

Vaynman v Maimiondes Med. Ctr.

2003 NY Slip Op 30213(U)

September 25, 2003

Supreme Court, Kings County

Docket Number: 15316/97

Judge: David Schmidt

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At an IAS Term, Part 47 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 25TH day of September, 2003

P R E S E N T :

HON. DAVID I. SCHMIDT,
Justice.

..... -X
Felix vVaynman, as Guardian Ad Litem for plaintiff,
GALINA NOVOSYOLOVA, and FELIX VAYNMAN,
individualy,

Plaintiff,

- against -

Index No. 15316/97

MAIMIONIDES MEDICAL CENTER,
PETRA GURTNER, M.D. and DAVID MASEL, M.D.,

Defendants.

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The following papers numbered 1 to 22 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-3, 4-7, 8-9
Opposing Affidavits (Affirmations)_____	10-20
Reply Affidavits (Affirmations)_____	21.22
_____ Affidavit (Affirmation)_____	
Other Papers_____	

Upon the foregoing papers, defendant Maimionides Medical Center (Maimionides) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' action against it. Defendant David L. Masel, M.D. (Dr. Masel) moves for summary judgment dismissing

plaintiffs' action against him. Plaintiffs cross-move, pursuant to 22 NYCRR § 130-1.1(c)(1), for an order imposing sanctions against Dr. Masel and Dr. Gurtner's attorney.

Background Facts

On February **19, 1995**, plaintiff Galina Novosyolova collapsed and was transported to Coney Island Hospital by ambulance. Upon arriving at Coney Island Hospital, Ms. Novosyolova was admitted to the emergency room and examined by a Dr. Jarolinu. Dr. Jarolinu determined that Ms. Novosyolova was unresponsive and requested a consultation by a neurosurgeon. Ms. Novosyolova was then examined by Dr. A. Pilch, a physician at Coney Island Hospital, who diagnosed Ms. Novosyolova as having suffered a brain aneurysm which caused a Grade V subarachnoid hemorrhage.

Given the severity of Ms. Novosyolova's condition, Dr. Pilch determined that Coney Island Hospital lacked the facilities necessary to treat the patient and sought to have her transferred to Maimonides. Accordingly, Dr. Pilch contacted Dr. Masal, a neurosurgeon associated with a private medical group with admitting privileges at both Coney Island Hospital and Maimonides. After discussing the matter with **Dr. Pilch**, **Dr. Masal** agreed to have Ms. Novosyolova transferred to Maimonides. Thereafter, Ms. Novosyolova was transported to Maimonides via ambulance and admitted to the emergency room at Maimonides at approximately 2:50 p.m. on February **19, 1995**. It is undisputed that Dr. Masel signed Ms. Novosyolova's medical chart as the accepting physician for the transfer to Maimonides.

Upon her arrival at Maimonides, Ms. Novosyolova was attended to by Lawrence Farago, M.D., a second-year resident employed by Maimonides. At approximately 8:00 a.m. on February 20, 1995, Dr. Masel examined Ms. Novosyolova and ordered a fluid challenge test due to the fact that her blood pressure was low. Dr. Masel also canceled an angiogram that Ms. Novosyolova was scheduled to undergo based upon his belief that she would not survive the procedure due to her low blood pressure. Although Dr. Masel continued to be listed as the admitting physician on Ms. Novosyolova's medical chart, the record before the court indicates that the fluid challenge test was the only treatment which Dr. Masel administered to Ms. Novosyolova during the course of her stay at Maimonides.

At approximately 6:00 p.m. on February 20, 1995, Ms. Novosyolova was transferred from the emergency room to the pulmonary intensive care unit at Maimonides. Between February 20 and March 31, 1995, Ms. Novosyolova remained at Maimonides under the care of defendant Petra Gurtner, M.D. (Dr. Gurtner). Although Dr. Gurtner retained privileges at Maimonides, it is undisputed that she was not employed by the hospital but, rather, was associated with the same private medical group as Dr. Masel. On March 31, 1995, Ms. Novosyolova was transferred from Maimonides to New York University Medical Center. A Maimonides Physician Attestation Form generated on April 6, 1995 listed Dr. Masel as Ms. Novosyolova's admitting and discharging physician. However, Dr. Masel did not sign this form.

On April 3, 1995, Ms. Novosyolova underwent a cerebral angiogram and clipping of the right superior hypophyseal artery aneurysm at NYU Medical Center. On May 12, 1995, Ms. Novosyolova was transferred to a skilled nursing facility. Presently, Ms. Novosyolova resides at home with the assistance of a 24-hour-a-day health aide.

Ultimately, Ms. Novosyolova and her husband Felix Vaynman (plaintiffs) brought the instant medical malpractice action against Dr. Masel, Dr. Gurtner, and Maimonides. Maimonides and Dr. Masel now move separately for summary judgment dismissing plaintiffs' action against them.

Claims Against Maimonides

In moving to dismiss plaintiffs' action against it, Maimonides points to the undisputed fact that it did not employ Dr. Masel or Dr. Gurtner. Under the circumstances, Maimonides reasons that it cannot be held liable for any malpractice that might have been committed by these private attending physicians. In the alternative, Maimonides argues that, even if it can be held responsible for the acts or omissions of Dr. Masel or Dr. Gurtner, there is no basis for plaintiffs' claims against Maimonides inasmuch as the care provided by Dr. Masel and Dr. Gurtner conformed with good and accepted medical practice. Finally, Maimonides contends that plaintiffs' claims against it must be dismissed inasmuch as Ms. Novosyolova's injuries were caused solely by a brain aneurysm that occurred before she was admitted to Maimonides and nothing that Maimonides did or did not do had any effect upon these injuries.

In opposition to Maimonides' motion, plaintiffs' argue that Maimonides may be held liable for Dr. Masel and Dr. Gurtner's alleged malpractice because Ms. Novosyolova did not enter Maimonides seeking treatment from a specific physician but, rather, was admitted into Maimonides through its emergency room. Plaintiffs contend that there are issues of fact regarding whether or not Dr. Masel and Dr. Gurtner's treatment of Ms. Novosyolova conformed with good and accepted medical practice and whether their alleged malpractice caused further injuries to Ms. Novosyolova. Finally, plaintiffs argue that, irrespective of any negligence on the part of Dr. Masel or Dr. Gurtner, Maimonides is liable for the negligence of its employee, Dr. Farago. In particular, plaintiffs maintain that Dr. Farago was negligent in failing to perform an angiogram during the 17 hours between Ms. Novosyolova's initial admission to Maimonides and her examination by Dr. Masel on the morning of February 20, 1995.

Generally speaking, "[i]n order for a hospital to be liable for the malpractice of physicians, it must be shown that the physicians performed their services under the hospital's control or supervision" (*Klippel v Rubinstein*, 300 AD2d 448, 449). Here, it is undisputed that neither Dr. Masel nor Dr. Gurtner were employed, supervised, or controlled by Maimonides.

However, an exception to this general rule has been established in a line of cases beginning with the Appellate Division, Third-Department's decision in *Mduba v Benedictine Hosp.* (52 AD2d 450). Specifically, when a patient enters an emergency room seeking

treatment from a hospital rather than a specific physician and is ultimately treated by doctors furnished but not employed by the hospital, the hospital is liable for the malpractice committed by emergency room physicians. This line of cases is based upon the principle that, when a hospital holds itself out to the public offering and rendering hospital services, patients should not be bound by “secret limitations contained in a private contract between the hospital and the doctor” (*Mduba*, 52 AD2d at 453).

Here, plaintiffs maintain that the *Mduba* line of cases is applicable under the facts of this case. The court disagrees with this contention. It is true that Ms. Novosyolova was admitted to Maimonides through its emergency room. It is also true that plaintiffs did not specifically choose Dr. Masel or Dr. Gurtner to treat Ms. Novosyolova at the time she was admitted to Maimonides. However, this is not a case where the patient entered the emergency room from “off the street” and was treated by doctors furnished by the hospital. Rather, Ms. Novosyolova was transferred to Maimonides from Coney Island Hospital *after* Dr. Masel was contacted by Ms. Novosyolova’s treating physician at Coney Island Hospital and agreed to accept the **transfer** (*see Cirella v Central Gen. Hosp.*, 217 AD2d 680). Thus, at the time Ms. Novosyolova entered the emergency room at Maimonides, her treating physicians at Maimonides, who were not emergency room doctors, had already been arranged for and selected. For its part, Maimonides did not have any control over this transfer or input into which physicians would be treating Ms. Novosyolova once she arrived at Maimonides.

Furthermore, Ms. Novosyolova remained at Maimonides for a six-week period during which time Dr. Gurtner oversaw her treatment. Indeed, Feliks Vaynman acknowledged at his deposition that he had daily discussions with Dr. Gurtner regarding his wife's treatment and condition. In the court's view, to hold Maimonides vicariously liable for Dr. Gurtner's alleged malpractice over such an extended period would stretch the *Mduba* doctrine well beyond its original intent.

Finally, there is no basis for plaintiffs' claim that Maimonides may be liable for Ms. Novosyolova's injuries based upon the alleged negligence of Dr. Farago. Plaintiffs claim that Dr. Farago should have performed an angiogram on Ms. Novosyolova during the 17 hours that he oversaw her treatment. However, it is clear that Dr. Farago, a second-year resident, had no such authority. In fact, Dr. Farago testified that an angiogram had been scheduled for the morning of February 20, 1995 but it was cancelled on Dr. Masel's orders. "A hospital is sheltered from liability in those instances where its employees follow the directions of the attending physician . . . unless that doctor's orders 'are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders'" (*Walker v Betancourt*, 283 AD2d 223, 224, quoting *Wamey v Haddad*, 237 AD2d 123). Here, it cannot be said that Dr. Masel's order to cancel the angiogram based upon Ms. Novosyolova's low blood pressure condition were "clearly contraindicated."

Under the circumstances, plaintiffs' claims against Maimonides must be dismissed.

Claims Against Dr. Masel

Dr. Masel moves for summary judgment dismissing plaintiffs' action against him. In *so* moving, Dr. Masel notes that the only treatment which he administered to Ms. Novosyolova was the aforementioned fluid challenge test due to the fact that her blood pressure was low. Dr. Masel further argues that ordering this test was appropriate and within applicable standards of medical care. Under the circumstances, Dr. Masel reasons that there is no basis for plaintiffs' claims against him. In support of this argument, Dr. Masel submits an expert affirmation by James E.O. Hughes, M.D., a physician licensed to practice medicine in the State of New York and board-certified in neurological surgery, in which he avers that "[o]rdering the fluid challenge test was appropriate and in accordance with good and accepted medical standards of care given the patient's low blood pressure at the time." Dr. Hughes further asserts that "[n]ot performing surgery on February 19 or February 20, 1995 was appropriate and did not cause Ms. Novosyolova's condition."

In opposition to Dr. Masel's motion, plaintiffs contend that there are factual issues regarding whether or not Dr. Masel oversaw Ms. Novosyolova's treatment during the length of her stay at Maimonides. In this regard, plaintiffs point out that Dr. Masel admitted Ms. Novosyolova to Maimonides as attending physician and that Dr. Masel was listed as the discharging physician on the Maimonides Physician Attestation Form. Plaintiffs further argue that there are factual issues regarding whether this treatment departed from good and accepted standards of medical practice. In support of **this** claim, plaintiffs submit an

affirmation by a board certified neurosurgeon in which it is alleged that an arteriogram should have been performed upon Ms. Novosyolova to check for a vasospasm, that Ms. Novosyolova's condition required intra cranial pressure monitoring and the placement of a ventricular drain, and that Ms. Novosyolova should have been operated upon within 24 to 48 hours after her admission to the hospital.

The evidence before the court, including Dr. Masel's affidavit and deposition testimony and Feliks Vaynman's deposition testimony, indicates that Dr. Masel's involvement in the treatment of Ms. Novosyolova was limited to accepting her transfer from Coney Island Hospital upon her arrival at Maimonides, ordering a fluid challenge test, and cancelling an angiogram due to Ms. Novosyolova's low blood pressure. Plaintiffs have failed to demonstrate that this treatment failed to comply with good and accepted medical standards of care. With respect to the fluid test, Dr. Hughes' affirmation indicates that this treatment was appropriate given Ms. Novosyolova's low blood pressure condition, a contention not disputed by plaintiffs' own expert. Furthermore, while plaintiffs' expert maintains that Dr. Masel was negligent in failing to perform an angiogram on Ms. Novosyolova "within the first 24 to 48 hours" of her arrival at Maimonides, the record indicates that Dr. Masel handed over treatment of Ms. Novosyolova to Dr. Gurtner approximately 17 hours after her admission, well before this 24 to 48 hour period expired. In any event, the "bare conclusory" allegations made by plaintiffs' expert are insufficient to demonstrate that Dr. Masel's determination, that Ms. Novosyolova's low blood pressure

condition made it too dangerous to perform an angiogram deviated from accepted standards of care (*Arias v Flushing Hosp. Med. Ctr.*, 300 AD2d 610,611). Indeed, plaintiffs' expert does not directly address this critical issue.

Finally, the fact that Dr. Masel's name appears on the Maimonides Physician Attestation Form as the discharging physician is insufficient to raise an issue of fact regarding whether Dr. Masel oversaw Ms. Novosyolova's treatment since Dr. Masel did not sign this form (*Conti v Valeriona*, 259 AD2d 655,656).

Under the circumstances, plaintiffs' action against Dr. Masel must be dismissed.

Plaintiffs' Cross Motion for Sanctions

Plaintiffs cross-move, pursuant to 22 NYCRR 130-1.1(c)(1) for sanctions against Dr. Masel and Dr. Gurtner's attorney, Alexander Rosati, **Esq.**, and the law firm of Martin, Clearwater and Bell. In so moving, plaintiffs contend that Mr. Rosati's December 28, 2001 motion seeking sanctions against plaintiffs was a frivolous motion.

Plaintiffs' cross motion is denied. Given the unusual procedural history of this matter, the court cannot say that Mr. Rosati's previous motion seeking sanctions against plaintiffs based upon their attempt to revive their action against Dr. Gurtner was *so* "completely without merit in law" *so* as to itself warrant the imposition of sanctions (*Retina Assocs. of Long Is., P.C., v Rosberger*, 299 AD2d 533,534).

Summary

In summary, the court rules as follows: (1) Maimonides' motion for summary judgment dismissing plaintiffs' action against it is granted; (2) Dr. Masel's motion for summary judgment dismissing plaintiffs' action against him is granted; and (3) plaintiffs' cross motion for sanctions is denied.

Th's constitutes the decision and order of the court.

E N T E R,

J. S. C. HON. DAVID I. SCHMIDT