

<b>Rodriguez v Catapano</b>
2016 NY Slip Op 31867(U)
August 19, 2016
Supreme Court, Suffolk County
Docket Number: 38278-2010
Judge: William G. Ford
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INDEX No. 38278-2010

CAL. No. 15-01360MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

**PUBLISHED**

**PRESENT:**

Hon. WILLIAM G. FORD  
Justice of the Supreme Court

MOTION DATE 12-17-15 (009)

MOTION DATE 12-9-15 (010)

ADJ. DATE 4-20-16

Mot. Seq. #009 - MD  
#010 - MD

-----X  
AMANDA RODRIGUEZ,

Plaintiff,

- against -

MICHAEL CATAPANO, M.D.,  
WAINSCOTT WALK-IN MEDICAL CARE,  
PLLC, d/b/a WAINSCOTT WALK - IN  
CLINIC, LARA A. DESANTI-SISKA, M.D.,  
Individually and d/b/a BRIDGEHAMPTON  
FAMILY MEDICAL PRACTICE,  
SOUTHAMPTON HOSPITAL, and JUSTIN  
R. ZACK, M.D.,

Defendants.  
-----X

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Upon the following papers numbered 1 to 146 read on these motions for summary judgment ; Notice of Motion/  
Order to Show Cause and supporting papers 1-53; 71- 128 ; Notice of Cross Motion and supporting papers      ; Answering  
Affidavits and supporting papers 54-68; 129-144 ; Replying Affidavits and supporting papers 69-70; 145-146 ; Other       
; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (seq. 009) of defendants Michael Catapano, M.D., and Wainscott Walk-  
In Medical Care, LLC, and the motion (seq. 010) of defendant Southampton Hospital are consolidated for  
the purposes of this determination; and it is further

**ORDERED** that the motion of defendants Michael Catapano, M.D., and Wainscott Walk-In Medical  
Care, LLC, for summary judgment dismissing the complaint against them is **DENIED**; and it is further

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**ORDERED** the motion of defendant Southampton Hospital for summary judgment dismissing the complaint against it is **DENIED**.

Plaintiff commenced this action against defendants Michael Catapano, M.D., Wainscott Walk-In Medical Care, PLLC, Lara DeSanti-Siska, M.D., Southampton Hospital, and Justin Zack, M.D., seeking damages for medical malpractice and for negligent hiring and supervision of medical staff. By her bill of particulars, plaintiff alleges, in part, that Dr. Catapano was negligent in failing to diagnose her ankle fracture. By stipulation, dated January 13, 2016, the action was discontinued as against Dr. DeSanti-Siska.

Defendants Michael Catapano and Wainscott Walk-In Medical Care, PLLC, now move for summary judgment dismissing the complaint against them on the grounds that their treatment of plaintiff Amanda Rodriguez did not depart from accepted medical practice, and that they were not a proximate cause of her injuries. In support of the motion, defendants submit copies of the pleadings, the transcripts of the parties' deposition testimony, plaintiff's medical records and an affirmation by Dr. Philip Robbins.

Plaintiff testified that she injured her left ankle while hanging a hammock and presented to Wainscott Walk-In Medical Care two days later, April 25, 2008. She testified that she was treated at Wainscott Walk-In Medical Care by Dr. Catapano, who examined her ankle and took an x-ray examination of it. Plaintiff testified that Dr. Catapano told her that she had a sprain and recommended that she wear an ankle brace and take Advil. She testified that over time her ankle pain became worse, and that on September 9, 2008 she sought treatment at Bridgehampton Family Medical Practice, where she was treated by Dr. Lara Desanti-Siska. She testified that Dr. Siska examined her ankle and gave her a prescription for an x-ray examination, which was performed that same day at Southampton Hospital. Plaintiff testified that she presented to Dr. Siska's office on September 30, 2008, and that Dr. Siska told her the x-ray indicated she had an ankle sprain and recommended that she undergo physical therapy and wear a heel lift. Plaintiff testified that she started physical therapy treatments but they were too painful, and that she returned to Dr. Siska on December 22, 2008. She testified that Dr. Siska recommended that she have a magnetic resonance imaging test (MRI) performed, and that she prescribed Percoset for the pain. Plaintiff testified that she had the MRI on January 31, 2009, and that Dr. Siska told her the MRI examination indicated she had severe avascular necrosis (AVN). Dr. Siska referred her to Dr. Feder, an orthopedic surgeon, who began treating the AVN condition.

Dr. Michael Catapano testified that he is board certified in internal medicine and emergency medicine, and that he was working at Wainscott Walk-In Clinic on June 24, 2006, when plaintiff presented with a left-ankle injury. He testified that he examined the ankle and recommended that an x-ray test be conducted, but plaintiff did not wish to have one at that time. He testified that he prescribed Vicodin for the pain and Anaprox, an anti-inflammatory medication, and recommended that she return in a week to have an x-ray examination if she was still in pain. Dr. Catapano testified that he did not treat plaintiff again until April 25, 2008, when she presented with a another left-ankle injury she allegedly sustained when she fell while she was hanging a hammock. He testified an examination of her left ankle revealed she had full range of motion and was neurovascularly intact. He testified that he took two x-rays of the left ankle, which did not indicate a fracture of the talus bone or any other abnormalities. Dr. Catapano testified he assessed the ankle as being sprained, and recommended that plaintiff take Advil and use an ACE wrap and an air cast.

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He testified that he normally recommends to patients to return in one week if they are not feeling better, and that plaintiff did not return.

Dr. Lara Desanti-Siska testified that plaintiff presented to the office of Bridgehampton Family Medicine on September 9, 2008 with complaints of pain in her left ankle from an injury she had in April 2008. She testified that she examined plaintiff's left ankle, and that it was swollen. Dr. Siska testified that she referred plaintiff to Southampton Hospital to have an x-ray test, and that she prescribed anti-inflammatories and physical therapy treatment. She testified that she received an x-ray report prepared by Dr. Justin Zack, a radiologist at Southampton Hospital, which indicated that the ankle was normal. She testified that plaintiff presented again with complaints of pain to her left ankle on December 22, 2008, and she ordered a Magnetic Resonance Image (MRI), which indicated that plaintiff had AVN and she referred her to Dr. Feder.

Dr. Justin Zack testified he is a radiologist and works for North Fork Radiology, which provides radiology services to Southampton Hospital. He testified that he reads various imaging studies and prepares reports through dictation which are then transcribed, put into written form, and are reviewed and signed by him electronically. Dr. Zack states that he reviewed three x-ray images of plaintiff's left ankle taken on September 9, 2008 from East Hampton Clinic, and that he prepared a report. Dr. Zack testified that East Hampton Clinic is an outpatient imaging office that performs x-ray tests for patients on an outpatient basis at Southampton Hospital. He states that when he initially reviewed the pictures and prepared the report, he did not observe any abnormalities of the bones in plaintiff's left ankle, but upon a recent review he observed increased density in the talus.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

To impose liability upon 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 (*Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a prima facie showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert

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affidavits that the defendant did not deviate or depart from accepted medical practice in his or her treatment of the patient or that any departure was not a proximate cause of plaintiff's injuries (*see Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy its burden on a motion for summary judgment, defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

The affirmation of Dr. Philip Robbins, a board certified orthopedist, is submitted. In his affirmation, Dr. Robbins states that he is familiar with the evaluation, diagnosis and treatment of patients with AVN. He states that he has reviewed the medical records, the bill of particulars, and the transcripts of deposition testimony of plaintiff, Dr. Siska, Dr. Zack and Dr. Catapano. Dr. Robbins describes AVN as a death of bone tissue caused by a lack of blood supply. He states that the cause of interrupted blood flow is unknown in approximately 25 per cent of the people with AVN, and that it is referred to as idiopathic AVN. Dr. Robbins states that severe trauma such as ankle fractures or dislocations can cause interrupted blood flow which can cause AVN. He states that excessive corticosteroid use and excessive alcohol use also are a cause of AVN. Dr. Robbins opines, with a reasonable degree of medical certainty, that plaintiff's AVN is idiopathic. He states that he reviewed the x-ray pictures of plaintiff's ankle taken by Dr. Catapano on April 25, 2008 and avers that they are "technically good x-rays," which do not reveal any abnormalities of the talus bone or any bony fractures. He states that Dr. Catapano's physical examination did not reveal any signs of any abnormality or a fracture, and opines, with a reasonable degree of medical certainty, that Dr. Catapano's treatment was in accord with accepted medical practice. Dr. Robbins states that the findings from the x-ray pictures taken in February 2009, which revealed, among other things, a mild collapse of the talar dome, were not present on the x-ray picture taken on April 25, 2008. Furthermore, Dr. Robbins opines, with a reasonable degree of medical certainty, that Dr. Catapano's treatment was not a proximate cause of plaintiff's injuries. He states that even if an earlier diagnosis of AVN had been made, it would not have altered the outcome, as there are no good treatments for AVN. He opines that the condition typically runs its course resulting in articular surface collapse.

The submissions of Dr. Catapano and Wainscott Walk-In Medical Care demonstrate, prima facie, that the treatment rendered to plaintiff on April 25, 2008 was in accord with good and accepted practice and was not a proximate cause of plaintiff's injuries. Having established, prima facie, their entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923), defendants shifted the burden to plaintiff to proffer evidence in admissible form raising a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). In opposition to the motion, plaintiff submits, among other things, an affirmation by Dr. Javier Beltran, a radiologist, and an affirmation by Dr. Sheldon Simon, an orthopedist. Dr. Beltran states that he reviewed the x-ray images taken by Dr. Catapano and opines, with a reasonable degree of medical certainty, that Dr. Catapano departed from accepted medical practice by failing to take a third x-ray test of plaintiff's left ankle to obtain an oblique/mortise view of the ankle. He opines that the lateral talar dome is obstructed in both x-rays by the overlapping lateral malleolus and, that, without a third view of the ankle, an accurate diagnosis could not be made. Dr. Beltran believes that the fracture and

necrosis existed in April 2008 and were not diagnosed due to the quality of the x-ray films and the lack of a third view through an x-ray test of the oblique view.

Dr. Sheldon Simon states that he is a board certified orthopedic surgeon and is familiar with diagnosing and treating AVN of the talus. Dr. Simon opines, with a reasonable degree of medical certainty, that Dr. Catapano's diagnosis and treatment of plaintiff departed from accepted medical practice. He states that the two x-rays taken by Dr. Catapano were of poor quality and were insufficient to permit a fair and reasonable diagnosis of plaintiff's condition. Dr. Simon opines that if plaintiff's condition was diagnosed in April 2008, her treatment could have begun sooner and she would not have needed the several surgeries she endured.

The affirmations of plaintiff's experts are sufficient to raise triable issues of fact as to whether Dr. Catapano breached the duty of care owed to plaintiff by departing from acceptable medical practice and whether such departure was a cause of plaintiff's injuries. In a medical malpractice action, conflicting expert opinions require denial of a summary judgment motion (*Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]). Such issues of credibility are properly determined by the trier of fact (*Wexelbaum v Jean*, 80 AD3d 756, 915 NYS2d 161 [2d Dept 2011]). Accordingly, the motion of Dr. Catapano and Wainscott Walk-In Medical Care for summary judgment in their favor is denied.

Defendant Southampton Hospital moves for summary dismissing the complaint against it on the grounds that it cannot be vicariously liable for the conduct of Dr. Catapano, Dr. Siska or Dr. Zack, as they are not employees of the hospital, that it was not negligent in hiring Dr. Zack, and that its staff did not depart from acceptable medical practice in its treatment of plaintiff and was not a proximate cause of her injuries. In support of the motion, the hospital submits copies of the pleadings, the transcripts of the parties' deposition testimony, plaintiff's medical records, an expert affidavit, an affidavit by Sharon DiSunno, and a copy of the agreement made between Southampton Hospital and Southampton Radiology.

A hospital owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (*see Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]). "The requisite elements of proof in a medical malpractice are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Paone v Lattarulo*, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). Therefore, to establish medical malpractice by a hospital through its employees, expert medical testimony must be offered to demonstrate that a staff physician, resident, intern, nurse, technician, or other professional employee violated some accepted standard of good professional practice (*see Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 98 AD3d 545, 949 NYS 2d 714 [2d Dept 2012]).

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (*see Hill v St Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3 [1957]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the

hospital. However, “an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing” (*Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]). Under a theory of apparent or ostensible agency, a hospital may be vicariously liable for the malpractice of a physician, who is not an employee of the hospital, if a patient reasonably believes that the physicians treating him or her were provided by the hospital or acted on behalf of the hospital (*Hilsdorf v Tsioulis*, 132 AD3d 727, 17 NYS3d 655 [2d Dept 2015]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]).

To establish a prima facie showing of entitlement to summary judgment, a defendant hospital must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant’s treatment of the patient or that any departure was not a proximate cause of plaintiff’s injuries (*see Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy its burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff’s bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

The affirmation of James Naidich, M.D., a board certified radiologist is submitted. In his affirmation, Dr. Naidich enumerates the records he relied on to form his opinion, including the x-ray films taken on September 9, 2008. Dr. Naidich states that Dr. Siska ordered two x-ray pictures of plaintiff’s left ankle, and that plaintiff arrived at the radiology department located in Southampton Hospital where three x-ray images of her left ankle were taken by a technician. Dr. Naidich reviewed the x-ray pictures of plaintiff’s ankle, and opines that the quality of the images are excellent, and that the radiology technician obtained three views of plaintiff’s ankle in accordance with the “best radiological practice.” He states that no one at the radiology facility provided any information concerning the results of the x-ray examination and the results were interpreted and reported by Dr. Zack who never met with plaintiff. Dr. Naidich opines, with a reasonable degree of medical certainty, that the services rendered to plaintiff by the hospital were in accord with accepted medical practice and were not a proximate cause of plaintiff’s injuries.

Sharon DiSunno, Vice President of the Quality Assurance Program for Southampton Hospital, states in her affidavit that Southampton Hospital does not employ radiologists to interpret diagnostic studies performed at the hospital. She states that Southampton Hospital has a contract with Southampton Radiology, P.C., which provides such services through their employees, including Dr. Zack, and that the contract was in effect in September 2008. DiSunno states that patients are billed by Southampton Radiology and are informed of this through signs posted in the radiology suite at East Hampton Clinic. She states that the hospital only bills patients for the technical services provided.

The complaint alleges that the alleged acts of negligence by Southampton Hospital occurred on September 9, 2008. Plaintiff alleges, among other things, that the hospital staff was negligent in its care and treatment of her, and that it was negligent in failing to order further diagnostic testing and in failing to monitor her condition. The complaint further alleges that Dr. Zack is an employee of the hospital and,

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therefore, the hospital is vicariously liable for his conduct. The complaint also contains a cause of action against Southampton Hospital for negligent hiring and supervision.

The evidence submitted by Southampton Hospital establishes prima facie its entitlement to judgment as a matter of law, as it demonstrates that Dr. Zack was not an employee of the hospital, and the record is devoid of any evidence of independent acts of negligence by the technician who took the x-ray examinations.

In opposition to the hospital's motion, plaintiff submits, among other things, her own affidavit and the radiology report. The report is in the name of Southampton Hospital with its address of 240 Meeting House Lane and it is electronically signed by Dr. Zack. In plaintiff's affidavit, she states that she made an appointment with Southampton Hospital to have the x-ray tests performed and presented to Southampton Hospital to have them taken. Plaintiff's submissions raise triable issues of fact with respect to the issue of apparent or ostensible authority which may impose liability on the hospital for the conduct of Dr. Zack (*See Sullivan v Sirop*, 74 AD3d 1326, 905 NYS2d 240 [2d Dept 2010]). Accordingly, the motion of Southampton Hospital for summary judgment dismissing the complaint against it is **DENIED**.

Dated: August 19, 2016  
Riverhead, New York

  
HON. WILLIAM G. FORD, JSC

FINAL DISPOSITION     NON-FINAL DISPOSITION