SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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ANDREA GALINA, as the Executrix of the Estate of MICHAEL GALINA, deceased, and ANDREA GALINA, Individually, **Index №.805334/2015**

Plaintiff

-against-

BLAIR S. LEWIS, M.D., BLAIR S. LEWIS, M.D., P.C., CAPSULE ENDOSCOPY OF NEW YORK, P.C., and CARNEGIE HILL ENDOSCOPY, LLC,

Defendants

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendant CARNEGIE HILL ENDOSCOPY ("defendant") moves for summary judgment and an order dismissing the complaint of plaintiff ANDREA GALINA ("plaintiff"), as executor of the estate of MICHAEL GALINA ("decedent") as against it. Plaintiff opposes defendant's application.

BACKGROUND AND ARGUMENTS

Decedent was a patient of defendant BLAIR LEWIS, M.D. ("Dr. Lewis"), a gastroenterologist, who treated decedent for an inherited condition of his gastrointestinal tract known as Peutz Jeghers Syndrome ("PJS"). Decedent first came under the care of Dr. Lewis in 2003. Thereafter, Dr. Lewis continuously performed colonoscopies and upper endoscopies on decedent until 2014. Notably, decedent was diagnosed with cancer in October, 2014. Thereafter, decedent succumbed to that ailment.

The crux of plaintiff's wrongful death lawsuit is an alleged failure to timely diagnose cancer. In support of the instant motion, defendant contends that it was not involved in decedent's care and treatment until September 26, 2012, and therefore could not have been a proximate cause of the alleged failure to diagnose decedent's cancer. Defendant further submits that the requisite physician-patient relationship between decedent and defendant is absent. Even if such a relationship could be established, defendant surmises that it provided timely and proper care to decedent for the claimed injuries, not limited to cancer and decedent's death. To support that position, defendant annexes the affirmation of Matthew J. McKinley, M.D. ("Dr. McKinley"), a physician board-certified in gastroenterology and internal medicine, who opines that defendant's

treatment of decedent from September 26, 2012 onwards comported with applicable standards of care, and did not proximately cause decedent's injuries.

In addition, defendant argues that it is not vicariously responsible for the actions of Dr. Lewis, or anyone else for that matter. At his deposition, Dr. Lewis testified that defendant is an ambulatory endoscopy center that he partly owns. As past owner, Dr. Lewis further testified that he "performs procedures" at defendant's facility. Nevertheless, Dr. Lewis explained that he maintains an office separate and apart from defendant. Dr. Lewis further testified that his practice would bill defendant for "professional services" and that defendant "would bill for facility fees." When Dr. Lewis was asked at his deposition whether he treated decedent pursuant to his relationship with defendant, Dr. Lewis unequivocally testified "No."

In opposition, plaintiff argues that defendant is vicariously liable for the alleged malpractice of Dr. Lewis, its purported "founder, owner, employee and Medical Director." Specifically, plaintiff argues that defendant is vicariously liable for the acts of Dr. Lewis that took place in 2012 and 2013.[1] Plaintiff further avers that once defendant's offices opened in 2012, decedent was exclusively seen by Dr. Lewis at defendant's facility for all medical procedures, including colonoscopies. Among other things, plaintiff highlights the connection between defendant and Dr. Lewis by stating that Dr. Lewis is identified as one of defendant's physicians on defendant's website. Plaintiff also underscores that the facts before the court are unique insofar as plaintiff and decedent knew Dr. Lewis before coming to defendant's facilities, but subsequently continued decedent's care under defendant with the reasonable expectation that decedent was not only the patient of Dr. Lewis, but defendant as well.

Separately, plaintiff challenges the probative value of Dr. McKinley's expert affirmation by positing that Dr. McKinley's opinion is devoid of an assessment of the relevant standard of care with regard to claims of negligence against Dr. Lewis. To be sure, plaintiff states that "[a]t no time does Dr. McKinley affirm that the patient care rendered by [Dr. Lewis] met the standard of care, said care concerning the failure to provide the surveillance of [decedent] for a cancerous condition in his upper gastrointestinal tract after a large tumor was removed in 2011 and after the surgeon who resected same requested that [Dr. Lewis] perform another upper endoscopy."

In sum, plaintiff states that the proofs submitted by defendant, including Dr. McKinley's expert affirmation, are insufficient to establish a prima facie entitlement to summary judgment. As a result of those deficiencies, plaintiff submits that plaintiff was under no obligation to furnish an expert affirmation of its own. Even if this court concludes that defendant did establish a prima facie showing, plaintiff argues that enough issues of fact exist surrounding the scope of Dr. Lewis' employment, and defendant's potential vicarious liability, to preclude a finding in favor of defendant.

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[1] Plaintiff states that prior to those years, the care rendered to decedent by Dr. Lewis occurred exclusively at Dr. Lewis' private office.

In reply, defendant states that plaintiff's opposition fails because plaintiff did not submit an expert affirmation. To be sure, defendant highlights that plaintiff's opposition is composed of plaintiff and plaintiff's counsel's own unsupported assertions. Those assertions, defendant contends, are insufficient to raise triable issues of fact regarding defendant's alleged deviation from accepted medical practice.

Defendant further reiterates that its prima facie showing is supported by Dr. McKinley's expert affirmation, which consists of statements indicating that defendant did not decide which gastrointestinal procedures decedent underwent. In point of fact, defendant submits that "plaintiff cannot and does not cite any evidence to support her argument that [defendant] was a 'medical provider' or held itself out as a 'medical practice.'" Indeed, defendant reemphasizes that Dr. Lewis treated decedent as a patient of his own, not as a patient of defendant. As such, defendant reiterates that plaintiff has not presented any admissible evidence that defendant derogated the standard of care, proximately caused decedent's injuries, and is vicariously liable for Dr. Lewis' purported malpractice. Accordingly, defendant reiterates that it is entitled to judgment in its favor.

LEGAL STANDARD

A. Malpractice

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr*., 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well-settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth*., 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at

108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp*., 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id*. at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp*., 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

B. Vicarious Liability

"As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment" (*Adams v. New York City Transit Auth*., 88 NY2d 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 NY2d 72 [1986]). A medical facility may also be held vicariously liable for non-employees on the theory of agency/control in fact, or in the alternative theory of ostensible agency (*id.*). For example, agency has been applied to hold a medical facility responsible for the malpractice of a physician providing services there, despite the physician's status as an independent contractor, where medical care was sought by a patient from the facility rather than from a particular physician (*id*.). Of course the application of this rule depends upon whether the plaintiff could have reasonably believed, based upon all of the surrounding circumstances, that the physician was provided by the facility or was otherwise acting on their behalf (*Soltis v. State of New York*, 172 AD2d 919 [3rd Dept 1991]). Where issues of facts exist as to the issue of control and ostensible agency, courts have generally denied summary judgment on the issue of vicarious liability (*see Welch v. Scheinfeld*, 21 AD3d 802, 808-809 [1st Dept 2005]; *Santiago v. Archer*, 136 AD2d 690, 691 [2d Dept 1988]; *Mduba v. Benedictine Hosp*., 52 AD2d 450 [2d Dept 1976]).

ANALYSIS

Here, defendant's submission of deposition testimony, medical records, and the expert affirmation of Dr. McKinley establish a prima facie defense entitling defendant to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Lewis' deposition testimony verifies that Dr. Lewis had his own professional corporation separate and apart from

defendant during the relevant period of time. Moreover, when Dr. Lewis would see decedent at defendant's facility, his practice "would bill for professional services," and defendant would separately "bill for facility fees." It is axiomatic that such an arrangement would belie logic if a symbiotic relationship existed between Dr. Lewis and defendant.

Dr. Lewis further testified that "his office" would send booking information to defendant for decedent's colonoscopies. This factual assertion is important, because had decedent been an established patient of defendant for treatment other than outpatient endoscopies, it would have been unnecessary for Dr. Lewis' office to send booking information to defendant since decedent would have already been in defendant's system as an existing patient. There is also testimony in the record from Scott Williams ("Williams"), a former employee of defendant, that Dr. Lewis did not have an office at defendant's facility between 2012 and 2014. Williams further testified that a doctor performing procedures at defendant's facility would set up the date and time of the procedures, further demonstrating that patients were not patients of defendant, but rather were patients of the physicians performing their procedures. Much of plaintiff's opposition to this notion is presented out of context. For instance, the court finds unavailing plaintiff's argument that agency by estoppel is applicable in this case. Indeed, decedent independently chose to retain Dr. Lewis prior to his treatment at defendant's facility. As such, there is no credible evidence within the record to suggest that decedent treated with Dr. Lewis exclusively at defendant's facility because decedent wanted to avail himself of defendant's services. In fact, there is substantial evidence to the contrary. Most importantly, decedent had a pre-existing relationship with Dr. Lewis, not defendant, and decedent was treated by Dr. Lewis for reasons entirely separate from his affiliation with defendant. For vicarious liability purposes, that places the instant matter within the ambit of *Mduba v. Benedictine Hosp.*, 52 AD2d 450 (2d Dept 1976), and the Appellate Division, First Department, precedent that has followed it (*see e.g.*, Welch, 21 AD3d 802, *supra*).

Beyond the deposition testimony referenced, the medical records corroborate the testimony of defendant's witnesses. To be sure, Dr. Lewis' billing records reveal separate and distinct charges for his professional services and defendant's facility fees.

In addition, plaintiff's argument that defendant's malpractice lies principally in its failure to follow its own policies and procedures, thereby increasing decedent's cancer risk, is debunked by Dr. McKinley. To be sure, Dr. McKinley specifically provides that the course of treatment rendered to decedent was within the purview of Dr. Lewis rather than defendant. Indeed, Dr. McKinley opines that it was the responsibility of Dr. Lewis, rather than defendant, to decide when and what procedures decedent underwent. As defendant bore no responsibility for decedent's course of treatment, Dr. McKinley opines that defendant was not the proximate cause of decedent's alleged injuries. Even so, Dr. McKinley affirms that there is no credible evidence that Dr. Lewis' actions, even if attributable to defendant, ran afoul of the standard of care and proximately caused decedent's injuries. As Dr. McKinley's expert opinions are predicated upon ample support within the record, defendant has shown that there were no departures of care attributable to defendant and

its staff that proximately caused decedent's injuries. As such, defendant has made a requisite prima facie showing supported by an expert affirmation.

In opposition to defendant's prima facie showing, plaintiff fails to raise triable issues of fact sufficient to preclude summary judgment. To be sure, much of the evidence cited by plaintiff to establish a connection between Dr. Lewis and defendant is from websites that were not established contemporaneously with the treatment at issue. As defendant highlights, "the webpages are the equivalent of photographs of an accident scene that post-date the accident." Other assertions by plaintiff and plaintiff's counsel are unattributed, and therefore of no probative value. Most glaringly, plaintiff does not annex an expert affirmation from a medical doctor to rebut Dr. McKinley's assertions (*see Roques*, 73 AD3d 204, *supra*; *see also Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*). Consequently, plaintiff has failed to rebut defendant's prima facie showing. As plaintiff has not raised any triable issues of fact, an order of dismissal in defendant's favor is warranted.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted in its entirety; and it is further

ORDERED that defendant is directed to serve a copy of this decision and order with notice of entry within 20 days of its issuance; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in defendant's favor accordingly; and it is further

ORDERED that the Clerk of the Court is directed to remove defendant's name from the caption; and it is further

ORDERED that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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ANDREA GALINA, as the Executrix of the Estate of MICHAEL GALINA, deceased, and ANDREA GALINA, Individually, **Index №.805334/2015**

Plaintiff

-against-

BLAIR S. LEWIS, M.D., BLAIR S. LEWIS, M.D., P.C., and CAPSULE ENDOSCOPY OF NEW YORK, P.C.

Defendants

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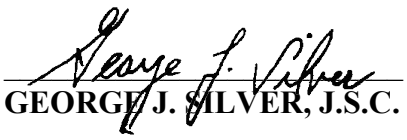
; and it is further

ORDERED that the parties are directed to appear for a virtual conference before the court on July 27, 2020 at 10:30 AM.

This constitutes the decision and order of the court.

Dated: July 1, 2020



GEORGE J. SILVER, J.S.C.