

Brown v Speaker

2006 NY Slip Op 30533(U)

April 11, 2006

Supreme Court, New York County

Docket Number: 105230/02

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

CRAIG BROWN,

Plaintiffs,

Index No.: 105230/02

MOTION SEQ. NO. 04 - 06

MOTION CAL. NO. _____

-v-

MARK G. SPEAKER, M.D., LASER AND CORNEAL
SURGERY ASSOCIATES, P.C., TLC LASER EYE
CENTER and WILLIAM TULLO, O.D.,

Defendants.

FILED

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The following papers, 1 - 89, were read on this motion by defendant TLC Laser Eye Center for summary judgment dismissing the complaint insofar as asserted against it; separate motion by defendant William Tullo, O.D. for summary judgment dismissing the complaint insofar as asserted against him; and separate motion by defendant Mark G. Speaker, M.D. for an order striking certain boilerplate claims raised in plaintiff's supplemental bill of particulars, and directing plaintiff to amend their bill of particulars so as to set forth specifics as to claims relating to defendants' violation of FDA regulations, as well as regulations and limits promulgated by the manufacturer of the LASIK machine at issue.

Papers Numbered

MOTION SEQUENCE NUMBERS 04

Notice of Motion /Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

1-20

21-32

33-40

41-43

MOTION SEQUENCE NUMBER 05

Notice of Motion /Order to Show Cause - Affidavits - Exhibits -

Memorandum Of Law

Answering Affidavits - Exhibits _____

Replying Affidavits _____

44-56

57-68

69

MOTION SEQUENCE NUMBERS 06

Notice of Motion /Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits _____

Replying Affidavits _____

70-77
78-89

Cross-Motion: Yes No

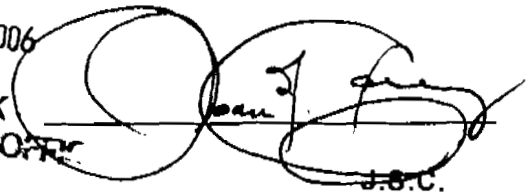
It is hereby ordered that the aforementioned motions are decided in accordance with the accompanying decision and order

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Dated: 04/11/2006

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK Part 40D

CRAIG BROWN,

Plaintiff,

Index No.: 105230/02

-against-

DECISION & ORDER

MARK G. SPEAKER, M.D., LASER AND CORNEAL
SURGERY ASSOCIATES, P.C., TLC LASER EYE
CENTER and WILLIAM TULLO, O.D.,

Defendants.

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JOAN B. CAREY, J.:

Introduction

Motion by defendant TLC Laser Eye Center for summary judgment dismissing the complaint insofar as asserted against it; separate motion by defendant William Tullo, O.D. for summary judgment dismissing the complaint insofar as asserted against him; and separate motion by defendant Mark G. Speaker, M.D. for an order striking certain boilerplate claims raised in plaintiff's supplemental bill of particulars, and directing plaintiff to amend his bill of particulars so as to set forth specifics as to claims relating to defendants' violation of FDA regulations, as well as regulations and limits promulgated by the manufacturer of the LASIK machine at issue.

Facts & Procedural Posture

Plaintiff, Craig Brown, visited the TLC Laser Eye Center (hereinafter the Center) a number of times beginning in June of 1999, expressing an interest in undergoing LASIK surgery to correct his visual impairment. On December 15, 1999, defendant William Tullo, O.D., an optometrist, examined plaintiff at the Center's facility to determine if he was a candidate for this procedure. Due to the high degree of nearsightedness that plaintiff exhibited, Dr. Tullo recommended that plaintiff consider undergoing an alternative procedure. Notwithstanding, Dr. Tullo ultimately concluded that plaintiff was a candidate for the LASIK surgery.

Following the examination by Dr. Tullo, plaintiff was further examined by defendant Mark G. Speaker, M.D., an ophthalmologist to whom he was referred by Dr. Tullo. It appears that Dr. Speaker, much like Dr. Tullo, recommended that plaintiff consider undergoing an alternative procedure. Nevertheless, Dr. Speaker confirmed that plaintiff was an acceptable LASIK candidate.

The surgery at issue was performed by Dr. Speaker on January 21, 2000, at the Center. It is noted that plaintiff executed an informed consent form prior to undergoing the procedure. The aforementioned form was also executed by Dr. Speaker, as well as a witness.

Plaintiff alleges that as a result of the LASIK surgery he suffered extensive visual problems. Plaintiff commenced the

instant action against the defendants to recover damages for medical malpractice and lack of informed consent. The plaintiff alleges, among other things, that the defendants were negligent in the performance of his LASIK surgery because the procedure was contraindicated under the circumstances and that the risks associated with the surgery were not properly disclosed to him.

Defendants the Center and William Tullo, O.D. separately move for summary judgment dismissing the complaint insofar as asserted against them. Additionally, defendant Mark G. Speaker, M.D. presently moves for an order striking certain boilerplate claims raised in plaintiff's supplemental bill of particulars, and directing plaintiff to amend his bill of particulars so as to set forth specifics as to claims relating to defendants' violation of FDA regulations, as well as regulations and limits promulgated by the manufacturer of the LASIK machine at issue.

Analysis

I. William Tullo, O.D.

Dr. Tullo moves for summary judgment dismissing the complaint, along with all cross-claims, as asserted against him, arguing that dismissal is warranted because the damages being alleged by plaintiff all result from Dr. Speaker's performance of LASIK surgery. Dr. Tullo contends that the determination that plaintiff was an appropriate candidate for LASIK surgery was a medical

decision made by plaintiff's surgeon, Dr. Speaker, and all calculations necessary for the performance of such surgery were also made at the sole discretion of Dr. Speaker. Therefore, according to Dr. Tullo, he cannot be held liable for the alleged negligent performance of plaintiff's surgical procedure. Dr. Tullo further argues that he is entitled to dismissal of plaintiff's cause of action for lack of informed consent as he did not perform the LASIK procedure, and, thus, was not responsible for obtaining plaintiff's informed consent relating to same.

With respect to Dr. Tullo's involvement in the performance of plaintiff's surgery, he argues that absent from the record before this court is any evidence that he possessed decision making authority concerning any aspect of plaintiff's LASIK procedure. Notwithstanding, the record is to the contrary. According to Dr. Tullo's deposition testimony, the purpose of performing an initial screening of patients at the Center prior to being seen by an ophthalmologist was "to rule out people who are absolute non-candidates." Based upon such testimony, this court finds that issues of fact exist with respect to whether plaintiff should have been advised by Dr. Tullo following his initial screening that he was not a suitable candidate for the LASIK procedure.

Based upon the foregoing, Dr. Tullo has failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him with

respect to those claims concerning the negligent performance of plaintiff's LASIK Surgery.¹ Accordingly, that portion of Dr. Tullo's motion seeking dismissal of plaintiff's claim relating to the negligent performance of his LASIK surgery is denied.

Lastly, with respect to Dr. Tullo, he is entitled to dismissal of plaintiff's cause of action for lack of informed consent as he did not perform plaintiff's LASIK procedure (see Domaradzki v Glen Cove Ob/Gyn Assoc., 242 AD2d 282 [2d Dept. 1997]; Spinosa v Weinstein, 168 AD2d 32 [2d Dept. 1991]).

II. TLC Laser Eye Center

Defendant Center moves for summary judgment dismissing the complaint insofar as asserted against it arguing that it cannot be held vicariously liable for the purported medical malpractice committed in connection with plaintiff's treatment at the facility.

¹ It appears that because Dr. Tullo's motion sought dismissal of the complaint as asserted against him on the ground that he did not possess any decision making authority concerning any aspect of plaintiff's LASIK procedure, he did not feel the necessity to submit an affidavit of a medical expert setting forth that the care that he rendered to plaintiff was in accordance with good and accepted standards of medical practice. The court notes that even if Dr. Tullo had submitted such an affidavit, based upon the affidavit of plaintiff's expert submitted in opposition to the motion, an issue of fact would have been created resulting in the denial of summary judgment. Plaintiff's expert, a licensed optometrist, averred that plaintiff departed from accepted standards of optometric care by advising plaintiff that he was a candidate for LASIK surgery, as well as referring him to an ophthalmologist for the performance of the surgery, when he was clearly not a suitable candidate.

The Center contends that Dr. Speaker and Dr. Tullo were independent contractors of the Center, and, thus, it may not be held vicariously liable for their alleged malpractice.

Initially, the Center failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it, as it did not set forth sufficient evidence demonstrating that Dr. Speaker and Dr. Tullo were independent contractors of the Center, as opposed to employees.² Since issues of fact exist as to whether Doctors Speaker and Tullo are employees or independent contractors, summary judgment is improper (see Campanelli v. Flushing Ultrasound Services, 287 AD2d 428 [2d Dept. 2001]; Santiago v. Hamilton Archer, 136 AD2d 690 [2d Dept. 1988]).

In any event, even if the Center had sufficiently demonstrated that Dr. Speaker and Dr. Tullo were, in fact, independent contractors, the principle of ostensible agency or agency by estoppel has been applied by New York courts to hold a hospital or

² It is noted that annexed to the Center's affirmation in reply to the opposition papers submitted by plaintiff and defendants Dr. Speaker and Laser and Corneal Surgery Associates, P.C. was a "Medical Director Agreement" executed by Dr. Speaker, which sets forth that Dr. Speaker was acting as an independent contractor in the performance of that Agreement. However, as such evidence seeks to remedy basic deficiencies in the Center's prima facie showing rather than address arguments contained in plaintiff's opposition papers it will not be considered in the determination of the instant motion (see Adler v. Suffolk County Water Authority, 306 AD2d 229 [2d Dept. 2003]; Miqdol v. City of New York, 291 AD2d 201 [1st Dept. 2002]).

other medical treatment facility liable for the malpractice of a medical practitioner providing services at that facility, despite that practitioner's status as an independent contractor, where medical treatment was sought by the plaintiff from the facility, as opposed to the particular practitioner (see Hill v. St. Clare's Hospital, 67 NY2d 72 [1986], citing Hannon v. Siegel-Cooper Co., 167 NY 244 [1901]; Malcom v. Mount Vernon Hospital, 309 AD2d 704 [1st Dept. 2003]; Soltis v. State of New York, 172 AD2d 919 [3d Dept. 1991]; Santiago v. Archer, 136 AD2d 690 [2d Dept. 1988]; Lanza v. Parkeast Hospital, 102 AD2d 741 [1st Dept. 1984]; Mduba v. Benedictine Hospital, 52 AD2d 450 [3d Dept. 1976]). The aforementioned agency principle is applicable where the plaintiff reasonably believed that the medical practitioner was acting at the facility's behest (see Malcom v. Mount Vernon Hospital, supra; Soltis v. State of New York, supra).

The evidence submitted in support of the Center's motion, including the injured plaintiff's deposition testimony, indicates that he sought treatment from the Center and not from any particular optometrist or ophthalmologist. Moreover, no evidence has been submitted that would demonstrate, as a matter of law, that plaintiff could not have reasonably believed that Dr. Speaker or Dr. Tullo were acting at the behest of the Center. Therefore, triable issues of fact also exist with respect to whether the Center may be vicariously liable on the ground of apparent or

ostensible agency for the alleged malpractice of Dr. Speaker and Dr. Tullo. Based upon the foregoing, the Center's motion for summary judgment is denied.

III. Mark G. Speaker, M.D.

Dr. Speaker moves for an order striking certain boilerplate claims raised in plaintiff's supplemental bill of particulars, and directing plaintiff to amend his bill of particulars so as to set forth specifics as to claims relating to defendants' violation of FDA regulations, as well as regulations and limits promulgated by the manufacturer of the LASIK machine at issue.

It is well settled that "[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at the trial" (Twiddy v. Standard Mar. Transp. Servs., 278 AD2d 578 [1st Dept. 1990]; see also Garrett v. Comm. Gen. Hosp. Of Greater Syracuse, 288 AD2d 928 [4th Dept. 2001]; Graves v. County of Albany, 278 AD2d 578 [3d Dept. 2000]; Bouton v. County of Suffolk, 125 AD2d 620 [2d Dept. 1986]). Further, a bill of particulars must clearly detail the specific acts of negligence attributed to each defendant (see Felock v. Albany Med. Ctr. Hosp., 258 AD2d 772 [3d Dept. 1999]; Miccarelli v. Fleiss, 219 AD2d 469 [1st Dept. 1995]).

Plaintiff details the specific acts of negligence attributed to Dr. Speaker in his supplemental amended bill of particulars.

However, the supplemental amended bill of particulars also contains the following language, which is overbroad and vague: "the defendant . . . [was] negligent in the services rendered for and on behalf of plaintiff in failing to use reasonable care; . . . in departing from accepted standards in the procedures and treatment performed; [and] in failing to follow appropriate practice." Plaintiff is directed to amend his bill of particulars within 20 days of service upon his counsel of a copy of this order with notice of entry, eliminating the surplusage set forth above.

Furthermore, as plaintiff alleges that Dr. Speaker, in the performance of his surgery, violated FDA regulations, as well as the rules promulgated by the manufacturer of the LASIK machine at issue, Dr. Speaker is entitled to the particulars from plaintiff regarding those specific rules and regulations (see Liga v. Long Island Rail Road, 129 AD2d 566 [2d Dept. 1987]; Brady v. Benedictine Hosp., 74 AD2d 937 [3d Dept. 1980]). Therefore, plaintiff is directed to amend his bill of particulars, within 20 days of service upon his counsel of a copy of this order with notice of entry, so as to set forth specifics as to the FDA regulations allegedly violated by Dr. Speaker in the performance of plaintiff's surgery, as well as those regulations and limits promulgated by the manufacturer of the LASIK machine at issue.

Conclusion

Based on the foregoing, it is hereby

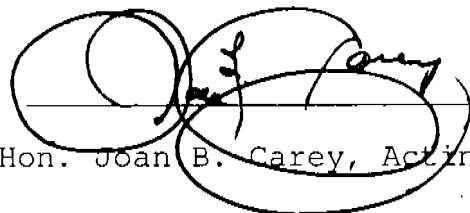
ORDERED that the motion for summary judgment dismissing the complaint insofar as asserted against William Tullo, O.D., is granted to the extent that plaintiff's medical malpractice cause of action premised upon Dr. Tullo's alleged failure to obtain informed consent from plaintiff is dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that the motion for summary judgment dismissing the complaint insofar as asserted against TLC Laser Eye Center is denied; and it is further,

ORDERED that defendant Mark G. Speaker, M.D.'s motion is granted to the extent that plaintiff is directed to amend his bill of particulars within 20 days of service upon his counsel of a copy of this order with notice of entry (i) eliminating the overbroad and vague allegations of negligence as set forth above; and (ii) setting forth specifics as to the FDA regulations allegedly violated by Dr. Speaker in the performance of plaintiff's surgery, as well as those regulations and limits promulgated by the manufacturer of the LASIK machine at issue; and it is further,

ORDERED that counsel for all parties are to appear before the court on May 26, 2006, at 9:30am, at 111 Centre Street, room 572, Part 40D, for a pretrial conference.

Date: 4-11-2006



Hon. Joan B. Carey, Acting JSC

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