

<b>Kinney v Pellegrini</b>
2020 NY Slip Op 33335(U)
October 9, 2020
Supreme Court, Kings County
Docket Number: 523206/2017
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9<sup>th</sup> day of October 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,  
Justice

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ROBERT KINNEY, as Administrator of the Estate of MARIE KINNEY, Deceased,

Plaintiffs,

**DECISION AND ORDER**  
Index No. 523206/2017

-against-

JOHN PELLEGRINI, M.D., RICHARD GOLDBERG, M.D.,  
MARTIN E. ROSEN, M.D., IAN WALL, M.D.,  
GASTROENTEROLOGY ASSOCIATES OF BROOKLYN and  
MOUNT SINAI BROOKLYN (KINGS HIGHWAY HOSPITAL),

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion _____	_____ 1 _____
Amended Affirmation in Support _____	_____ 2 _____
Affirmation in Opposition _____	_____ 3 _____
Affirmation Reply _____	_____ 4 _____

This is a motion brought on by Defendants, John Pellegrini, M.D., Martin Rosen, M.D., Ian Wall, M.D. and Gastroenterology Associates of Brooklyn. Dr. Goldberg, deceased, was never served by Plaintiff. The remaining Defendant neither moved independently nor participated in the current application. Plaintiff submitted no opposition to that portion of the motion set forth on behalf of Dr. Wall and Gastroenterology Associates of Brooklyn and their request for dismissal is granted. After oral argument, the Court determined that an issue of fact exists between the parties as to the care and treatment rendered by Dr. Pellegrini to Marie Kinney and that

portion of the case is continuing. Decision was reserved as to the issues presented by Dr. Rosen. They are addressed in the body of this writing.

This is an action sounding in medical malpractice. Action was commenced in December 2017. The litigation proceeded in the usual course and, ultimately, the current motion practice ensued. The above captioned matter currently appears on the Medical Malpractice Trial Readiness Part's calendar and it is possible that the issues raised herein will become moot, as negotiations between the parties are on-going.

It is undisputed that Ms. Kinney began treating with Dr. Pellegrini, an internist, on August 22, 2001. Her final office visit was on June 29, 2015. Dr. Rosen, a gastroenterologist, was a solo practitioner who had a verbal arrangement with Drs. Pellegrini and Goldberg to see patients at their office from time to time. These would be on referral from Dr. Pellegrini and Dr. Goldberg. Ms. Kinney was seen by Dr. Rosen, at the Pellegrini offices, on May 13, 2014, the only time the two had contact with each other. She was referred, by Dr. Pellegrini, so that the results of a lumbar spine x-ray, "suspicious for pancreatitis", could be clinically correlated and for an examination regarding Dr. Pellegrini's concern regarding IBS. It was determined, at the one visit by Dr. Rosen, that the patient did not have pancreatitis. She was further advised to avoid dairy. Ms. Kinney was diagnosed with ovarian cancer in August of 2015, post-surgery for a perforated colon. It is Plaintiff's claim that Drs. Pellegrini and Rosen failed to diagnose said condition, which led to extensive pain and suffering and death. The hospital appears in the case due to decubitus ulcers Plaintiff developed.

To be entitled to summary judgment as a matter of law pursuant to CPLR §3212, the moving party must make a *prima facie* showing to said judgment by tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact. Once a showing has been made by the moving party, the burden then shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact to require a trial (*see Alvarez v. Prospect Hospital*, 68 NY2d 350 [1986]).

It is undisputed that Plaintiff commenced this action on December 15, 2017, beyond the applicable statute of limitations from the May 13, 2014 visit with Dr. Rosen. Defendant, Dr. Rosen, contends that he is an independent contractor, separate and apart from the Pellegrini practice. It is Defendant's position that the action

is time-barred and must be dismissed as a matter of law. And that, even if the matter is determined to be timely, Dr. Rosen did not depart from applicable standards of care in his treatment of the decedent. Plaintiff, on the other hand, contends that an ostensible agency existed between Drs. Pellegrini and Rosen and that the continuous treatment theory is therefore applicable to the day and the treatment in question. (Neither side contests that the care and treatment rendered by Dr. Pellegrini to Ms. Kinney is continuous and that the commencement of this action, as to him, is therefore timely). Further, it is Plaintiff's contention that the treatment rendered by Dr. Rosen on May 13, 2014 was not within medical standards.

“Although 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, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed” (*Hill v. St. Claire's Hospital*, 67 NY2d 72, 79 [1986]). “Nor is affiliation of a doctor with a hospital or other medical facility, not amounting to employment, alone sufficient to impute the doctor's negligent conduct to the hospital or facility” (*id.*). “Thus, a hospital may not be held for the acts of an anesthetist who was not an employee of the hospital, but one of a group of independent contractors, and when physicians share office space and by agreement service each other's patients for a shared fee, the malpractice of the treating physician will not be imputed to the absent physician, even though it is the latter who bills for the treatment” (*id.*). “Likewise, that a physician is a shareholder, officer or employee of a professional service corporation does not make him vicariously liable for the malpractice of another doctor who is an officer, director and employee of the corporation” (*id.*, quoting *Connell v. Hayden*, 83 AD2d 30, 49-59 [2d Dept 1981]).

“While vicarious liability for medical malpractice generally turns, therefore, on agency or control in fact, we have also . . . recognized as a predicate for malpractice liability apparent or ostensible agency (or, as it is sometimes called, agency by estoppel or by holding out)” (*id.*). “It has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic, by . . . New York courts” (*id.* at 80-81).

Dr. Rosen saw patients in Dr. Pellegrini's offices several times a month. Many, if not all, of the patients seen in said facility were referred to him by Drs. Pellegrini and Goldberg. It is clear that all of the patients of the Pellegrini/Goldberg practice who required a gastroenterological consult were sent to either Dr. Rosen or Dr. Wall. They were seen within the confines of the Pellegrini offices. Their relationship was a continuing one whereby Dr. Rosen maintained a consistent and regular presence at Dr. Pellegrini's office and provided recurrent care and treatment to patients requiring gastroenterology evaluation. The Court is of the opinion that an agency by estoppel, or ostensible agency, was created by the physicians and that the continuous treatment doctrine may be imputed to Dr. Rosen by virtue of this agency arrangement. Thus, the action was commenced in a timely fashion against said moving Defendant.

The Court further holds that a question of fact has been created between the parties as to the actual treatment or care rendered by Dr. Rosen to Ms. Kinney and Defendant's motion to dismiss as to him is DENIED.

The motions of Ian Wall, M.D. and Gastroenterology Associates of Brooklyn is granted, without opposition, and the case pending against them is DISMISSED. The Parties are directed to amend the caption accordingly.

The motions of John Pellegrini, M.D. and Martin Rosen, M.D. are DENIED. The parties are directed to return to the MMTRP on October 19, 2020 for a continued conference.

This constitutes the opinion, decision and order of this court.

ENTER,



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HON. MARSHA L. STEINHARDT  
J.S.C.