

Cristiano v Sacca

2022 NY Slip Op 33226(U)

September 21, 2022

Supreme Court, New York County

Docket Number: Index No. 805333/2016

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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JOSEPH CRISTIANO, by the Administrator of his Estate,
MARIANNA CRISTIANO and MARIANNA CRISTIANO,
Individually,

Plaintiff,

- v -

MICHAEL SACCA, M.D., GARRI PASKLINSKY, M.D.,
PAVAN J. DALAL, M.D., ANNIKA MARGUERITE MEYER,
M.D., SUNG Y. KIM, M.D., GOOD SAMARITAN HOSPITAL,
and THE MOUNT SINAI HOSPITAL,

Defendants.

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INDEX NO. 805333/2016
MOTION DATE 06/27/2022
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 144 were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on departures from good and accepted practice, lack of informed consent, and wrongful death, the defendant Good Samaritan Hospital (GSH) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff does not oppose the motion. The motion is granted.

A basic outline of this dispute is set forth in this court's September 20, 2022 order disposing of MOTION SEQUENCE 002. In short, the plaintiff asserted that, in June 2015, subsequent to two aortic bypass surgeries in December 2014 and May 2015, respectively, her decedent, Joseph Cristiano, suffered from a pseudoaneurysm that should have been diagnosed on computed tomography angiogram (CTA) imaging obtained at GSH, but that the condition was not identified, and thus remained untreated. She asserted that the defendants' failure timely to diagnose and treat that pseudoaneurysm permitted the adverse effects of condition to

deteriorate, leading her decedent to sustain an abdominal aortic aneurysm rupture in August 2015 that caused his death.

In support of its motion, GSH submitted the pleadings, the plaintiff's bill of particulars, the transcripts of the parties' depositions, and relevant medical and hospital records. It established its prima facie entitlement to judgment as a matter of law with those documents, as well as the expert affirmation of William D. Suggs, M.D., a board-certified vascular surgeon.

Dr. Suggs opined that neither GSH, nor any of its nurses, staff members, doctors, or other personnel departed from good and accepted practice in treating the decedent between December 2014 and May 2015, when he was admitted to GSH for bypass surgeries or otherwise under GSH's care. In addition, he concluded that GSH's conduct in treating the decedent did not cause or contribute to his injuries or death.

As Dr. Suggs explained it, GSH's records indicated that all of the requested consultations with appropriate specialists were obtained by GSH's staff, both pre and post-operatively, when those consultations were ordered by the decedent's primary attending and treating physician, the defendant Michael J. Sacca M.D. He asserted that the proper studies were undertaken by hospital staff as ordered, that GSH staff performed proper assessments and provided appropriate medications, and that the decedent was "stabilized from a vascular standpoint before being discharged to Southside Hospital" after his December 24, 2014 aorto-femoral bypass procedure at GSH had been performed by Sacca, with assistance from the defendant Garri Pasklinsky, M.D. Dr. Suggs asserted that the decisions concerning whether to prescribe certain medications, whether the decedent was stable for surgery, whether the decedent should undergo recommended procedures, what type of post-surgical care should be provided, which studies needed to be undertaken, and whether to discharge the decedent after surgery were decisions that properly were made by the decedent's treating physicians, and were not the duty of hospital personnel.

Dr. Suggs proceeded to explain that GSH's records reflected

“palpable pulses and well-perfused lower extremities after the December 24th Surgery despite the lower extremity weakness of unknown etiology. Similarly, all orders, consults and requested studies were implemented and obtained properly before and after the May 12, 2015 removal of the non-functioning bypass, which healed without complication after the decedent was stabilized from a vascular standpoint. As such, it is my further opinion within a reasonable degree of medical certainty that the hospital staff acted accordingly and within the standard of care with regard to the surgeries performed by Dr. Sacca in December 2014 and May 2015.

Dr. Suggs expressly rejected the plaintiff’s claim that, during her decedent’s admission to GSH, GSH’s nurses and hospital staff failed appropriately to treat the decedent for a developing pseudoaneurysm and/or aneurysm, or a rupture of such a pseudoaneurysm or aneurysm. He asserted that there was no evidence of the presence of an aneurysm or pseudoaneurysm between December 2014 and June 2015 and, hence, no orders for treatment that GSH’s staff were required to implement in connection with such conditions. Hence, Dr. Suggs concluded that GSH did not depart from the standard of care.

Dr. Suggs also agreed with the defendant Sung Y. Kim, M.D., that, although there was an accumulation of fluid at the surgical site that was reflected on a June 2015 scan performed by the defendant Mt Sinai, that accumulation was not an aneurysm or pseudoaneurysm, and did not reflect the existence thereof. Dr. Suggs noted that

“The decedent’s hospital records indicate that it was not until approximately three months after discharge from Good Samaritan Hospital that admission records first note a diagnosis of an aneurysm at Plainview Hospital in late August 2021, with orders addressing treatment of same - both at Plainview Hospital and North Shore Manhasset. Consequently, the claim regarding improper treatment of a pseudoaneurysm cannot be sustained by plaintiff as to defendant Good Samaritan. Again, it is my opinion within a reasonable degree of medical certainty that these claims are not proper as to the nurses and hospital staff. The decisions about the treatment and diagnosis of an aneurysm (or lack thereof) is left to the discretion of the treating physicians, and are in no way made by, or the responsibility of the nurses or staff.”

Dr. Suggs further opined that there was no basis for the plaintiff’s lack of informed consent cause of action insofar as asserted against GSH, as it was Sacca’s obligation to obtain the decedent’s fully informed consent to the invasive December 24, 2014 bypass procedure and the May 12, 2015 revision procedure, and Sacca did, in fact, obtain such consent.

Finally, Dr. Suggs explicitly rejected the plaintiff's contention that it was improper for GSH to grant operating privileges to Sacca and Pasklinsky, as there was

"no evidence which would support an allegation that Drs. Sacca and Pas[k]linsky were unqualified to perform surgery. Drs. Sacca and Pas[k]linsky are board certified and licensed to practice medicine in the State of New York, and have completed Vascular Surgery Fellowships. The records and testimony demonstrate that these physicians have a long-standing relationship with Good Samaritan Hospital, and nothing in the record, inclusive of the documentary evidence or the testimony of the parties, supports plaintiff's claim."

The plaintiff did not oppose GSH's motion.

The standards applicable to motions for summary judgment in the context of causes of action to recover for medical malpractice and lack of informed consent are set forth in detail in this court's September 20, 2022 order disposing of Motion Sequence 002.

As additionally relevant to the medical malpractice claims asserted against GSH, "[g]enerally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee" (*Sampson v Contillo*, 55 AD3d 588, 589 [2d Dept 2008], quoting *Quezada v O'Reilly-Green*, 24 AD3d 744, 746 [2d Dept 2005]; see *Hill v St. Clare's Hospital*, 67 NY2d 72, 79 [1986] ["(a)lthough 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, as when the physician is retained by the patient himself"]; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 888 [2d Dept 2007]; *Welch v Scheinfeld*, 21 AD3d 802, 807 [1st Dept 2005]; *Christopherson v Queens-Long Is. Med. Group, P.C.*, 17 AD3d 393, 394 [2d Dept 2005]). Hence, a physician's mere affiliation with a hospital is insufficient to hold a hospital vicariously liable for the physician's malpractice (see *Pratt v Haber*, 105 AD3d 429, 429 [1st Dept 2013]). Under most circumstances, where a physician is not employed by a hospital, and the plaintiff makes no allegations of "any separate alleged acts and omissions of" the hospital's staff (*Suits v Wyckoff Heights Med. Ctr.*, 84 AD3d 487, 489 [1st Dept 2011]), the hospital cannot be held liable for the physician's malpractice (see *id.*).

Stated more specifically,

“[i]t is well settled that a hospital is not vicariously liable for the acts of a private attending physician at its facility who is retained by a patient and is immune from liability where its employees *follow the direction of the attending physician*, unless that physician's orders ‘are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders’”

(*Garson v Beth Israel Med. Ctr.*, 41 AD3d 159, 160 [1st Dept 2007] [emphasis added], quoting *Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001] [internal quotation marks and citations omitted]).

GSH established its prima facie entitlement to judgment as a matter of law by demonstrating that Sacca was not its employee, that Sacca's orders were not clearly contraindicated, and that none of its employees independently committed any negligent actions or omissions. Since the plaintiff failed to oppose GSH's motion, she failed to raise a triable issue of fact in opposition to this showing, and summary judgment must be awarded to GSH dismissing the medical malpractice cause of action insofar as asserted against it.

“With respect to a cause of action predicated on lack of informed consent, ‘where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent’” (*Cynamon v Mount Sinai Hosp.*, 163 AD3d 923, 925 [2d Dept 2018], quoting *Salandy v Bryk*, 55 AD3d 147, 152 [2d Dept 2008]; see *Mirshah v Obedian*, 200 AD3d 868, 874-875 [2d Dept 2021]; *A.A. v St. Barnabas Hosp.*, 176 AD3d 582, 584 [1st Dept 2019]). The only exception to this rule is when a hospital should have known that the treating physician had not obtained informed consent for the procedure that was performed (see *Bradshaw v Lenox Hill Hosp.*, 126 AD3d 484, 485-486 [1st Dept 2015]).

GSH established its prima facie entitlement to judgment as a matter of law in connection with the lack of informed consent cause of action by demonstrating that Sacca was an independent attending and treating physician, and that he obtained the decedent's consent to the two procedures in any event. Since the plaintiff did not oppose GSH's motion, she failed to

raise a triable issue of fact, and summary judgment thus must be awarded to it dismissing the lack of informed consent cause of action insofar as asserted against it.

GSH also demonstrated, prima facie, that it did not improperly grant operating privileges to Sacca and Pasklinsky. Inasmuch as the plaintiff did not oppose the motion, it must be awarded summary judgment dismissing the cause of action alleging negligent credentialing.

In light of the foregoing, it is

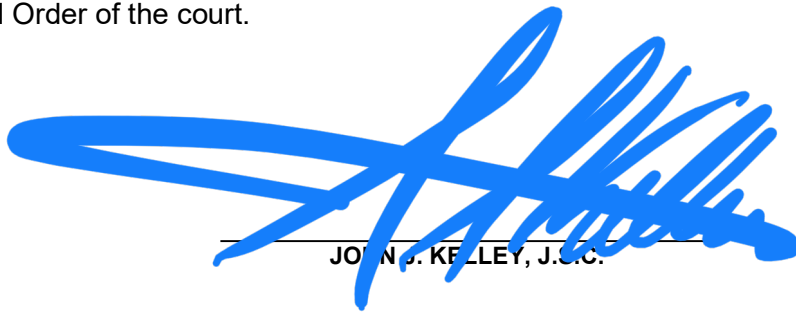
ORDERED that the motion of the defendant Good Samaritan Hospital for summary judgment dismissing the complaint insofar as asserted against it is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendant Good Samaritan Hospital; and it is further,

ORDERED that the action is severed as against the defendant Good Samaritan Hospital; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendant Good Samaritan Hospital.

This constitutes the Decision and Order of the court.

9/21/2022
DATE


JOHN J. KELLEY, J.C.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE