

**Johnston v Badillo**

2016 NY Slip Op 32224(U)

July 22, 2016

Supreme Court, Suffolk County

Docket Number: 12-1483

Judge: Arthur G. Pitts

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INDEX No. 12-1483  
CAL. No. 14-02035MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 4-20-15  
ADJ. DATE 6-23-16  
Mot. Seq. # 001- MotD

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Upon the following papers numbered 1 to 72 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 67; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 68- 70; Replying Affidavits and supporting papers 71-72; Other       ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion of defendant St. Francis Hospital and Kenneth Strobel, PA, for summary judgment dismissing the complaint against them is granted as to Kenneth Strobel, PA and is otherwise denied as to St. Francis Hospital as set forth herein.

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Plaintiff commenced this medical malpractice action to recover damages for injuries he allegedly sustained as a result of defendants' medical malpractice during the period from September 18, 2009 until November 1, 2009 and the lack of informed consent. The complaint alleges, among other things, that defendants were negligent in failing to properly perform a robotic-assisted radical prostatectomy, which caused a leak between the bladder neck and urethra, and in failing to inspect the anastomotic leak, which caused several urinary tract infections and sepsis. The complaint also alleges that defendant St. Francis Hospital was negligent in failing to hire competent medical personnel, and is liable under the doctrine of respondeat superior.

Defendants Kenneth Strobel, PA, and St. Francis Hospital now move for summary judgment dismissing the complaint against them on the grounds that their treatment of plaintiff did not depart from accepted medical practice, and that they cannot be liable for lack of informed consent. St. Francis Hospital further argues that the physicians who performed the surgery are private physicians for whom they cannot be vicariously liable. In support of the motion, defendants St. Francis Hospital and Kenneth Strobel submit copies of the pleadings, the transcripts of the parties' deposition testimony, plaintiff's medical records and affirmations by Dr. Vibhu Narang and Dr. Barry Schwartz.

Plaintiff testified that he was diagnosed with prostate cancer in March 2009 and consulted with several physicians before choosing Dr. Felix Badillo. He testified that he presented to Dr. Badillo's office in Great Neck and that Dr. Badillo explained the surgery he intended to perform and the risks involved. Plaintiff testified that they scheduled the prostatectomy for September 18, 2009 to be performed at St. Francis Hospital. He testified that he felt fine when he was discharged from the hospital and that he went home with a tubular drain in his left side. Plaintiff testified that the tube became dislodged and he presented to the office of Dr. Badillo on September 24, 2009. He testified that Dr. Badillo examined him and was not worried about the drain.

Plaintiff testified that he returned to work on a part-time basis sometime prior to November 1, 2009. He testified that on October 27, 2009, he experienced pain in his right leg, back and stomach, and presented to the emergency room at St. Francis Hospital at approximately 7:00 p.m. He testified that he was diagnosed with sciatica by Dr. Craig Lerman and sent home the next morning with a recommendation to consult with a pain management provider. Plaintiff testified that he treated with a pain management doctor, who gave him a shot which helped the pain in his leg, but his stomach pain continued. He testified that he did not contact Dr. Badillo and presented to Huntington Hospital on November 1, 2009, where he was admitted and remained as a patient until November 19, 2009. He testified that he underwent several surgeries to remove an infection the "size of a football," and then was transported to St. Francis Hospital, where he remained until December 4, 2009. Plaintiff testified that he was transferred from St. Francis Hospital to a rehabilitation facility in Cold Spring Hills, because he was having trouble walking, and was discharged from the rehabilitation facility on December 24, 2009. Plaintiff testified that he continued to be examined by Dr. Badillo and continued with the catheter. He testified that he also had a vascular assisted closure (VAC) inserted, and that a nurse visited him at home to care for it. Plaintiff testified that he stopped treating with Dr. Badillo in 2010 and now treats with Dr. DiBlasio, a urologist in Huntington. He testified that he suffers from erection problems, leakage, and a dropped right foot.

Dr. Felix Badillo testified that he is a board certified urologist and a partner in defendant Urology Associates, P.C. Dr. Badillo testified that plaintiff presented to his office on March 26, 2009, having been diagnosed with prostate cancer by his physicians, Dr. Patane and Dr. DiBlasio. He testified that he reviewed plaintiff's medical history, performed an examination, and ordered a CAT scan and bone scan. He testified

that he recommended to plaintiff that he have a radical prostatectomy and informed him about the procedure and the risks involved with it. Further, he testified that he recommended a robotic-assisted prostatectomy,

as it involves less risks for overweight patients than alternative procedures. Dr. Badillo testified that he performs between 4 and 6 robotically-assisted prostatectomies per week, and that he has been performing them since 2005. He testified that plaintiff agreed to have the surgery and presented to his office on August 11, 2009 to review pre-operative and post-operative care with his nurse practitioner.

Dr. Badillo testified that on September 18, 2009, plaintiff presented to St. Francis Hospital for the surgery. He testified he spoke to plaintiff prior to the surgery and reviewed the pre-operative tests that were performed a week earlier. He testified that he was assisted in the operating room by Kenneth Strobel, a physician's assistant, who is employed by St. Francis Hospital. Dr. Badillo testified that Strobel's role as a surgical assistant was to irrigate, retract, extract fluid, hand him instruments, and change the instruments in the robot when necessary. He testified that he is the only person who controls the robot. He testified further that a scrub nurse, a circulating nurse, and an anaesthesiologist were present during the procedure, and explained how the surgery was performed. He testified that prior to the surgery, plaintiff was prescribed antibiotics to prevent infection and that after the anastomosis was completed, he performed pressure tests to determine if any leaks were present, and none were discovered. Dr. Badillo testified that an internal drain was inserted and removed before plaintiff was discharged, and that a Foley catheter was inserted and remained for six days after the surgery. He testified that it is his practice to visit the patient in the recovery room, and to instruct the patient and/or a family member on how to care for the catheter and the types of symptoms which would necessitate a call to his office. Dr. Badillo testified that he prescribed antibiotics and Vicodin for plaintiff.

Dr. Badillo testified that plaintiff presented to his office on September 24, 2009 for a follow-up visit, at which time he performed an examination and conducted a cystogram. He testified that the results of the examination and cystogram were normal and he removed the catheter. On October 29, 2009, Dr. Badillo testified that he received a phone message from plaintiff stating that he had back and leg pain, and that he had received injections in his buttocks from a pain management facility. He testified that the note from his secretary also stated that plaintiff "still has abdominal pain." He testified that he spoke to plaintiff but does not recall the conversation and did not take any notes. Dr. Badillo testified that on November 1, 2009, when he returned from a vacation, he received a note from Dr. Bodi, a urologist from Huntington Hospital, which said that plaintiff was seen in the emergency room with an abdominal abscess and acute renal failure, and that he was too unstable to transfer to St. Francis Hospital. He testified that Dr. Bodi conducted exploratory surgery, drained the abscess and inserted a suprapubic tube for urinary diversion, as he was unable to insert a catheter. Dr. Badillo testified that plaintiff was transferred to St. Francis Hospital on November 19, 2009, and that he observed plaintiff with two drains which were inserted by the doctors at Huntington Hospital. Further, Dr. Badillo testified that he inserted a catheter on November 20, 2009. He testified that either himself, or one of his partners, saw plaintiff on a daily basis and each day he counter-signed notes created by the physician's assistants. Dr. Badillo testified that he examined plaintiff on November 30, 2009 and on December 4, 2009, at which time he discharged him from the hospital and sent him to a rehabilitation facility for physical therapy. He testified that plaintiff was seen in his office for follow-up visits on January 5, 2010 and January 19, 2010. Further, he testified that a CT scan and cystogram performed in January 2010 revealed no abscess and no abnormalities. He further testified that plaintiff's bladder control was improving. Dr. Badillo testified that he saw plaintiff on January 26, 2010 and February 17, 2010. He testified plaintiff's wound was healing nicely, and the drainage was dry. Dr. Badillo removed the wound VAC and began erection protocol, which he customarily begins with patients following such surgery. He testified that he

did not hear from plaintiff again and that he received a letter from Dr. Diblasio in September 2010, who is plaintiff's current urologist.

Dr. Craig Lerman testified that he is employed by Nassau Emergency Medicine, PC, which has a contract with St. Francis Hospital to provide staff in the emergency department, and that he was working on October 27, 2009. He testified that plaintiff presented to the hospital at approximately 5:00 p.m. on October 27, 2009, with complaints of lower back pain and leg pain, that he was triaged by the nurses, and that he examined him at approximately 6:15 p.m. He testified that he reviewed the triage assessment records, obtained plaintiff's medical history from him and performed a physical examination. Dr. Lerman testified that plaintiff was afebrile and his vital signs were normal, and that he diagnosed him as suffering with sciatica and gave him two Percocets for the pain. He testified that plaintiff vomited and his blood pressure was low, but he attributed it to the side effects of the medication. He testified that his shift was over at 11:00 p.m., and that he customarily reports his findings to the attending physician on the following shift.

Dr. Scott Strumpfler testified that he is employed by Nassau Emergency Medicine, PC, and is the assistant director of the emergency department at St. Francis Hospital. He testified that his shift began at 8:00 p.m. on October 27, 2009, and that he visited plaintiff after being made aware from a nurse that plaintiff had vomited. He testified that plaintiff had been given orange juice and he attributed the vomiting episode to the juice. Dr. Strumpfler testified that he did not review the medical chart prepared by Dr. Lerman which contained plaintiff's medical history and his vital signs, as he customarily does not, unless there is a problem. He testified that while plaintiff had low blood pressure and a temperature of 99.6, such findings are not indicative of an infection. Dr. Strumpfler testified that he accepted Dr. Lerman's diagnosis of sciatica and had no reason to question it. He testified that plaintiff's heart rate was normal, his O2 saturation levels were normal, his respiration was normal, and that he attributed plaintiff's vomiting and low blood pressure to the Percocet and orange juice.

Dr. Christopher Maurischat testified that he is employed by Nassau Emergency Medicine, PC, and was working as an attending physician in the emergency department at St. Francis Hospital on the morning of October 28, 2009. He testified that plaintiff became his patient after Dr. Strumpfler's shift ended, and that he followed Dr. Strumpfler's orders contained in plaintiff's chart, which were to discharge patient if he was not vomiting or nauseated. Dr. Maurischat reviewed plaintiff's chart and testified that plaintiff was given Compazine at 7:00 a.m. and discharged at 10:00 a.m. He testified that he accepted Dr. Lerman's diagnosis of sciatica and that plaintiff's vital signs were normal when he was discharged, except that he had low blood pressure. He testified that after plaintiff was discharged, he had no further contact with him until he returned to the emergency department at St. Francis Hospital on December 9, 2019.

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]).

As to the branch of the motion seeking summary judgment in favor of St. Francis Hospital, 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]).

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 2015]). 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]).

Here, St. Francis Hospital and PA Strobel submit the expert affirmations of Dr. Vibhu Narang and Dr. Barry Schwartz. Dr. Narang states that he is a “board certified emergency room physician licensed to practice medicine in the State of New York.” Dr. Schwartz states that he is a licensed physician, board certified in urology. Both doctors fails to discuss their work experience and neither doctor has included a curriculum vitae with the moving papers. This lack of information prohibits the court from determining whether they possess the requisite background to provide a reliable opinion (*see Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]; *Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196, 998 NYS2d 502 [3d Dept 2014]; *Dyckes v Stabile*, 2015 NY Slip Op 30602[U] [Sup Ct, Suffolk County 2015]).

More significantly, both affidavits are conclusory and recitative and, thus, lack sufficient allegations “to demonstrate that the conclusions it contains are more than mere speculation” (*Romano v Stanley*, 90 NY2d 444, 452, 661 NYS2d 589, 593 [1997]). Additionally, both affidavits are unresponsive to the allegations in the bill of particulars. To satisfy his or her burden on a motion for summary judgment, a 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]). Here, both Dr. Narang and Dr. Schwartz fail to discuss, among other things, the allegation that the emergency room staff failed to determine the etiology of plaintiff’s post-operative complaints and the applicable standard of care for a patient who presents with such complaints

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following a prosectomy. Further, the affidavits fail to address the allegation that the emergency room staff at St. Francis Hospital failed to consult with a urologist, given the plaintiff's history. Therefore, the affirmations are insufficient to satisfy the hospital's burden of establishing, prima facie, that the conduct of its staff was in accord with accepted medical practice and did not depart from such standard. Accordingly, the branch of the motion for summary judgment dismissing the complaint against St. Francis Hospital is denied.

As for the branch of the motion of PA Strobel for summary judgment dismissing the complaint against him, the testimony of Dr. Badilla establishes, prima facie, that Strobel's conduct was in accord with acceptable medical practice and was not a proximate cause of plaintiff's injuries, as he merely assisted Dr. Badilla at the surgery and did not control the robot. Having established his entitlement to summary judgment, Strobel shifted the burden to plaintiff to raise a triable issue of fact. In opposition to the motion, plaintiffs failed to submit evidence raising a triable issue as to whether Strobel breached a duty of care owed to plaintiffs. The unsigned redacted affidavit of plaintiffs' expert included with the opposition papers is insufficient to defeat summary judgment, as plaintiffs failed to submit an unredacted original affidavit of their expert to the Court for in camera inspection or to explain the failure to identify such expert by name (*Capobianco v Marchese*, 125 AD3d 914, 4 NYS3d 127 [2d Dept 2015]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 994 NYS2d 159 [2d Dept 2014]). More importantly, the affidavit is devoid of any discussion regarding Strobel, as is the affirmation of plaintiffs' counsel. Accordingly, the branch of the motion for summary judgment dismissing the complaint against Strobel is granted.

Dated: Riverhead, New York  
July 22, 2016



ARTHUR G. PITTS, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION