

Jaffe v New York Presbyt. Hosp.
2019 NY Slip Op 33439(U)
November 22, 2019
Supreme Court, New York County
Docket Number: 155476/2017
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 10

Justice

ALAN JAFFE,

Motion Index: 155476/2017

Motion Seq. No.: 003

Plaintiff,

- v -

DECISION & ORDER

THE NEW YORK PRESBYTERIAN HOSPITAL, and
DR. GOVIND NANDAKUMAR,

Defendants.

Cross-Motion: Yes No

Plaintiff ALAN JAFFE (“plaintiff”) moves for an order compelling defendant THE NEW YORK PRESBYTERIAN HOSPITAL (“NYPH”) to comply with plaintiff’s amended notice of discovery and inspection dated January 30, 2019 pertaining to the employment relationship between Dr. Nandakumar and NYPH. Defendant NYPH opposes the motion.¹ For the reasons discussed below, the court denies the motion.

BACKGROUND AND ARGUMENTS

In this medical malpractice action, plaintiff alleges that due to Dr. Nandakumar’s negligently performed colorectal surgery at NYPH on or about March 7, 2014, plaintiff required further surgeries due to a severe infection.

Plaintiff asserts that at the commencement of this action, Dr. Nandakumar had moved to India, and has not been served with process. As such, Dr. Nandakumar has not appeared or answered in this action. Plaintiff highlights that there is an issue as to whether Dr. Nandakumar was an employee of NYPH during the time of plaintiff’s treatment, thus establishing a potential theory of liability under the principle of *respondeat superior* on behalf of NYPH.

On January 30, 2019, plaintiff served NYPH with a demand for discovery which requested information as to whether Dr. Nandakumar was an employee or independent contractor of NYPH.

¹ Defendant GOVIND NANDAKUMAR, M.D. (“Dr. Nandakumar”) has not appeared or answered in this action.

Plaintiff requested, *inter alia*, contracts/written agreements by or between Dr. Nandakumar and NYPH, any rules, regulations, and codes of conduct promulgated or established by NYPH which applied to Dr. Nandakumar, tax statements issued by NYPH to Dr. Nandakumar, policies of liability insurance which covered Dr. Nandakumar, and any lease agreements to which NYPH was a party, which permitted or provided for Dr. Nandakumar to occupy an office space at 525 East 68th Street, New York, NY. Plaintiff states that NYPH declined to answer every item in his demand, and did not provide any of the requested documents. Rather, plaintiff highlights that NYPH made boilerplate objections to his demands (i.e. relevance and burden).

Plaintiff also avers that he saw Dr. Nandakumar for “office visits” exclusively at his office at NYPH’s premises at 525 East 68th Street. Plaintiff also notes that Dr. Nandakumar used stationary with the words “Weill Cornell Physicians” and “New York Presbyterian-Weill Cornell Medical Center” on his letterhead. Plaintiff further underscores that he had “expected” that Dr. Nandakumar was “associates” with NYPH as an employee.

In opposition, NYPH asserts that it has responded to plaintiff’s demand, but that plaintiff’s demand is an attempt to improperly impute liability upon NYPH for the alleged negligence of Dr. Nandakumar, plaintiff’s private physician. According to NYPH, the items sought in plaintiff’s demand are irrelevant to the issues at dispute.

NYPH also argues that Dr. Nandakumar was not an employee or independent contractor of NYPH. In support of its assertion, NYPH annexes an affidavit of Andrew O’Brien (“Mr. O’Brien”), Human Resources Business Partner at NYPH, who attests that Dr. Nandakumar was neither an employee nor an independent contractor of NYPH in 2014 or 2015. Mr. O’Brien also submits that NYPH did not issue any W-2 or 1099-MISC tax forms for Dr. Nandakumar.

Additionally, NYPH argues that plaintiff’s reliance on *Mduba v. Benedictine Hospital* is irrelevant and inapplicable to this case (52 A.D.2d 450 [3d Dept. 1976]). NYPH highlights that while the Appellate Division, Third Department held that “patients entering the emergency room, could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital,” here, Dr. Nandakumar was neither an employee nor an independent contractor of NYPH, and plaintiff did not become a patient of Dr. Nandakumar through an emergency room setting. Rather, NYPH maintains that Dr. Nandakumar treated plaintiff based on a referral from Dr. Brian Bosworth (“Dr. Bosworth”), a gastroenterologist.

Finally, NYPH asserts that while Dr. Nandakumar had admitting privileges at NYPH, privileges to admit a patient to a hospital is not the same as being an employee of the hospital. Moreover, NYPH argues that privileges to admit a patient does not give rise to vicarious liability.

DISCUSSION

“As a general rule, a hospital cannot be held vicariously liable for the malpractice of a treating physician who is not an employee of the hospital” (*Noble v. Porter*, 188 A.D.2d 1066, 1066 [4th Dept. 1992]; *Gardner v. Brookdale Hosp. Med. Ctr.*, 73 A.D.3d 1124, 1124 [2d Dept. 2010]). “In order for a hospital to be liable for the malpractice of physicians, it must be shown that the physicians performed their services under the hospital’s control or supervision” (*Klippel v. Rubinstein*, 300 A.D.2d 448, 449 [2d Dept. 2002]). Moreover, a hospital may be held vicariously liable for the acts of independent physicians “if the patient enters the hospital through the emergency room seeking treatment from the hospital, not from a particular physician” (*Noble*, 188 A.D.2d at 1066, *supra*; *Gardner*, 73 A.D.3d at 1124, *supra*).

Here, plaintiff has failed to establish a sufficient basis to request information relating to Dr. Nandakumar’s employment status with NYPH. Indeed, plaintiff does not allege nor indicate that he “entered” NYPH “through the emergency room” to receive treatment from NYPH generally (*id.*; *Klippel*, 300 A.D.2d at 449, *supra* [“As the decedent was not admitted into the emergency room seeking treatment from the hospital, rather than a specific physician, this case is distinguishable from the line of cases in which hospitals are held vicariously liable for the acts of emergency room physicians. Here, the decedent was admitted into the hospital under the care of the respondent Dr. Alan R. Rubinstein for a routine labor and delivery.”]; *cf. Mduba*, 52 A.D.2d at 450, *supra*). Rather, plaintiff was referred to Dr. Nandakumar by Dr. Bosworth, a gastroenterologist, for which plaintiff received treatment at Dr. Nandakumar’s office (*Gardner v. Brookdale Hosp. Med. Ctr.*, 73 A.D.3d 1124, 1125 [2d Dept. 2010] [defendant was not vicariously liable for doctor’s alleged negligence where a private physician referred the mother of the infant plaintiff to the hospital, and instructed her to go to the hospital]).

Moreover, plaintiff states in his affidavit that he “went to defendant Dr. Nandakumar,” and that he when he “saw Dr. Nandakumar for an office visit, it was always at his office” in a “building of defendant [NYPH]” (*see, Thurman v. United Health Servs. Hosps., Inc.*, 39 A.D.3d 934, 936–37 [3d Dept. 2007] [“decedent could not have reasonably believed that he was receiving medical care from the hospital in general rather than from a particular physician” where “plaintiff’s affidavit reflects that decedent either requested or consented to Marhaba being called in to oversee his care.”]). Although plaintiff claims that he saw Dr. Nandakumar because he wanted a physician “affiliated” with NYPH, “affiliation of a doctor with a hospital or other medical facility, not amounting to employment, alone [is insufficient] to impute the doctor’s negligent conduct to the hospital or facility” (*Hill v. St. Clare’s Hosp.*, 67 N.Y.2d 72, 79 [1986]; *see also, Belak-Redl v. Bollengier*, 74 A.D.3d 1110, 1111 [2d Dept. 2010] [hospital was not vicariously liable for any alleged acts or omissions of doctors as it demonstrated that the doctors were not its employees]).

Furthermore, the affidavit of Mr. O'Brien demonstrates that after a diligent search and a review of the applicable records maintained by NYPH, Dr. Nandakumar was found to not be an employee of NYPH in 2014 or 2015, and that NYPH did not issue W-2 or 1099-MISC tax forms for Dr. Nandakumar for 2014 or 2015 (*see, Hoad ex rel. Hoad v. Dolkart*, 127 A.D.3d 1310, 1314 [3d Dept. 2015] [hospital was not liable for alleged negligence based on a theory of ostensible agency where defendant's vice president of medical affairs "submitted an affidavit wherein he explained that Dolkart was not an employee, but a tenant with admitting privileges at AOMC. The record confirms that when Hoad was transferred from the emergency room, she consented to a transfer into Dolkart's care at AOMC, not to AOMC generally."]).

As such, it is hereby

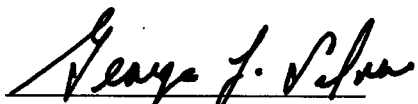
ORDERED that plaintiff's application to compel NYPH to comply with plaintiff's amended notice of discovery and inspection dated January 30, 2019 is DENIED; and it is further

ORDERED that plaintiff's application to compel NYPH to provide the documents requested in his January 30, 2019 notice of discovery and inspection is DENIED; and it is further

ORDERED that the parties are directed to appear for a compliance conference on December 17, 2019 at 2:15 p.m. at 111 Centre Street (Part 10 Room 1227) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: November 22, 2019


HON. GEORGE J. SILVER
GEORGE J. SILVER

Check one: Case Disposed Non-Final Disposition