

Gorodetsky v Avashalumov

2023 NY Slip Op 33991(U)

November 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 518297/2018

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn New York on the 6th of November 2023.

P R E S E N T :

Hon. Genine D. Edwards, Justice

OLEG GORODETSKY and ELINA SOSKINA,

Plaintiffs,

Index No: 518297/2018

-against-

Decision & Order

STAN AVASHALUMOV, D.O.,
ALEX WICKER, RPA-C,
STATEN ISLAND UNIVERSITY HOSPITAL,
NORTHWELL HEALTH, and ADVANCED
ORTHOPEDICS AND JOINT PRESERVATION, P.C.,

Defendants.

<u>The following e-filed paper(s) read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion, Affidavits, Affirmations and Exhibits.....	122, 124-135
Stipulations of Discontinuance ¹	148-149
Affirmation, Memorandum of Law and Exhibits.....	152-160
Reply Affirmation.....	162

¹ Dr. Salem and Dr. Khabut were discontinued with prejudice via stipulation, thus defendants' request to dismiss the claims against Drs. Salem and Khabut are moot. Def. SIUH stipulated that if there is a finding of liability at trial with respect to any care/treatment provided to plaintiff, from 12/12/17 to 12/17/17, within scope of their employment, SIUH will be vicariously liable.

In an action to recover damages for medical malpractice and lack of informed consent, Staten Island University Hospital (“SIUH”) and Northwell Health, Inc. s/h/a “Northwell Health,” (“defendants”) moved for summary judgment dismissing the complaint. Plaintiffs opposed the motion.

Facts

On October 16, 2017, Oleg Gorodetsky (“Plaintiff”) presented himself at Advanced Orthopedics and Joint Preservation (“AOJP”) with complaints of knee pain due to a prior motor vehicle accident. Dr. Stan Avshalumov, an osteopathic medicine physician, examined plaintiff. Dr. Avshalumov’s impressions were: “1. Large knee effusion consistent with synovitis; 2. Radial tear of the midbody and anterior horn of the lateral meniscus; 3. Partial tear involving the insertion of the patellar tendon into the inferior margin of the patella; 4. Diffuse thickening and abnormal signal within the anterior cruciate ligament. This likely represents an interstitial tear. Mucoid changes may sometimes have the [sic] appearance and thus should be correlated clinically; and 5. Mild sprain of the proximal half of the medial collateral ligament.” His plan for plaintiff was to “Continue physical therapy modalities three times per week for six weeks as tolerated. Analgesia as needed for pain; Rest as needed; Ice to be applied as needed; Elevation as needed.”

During plaintiff’s follow-up appointment, on December 4, 2017, he was examined by Alex Wicker, RPA-C, a physician’s assistant. There were no noted changes from the first physical exam. Dr. Avshalumov gave plaintiff an MRI-assisted left knee cortisone injection.

Two days later, on December 6, 2017, plaintiff went to the emergency room at Maimonides Medical Center (“MMC”) complaining, again, of left knee pain for two weeks, and

a fever. MMC's differential diagnosis was a meniscal tear, septic arthritis, cellulitis, or synovitis.

On December 7, 2017, Aaron Ryoo, M.D., performed two CT scans of plaintiff's left lower extremity. The scans showed an intramuscular edema with the anterior compartment of plaintiff's left leg and along the tensor fascia latae. The results also showed a small knee joint effusion but did not show evidence of an abscess. Osseous structures were intact. Plaintiff was instructed to contact his primary healthcare provider to arrange follow-up care.

Six days later, on December 12, 2017, plaintiff went to the emergency department ("ED") at SIUH, complaining of a prolonged fever and pain in his left knee. Plaintiff was seen by Eric M. Steinberg, M.D. ("Dr. Steinberg"), an emergency room physician, and informed him of his upcoming, December 14, 2017 left knee meniscus surgery. Plaintiff also alerted Dr. Steinberg of his consumption of approximately 15-20 500mg Tylenol, 60 Motrin, 10 Advil, and 2 oxycodone over the past five days. According to SIUH's report, plaintiff's temperature upon intake, at 2:30 PM, was 97.2, and by 4 PM it increased to 102.4. SIUH's Adult Admission Assessment stated that an initial sepsis screen was performed during triage but did not reveal any diagnosable signs of sepsis. Plaintiff was given intravenous fluids and antibiotics.

Shortly after his admission to the ED, CT scans of his chest and abdomen were performed. A pulmonary-critical care physician, who reviewed those CT scans, noted that plaintiff's fever was not attributable to any pulmonary or abdominal pathology. Samples of plaintiff's blood and urine cultures were submitted to SIUH's Department of Microbiology. Towards the evening of December 12, 2017, plaintiff was transferred from the ED to an in-patient room. There, he was seen by Dr. Kochuvilapadittathil Raju ("Dr. Raju"), who performed a physical examination and noted left knee erythema and warmth. Dr. Raju listed his

impressions of plaintiff: “Etiology – ?; ? infections; ? VTE (venous thromboembolism); left knee cellulitis?; torn meniscus left knee.” It was also documented that plaintiff had “fever, chills, shakes – couple of days.” Dr. Raju ordered consultations with infectious disease and orthopedic specialists, to further ascertain whether plaintiff had a knee infection. Plaintiff did not see either specialist that day.

The next day, December 13, 2017, plaintiff was seen by Dr. Anthony Salem (“Dr. Salem”), an attending hospitalist at SIUH. Dr. Salem documented “fever/chills, unclear etiology; ✓ x-ray left knee...” During his deposition, Dr. Salem testified that he noted to check the x-ray of the left knee to look for any changes that may possibly be related to septic arthritis. He further testified that he included septic arthritis as part of his differential diagnosis due to plaintiff’s complaints of fever and left knee pain. Dr. Salem also spoke with the on-call orthopedist, Dr. Jonathan Gross, who suggested that plaintiff undergo his surgery, scheduled for December 14, 2017, at MMC.

In addition, a radiologist performed an x-ray of plaintiff’s left knee, finding no evidence of acute fracture, dislocation or joint effusion. Plaintiff was then seen by infectious disease consultant, Dr. Mohsena Amin (“Dr. Amin”), who noted, *inter alia*, that plaintiff’s left knee was not red or swollen. Dr. Amin also wanted to follow up on plaintiff’s blood cultures and recommended that plaintiff’s antibiotics be switched to Vancomycin or Cefepime.

However, the following day, December 14, 2017, Dr. Amin noted in her Progress Notes that plaintiff’s left knee was soft, had redness, swelling, and was tender. Fever and chills were noted. Septic arthritis of knee needed to be ruled out, thus an orthopedist consult for an arthrocentesis was recommended. Plaintiff did not see an orthopedist that day.

On December 15, 2017, Dr. Salem updated his progress notes to reflect plaintiff's knee swelling, warmth, and tenderness. In addition, plaintiff saw Dr. Vincent Ruggiero ("Dr. Ruggiero"), the on-call orthopedist. Dr. Ruggiero performed an arthrocentesis and aspirated plaintiff's knee. During his deposition, Dr. Ruggiero testified that on December 15th, plaintiff's left knee had joint-fluid and his white blood cell count was 687. A sample of plaintiff's joint-fluid culture was sent to the microbiology department.

On December 16, 2017, Dr. Salem recommended that plaintiff continue antibiotics, and ordered consultations with the infectious disease and orthopedist doctors to follow-up with the joint-fluid culture. The infectious disease and orthopedist doctors did not see plaintiff that day.

On December 17, 2017, plaintiff notified the nursing staff that his room did not have hot water. The nursing staff offered to change his room, but plaintiff declined. The nursing staff also offered physical therapy, but he refused because therapy would cause pain in his left knee, and he wanted his temperature to return to normal. According to SIUH's Vitals Input and Output Report, plaintiff's rectal temperature started at 101.9 at 12:44 A.M., increased to 102.9 by 8:55 P.M, then decreased to 98.9 by 11:30 P.M. Plaintiff discharged himself, at approximately 12AM on December 18, 2017, against medical advice, and went to MMC.

Law

In an action for medical malpractice, the required elements are a deviation or departure from accepted medical standards of practice, and that such departure proximately caused plaintiff's injuries. *Blank v. Adiyody*, 2023 WL 6853800, __ N.Y.S.3d __, (2d Dept. 2023); *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). When moving for summary judgement, the defendant bears the initial burden of

establishing that there was no departure from accepted medical practice, or if there was such a departure, it was not the proximate cause of plaintiff's injuries. *See Kelapire v. Kale*, 189 A.D.3d 1197, 134 N.Y.S.3d 255 (2d Dept. 2020). Where a defendant's affirmation or a defendant's expert's affidavit simply restates the treatment rendered and offers a conclusory opinion that such treatment did not constitute a departure from good and accepted medical practice, defendant's prima facie burden has not been met. *Marsh v. City of New York*, 191 A.D.3d 973, 142 N.Y.S.3d 598 (2d Dept. 2021).

If this burden is so met, "the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element." *See Sunshine v. Berger*, 214 A.D.3d 1020, 186 N.Y.S.3d 326 (2d Dept. 2023); *Kielb v. Bascara*, 217 A.D.3d 756, 191 N.Y.S.3d 158 (2d Dept. 2023). "Mere, conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the claim at issue, are insufficient to defeat summary judgment." *Nelson v. Lighter*, 179 A.D.3d 933, 116 N.Y.S.3d 360 (2d Dept. 2020). In determining a summary judgment motion, "the court must view the evidence in the light most favorable to the nonmoving party." *Many v. Lossef*, 190 A.D.3d 721, 137 N.Y.S.3d 128 (2d Dept. 2021). If the plaintiff demonstrates issues of facts sufficient to require a trial, then defendant's request for summary judgment must be denied. *Stewart v. North Shore Uni. Hosp. At Syosset*, 204 A.D.3d 858, 166 N.Y.S.3d 676 (2d Dept. 2022). Additionally, "summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Id at 860*.

Analysis

Medical Malpractice

In addition to the medical records, defendants proffered expert opinions from Matthew Grant, M.D. ("Dr. Grant"), board certified in infectious diseases and internal medicine, Elias Sakalis, M.D. ("Dr. Sakalis"), board certified in internal medicine and James Slover, M.D. ("Dr. Slover"), board certified in orthopedic surgery. Each physician opined that the movants did not deviate from the standard of care in their treatment of plaintiff, his injuries were not caused or worsened by the movants and were not the result of delayed or improper care.

Defendants' orthopedic expert, Dr. Slover elaborated in his affirmation that while assessing for septic arthritis is subjective, there are common, clear clinical signs including redness, fever, swelling, and decreased range of motion at the joint. Dr. Slover contended that because plaintiff presented to SIUH's ED with a fever and a known underlying cause for his pain, there was no obvious reason for movants to suspect septic arthritis. Dr. Slover further explained that SIUH's staff "appropriately admitted" plaintiff, given his history of a torn meniscus, to determine the etiology of the fever and providing intravenous antibiotics as well as ordering orthopedic and infectious diseases consultations.

Defendants' infectious diseases expert, Dr. Grant indicated that since plaintiff denied any swelling and redness, and same was not present during the initial physical exam, absence thereof was inconsistent with a finding of septic arthritis. Without evidence of effusion or inflammation upon a physical exam, Dr. Grant opined that there was no need for an arthrocentesis or knee tap.

Dr. Sakalis, the internal medicine expert, proffered that plaintiff's December 12th and 13th negative culture results were inconsistent with a finding of septic arthritis, and his treatment plan

was evolving but was disrupted by plaintiff discharging himself against medical advice. Dr. Sakalis propounded that movants did not delay in diagnosing plaintiff because he received the orthopedic and infectious disease consults in addition to monitoring and testing. Dr. Sakalis also averred that there were no orders given or acts performed by the attending physicians, including the orthopedic and infectious disease doctors, that deviated from accepted standards of medical practice as to require interference by either Dr. Salem or SIUH staff.

Contrary to the defendants' experts' opinions, the hospital records revealed the typical signs of septic arthritis to which Dr. Slover alluded. Thus, defendants failed to shoulder their burden. *Maestri v. Pasha*, 198 A.D.3d 632, 153 N.Y.S.3d 615 (2d Dept. 2021). Moreover, this Court need not consider plaintiff's opposition. *Wei Lin v. Sang Kim*, 168 A.D.3d 788, 89 N.Y.S.3d 688 (2d Dept. 2019).

Nevertheless, plaintiff raised triable issues of fact in opposition. Plaintiff's expert opined that SIUH and its staff deviated from the standard of care by failing to timely diagnose septic arthritis and implement a proper course of treatment, among other departures, thus causing injury to plaintiff. Based upon the medical records, plaintiff exhibited classic signs of septic arthritis: fever, pain, redness, and swelling, which the expert indicates is an emergency, and plaintiff should have been given an arthrocentesis stat. Yet, an arthrocentesis was not performed until three days into plaintiff's admission at SIUH. Plaintiff's expert explained that the diagnosis of septic arthritis in the knee is based on aspiration of the knee *before* administration of antibiotics. Administering antibiotics to plaintiff prior to performing the aspiration, rendered the results unreliable.

Based upon plaintiff's expert's affirmation as well as the facts in the record, plaintiff raised triable issues of fact precluding summary judgment. *Alao v. Richmond University*

Medical Center, 213 A.D.3d 722, 183 N.Y.S.3d 144 (2d Dept. 2023); *Many v. Lossef*, 190 A.D.3d 721, 137 N.Y.S.3d 128 (2d Dept. 2021). As the parties have produced conflicting expert testimony on the issue of medical malpractice, the matter must be submitted to a jury. *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022).

Informed Consent

A defendant can establish entitlement to summary judgment by demonstrating that the plaintiff signed a detailed consent form after being apprised of alternatives and foreseeable risks; that a reasonably prudent person in the plaintiff's position would not have declined to undergo the surgery; and that the actual procedure performed for which there was no informed consent was not a proximate cause of the injury. *Pirri-Logan v. Pearl*, 192 A.D.3d 1149, 145 N.Y.S.3d 545 (2d Dept. 2021). A plaintiff's signature on the consent forms, standing alone, does not support a defendant's entitlement to judgment as a matter of law. *Guinn v. New York Methodist Hosp.*, 212 A.D.3d 787, 183 N.Y.S.3d 431 (2d Dept. 2023). But where a plaintiff's claim does not contend that the procedure was an "unconsented-to affirmative violation of the plaintiff's physical integrity," that theory of liability is inapplicable. *Samer v. Desai*, 179 A.D.3d 860, 116 N.Y.S.3d 377 (2d Dept. 2020).

A review of the complaint and bill of particulars reveals that the claim of lack of informed consent is quite vague. There is no indication of a violation of the plaintiff's physical integrity. *Samer*, 179 A.D.3d 860 at 864. Indeed, plaintiff's counsel abandoned this claim and failed to proffer any argument regarding same in his affirmation and memorandum of law. Ergo, this Court finds no merit to this claim. See *Thomas v. Farrago*, 154 A.D.3d 896, 62 N.Y.S.3d 478 (2d Dept. 2017); *Schel v. Roth*, 242 A.D.2d 697, 663 N.Y.S.2d 609 (2d Dept. 1997).

Corporate Parent Liability

A parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary. *Broxmeyer v. United Capital Corp.*, 79 A.D.3d 780, 914 N.Y.S.2d 181 (2d Dept. 2010). Furthermore, dominion and control will not be proven through a mere showing that a corporation is a wholly owned subsidiary of the parent or that the parent owns a controlling interest in the shares of the subsidiary. *Neill v. Cinema de Lux*, 198 A.D.3d 974, 155 N.Y.S.3d 580 (2d Dept. 2021).

Here, there is no evidence that Northwell Health provided or rendered care or treatment to plaintiff. It appears that Northwell Health is merely a corporate parent of SIUH and maintains professional liability insurance for SIUH. Thus, defendants established that Northwell Health did not exercise complete dominion and control over SIUH. *See generally Mauro v. City of New York*, 204 A.D.3d 777, 164 N.Y.S.3d 465 (2d Dept. 2022). Plaintiffs failed to rebut defendants' contentions.

Negligent Hiring

An employer can be held liable for negligent hiring and/or retention where the employer had knowledge of or should have foreseen the employee's propensity for the conduct that caused an injury. *Guarino v. ProHEALTH Care Associates, LLP*, 219 A.D.3d 467, 194 N.Y.S.3d 517 (2d Dept 2023).

Defendants' expert Dr. Sakalis, upon review of the pleadings, deposition testimony, bill of particulars, supplemental bill of particulars, medical records, and Dr. Khabut's affidavit, opined that the doctors consistently adhered to the standard of care. Plaintiffs failed to raise a triable issue of fact. *S.W. v. Catskill Regional Medical Center*, 211 A.D.3d 890, 180 N.Y.S.3d

561 (2d Dept. 2022). *Henry v. Sunrise Manor Center for Nursing and Rehabilitation*, 147 A.D.3d 739, 46 N.Y.S.3d 649 (2d Dept. 2017).

Vicarious Liability

To defeat plaintiff's claim of vicarious liability, defendants must establish that "the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee," and that the exception to this general rule does not apply; namely that a hospital may not be held vicariously liable for the treatment provided by an independent physician except where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the plaintiff's choosing, or a nonemployee physician otherwise acted as an agent of the hospital, or the hospital exercised control over the physician. *Ciceron v. Gulmatico*, ___ N.Y.S.3d ___, 2023 WL 6613563 (2d Dept. 2023); *Vargas v. Lee*, 207 A.D.3d 684, 172 N.Y.S.3d 694 (2d Dept. 2022); *Fuessel v. Chin*, 179 A.D.3d 899, 116 N.Y.S.3d 395 (2d Dept. 2020).

It is clear from the affidavit of Mary-Beth Springstead, Associate Executive Director of Human Resources at SIUH, that Drs. Gross, Amin, and Ruggiero were not employees of the hospital, but independent contractors. Defendants further argue that since plaintiff did not undergo the arthrocentesis in SIUH's emergency department, and since the arthrocentesis was not deemed an urgent matter, this case cannot be decided in the same light as *Mduba v. Benedictine Hospital*, 52 A.D.2d 450, 384 N.Y.S.2d 527 (3d Dept. 1976).

Defendants are mistaken, this case falls squarely within *Mduba*, as plaintiff was initially admitted in the emergency department. Although the *Mduba* Court did not specify when a patient is informed of their treating doctor's status as a hospital employee or an independent contractor, that information is certainly not gained by plaintiff's mere egress from the emergency

department to the in-patient department. Defendants offered no evidence which showed that plaintiff was privy to the physicians' status as independent contractors nor that the doctors were plaintiff's private physicians. *Pinnock v. Mercy Med. Ctr.*, 180 A.D.3d 1088, 119 N.Y.S.3d 559 (2d Dept. 2020). Defendants failed to establish their burden of proof. Thus, this Court need not consider plaintiffs' contentions. *Id at 1093; Lin*, 168 A.D.3d 788.

Conclusion

Accordingly, defendants' motion for summary judgment is granted, solely with respect to plaintiffs' claims of lack of informed consent, corporate parent liability and negligent hiring. The complaint is dismissed as to Northwell Health. The clerk shall amend the caption accordingly.

All parties shall appear for an Alternative Dispute Resolution Conference on January 23, 2024, at 11AM.

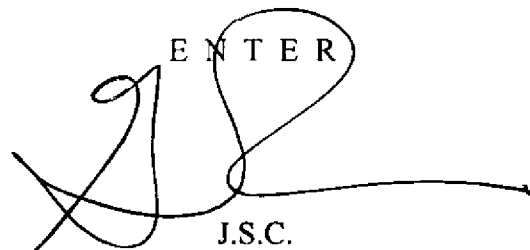
This constitutes the Decision and Order of this Court.

For Clerks use only

MG___

MD___

Motion Seq.#: 3

ENTER

J.S.C.

HON. GENINE D. EDWARDS