

Lynch v Kaiser

2017 NY Slip Op 32621(U)

December 14, 2017

Supreme Court, New York County

Docket Number: 805410/13

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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PENNY LYNCH,

Index No. 805410/13

Plaintiff,

DECISION

-against-

MICHAEL G. KAISER, M.D., NEUROSURGICAL
ASSOCIATES, P.C., CHRISTOPHER S. AHMAD, M.D.,
SPENCER ORTHOPEDICS PLLC, NEW YORK
ORTHOPAEDIC HOSPITAL ASSOCIATES, P.C.,
FARAH HAMEED, M.D., COLUMBIA DOCTORS,
NEW YORK AND PRESBYTERIAN HOSPITAL,
and NEW YORK-PRESBYTERIAN, THE UNIVERSITY
HOSPITAL OF COLUMBIA AND CORNELL,

Defendants.

-----X
MICHAEL G. KAISER, M.D., NEUROSURGICAL
ASSOCIATES, P.C., CHRISTOPHER AHMAD, M.D.,
NEW YORK ORTHOPAEDIC HOSPITAL ASSOCIATES, P.C.,
FARAH HAMEED, M.D., COLUMBIA DOCTORS,
NEW YORK AND PRESBYTERIAN HOSPITAL,
and NEW YORK-PRESBYTERIAN, THE UNIVERSITY
HOSPITAL OF COLUMBIA AND CORNELL,

Third-Party Index No.
595443/16

Defendants-Third Party Plaintiffs,

-against-

AMERICAN MEDICAL ALERT CORP. d/b/a H-LINK
ONCALL,

Third-Party Defendant.

-----X
Martin Shulman, J.

In this medical malpractice action, defendants-third party plaintiffs Michael G.
Kaiser, M.D. ("Dr. Kaiser"), Neurosurgical Associates, P.C., New York Orthopaedic

Hospital Associates, P.C., Farah Hameed, M.D., the Trustees of Columbia University in the City of New York s/h/a Columbia Doctors and the New York Presbyterian Hospital s/h/a New York-Presbyterian, the University Hospital of Columbia and Cornell (collectively defendants) now move for reargument pursuant to CPLR 2221(d) ("Reargue Motion") to be granted partial summary judgment on their third party complaint against American Medical Alert Corp. d/b/a H-Link Oncall ("H-Link") on the issue of liability or negligence. H-Link and plaintiff Penny Lynch ("Lynch") oppose this motion.

In defendants' underlying motion for summary judgment against H-Link, they sought common law indemnification, contractual indemnification and contribution. Of course, the lynchpin for this relief must rest on finding H-Link negligent and that its negligence was a substantial factor in contributing to Lynch's neurological injuries. While this court made certain findings against H-Link in its detailed August 21, 2017 decision and order, nonetheless this court *inter alia* denied defendants' motion in its entirety ("August Decision" annexed as Exhibit B to Reargue Motion).

In its August Decision, this court found record support for certain undisputed facts; to wit, "H-Link owed a duty to Dr. Kaiser [one of the named defendants] by virtue of . . . [its] contract [with the institutional defendants and its physicians], acknowledged its duty in its November 24, 2012 email [of apology] and admitted both the existence of a duty to defendants as well as a breach thereof in its representative's deposition

testimony. . ." (bracketed matter added)(August Decision at pp 8-9)¹.

Parenthetically, the Reargue Motion indubitably does not challenge the portion of the August Decision determining that a material issue of fact exists as to whether H-Link's negligence was a substantial factor in allegedly causing plaintiff's injuries and treatment delays, a triable issue best left for a jury to resolve. What defendants now contend is that the August Decision inadvertently failed to tie up a loose end by not expressly finding H-Link negligent as a matter of law due to its admitted breach of duty to Dr. Kaiser especially when H-Link conceded its "errors 'caused a serious delay in . . . Lynch receiving the patient care she needed.' . . ." (August Decision at p 4).

In opposition, H-Link and Lynch jointly and severally argue that defendants either failed to seek this specific relief or sought summary judgment on "liability and causation inexorably intertwin[ing] duty and causation . . ." (Coscia Opp Aff at ¶4) which requires the denial of the Reargue Motion.

This court disagrees. On the basis of H-Link's own documentary and deposition testimonial evidence, this court must conclude that H-Link was negligent as a matter of law as there are simply no issues of fact to resolve with respect to H-Link's breach of its duty to Dr. Kaiser and defendants in failing to timely and properly convey Lynch's emergent messages during the period November 21-23, 2012.

¹ H-Link's duty to Dr. Kaiser arose from its December 12, 2005 contract to provide after hours answering services. As more fully discussed in its August Decision, between November 21-23, 2012, Lynch, alarmed about certain debilitating, neurological symptoms she was experiencing, repeatedly attempted to reach out to Dr. Kaiser via H-Link's answering service. Notably, H-Link admitted it erroneously sent her emergent messages to Dr. Kaiser's "outdated pager number rather than to his cell phone, contrary to instructions he had given H-Link in January 2012 . . ." (August Decision at p 4).

Accordingly, this court grants defendants' Reargue Motion solely to the extent of awarding defendants' partial summary judgment against H-Link on the issue of its admitted negligence. This constitutes this court's decision and order.

Dated: New York, New York
December 14, 2017



Hon. Martin Shulman, JSC