

Pinilla v New York Hotel Trades Council
2018 NY Slip Op 31860(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 805150/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Constanza Pinilla, as Executrix of the Estate of
Lidija Glusica,

Index No.
805150/2014

Plaintiff,

**DECISION
and ORDER**

- v -

Mot. Seq. 2, 4

New York Hotel Trades Council and Hotel
Association of New York City Health
Center, Inc. and Mohammed S. Nizam, M.D.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is a medical malpractice action concerning defendant Mohammed S. Nizam, M.D.’s (“Nizam”) alleged failure to timely diagnose and treat decedent, Lidija Glusica (“Glusica”), for endometrial cancer. Nizam was an employee of New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. (“NYHTC”) during the time he treated Glusica.

NYHTC moves for partial summary judgment to dismiss any vicarious liability claims based upon the negligence of an employee other than Nizam and to dismiss all direct negligence claims, including claims of negligent hiring and negligent supervision, against NYHTC. Plaintiff does not oppose the relief requested by Nizam. Rather, Plaintiff cross moves for an order holding as a matter of law that NYHTC is vicariously liability for Nizam’s acts of negligence and medical malpractice. NYHTC opposes plaintiff’s cross motion.¹

¹ Plaintiff filed a note of issue on January 31, 2018. NYHTC timely filed its motion (Mot. Seq. 2) by Order to Show Cause for summary judgment on April 2, 2018. The return date of the Order to Show Cause was scheduled for May 11,

NYHTC's Motion for Partial Summary Judgment

1. Vicarious liability claims against NYHTC based on employees other than Nizam

Plaintiff's claims against NYHTC are based solely on vicarious liability for the alleged medical malpractice of Nizam. Plaintiff's Amended Complaint alleges "Defendant NIZAM and defendant [NYHTC], by its agents, servants and/or employees were negligent and departed from the accepted standards of gynecological practice in the care and treatment of plaintiff in failing to, *inter alia*, properly monitor plaintiff's condition, evaluate testing and properly instruct plaintiff in regards to her condition." Ex. J (Amended Compl., ¶ 13). In plaintiff's Supplemental Bill of Particulars, plaintiff alleges, "At the current time, plaintiff has no way of identifying those who the defendants are vicariously liable for as plaintiff is unaware of their legal relations to the defendants. Plaintiff cannot make this determination without obtaining deposing [sic] the defendants." Ex. O (¶ 7). Plaintiff did not subsequently amend the Supplemental Bill of Particulars to identify any individual other than Nizam for whom NYHTC is vicariously liable. NYHTC contends that in addition to failing to identify any such individual, plaintiff has presented no evidence that any other person beside Nizam could serve as the basis for imposing vicarious liability against NYHTC.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. That party must produce

2018, with opposing papers to be served by overnight mail on May 4, 2018. On May 4, 2018, plaintiff e-filed a cross motion for partial summary judgment. On May 8, 2018, plaintiff filed the same cross motion by Order to Show Cause (Mot. Seq. 4). NYHTC and plaintiff's motions were made returnable on June 26, 2018. The return date was subsequently adjourned to July 17, 2018 to allow NYHTC an opportunity to submit opposition papers to plaintiff's motion. NYHTC contends that plaintiff's cross motion should be denied as untimely because it was made beyond 60 days from the filing of the Note of Issue. "[A]n untimely motion or cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds." *Grande v. Peteroy*, 39 A.D.3d 590, 591-92 (2d Dept 2007), *as amended* (Dec. 18, 2007). Here, as both NYHTC's motion and plaintiff's cross motion for partial summary judgment relate to NYHTC's vicarious liability, plaintiff's cross motion will be considered.

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]. In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moniger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 (1970); *Edison Stone Corp. v. 42nd Street Dev. Corp.*, 145 A.D.2d 249, 251-252 (1st Dept. 1989). Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. *See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 (1st Dept. 2002).

“As a general rule, employers are held vicariously liable for their employee’s torts only to the extent that the underlying acts were within the scope of the employment.” *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 119 (1996). The rule extends to medical facilities, who can be vicariously liable for the negligence or malpractice of their employees including their physicians. *Hill v. St. Clare’s Hospital*, 67 N.Y.2d 72 (1986). Vicarious liability allegations based upon unnamed agents, servants, and employees are overbroad and improper. *See e.g., Crispino v. Andersen*, 33 Misc. 3d 1204(A) (N.Y. Sup. Ct., Nassau County, 2011) (“In addition, the courts have also found that the language, ‘agents, servants, and/or employees,’ is improper. Such language has been found to be vague and overbroad, making it unacceptable.”)

Here, since plaintiff has not alleged vicarious liability against any individual besides Nizam for whom NYHTC is allegedly vicariously liable, all claims sounding in vicarious liability based on unnamed “agents, servants, and/or employees” of NYHTC are dismissed without opposition.

2. Claims of Direct Negligence against NYHTC

NYHTC also moves for partial summary judgment to dismiss all claims of direct negligence, including claims of negligent hiring and negligent supervision, against NYHTC. Plaintiff does not oppose.

Plaintiff's Cross Motion for Partial Summary Judgment

Plaintiff's cross motion seeks an order holding that as a matter of law, NYHTC is vicariously liability for Nizam's acts of negligence and medical malpractice. In support, Plaintiff submits, *inter alia*, the attorney affirmation of Lauren Pennisi ("Pennisi Aff."), pleadings, the employment contract between Nizam and NYHTC; and a portion of Nizam's deposition testimony.

"[U]nder the doctrine of Respondeat superior, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his employment." *Lundberg v. State*, 25 N.Y.2d 467, 470 (1969). "An employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly over the employee's activities." *Stavitz v. City of New York*, 98 A.D.2d 529, 531 (1st Dept 1984). "The question whether one is acting within the scope of employment is a question of law when there is no conflicting evidence or the facts are undisputed." N.Y. Pattern Jury Instr.--Civil 2:235. *See e.g., Lundberg*, 25 N.Y. 2d at 471-472.

On October 11, 2017, Nizam produced his employment contract with NYHTC to provide medical services to NYHTC's members. (Pennisi Aff., ¶7, Exh. J). At his deposition on October 25, 2017, Nizam testified that he was an employee of NYHTC during the time period he treated Glusica and received payment for his services by NYHTC. (Aff. of Pennisi, ¶15, Exh. K pages 19-20 and 28:17-20).

Accordingly, Plaintiff has produced evidence that Nizam was an employee of NYHTC pursuant to a contract, Nizam rendered medical services to Glusica within the scope of his employment at NYHTC, and was paid for his services by NYHTC. In opposition, NYHTC fails to raise a triable issue of fact. Accordingly, Plaintiff's cross motion is granted to the extent that NYHTC is vicariously liable as a matter of law for its employee Nizam's acts of negligence and medical malpractice if the jury finds him culpable for said acts.

Wherefore, it is hereby

ORDERED that New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc.'s motion (Mot. Seq. 2) for partial summary judgment is granted without opposition; and it is further

ORDERED that that claims of vicarious liability based upon the alleged negligence of any individual other than Mohammed S. Nizam, M.D., are dismissed; and it is further

ORDERED that claims of direct negligence, including claims of negligent hiring and negligent supervision, against New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., are dismissed; and it is further

ORDERED that plaintiff's cross motion (Mot. Seq. 4) is granted, and New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. is vicariously liable as a matter of law for Mohammed S. Nizam, M.D.'s acts of negligence and medical malpractice if the jury finds him culpable for said acts.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: August 1, 2018



Eileen A. Rakower, J.S.C.