Matter of Rhee v Shiau
2019 NY Slip Op 30291(U)
February 1, 2019
Supreme Court, Kings County
Docket Number: 507949/13
Judge: Bernard J. Graham

At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of February, 2019.

P R E S E N T:

HON. BERNARD J. GRAHAM, J.S.C.,
Justice.

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DENNIS RHEE, as Executor of the Estate of SOO CHULL RHEE, Deceased,

Plaintiff,

- against -

Index No. 507949/13

JOHN SHIAU, M.D., HEALTHCARE ASSOCIATES IN MEDICINE, P.C. AND STATEN ISLAND UNIVERSITY HOSPITAL,

Defendants.

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The following papers numbered 1 to 13 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-8
Opposing Affidavits (Affirmations)	9-11
Reply Affidavits (Affirmations)	12, 13
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C., (Healthcare Associates) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint as against them. Defendant Staten Island University Hospital (SIUH), likewise moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it.

SIUH's motion (Motion Sequence Number 6) is denied with leave to renew within 60 days from the date a copy of this order is served upon it with notice of entry. Dr. Shiau and Healthcare Associates' motion (Motion Sequence Number 5) is denied.

Plaintiff Dennis Rhee alleges that his father, Soo Chull Rhee,[1] suffered injuries and ultimately died on January 20, 2013, as a result of malpractice in the care of his spine during and following spinal surgeries performed by Dr. Shiau on July 6, 2011 and July 20, 2011at SIUH. Dr. Shiau first saw Rhee at his office on June 27, 2011, based on a referral from Dr. Kenneth Chapman, a pain management specialist who had been treating weakness and pain in Rhee's lower extremities with, among other things, epidural injections. Rhee presented at Dr. Shiau's office with complaints of lower back pain, radiculopathy, difficulty walking, and extremity weakness and, upon examination, Dr. Shiau noted that Rhee could not stand unaided, and was in a lot of pain. Based on the history, examination, and a May 28, 2011 MRI that Rhee provided to Dr. Shiau showing significant stenosis from L1-2 to L4-5, Dr. Shiau recommended that Rhee go to the hospital through the emergency room in order to receive IV steroids, undergo a repeat MRI, and ultimately to undergo decompression surgery.

Rhee proceeded to SIUH that day, where he was admitted to the hospital through the emergency room. Following his admission under Dr. Shiau's surgical service, a course of steriods was started and the repeat MRI was conducted on June 27, 2011. The repeat MRI showed no change from the May 28, 2011 MRI. While Rhee showed some improvement with the steroids, that did not change Dr. Shiau's plan to perform a decompressive laminectomy because a patient, particularly one like Rhee, who sufferred from diabetes, cannot stay on steroids indefinitely. After obtaining medical clearances, and providing for

[1] All subsequent references to "Rhee" without a first name relate to decedent Soo Chull Rhee.

time following the discontinuance of Plavix, Dr. Shiau performed the decompressive laminectomy on July 6, 2011. Based on his microscopic examination of Rhee's spine during the surgery, Dr. Shiau believed he had successfully decompressed Rhee's spine.

Although Rhee showed some initial improvement following the surgery, by the time of an examination performed on July 13, 2011, Dr. Shiau believed that Rhee's condition had regressed. On July 16, 2011, Dr. Shiau again found that Rhee was weaker in all muscle groups, and ordered lumbar and thoracic MRI's to assess Rhee's condition. As is relevant here, the radiologist, in the reports relating to the July 16, 2011 lumbar and thoracic MRI's, noted the presence of a disc bulge at L3-4 with severe spinal stenosis, and a right paracentral disc herniation at T10-11 causing severe canal stenosis and compression. Based on his own review of the MRI films, Dr. Shiau concluded that the finding of stenosis at L3-4 was incorrect, and that what was shown in the lumbar films was a post-surgical buildup of fluid that would dissipate on its own. Because of the location of Rhee's weakness, Dr. Shiau believed Rhee's post-surgical problems were caused by the disc herniation at T 10-11. A thoracic CT Scan performed on July 18, 2011, confirmed the presence of the herniation at T 10-11, and on July 20, 2011, Dr. Shiau performed a thoracic decompression surgery at the T 10-11 site. Following this thoracic decompression surgery, Rhee could not move his lower extremities, and a July 21, 2011 MRI revealed a possible infarction or contusion at T 10-11. Rhee's strength and sensation continued to decline following the surgery, and he was ultimately diagnosed with paraplegia. Rhee died on January 13, 2013.

Plaintiff commenced this action premised on medical malpractice and wrongful death in December 2013, issue has been joined, and defendants' motions are now before the court.

The court will first consider Dr. Shiau and Healthcare Associates' motion. "In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider 'departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries'" (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]). A defendant moving for summary judgment dismissing a medical malpractice action must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries (*see Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2d Dept 2013]). "Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (*Schmitt*, 121 AD3d at 1088; *see Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

In support of their motion, Dr. Shiau and Healthcare Associates have submitted an affirmation from John K. Houten, M.D., a doctor board certified in Neurological Surgery.[2] Dr. Houten asserts that Dr. Shiau properly performed the July 6, 2011 surgery and that he fully decompressed Rhee's lumbar spine from the L 1-2 level to the L 4-5 level. Dr. Houten agrees with Dr. Shiau's assessment that fluid buildup is what is shown in the July 16, 2011 lumbar MRI and that this buildup is a normal post-surgical finding that does not produce

[2] From the record, it is appears that Dr. Shiau is employed by, or in someway associated with, Healthcare Associates. Plaintiff, in his bill of particulars addressed to Healthcare Associates, asserts that its liability is based on malpractice committed by Dr. Shiau. As the parties do not separately address Healthcare Associates' liability, the court assumes, for the sake of the instant motion, that Healthcare Associates' liability turns on whether Dr. Shiau may be held liable.

symptoms and does not require surgical intervention. Dr. Houten also concluded that the herniation at T 10-11 that was shown in the July 16, 2011 thoracic MRI and CT-Scan was the cause of Rhee's hip weakness and that the thoracic decompression surgery was indicated. Although Dr. Houten noted that thoracic decompression surgery is risky, he asserted that, given the level of stenosis at T 10-11, there was a high risk of continued worsening of Rhee's neurological function, including a risk that the spinal cord compression would cause paralysis.

Dr. Houten also opined that Rhee's postoperative condition was not the result of any malpractice by Dr. Shiau in performing the surgery. Rather, Dr. Houten noted that paralysis is a common and well known risk of the surgery performed by Dr. Shiau, and that paralysis, in and of itself, is not an indication of a departure from the standard of care. Dr. Houten concluded that it was likely that Rhee's condition was either caused by a reperfusion injury following the decompression of the spinal cord or by the necessary manipulation around the spinal cord during the surgery. Through Dr. Houten's affirmation, as well as the appended medical records and deposition testimony, Dr. Shiau has demonstrated, prima facie, that he did not depart from accepted standards of medical care (*see Senatore v Epstein*, 128 AD3d 794, 796 [2d Dept 2015]; *Khosrova v Westerman*, 109 AD3d 965, 966 [2d Dept 2013]; *Mitchell v Lograno*, 108 AD3d 689, 692-693 [2d Dept 2013]).

In opposition, plaintiff has submitted an affirmation from a board certified neurosurgeon, who asserts that the weakness in Rhee's feet and ankles and persistent urinary retention following the July 6, 2011 lumbar decompression surgery correlate with the severe stenosis and compression at the L 3-4 level shown in the July 16, 2011 MRI, rather than a conus syndrome related to the herniation at T 10-11. Because the CT-scan showed a calcified herniation at that level, plaintiff's neurosurgeon asserts that the thoracic herniation

was a chronic and longstanding abnormality that predated the lumbar procedure and would not likely account for Rhee's acutely worsened weakness in his ankles and feet that developed after the July 6, 2011 surgery.[3] Plaintiff's neurosurgeon also asserts that fluid buildup up, coupled with the hemostatic material used to seal the lumbar area during the surgery and the presence of a clot, caused the stenosis at L 3-4, and that, contrary to the assertion of Dr. Shiau and Dr. Houten, lumbar decompression surgery was necessary to correct the fluid buildup. Because such a lumbar decompression procedure is simpler and safer than the thoracic procedure performed by Dr. Shiau, and because, as discussed above, the stenosis caused by the fluid buildup was the most likely cause of Rhee's post-surgical deficits, plaintiff's neurosurgeon opines that Dr. Shiau departed from accepted medical practice in choosing to address the thoracic herniation instead of the L 3-4 stenosis. Additionally, plaintiff has submitted an affirmation from a board certified neuroradiologist who opines that the stenosis shown at the L 3-4 level in the July 16, 2011 MRI was worse than that present prior to the July 6, 2011 surgery and that the appearance of the T 10-11 herniation in the July 16, 2011 thoracic MRI suggests that it was a chronic finding and thus highly unlikely to be the cause of the acute change in Rhee's condition following the lumbar surgery. Through these affirmations, in which the doctors detail the basis of their opinions and support them by reference to the medical records, plaintiff has demonstrated the existence of a factual issue warranting denial of the motion by Dr. Shiau and Healthcare Associates (*see Omane v Sambaziotis*, 150 AD3d 1126, 1129 [2d Dept 2017]; *Polanco v*

[3] In his own deposition testimony, Dr. Shiau agreed that the herniation was a calcified lesion and that it had probably been there a long time. Dr. Shiau, however, posited that, despite the likely long term presence of the herniation, it may have become problematic only around the time plaintiff sought treatment from Dr. Shiau.

Reed, 105 AD3d 438, 441-442 [1st Dept 2013]; *Poter v Adams*, 104 AD3d 925, 926-927 [2d Dept 2013]; *Bell v Ellis Hosp.*, 50 AD3d 1240, 1242 [3d Dept 2008]).

SIUH, in moving for summary judgment, asserts that it may not be held liable to plaintiff because the allegedly negligent care at issue was provided by Dr. Shiau, a private attending physician selected by Rhee (*see Diller v Munzer*, 141 AD3d 628, 629 [2d Dept 2016]; *Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]; *see also Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). In order to avoid liability for Dr. Shiau's acts on this ground, SIUH bears the initial evidentiary burden of demonstrating that Dr. Shiau was not its employee (*see Lormel v Macura*, 113 AD3d 734, 735 [2d Dept 2014]; *see also Speigal v Beth Israel Med. Ctr.-Kings Hwy Div.*, 149 AD3d 1127, 1129 [2d Dept 2017]; *Sullivan v Sirop*, 74 AD3d 1326, 1328 [2d Dept 2010]). SIUH has failed this burden here (*see Lormel*, 113 AD3d at 735). Although SIUH has attached plaintiff's medical records showing entries by Dr. Shiau on Healthcare Associates forms, and Dr. Shiau's deposition testimony in which he effectively identifies himself as part of the Healthcare Associates group, without more, such an association with Healthcare Associates fails to demonstrate that Dr. Shiau was not an employee of SIUH during the relevant time. SIUH's motion must thus be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

However, for several reason, this denial is made with leave to renew. Initially, since plaintiff did not address the issue of Dr. Shiau's employment in his opposition papers, the court identified the issue regarding whether Dr. Shiau was employed by SIUH sua sponte (*see Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54 [2d 2014]). Further, plaintiff's failure to oppose the motion on this ground may simply reflect the fact that there is no real issue with respect to whether SIUH employed Dr. Shiau. The

court notes that Dr. Shiau, in his answer (which is attached as an exhibit to Dr. Shiau's own motion) denies that he was employed by SIUH and admits that he was employed by Healthcare Associates.[4] As the court is not convinced, contrary to plaintiff's contention, that a patient's entering a hospital through the emergency room automatically makes the hospital liable as an apparent or ostensible agent – at least where the patient goes to the hospital at the direction of the private attending physician and receives treatment from the private attending physician (*see Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014]; *Schultz v Shreedhar*, 66 AD3d 666, 667 [2d Dept 2009]; *Christopherson v Queens-Long Is. Med. Group, P.C.*, 17 AD3d 393, 394 [2d Dept 2005]) – Dr. Shaiu's employment status may be dispositive of SIUH's liability. Under these circumstances, allowing SIUH to address the issue in a renewed motion may further the ends of justice and conserve judicial resources (*see Rose v Horton Med. Ctr.*, 29 AD3d 977, 978 [2d Dept 2006]; *see also American Equity Ins. Co. v A & B Roofing, Inc.*, 106 AD3d 762, 763 [2d Dept 2013]).

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. BERNARD J. GRAHAM

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[4] However, as there is no verification signed by Dr Shiau attached to his answer, the admissions by Dr. Shiau, while binding on Dr. Shiau, do not constitute admissible proof on which SIUH can rely upon in support of its motion (*see Loschiavo v De Bruyn*, 6 AD3d 1113, 1114 [4th Dept 2004]).