| **Wan Fund Leung v Yan Q. Sun** |
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| 2019 NY Slip Op 30465(U) |
| February 19, 2019 |
| Supreme Court, New York County |
| Docket Number: 450461/16 |
| Judge: Joan A. Madden |
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**
**PRESENT:HON. JOAN A. MADDEN PART 11**
***Justice***

**WAN FUND LEUNG and WEI LEUNG,**

**Plaintiffs,**

**INDEX NO. 450461/16**
**MOTION DATE: 1-10-19**

**- v -**

**MOTION SEQ. NO.:007**

**YAN Q. SUN, M.D., SEUNGYOUL YI, MD, EUN SU KIM, R.P.T., SUN ORTHOPEDICS INC. AND SEUNGYOUL YI PHYSICAL THERAPY, P.C. d/b/a DAO WON REHABILITATION,**
**Defendants,**

The following papers, numbered 1 to _____ were read on this motion for partial summary judgment and to compel.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion: [ ] Yes [ x ] No**

In this medical malpractice action, plaintiffs move for an order 1) deeming defendant Eunsu Kim ("Mr. Kim") an employee or agent of defendant Seungyoul Yi Physical Therapy, P.C. d/b/a Doa Won Rehabilitation; 2) finding defendant Seungyoul Yi Physical Therapy, P.C. d/b/a Doa Won Rehabilitation vicariously liable for Mr. Kim's negligence or, alternatively, 3) compelling Mr. Kim's deposition pursuant to CPLR 3124 for the limited purpose of establishing his employment status at the time of the alleged malpractice. Defendant Seungyolul Yi, M.D. ("Mr. Yi") and defendant Seungyoul Yi Physical Therapy, P.C. d/b/a Doa Won Rehabilitation ("Dae Won Rehabilitation")[1] separately oppose the motion. Mr. Kim, who is *pro se* and whose insurer has disclaimed coverage in connection with this action, responds to the motion by submitting his affidavit which was previously submitted in response to plaintiffs' motion for a default judgment against him.

Plaintiffs allege that on August 6, 2012, Mr. Kim negligently administered acupuncture

[1]According to the moving defendants, plaintiff incorrectly named defendant Seungyoul Yi Physical Therapy, P.C. d/b/a Doa Won Rehabilitation instead of Dae Won Rehabilitation.

treatment to plaintiff Wan Fund Leung's left shoulder in the form of excessive exposure to infrared treatment causing a burn to his arm. Mr. Yi owns and operates Dae Wong Rehabilitation, a physical therapy practice at 139 Centre Street, #PH103, New York, NY. Defendant Yan Q. Sun, M.D. allegedly referred Mr. Leung to Mr. Yi's practice for treatment of his shoulder.

Plaintiffs move for an order deeming Mr. Kim to be an employee or agent of Dae Won Rehabilitation, and finding Dae Won Rehabilitation vicariously liable for Mr. Kim's negligence, or, in the alternative, compelling Mr. Kim's deposition.

Mr. Yi opposes the motion, arguing that there is no employer/employee relationship between him and Mr. Kim and therefore no basis for imposing vicarious liability on him for any negligence by Mr. Kim. In support of the motion, Mr. Yi submits his affidavit in which he states he is an employed by Dae Won Rehabilitation as its Chief Executive Officer and that "Dae Won Rehabilitation is not a business entity of any type but merely the assumed name of my practice." He also states that Dae Won Rehabilitation does not have any W-2 employees other than himself and that acupuncturists, like Mr. Kim, are retained by advertisements on Craigslist, and are independent contractors. He also states that he did not have supervision or control over the acupuncture services provided by Mr. Kim and that, in any event, it would be premature to grant summary judgment on this issue before discovery is completed.

Dae Won Rehabilitation also opposes the motion and relying on Mr. Yi's affidavit, asserts that there is no relationship between it and Mr. Kim, who is an independent contractor and thus there is no basis for finding it vicariously liable for any negligence attributable to Mr. Kim. It also argues that the summary judgment is premature.

As for plaintiffs' motion to compel Mr. Kim's deposition, the defendants note that in its status conference order dated June 6, 2018, the court directed that depositions proceed in caption order, and argue that plaintiffs have not shown any special circumstance requiring that Mr. Kim's deposition be given priority.

In reply, plaintiffs argue that they are not seeking summary judgment as to liability but only as to the issue of Mr. Kim's employment status which crucial to determining which insurance carrier, if any, is responsible for his coverage in this action. Plaintiffs also argue that

Mr. Yi's conclusory affidavit is insufficient and points to Mr. Kim's affidavit in opposition to plaintiffs' motion for a default judgment in which he states that Mr. Yi determined his salary and working hours and encouraged his patients to have acupuncture performed, and that Mr. Yi would describe the symptoms of each patient before Mr. Kim saw them, including Mr. Leung. Under these circumstances, plaintiffs argue that Mr. Kim was clearly under the supervision and control of Mr. Yi and Dae Won Rehabilitation or, at the very least, a relationship of ostensible agency existed.

Alternatively, plaintiffs assert that taking Mr, Kim's deposition as to the "collateral issue" of his relationship with defendants Mr. Yi and Dae Won Rehabilitation is not an attempt to go out of caption order since the issue is not related to the liability, and the deposition is required so that the action can move forward.

In response to the motion, Mr. Kim submits his affidavit that he previously submitted in opposition to plaintiffs' motion for a default judgment.[2] Mr. Kim states that he was hired by Mr. Yi after responding to an advertisement on Craigslist for a licensed part-time acupuncturist. He states that "[m]y initial compensation was suppose to be $18 per hour and my hours 10 am to 7 pm, 3 days per week [but that]...on my first day of the job, which was the day of the incident, I was informed that my hours would be reduced to 11 am to 5 pm beginning that day due to slow business." He also states that on that day Mr. Yi "went around asking patients if they wanted to receive acupuncture treatment. He then described to me the symptoms of each of the patients who did and I administered the acupuncture needles." As for his treatment of Mr. Leung, Mr Kim states that Mr. Yi instructed him to "provide acupuncture treatment to a patient experiencing pain in his left shoulder."

Mr. Kim describes his treatment of Mr. Leung as follows:

> I inserted the needles as I always do into his shoulder and focused on an infra-red light on the area. As I was positioning the lamp, I cautioned him

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[2]Mr. Kim is not fluent in English and requires a Korean interpreter. At the original January 3, 2019 return date of the motion, Mr. Kim submitted this affidavit, which had not been served on the other parties in connection with the instant motion. The court therefore adjourned the motion to January 10, 2019 so that the other parties would have an opportunity to respond to Mr. Kim's submission. No opposition or response was received by the court.

> saying 'If it gets to hot call me, Ok?' to which he responded by nodding several times. I set the timer for twenty minutes and waited right outside of the curtain area...and never left that spot. During that time, I never heard a noise from him. However, when I returned to [Mr. Leung] after the twenty minutes, I noticed that the infra-red light was now in a different position, with the lamp head close to his upper arm. I saw that his upper arm had begun to bluster and immediately informed [Mr] Yi [who] ...administered emergency treatment to [Mr. Leung] and spoke to him.

According to Mr. Kim, the day after the incident he made a report to his malpractice insurance carrier, American Acupuncture Council, and that two weeks later he received a coverage denial letter based on his failure to obtain written consent to treatment and an agreement to arbitrate from Mr. Leung. See Kim Aff., Exhibit D.

Discussion

On a motion for summary judgment, the proponent "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 Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees...that rule does not apply when the treatment is provided by an independent physician [or contractor]." Hill v. St. Clare's Hosp, 67 NY2d 72, 79 (1986)(internal citation and quotations omitted). "Nor is affiliation of a doctor (or contractor) with a hospital or other medical facility, not amounting to employment, alone sufficient to impute the doctor's [or contractor's] negligent conduct to the hospital or facility." Id These holdings are consistent with the "general rule, [that] a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors, as opposed to employees of the principal, perform their work." Goodwin v. Comcast Corp, 42 AD3d 322, 322 (1st Dept 2007)(internal citation omitted); see also Kleeman v. Rheingold, 81 NY2d 270, 273 (1993). "Factors relevant to assessing control include whether a worker (1) worked at his own

convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule" Hernandez v. Chefs Diet Delivery, LLC, 81 AD3d 596, 598 (2d Dept 2011)(internal citation and quotations omitted). Others factors considered are the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work. Fitzpatrick v Holimont Inc., 247 AD2d 715, 715 (3d Dept), lv dismissed 92 NY2d 888 (1998). "Whether an individual is an independent contractor or employee must be determined on an ad hoc basis...and typically involves questions of fact as to who controls the methods and means by which the work is done." Stevens v. Spec. Inc., 224 AD2d 811, 811-812 (3d Dept 1996); see also Carrion v. Orbit Messenger, Inc., 192 AD2d 366 (1st Dept), appeal dismissed 82 NY2d 742 (1993).

Vicariously liability in medical malpractice actions can also be predicated on apparent or ostensible agency. Hill v. St. Clare's Hosp, 67 NY2d at 79. "To create an apparent or ostensible agency, the plaintiff must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent ...[and] the plaintiff must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not on reliance on the agent's skill." Loaiza v. Lam, 107 AD3d 951, 952 (2d Dept 2013).

Under these principles, it cannot be said on this record that Mr. Yi and/or Dae Won Rehabilitation are vicariously liable as a matter of law for any negligence or malpractice by Mr. Kim either based on an alleged employment relationship or apparent/ostensible agency, as different inferences can be drawn from the evidence as to the amount of control exercised over Mr. Kim's means and methods of work, by Mr. Yi, as principal of Dae Won Rehabilitation. In addition, as discovery has not been completed and depositions have not been conducted, it would be premature to determine factual issue related to control. Nor is there evidence sufficient to establish that plaintiff relied on an appearance of authority between Mr. Kim and Mr. Yi and/or Dae Won Rehabilitation such as to give rise to liability on a theory of apparent or ostensible agency.

As for plaintiffs' motion to compel Mr. Kim's deposition regarding issues related to his status as an employee or independent contractor, such request is denied. "Under CPLR 3106 (a),

'[a]s a general rule, in the absence of special circumstances, priority of [deposition] examination belongs to the defendant if a notice therefor is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination.'" Serio v. Rhulen, 29 AD3d 1195, 1196-1197 (3d Dept 2006), quoting Bucci v. Lydon, 116 AD2d 520, 521 (1st Dept 1986). "The rationale for the implied statutory priority given to defendants is that the defendant is blameless until the plaintiff proves otherwise; therefore, in the absence of special circumstances, the defendant should be given the chance to examine first in order to find out what the case [i.e., the allegations in the complaint] is about." Id at 1197 (internal quotations and citations omitted); see also Rapillo v. Saint Barnabas Hosp., 93 AD2d 760, 760 (1st Dept 1983)(same).

Here, defendants served their notice of deposition with their answers or amended answers and the court's order dated June 7, 2018, provides for depositions to proceed in caption order with Mr. Leung's deposition to be taken first. Nor have plaintiffs shown special circumstances warranting that Mr. Kim's deposition be taken out of caption order. "The order of normal priority may be reversed only upon plaintiff's showing of special circumstances, such as the existence of a fiduciary relationship between the parties.... or where the facts sought to be elicited are peculiarly within the knowledge of the defendant or the information is within the defendant's custody" Serio v. Rhulen, 29 AD3d at 1197 (internal citations and quotations omitted). In this regard, contrary to plaintiff's position, Mr. Kim's deposition will not expedite the litigation or resolve the issue of his employment status since as is evident from Mr. Kim's affidavit, Mr. Kim does not have exclusive knowledge of the facts related to this issue.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that the parties shall appear on April 11, 2019 at 10 am, for a previously scheduled status conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: February 19, 2019

J.S.C. HON. JOAN A. MADDEN J.S.C.

**Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION**