

Coore v Franklin Hospital Medical Center

2004 NY Slip Op 30102(U)

June 7, 2004

Supreme Court, New York County

Docket Number:

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Stanley E. Hefner
01 11627/2000

PART 29

COORE, HEATHER
VS
FRANKLIN HOSPITAL

SEQ

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION.**

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/7/04 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
HEATHER COORE,

Plaintiff,

Index No.: 111627/00

-against-

FRANKLIN HOSPITAL MEDICAL CENTER,
SHARON **CASSIDY**, M.D., **ALAN BERGER**, M.D. and
KAREEM E. TANNOUS, M.D.,

Defendants.

-----x
Sklar, J.:

Defendant Kareem Tannous, M.D. moves for summary judgment dismissing this medical malpractice action as to him. Franklin Hospital (“the hospital”) via cross motion **also** seeks dismissal of the action as to it. The essence of the cross motion is that hospital is not vicariously liable for Dr. Tannous and that in any event Dr. Tannous is not liable.

The applications are opposed solely by codefendant **Alan Berger**, M.D. but only to the extent that the pleadings allege departure from standards of good and accepted medical practice (first cause of action). Dr. Berger does not oppose dismissal of the lack of informed consent cause of action (second cause of action) presumably because it is evident from the plaintiff’s bills of particulars that plaintiff’s “lack of informed consent” claim is actually asserting a claim for medical negligence under the first cause of action. Specifically plaintiff asserts that she was not told that if a physician prescribed an excessive dose of oral contraceptives the patient could suffer adverse consequences, namely “arterial infarct, embolization, and thrombosis”. Accordingly the second cause of action is dismissed as to Dr. Tannous and the hospital.

As to the first cause of action Dr. Tannous' application is denied. As the movant he in the first instance has the burden of prima facie establishing his entitlement to summary judgment by eliminating all material issues of fact raised by the pleadings. He has failed to do this.

Dr. Berger testified that he first treated plaintiff on September 3, 1999 (before she went to the emergency room later that evening). At that first visit plaintiff complained of dysfunctional bleeding. Dr. Berger wrote on the chart "rule out fibroids" and testified that based on his examination "[y]ou can make [sic] presumed diagnosis of fibroids or adenomyosis". EBT p 26 At that time plaintiff was on birth control pills that had been prescribed by another doctor, Dr. Cassidy. Berger EBT pp 33 Dr. Berger testified that he did not tell plaintiff to stop the pills or increase them and assumed she only took one a day. Ibid p 44 Plaintiff at her deposition asserted that before she went to the emergency room Dr. Berger had, evidently on the evening of September 3, 1999, instructed her to take a triple dose of birth control pills for three days, then two a day for two days and then to take one a day for the bleeding and to go to the defendant hospital's emergency room where Dr. Berger had privileges if there were an emergency. Coore EBT p 96 Coore testified that Berger had given her extra birth control pills earlier that day. Ibid P 97

The bill of particulars (at ¶ 1 m) asserts, inter alia, that Dr. Tannous, who saw plaintiff in the hospital's emergency room, was negligent in continuing the oral contraceptive three times a day for dysfunctional bleeding, and in failing to evaluate the propriety of high dose hormonal therapy given, inter alia, plaintiff's sustained hypertension.

According to the emergency room record plaintiff presented with high **blood** pressure which dropped while she was there but was still high. Plaintiff was discharged from the emergency room at 2:45 **A.M.** on Saturday September 4, 1999 with instruction to take “[b]irth control pill, one tab 3x/day till bleeding stopped”. She was further instructed to call “Gyn”, meaning her private gynecologist in the “**A.M.**”. See, hospital chart Plaintiff testified that the emergency room doctor told her to take the pills 3x a day for 3 days, twice a day for two days and then once a day. EBT p 110

According to plaintiff (See, p 110) she contacted her private gynecologist, codefendant Dr. Berger, informed him of her emergency room visit and of Dr. Tannous’ instructions regarding the birth control pills, and Dr. Berger allegedly confirmed that she should follow them. Dr. Berger denies that plaintiff contacted him at that time.

About 12 days later plaintiff experienced the signs and symptoms now attributed to a stroke and was admitted on September 15 to the same hospital. She was transferred several days later on September 18 to New York University Hospital for further evaluation and treatment. According to plaintiff’s bill of particulars as to the hospital it was vicariously liable for Dr. Tannous and for a Dr. Mohammed Husain who during the September 15-18 hospitalization evidently erroneously diagnosed plaintiff as having a migraine headache and brain tumor and thus allegedly failed to render timely and appropriate treatment.

According to Dr. Tannous’ expert, who fails to comment on whether plaintiff’s decreased high blood pressure during her emergency room visit was normal (Dr. Tannous conceded it was not during his deposition but surmised that it could have been due to anxiety on plaintiff’s part. See, Tannous EBT pp 128-133, 119), Dr. Tannous’ treatment was within

accepted standards of medical practice and could not have caused injury to plaintiff because plaintiff allegedly contacted her own physician, Dr. Berger, only hours after she was discharged from the emergency room and thus could only have taken one birth control pill before talking to Dr. Berger.

In opposition, Dr. Berger's counsel observes that Dr. Berger's position is that plaintiff did not contact him that morning or any time before September 13, other than to discuss ultrasound results. Dr. Berger testified that he never prescribed or told plaintiff to take a triple dose of birth control pills, nor was he aware of a physician triple dosing the birth control pills for plaintiff. Berger EBT pp41-44, 67 Dr. Berger's expert opined that it was a departure in light of the patient's high blood pressure ~~or~~ Dr. Tannous to have prescribed three birth control pills a day.

While Dr. Berger's expert's affidavit is rather conclusory, it is no less conclusory than those of Dr. Tannous' and the hospital's experts. As previously noted Dr. Tannous' **expert** fails to comment on whether plaintiff's last recorded blood pressure was high, and Dr. Tannous testified that it was high. I further note that Dr. Tannous testified (EBT pp 59-65) that three birth control pills per day is a dose given only in rare situations, and only **if** the patients is followed "correctly". Dr. Berger testified (EBT p 42) that a triple dose would be prescribed by him only when a patient who had dysfunctional bleeding had a work-up ruling out fibroids, adenomyosis and/or pregnancy related complications. At the time Dr. Berger saw plaintiff on September 3 and at the time of plaintiff's release from the emergency room Dr. Berger had not yet ruled out fibroids (See, Berger EBT p 26), and a sonogram was not performed until September 7, 1999. Dr. Tannous who performed a physical exam on plaintiff before directing her to take the triple

dose of birth control pills believed that his finding of an irregular uterus was probably due to fibroids. See, Tannous EBT pp 79-80 A sonogram performed on September 7, 1999 revealed fibroids, which were the probable cause of plaintiff's abnormal bleeding (Cassidy, EBT pp 53, 45) which could be treated surgically and/or with Motrin and iron therapy (Ibid pp 55, 59) Dr. Berger testified (EBT pp 47-48) that he would not use birth control pills to treat fibroids.

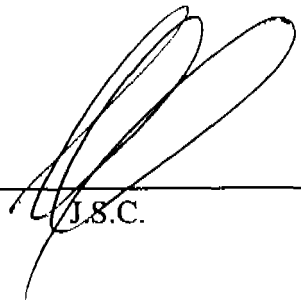
It is clear from the foregoing that there is an issue of fact as to the propriety of Dr. Tannous' treatment. Moreover Dr. Tannous did not address the issue raised by the bill of particulars as to his failure to evaluate the propriety of high dose hormonal therapy given plaintiff's sustained hypertension. Dr. Tannous' expert's legal conclusion that the causal link was broken because Dr. Tannous told plaintiff to followup with her gynecologist is without merit. If plaintiff did not in fact follow-up with Dr. Berger as is asserted by Dr. Berger then there is an issue as to plaintiff's comparative negligence which would not as a matter of law exonerate Dr. Tannous for allegedly improperly having plaintiff take the triple dose. And, if plaintiff called Dr. Berger and he confirmed the adequacy of Dr. Tannous' advice, as is alleged by plaintiff, that would not exonerate Dr. Tannous for Dr. Berger's subsequent malpractice. Accordingly Dr. Tannous' application to dismiss the first cause of action is denied.

The hospital's application for summary judgment dismissing the first *cause of action* is also denied. The hospital fails to address any of the allegations in the pleadings relating to the September 15, 1999 hospitalization. In addition the hospital has failed to establish as a matter of law that it was not Dr. Tannous' de facto employer, and thus it has not established that it is entitled to dismissal of the claims arising from the emergency room treatment rendered by Dr. Tannous between September 3 and 4, 1999.

Dr. Tannous was a partner in a private practice which had a contractual relationship with the hospital to treat, inter alia, patients in its emergency who needed a ob/gyn consultation. Tannous EBT, p 24-25 Dr. Tannous also saw his own private patients at the hospital. Tannous EBT p 22 Pursuant to his contractual relationship he worked at the hospital one set day a week from eight in the morning to eight at night. Id 20 For that **work** the hospital issued him a paychrek. Id 20-21 According to the contract the hospital guaranteed Dr. Tannous that he would earn at least \$80,000 for his work in the emergency room. It appears that the hospital billed for the treatment rendered by Dr. Tannous. See, cross motion, exh E ¶ "1" Further, it appears that plaintiff believed that Dr. Tannous was an emergency room physician [Sec, Coore EBT p 110], a belief that could be viewed as reasonable in light of the fact that he was assigned to her since he was on-call to consult and treat gynecological patients in the hospital's emergency room pursuant to his contract with the hospital.

In conclusion the motion and cross motion are granted solely to the extent of dismissing the **lack** of informed consent cause of action as to Dr. Tannous and the hospital but are otherwise denied.

Settle order.
 Dated: 6/7/04
FILED
 JUN 16 2004
 COUNTY CLERK'S OFFICE
 NEW YORK



 J.S.C.