To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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JAMIE-ANN KARLSSON and MICHAEL B. KARLSSON II,

Plaintiff,

-against-

WESTCHESTER COUNTY HEALTH CARE CORP., PUTNAM HOSPITAL CENTER, EOS MEDICAL GROUP, P.C., STUART ROBERTS, M.D., PUTNAM IMAGING ASSOCIATES, P.C., MASAHI KAI, M.D., DAVID SPIELVOGEL, M.D.,

Defendants.

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DECISION & ORDER
Index No. 50250/2016
Motion Sequence 9

The following papers were read on the motion for summary judgment dismissing the complaint, pursuant to CPLR 3212:

Notice of Motion/Affirmation/Exhibits A-R 1-19

Factual and Procedural Background

The plaintiffs commenced this medical malpractice action alleging that on July 11, 2013, Westchester County Healthcare Corp. ("WCHC") failed to confirm the presence of an aortic dissection prior to performing surgery on the plaintiff, Jamie-Ann Karlsson ("Karlsson"). The plaintiffs allege that the doctors at WCHC failed to recommend and perform a diagnostic study such as a transesophageal echocardiography or an MRI to confirm the diagnosis of an Acute type "A" aortic dissection and failed to offer Karlsson an available alternative to open heart surgery to rule out the aortic dissection. The plaintiffs also allege that WCHC ignored Karlsson's lack of signs or symptoms of an aortic dissection.

WCHC now files the instant motion for summary judgment to dismiss the complaint arguing that it did not employ Dr. Kai or Dr. Spielvogel[1] and their affiliation with WCHC is insufficient to impute their alleged negligent conduct to the hospital or medical facility. WCHC also argues that it did not commit negligence or malpractice, nor did it fail to obtain informed consent and did not breach a duty to Karlsson. In support of its motion, WCHC relies upon, *inter alia*, the affidavit of Arnar Geirsson, M.D., deposition transcripts, medical records, an attorney's affirmation and copies of the pleadings and other court documents.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact," (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made does the burden shift and the opposing party must set forth evidentiary proof establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion (*see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

"In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*see Stukas v Streiter,* 83 AD3d 18, 23 [2d Dept 2011]; *see also Aronov v Soukkary*, 104 AD3d 623]). "[A] defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Id.*). In opposition, a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact. (*Id.*) Typically, the moving party's prima facie case is established by affidavits or affirmations submitted by expert medical professionals and the

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[1]The complaint has been dismissed as against Dr. Kai and Dr. Spielvogel due to lack of service.

opposing party can only show genuine issues of material facts by offering their own expert medical testimony countering that of the moving party, (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 496 [1997]).

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees (*Bing v Thunig,* 2 NY2d 656), that rule does not apply when the treatment is provided by an independent physician...." (*see Hill v. St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). "A hospital may not be held [liable] for the acts of [a physician] who was not an employee of the hospital, but one of a group of independent contractors" ([*Id.*]; *see also Sullivan v Sirop*, 74 AD3d 1326 [2d Dept 2010]).

"However, vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel" (*see Dragotta v Southampton Hosp.*, 39 AD3d 697 [2d Dept 2007]). To create an apparent agency, there must be words or conduct of the principal to a third party, which give rise to the appearance of authority to act on behalf of the principal (*Id.*). The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal and the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal (*Id.*). "[T]he patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital's behalf" (*Id.*).

Here, WCHC has demonstrated its prima facie entitlement to judgment as a matter of law on the issue of vicarious liability by establishing that the physicians who performed the surgery on Karlsson were not its employee and the complaint against those physicians have been dismissed, therefore, there is no basis for the plaintiffs' assertion of liability against WCHC.

WCHS has also demonstrated that Dr. Kai and Dr. Spielvogel did not deviate from good and accepted medical practice in the treatment of Karlsson (*see Dandrea v Hertz*, 23 AD3d 332 [2d Dept 2005]), by the submission of Dr. Geirsson's affidavit, who opined within a reasonable degree of medical certainty, based upon review of the record, that WCHC did not deviate from the accepted standard of care in the provision of care and treatment to

Karlsson. Dr. Geirsson also opines that there is no evidence of lack of informed consent as to WCHC.

The burden now shifts to the plaintiffs to submit evidentiary facts or materials to rebut the prima facie showing, so as to demonstrate the existence of a triable issue of fact.

The plaintiffs did not oppose the motion, therefore, they have failed to demonstrate the existence of any issues of fact to rebut WCHC"s prima facie showing.

Accordingly, based on the foregoing, WCHC's motion for summary judgment is granted and it is

ORDERED that the motion for summary judgment is granted and it is further

ORDERED that the action is dismissed as against Westchester County Healthcare Corp.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 19, 2019

ENTER

Sam D. Walker

HON. SAM D. WALKER, J.S.C.