

Scibetta v Southside Hosp.
2016 NY Slip Op 31836(U)
July 29, 2016
Supreme Court, Suffolk County
Docket Number: 19876/2011
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the County of Suffolk
State of New York - Part XL **COPY**

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

X-----X
BARBARA SCIBETTA, as Administratrix of the
Goods, Chattels and Credits of EDWARD J.
SCIBETTA, deceased, and BARBARA SCIBETTA,
Individually,

Plaintiff,

- against -

SOUTHSIDE HOSPITAL, MANAL HEGAZY, M.D.
and ISLAND SURGICAL AND VASCULAR
GROUP, P.C.,

Defendants.

X-----X

INDEX NO.:19876/2011

**SEQ. NOS.:002-MG
003-MG**

KUJAWSKI & KUJAWSKI, ESQS.
Attorney for Plaintiff
1637 Deer Park Avenue
Deer Park, NY 11729-0661

PERRY, VAN ETTEN, ROZANSKI &
PRIMAVERA, LLP
Attorney for Southside Hospital
538 Broadhollow Road
Melville, NY 11747

SHAUB, AHMUTY, CITRIN & SPRATT, LLP
Attorney for Hegazy and Island Surgical
1983 Marcus Avenue
Lake Success, NY 11042

Upon the following papers numbered 1 to 55 read on this motion for Summary Judgment; for Late Demand for Jury Trial; Notice of Motion/ Order to Show Cause and supporting papers 1-31; 38-55; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 32-35; Replying Affidavits and supporting papers 36-37; ~~Other 0~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by Defendant Southside Hospital for an order granting summary judgment in its favor and the motion by Defendants Manal Hegazy, M.D., and Island Surgical and Vascular Group, P.C., for leave to file a late demand for a jury trial are consolidated for purposes of this determination; and it is

ORDERED that the motion by Defendant Southside Hospital for an order granting summary judgment in its favor and dismissing the complaint as asserted against it is granted; and it is further

ORDERED that the motion by Defendants Manal Hegazy, M.D., and Island Surgical and Vascular Group, P.C. for leave to file a late demand for a jury trial is granted.

This is a medical malpractice and wrongful death action brought to recover damages arising from the treatment of Plaintiff Barbara Scibetta's husband, Edward J. Scibetta, for an inguinal hernia between December 15 and December 28, 2009. In December 2009, Mr. Scibetta presented to his primary care physician, Dr. Nakhajavan, with complaints of right-sided stomach pain and swelling of the right groin. Dr. Nakhajavan diagnosed Mr. Scibetta with an inguinal hernia and referred him to Defendant Island Surgical and Vascular Group, P.C., for surgical evaluation. On December 15, 2009, Mr. Scibetta was seen by Defendant Manal Hegazy, M.D., who examined him and confirmed the diagnosis of a reducible right inguinal hernia. Dr. Hegazy recommended that the hernia be repaired laparoscopically. Mr. Scibetta decided to undergo the procedure, and it was scheduled for December 28, 2009 at Defendant Southside Hospital. At the December 15 visit, Dr. Hegazy gave Mr. Scibetta written instructions to stop taking Plavix, an anti-coagulant, and aspirin for 7 (seven) days prior to the procedure; these medications had been previously prescribed to Mr. Scibetta to treat coronary artery disease. On December 21, 2009, Mr. Scibetta presented to Southside Hospital for pre-surgical testing, all of which was unremarkable. On December 22, 2009, Dr. Caselnova, Mr. Scibetta's treating cardiologist, issued handwritten clearance for the surgery, concurring with Dr. Hegazy's instructions regarding the Plavix and aspirin, and further instructing Mr. Scibetta to resume taking these medications after the procedure.

On the morning of December 28, 2009, Mr. Scibetta presented at Southside Hospital for his scheduled outpatient procedure, which concluded at 8:25 a.m. with no complications. At 11:15 a.m., nurse Janet Borkowski reviewed the doctor's post-operative instructions with Mr. Scibetta and his wife, then he was discharged from the hospital. At approximately 12:00 p.m., after he arrived at home, Mr. Scibetta complained of chest pains and Mrs. Scibetta observed him on the floor shortly thereafter. Mr. Scibetta was transported *via* ambulance to Good Samaritan Hospital, where he was pronounced dead at 1:30 p.m. that same day. Mr. Scibetta's death certificate lists his cause of death as cardiopulmonary arrest as a consequence of ventricular tachycardia/fibrillation and coronary artery disease.

Plaintiff alleges that Mr. Scibetta was injured as a result of Defendants' medical malpractice, namely, the failure to give proper discharge instructions to Mr. Scibetta regarding post-operative chest pain and the resumption of his cardiac medications. With respect to Southside Hospital, by her complaint, as amplified by her verified bill of particulars, Plaintiff alleges that the hospital was negligent, among other things, in failing to provide Mr. Scibetta with proper medical advice with regards to the cessation of aspirin prior to surgery. Plaintiff alleges that, as a result of Defendants' malpractice, Mr. Scibetta suffered cardiopulmonary arrest, causing his death.

Southside Hospital now moves for summary judgment dismissing the complaint against it, arguing that it did not depart from good and accepted medical practice in its treatment of Plaintiff. In support of its motion, Southside Hospital submits copies of Mr. Scibetta's medical records, transcripts of the deposition testimony of Mrs. Scibetta, Nurse Janet Borkowski, and Dr. Hegazy, and a copy of Mr. Scibetta's death certificate. Southside Hospital also submits an affirmation of Paul E. Harnick, M.D., F.A.C.P., F.C.C.P., a physician with board certifications in internal medicine and cardiology.

Plaintiff opposes the motion, asserting that Southside Hospital's expert misstates certain facts in reaching his opinion as to whether the hospital departed or deviated from good and accepted medical practice in its treatment of Mr. Scibetta. In opposition, Plaintiff submits an affirmation of her attorney and an affirmation of Dr. Caselnova.

In addition, Defendants Dr. Hegazy and Island Surgical and Vascular Group, P.C. (hereinafter referred to as "the Island Surgical Defendants") move for an order granting leave to file a late demand for a jury trial. In support of their motion, the Island Surgical Defendants submit, among other things, an affidavit of Kelsey O'Brien, Esq., copies of correspondence sent to opposing counsel, and a demand for a trial by jury duly executed by the Island Surgical Defendants' counsel. Neither Plaintiff nor Southside Hospital has submitted any documents in opposition to this motion.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], quoting *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). To recover damages for medical malpractice, a Plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the Plaintiff's injuries (*see Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). Hospitals may be held liable for medical malpractice if their personnel engage in conduct that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician and this conduct proximately causes a Plaintiff's injury (*see Bleiler v Bodnar*, 65 NY2d 65, 72, 489 NYS2d 885, 889 [1985]; *Seiden v Sonstein*, 127

AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Fink v DeAngelis*, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]). However, this rule does not apply to treatment provided by an independent physician retained by the patient, and the affiliation of a doctor with a hospital alone is insufficient to impute the doctor's alleged negligent conduct to the hospital (see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79, 499 NYS2d 904, 909 [1986]; *Seiden v Sonstein*, *supra*; *Zhuzhingo v Milligan*, 121 AD3d 1103, 995 NYS2d 588 [2d Dept 2014]). Further, a hospital may not be held liable for injuries suffered by such a patient where the employees of the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits independent acts of negligence or the attending physician's orders are contraindicated by normal practice (see *Seiden v Sonstein*, *supra*; *Zhuzhingo v Milligan*, *supra*; *Fink v DeAngelis*, *supra*).

To establish its entitlement to summary judgment in a medical malpractice action, a Defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the Plaintiff was not injured as a result (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). After making this *prima facie* showing, the burden shifts to the Plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to the element or elements on which the Defendant has met its initial burden (see *Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]; *Stukas v Streiter*, *supra*).

Here, Southside Hospital established, *prima facie*, its entitlement to summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment its staff rendered to Plaintiff (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, *supra*; *Faccio v Golub*, *supra*). Further, its submissions demonstrated that Dr. Hegazy was a private attending physician, that its employees did not commit independent acts of negligence, and that Dr. Hegazy's orders were not contraindicated by normal practice (see *Hill v St. Clare's Hosp.*, *supra*; *Zhuzhingo v Milligan*, *supra*; *Fink v DeAngelis*, *supra*). In his affirmation, Dr. Harnick opines within a reasonable degree of medical certainty that the medical treatment provided by Southside Hospital's staff to Mr. Scibetta at all times was appropriate and in accordance with the accepted standards of care of a hospital facility as they existed in 2009; that the orders issued by Dr. Hegazy as to the care, treatment, and discharge of Mr. Scibetta were appropriate and issued in accordance with accepted standards of medical practice; and that Southside Hospital's staff at all times followed and carried out any and all orders by Dr. Hegazy in accordance with the accepted standards of care. As Dr. Harnick bases his conclusions upon Mr. Scibetta's medical records and the parties' deposition testimony, in addition to his education, knowledge, and medical experience, Southside Hospital has met its initial burden on the motion (see *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Lahara v Auteri*, 97 AD3d 799, 948 NYS2d 693 [2d Dept 2012]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]).

Southside Hospital having met its initial burden on the motion, the burden shifted to Plaintiff to submit admissible evidence raising a triable issue of fact *see Michel v Long Is. Jewish Med. Ctr., supra; Rivers v Birnbaum, supra; Stukas v Streiter, supra*). In opposition, Plaintiff submits an affirmation of her attorney and an affirmation of Mr. Scibetta's treating cardiologist, Dr. Caselnova. However, Dr. Caselnova's affirmation merely restates his instruction to Mr. Scibetta that cease taking Plavix and aspirin 7 (seven) days prior to the procedure and that he resume taking these medications after surgery when bleeding risk is lowest. Dr. Caselnova's affirmation does not describe the applicable standard of care under the circumstances, how Southside Hospital departed or deviated from such standard, or whether any such departure was a competent cause of Mr. Scibetta's injuries (*see Williams v Bayley Seton Hosp., supra; Makinen v Torelli, supra; Stukas v Streiter, supra*). Further, the affirmation of an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York, supra*). As Plaintiff's physician affirmation fails to rebut Southside Hospital's prima facie showing that it did not deviate or depart from good and accepted medical practice in its treatment of Mr. Scibetta, Plaintiff failed to raise any triable issues of fact (*see Zuckerman v City of New York, supra; Williams v Bayley Seton Hosp., supra; Makinen v Torelli, supra*).

As to the motion by the Island Surgical Defendants, CPLR 4102 (a) provides that "[a]ny party served with a note of issue not containing [a demand for a jury trial] may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within fifteen days after service of the note of issue." However, a court may relieve a party of the effect of failing to comply with the requirements of CPLR 4102 (a) "if no undue prejudice to the rights of another party would result."

Here, the Island Surgical Defendants have sufficiently demonstrated that their waiver of the right to demand a jury trial was inadvertent, and the other parties have not submitted papers in opposition. The motion, therefore, is granted. The Island Surgical Defendants shall serve a written demand for a trial by jury on all parties within 10 (ten) days after the entry of this order. The Island Surgical Defendants also shall serve upon the Calendar Clerk of this Court the aforesaid demand with proof of service and a copy of this order, and shall pay the fee prescribed by CPLR 8020 (c) (2), within 30 days after entry of this order. Upon receipt of such service, the Clerk shall calendar this action as one requiring a trial by jury.

In light of the foregoing, the summary judgment motion by Defendant Southside Hospital and the late jury demand motion by the Island Surgical Defendants are granted.

The foregoing constitutes the decision and Order of the Court.

DATED: JULY 29, 2016
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.