R.N., CRAIG
SHALMI, M.D., BARBARA SOMERS, NEW
YORK PAIN CONSULTANTS, LLC., JORGE
BAEZ, M.D., and THE CENTRAL
ORTHOPEDIC GROUP, LLP,

Defendants.

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-47; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motion of defendants Good Samaritan Hospital Medical Center and Stephanie Lovell-Rose, M.D., for summary judgment dismissing the complaint against them is granted.

Plaintiff Margaret Pruscha commenced this medical malpractice action against defendants to recover damages for injuries allegedly sustained as a result of negligent care and treatment and lack of

informed consent. Plaintiff's husband, Charles Pruscha, sued derivatively for loss of services, but subsequently discontinued his cause of action against defendants, and the caption was amended on December 4, 2013 to reflect same. By order dated July 22, 2015, the undersigned granted the motions of Craig Shalmi, Jason Idelson, William Sierra, Chemin Malone, Barbara Somers, and New York Pain Consultants and discontinued the action against them pursuant to CPLR 3217 (b).

The complaint, as amplified by the verified bill of particulars, alleges that defendant Stephanie Lovell-Rose and the medical staff at defendant Good Samaritan Hospital Medical Center were negligent in failing to diagnose and treat an infection, in failing to prescribe antibiotics, and were negligent in prematurely discharging plaintiff from the emergency room, among other things. Plaintiff further alleges that Good Samaritan Hospital Medical Center was negligent in hiring and supervising its medical staff, and failed to provide medical staff who possessed sufficient skill and knowledge to treat plaintiff. In addition, plaintiff alleges that defendant Good Samaritan Hospital Medical Center is vicariously liable for the conduct of defendant Dr. Lovell-Rose.

Dr. Lovell-Rose and Good Samaritan Hospital Medical Center (hereinafter Good Samaritan) now move for summary judgment dismissing the complaint against them on the grounds that their treatment of plaintiff did not depart from accepted medical practice, and they were not a cause of plaintiff's injuries. Good Samaritan also argues that it cannot be vicariously liable for the conduct of Dr. Lovell Rose. In support of the motion, defendants submit copies of the pleadings, the transcripts of the parties' deposition testimony, plaintiff's medical records and an affirmation by Dr. James Ryan.

At her deposition, plaintiff testified that she underwent a left-knee replacement surgery in 2006, and a revision surgery in February 2008. She testified that she regularly treats at New York Pain Consultants with Dr. Shalmi and Nurse Practitioner Barbara Somers. Plaintiff testified that in April 2008, she fell and hurt her left knee, shoulder and neck, and that she presented to Dr. Baez at Central Orthopedic Group for treatment. She testified that Dr. Baez performed x-ray tests and administered steroid injections for the pain. However, the pain continued, so she presented to the emergency room at Good Samaritan on May 3, 2008 at approximately 9:15 p.m. with complaints of pain in her neck, shoulders and knee. She testified that she was treated by a nurse and a physician who examined her and conducted various tests, including x-ray tests of her shoulder, knees and chest. She testified that blood and urine specimens were taken, and that she was told the results of the tests were normal. Plaintiff testified that she did not have a fever, and that she was discharged within a couple of hours after receiving pain medication and being instructed to contact her primary physician and her pain management doctor. She testified further that the discharge instructions advised her to return if she developed a fever.

Plaintiff testified that she presented to New York Pain Consultants on Monday and was seen by Barbara Somers. She testified that she was given a prescription for pain medication, and that she did not have a fever. Plaintiff testified that she continued to suffer from pain and took pain medication, but that the pain became unbearable on Thursday, so she presented to the emergency department at North Shore University Hospital at Plainview where she was diagnosed with an infection in her lower spine that was "wrapped around her nerves," and that a laminectomy was performed by Dr. Cohen.

Dr. Lovell-Rose testified that she is board certified in emergency medicine and received her medical degree in 1998. She testified that she worked at Stony Brook University Hospital from 1998 until 2003, and that she worked as an attending emergency department physician at Good Samaritan from 2003 until 2009. Dr. Lovell-Rose testified that she was working in the emergency department on the night plaintiff presented and that she remembers plaintiff. She testified that plaintiff was cognizant and alert, but spoke with her eyes closed at times. She testified that plaintiff was triaged by a nurse, that she examined her, conducted various tests and obtained a urine specimen for analysis. She testified that plaintiff informed her that she underwent a knee replacement surgery in February 2006 and a revision surgery in February 2008, and that she regularly uses pain medications, among other things. Dr. Lovell-Rose testified that she ordered Dilaudin and Toradol for plaintiff's complaints of pain, and that plaintiff indicated that she felt better. She testified that plaintiff's urine specimen contained bacteria, and her white blood cell count was high. Dr. Lovell-Rose explained she attributed such findings to a possible urinary tract infection which could not be confirmed until the results of the culture were obtained. During her deposition, Dr. Lovell-Rose referred to plaintiff's medical chart, which contained notes created by Dr. Idelson indicating that plaintiff's left-lower extremity had edema, and her own notes indicating that plaintiff's knees were swollen, and she complained of pain "all over." She testified that plaintiff did not have a fever and "no clear infectious source" was determined. Dr. Lovell-Rose testified that she diagnosed plaintiff with extremity pain and instructed her to contact her primary care physician and pain management group. She testified that she also advised plaintiff to return to the emergency department if she developed a fever.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

A hospital owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (*see Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]). "The requisite elements of proof in a medical malpractice are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Paone v Lattarulo*, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). Therefore, to establish medical malpractice by a hospital through its employees, expert medical testimony must be offered to demonstrate that a staff

physician, resident, intern, nurse, technician, or other professional employee violated some accepted standard of good professional practice (see *Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 98 AD3d 545, 949 NYS2d 714 [2d Dept 2012]).

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (see *Hill v St Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3 [1957]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the hospital. However, “an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing” (*Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]). Under a theory of apparent or ostensible agency, a hospital may be vicariously liable for the malpractice of a physician, who is not an employee of the hospital, if a patient reasonably believes that the physicians treating him or her were provided by the hospital or acted on behalf of the hospital (*Hilsdorf v Tsioulis*, 132 AD3d 727, 17 NYS3d 655 [2d Dept 2015]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2015]).

To impose liability upon a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries (*Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a prima facie showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant’s treatment of the patient or that any departure was not a proximate cause of plaintiff’s injuries (see *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]).

Here, defendants submit the expert affirmation of James Ryan M.D., who is board certified in internal medicine and emergency medicine. In his affirmation, Dr. Ryan states that he reviewed the bill of particulars, plaintiff’s medical records, and the transcripts of the parties’ deposition testimony. Dr. Ryan opines, with a reasonable degree of medical certainty, that the treatment rendered to plaintiff by Dr. Lovell-Rose and the staff at Good Samaritan was in accord with accepted medical practice and was not a proximate cause of plaintiff’s injuries. He states that plaintiff’s urine analysis revealed the presence of *Escherichia coli* bacteria (e-coli), which may be indicative of a urinary tract infection or vaginal flora but could not be confirmed for several days. As to the elevated white blood cell count, Dr. Ryan opines that plaintiff’s recent steroid injection or possible urinary tract infection could have caused such elevation. He states that as plaintiff indicated she felt wonderful after the pain medication was administered and did not have a fever, it was reasonable for Dr. Lovell-Rose to discharge her from the emergency department on May 4, 2008. He states further that the hospital records indicate plaintiff was properly instructed to return if she developed a fever, and that she did not return to Good Samaritan Hospital for treatment. According to Dr. Ryan, the spinal abscess diagnosed by the physicians at North Shore University

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Hospital at Plainview was caused by a bacteria known as methicillin sensitive staphylococcus aureus (MSSA), and explains that this strand of bacteria is separate and distinct from the E. coli bacteria which was present in plaintiff's urine on May 3, 2008. Dr. Ryan opines that Dr. Lovell-Rose properly examined plaintiff, obtained her vital signs and palpated her spine to assess for pain. He opines that, had a spinal abscess existed in plaintiff's spine, it would have caused her pain. Dr. Ryan delineates the results of plaintiff's vital signs, and explains how such results do not indicate the presence of an infection.

Defendants' submissions establish a prima facie case that Dr. Lovell-Rose and the medical staff at Good Samaritan Hospital did not deviate or depart from accepted medical practice in their treatment of plaintiff, and were not a proximate cause of plaintiff's injuries. Furthermore, the record establishes, prima facie, that the moving defendants cannot be liable for lack of informed consent. The elements of a claim for lack of informed consent are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). For the claim to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Here, the facts do not support a cause of action for lack of informed consent, as there is no allegation that plaintiff's injuries were due to an affirmative violation of her physical integrity (see *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]). Having met their burden, the burden shifts to plaintiff to proffer evidence raising a triable issue of fact (*Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). As there is no opposition to the motion, the motion of Dr. Lovell-Rose and Good Samaritan Hospital for summary judgment dismissing the complaint against them is granted.

Dated: November 22, 2016


 A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION