Heinze v New York Presbyt. Hosp./Weill Cornell Med. Ctr.
2018 NY Slip Op 31686(U)
July 21, 2018
Supreme Court, New York County
Docket Number: 161032/2016
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

JOY DEVRIES HEINZE and JOHN HEINZE,

MOTION INDEX NO. 161032/2016

MOTION DATE

- v. -

MOTION SEQ. NO. 001

NEW YORK PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL CENTER

Cross-Motion: ☐ Yes ☒ No

GEORGE J. SILVER, J.S.C.:

On January 12, 2012, plaintiff Joy DeVries Heinze ("plaintiff"), was visiting her husband, John Heinze, in the post-anesthesia care unit at defendant New York Presbyterian Hospital/Weill Cornell Medical Center ("defendant," "Hospital"). Plaintiff's husband was recovering from a medical procedure he underwent earlier in the day. Plaintiff alleges that while she was visiting her husband his attending physician, Dr. Benjamin Talei ("Dr. Talei"), requested that she hold a flashlight in place while he sutured and reinforced a drain near her husband's surgical site. While holding the flashlight, plaintiff claims that she became nauseous. As she subsequently stepped away from her husband's bedside to regain her composure, she fainted and fell to the ground, fracturing her ankle.

Defendant moves for summary judgment pursuant to CPLR § 3212, arguing that plaintiff has no viable claim for medical malpractice against it because she did not have a physician-patient relationship with the Hospital; and the Hospital owed her no duty of care under the circumstance. Additionally, defendant contends that as a matter of law, plaintiff's injury was unforeseeable, since merely asking a person to hold a flashlight cannot reasonably be perceived as posing a risk of harm to that person.

In opposition, plaintiff states that while she was surprised by Dr. Talei's request, she acquiesced because of her concern for her husband's well-being. Indeed, plaintiff avers that she followed Dr. Talei's direction and illuminated the site of her husband's neck wound with a flash light so that Dr. Talei could stop the secretion from the wound. Plaintiff affirms that doing so caused her to feel nauseated and dizzy before falling to the ground.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff argues that this sequence of events sounds in negligence rather than medical malpractice. Indeed, contrary to defendant's assertions, plaintiff argues that since this action is premised on allegations of negligence rather than medical malpractice, plaintiff does not have to establish that a physician-patient relationship existed between her and defendant. Rather, plaintiff argues that the absence of such a relationship does not preclude recovery in an action such as this where the physician's alleged negligence is readily determinable by a trier of fact based on common knowledge.

Believing that this action sounds in medical malpractice rather than ordinary negligence, defendant cites case law, including the Court of Appeals decision in *Davis v. South Nassau Communities Hospital*, 26 NY3d 563 (2015), for the proposition that courts have been reluctant to expand the physician's duty of care to third parties beyond the physician-patient relationship. Defendant similarly cites *Palsgraf v. Long Island R.R. Co.*, 248 NY 339, 344 (1928) and its progeny for the proposition that Dr. Talei's request was reasonable under the circumstance, and that it was not foreseeable that plaintiff would suffer injury as a result. If this court finds that defendant owed plaintiff a duty, defendant annexes the affidavit of Dr. Babak Givi ("Dr. Givi"), who opines that it was consistent with the standard of care and an acceptable exercise of professional judgment for Dr. Talei to ask the plaintiff to hold a flashlight in place so that he could suture a wound on plaintiff's husband's neck. Accordingly, defendant argues that since there was no breach of any duty owed to plaintiff, plaintiff's causes of action must be dismissed.

DISCUSSION

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The failure to make such a showing requires a denial of the motion (*see id.*). Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*see Alvarez v. Propect Hosp.*, 68 NY2d 320, 324 [1986]). Summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue

of fact remaining (*see Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept. 1992], *citing Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept. 1989]). The court's role is "issue-finding, rather than issue-determination" (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Moreover, whether a claim sounds in negligence or medical malpractice depends on whether medical judgment is required. Where the conduct involves a standard established by means of the exercise of medical judgment, the claim is for malpractice (*see e.g., Martuscello v. Jensen.*, 134 AD3d 4 [3rd Dept. 2015]). Where allegations do not focus on negligence in furnishing medical treatment to a patient, but rather on a hospital's failure in fulfilling a different duty, the claim sounds in negligence *(Weiner v. Lenox Hill Hospital*, 88 NY2d 784 [1996]).

In the instant matter, the claim before the court is one of ordinary negligence, as plaintiff has made no allegation that a physician-patient relationship existed as between herself and defendant, and the court is not being asked to expand on such a relationship. Given this posture, the court's focus turns to whether Dr. Talei had a duty to plaintiff and whether he acted reasonably in asking plaintiff, a lay person with no medical training, to assist him in a procedure involving open wounds, blood and suturing. More pointedly, did Dr. Talei enlist plaintiff as an agent and fail to use that degree of care that a reasonably prudent person would have exercised under the same circumstance? Since these issues are being raised in the context of defendant's motion for summary judgment, where the emphasis is on whether any issues of fact exist which preclude summary resolution of the dispute between the parties, the court is not deciding whether plaintiff will ultimately prevail on her claims, but rather whether there is a basis to have those claims resolved by a jury. Courts have held that a hospital that solicits non-hospital personnel to perform a function can still be held liable for the non-hospital employees alleged negligence if the non-hospital employees acted as agents of the hospital or if the hospital exercised control over them (*see e.g., Harrington v. Neurological Institute of Columbia Presbyterian Medical Center*, 254 AD2d 129, 130 [1st Dept. 1998]; *see also Hill v. St. Clare's Hosp.*,

67 NY2d 72, 80 [1986]).

However, courts are generally very reluctant to extend a physician's duty of care beyond the traditional physician-patient relationship, even where ordinary negligence rather than medical malpractice is implicated (*see McNulty v. City of New York*, 100 NY2d 227 [2003]). Recent precedent from the Appellate Division, First Department, reinforces the principle that a physician's duty does not extend to a patient's family members (*see Urciuoli v. Lawrence Hospital Center*, 89 AD3d 533 [1st Dept. 2011]). Even if a duty premised on ordinary negligence were extended in this case, liability still could not be imposed since the events at issue were unforeseeable. Indeed, asking a person to hold a flashlight cannot reasonably be perceived as posing a risk of harm to that person. As explained by Dr. Givi, Dr. Talei reasonably inquired if plaintiff would hold a flashlight, and common knowledge and experience would instruct that most people would not have fainted under these circumstances. Plaintiff asks this court to find a question of fact as to the reasonable foreseeability of her injury without any support for her contention that fainting while viewing a surgical incision is reasonably foreseeable. Plaintiff could have supported this claim with an expert affidavit, but failed to provide one. To say, in retrospect, that plaintiff's injury was reasonably foreseeable simply because it improbably happened to her is insufficient to defeat summary judgment, especially where defendant has provided more than adequate evidence illustrating that Dr. Talei's actions were reasonable and plaintiff's injury was unforeseeable, as a matter of law. Indeed, the medical records, deposition testimony, and case law demonstrate that defendant has made a prima facie showing of an entitlement to judgment in its favor. To be sure, Dr. Givi's affidavit sheds light on the lack of a duty between Dr. Talei and plaintiff, and also corroborates the dual notions that Dr. Talei's actions comported with reasonable care and that plaintiff's injury was unforeseeable. In light of Urciuoli, it is also apparent here that any perceived duty owed to plaintiff cannot be premised on Dr. Talei's physician-patient relationship with her husband (*Urciuoli*, 89 AD3d 533, *supra*).

Notably, any theory advanced by plaintiff premised on ordinary negligence rather than malpractice in opposing defendant's prima facie showing necessarily must fail because plaintiff never asserted certain claims of ordinary negligence in her bill of particulars and first raised such claims in opposition to the instant motion. To be sure,

plaintiff's bill of particulars, dated June 6, 2014, states that defendant allegedly breached the duty of care by enlisting plaintiff's assistance to hold the flashlight and that defendant should not have requisitioned plaintiff to perform a function commonly reserved for medical staff. In plaintiff's second response to defendant's demand for a verified bill of particulars, dated February 28, 2015, plaintiff adds that defendant was negligent in not considering the impact that participating in a medical procedure would have on an untrained lay person, and that defendant should have anticipated that plaintiff may be caused to react to viewing the suturing of her husband's neck and could possibly respond by fainting and suffering. However, in ¶ 22 of plaintiff's opposition to the instant motion, plaintiff claims for the first time that the Hospital's negligence is premised on the fact that the Hospital allowed the lights in the recovery room to dim and that Dr. Talei was negligent in not asking for the lights be raised. Plaintiff's new allegations regarding the adequacy of the lighting in the recovery room and whether Dr. Talei should have asked for them to be raised were never addressed in the plaintiff's complaint, amended complaint, or bills of particulars. Indeed, plaintiff's new allegations appear to be tailored to avoid a judgment in defendant's favor. It is well settled that a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting, for the first time in opposition to the motion, new theories of liability that were not previously set forth in the complaint or bills of particulars (*see Abalola v. Flower Hospital*, 44 AD3d 522 [1st Dept. 2007]; *Wilson v. New York City Transit Authority*, 66 AD3d 602 [1st Dept. 2009]).

Accordingly, based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the clerk is directed to enter judgment dismissing this case accordingly.

This constitutes the decision and order of the court.

Dated: July 21, 2018

HON. GEORGE J. SILVER

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Motion is: ■ Granted ☐ Denied ☐ Granted in Part