Ramos v Columbia Presbyt. Med. Ctr.

2007 NY Slip Op 30468(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0111263/2004

Judge: Eileen Bransten

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SCANNED ON 4/2/2007

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

Eileen Branstein

PART 6

Index Number : 111263/2004

RAMOS, ANA

VS

COLUMBIA PRESBYTERIAN MEDICAL

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 111263/04

MOTION DATE 1/23/07

MOTION SEQ. NO. 003

MOTION CAL. NO. ______

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum Decision.

FILED
APR 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3-22-07

J.S.C.

HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX
---X
ANA RAMOS,

Plaintiff,

-against-

Index No. 111263/04
Motion Date: 1/23/07
Motion Seq. No: 003

COLUMBIA PRESBYTERIAN MEDICAL CENTER, COLUMBIA PRESBYTERIAN EMERGENCY DEPARTMENT, COLUMBIA PRESBYTERIAN RADIOLOGY, COLUMBIA PRESBYTERIAN ORTHOPEDIC CLINIC, JOHN DOE, M.D. #1, JOHN DOE, M.D. #2, LARRY M. NEUMAN, M.D., and HEIGHTS MEDICAL CARE, P.C.,

Defendants.
---X
PRESENT: EILEEN BRANSTEN, J.

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Pursuant to CPLR 3212, defendants Larry M. Neuman, M.D. ("Dr. Neuman") and Heights Medical Care, P.C. ("Heights") move for summary judgment dismissal of the action commenced by plaintiff Ana Ramos ("Ms. Ramos"). Plaintiff does not the oppose the motion, but defendant New York-Presbyterian Hospital ("the Hospital") – served herein as Columbia Presbyterian Medical Center, Columbia Presbyterian Emergency Department, Columbia Presbyterian Radiology and Columbia Presbyterian Orthopedic Clinic ("the Clinic") – does.

Background

On February 5, 2002, Ms. Ramos was struck by a car while crossing the street in front of her house. Affirmation in Support of Motion ("Aff."), at ¶ 7. She presented at the Hospital, where doctors diagnosed her with a comminuted left-wrist fracture (a fracture in

which the bone is broken in several different places). *Id.* They placed her in a sugar tong splint and referred her to the Clinic. *Id.*

On February 12, 2002, Ms. Ramos went to the Clinic, where she underwent x-rays that revealed "acceptable alignment" of her wrist. Aff., at ¶ 8. Doctors ordered her to continue wearing the splint for two more weeks and then to return to the Clinic for a short-arm cast. *Id.*

On February 21, 2002, Ms. Ramos presented at Heights on the recommendation of her no-fault attorneys. Aff., at ¶ 9. There, she met with physician's assistant Russell Higley ("Mr. Higley"), to whom she complained of frontal and left temporal headaches, wrist pain, and pain in her right ribs and right shoulder. *Id.* Mr. Higley took x-rays of plaintiff's left wrist and referred her for an orthopedic consultation. *Id.* Although he did not meet with Ms. Ramos, Heights Medical Director Dr. Neuman signed Mr. Higley's report. *Id.*

For the next nine months, Heights physician Demetrios Mikelis, M.D. ("Dr. Mikelis") met with Ms. Ramos once a month. Aff., at ¶ 16. At each visit, he examined Ms. Ramos and measured the range of motion and swelling of her wrist and shoulders. *See*, Aff., Ex. F. In particular, Dr. Mikelis examined plaintiff's wrist on June 5, July 3, July 31, September 9, October 7 and November 27, 2002. Affirmation in Opposition ("Opp."), at ¶ 13. He wrote, however, that plaintiff's wrist injury was being managed by an orthopedist at the Hospital. Aff., at ¶ 12.

On March 26, 2002, Ms. Ramos returned to the Clinic to have her cast removed. Aff., at ¶ 13. Clinic staff applied a wrist splint and prescribed occupational therapy. *Id.* She presented for her last visit at the Clinic on April 8, 2002. Aff., at ¶ 15.

Ms. Ramos continued to receive treatment at Heights, including physical therapy for her wrist, through November 27, 2002. Aff., at ¶ 16; Opp., at ¶ 11. At no time did she meet with Dr. Neuman. Aff., at ¶ 16.

In this medical malpractice action – commenced August 4, 2004 – Ms. Ramos claims that defendants negligently failed to timely diagnose and treat her left-wrist fracture. Aff., at ¶ 5. In particular, Ms. Ramos avers that defendants failed to appreciate that the closed reduction was unsuccessful and that her wrist was out of alignment. Aff., Ex. C, at 2. She claims that as a result of defendants' negligence, she cannot straighten her left wrist and it is crooked and misaligned. Aff., Ex. C, at 7.

Dr. Neuman and Heights now move for summary judgment dismissal of plaintiff's complaint against them, arguing that they did not depart from accepted standards of medical care in treating her. Aff., at ¶ 6. They rely on the affidavit of Dr. Neuman, who opines to a reasonable degree of medical certainty that Heights treated Ms. Ramos in accordance with accepted standards of medical care. Aff., Ex. G, at ¶ 7. Specifically, Dr. Neuman states that Heights treated Ms. Ramos for headaches, shoulder pain and rib pain but that they had no duty to treat her wrist injury because it was being managed exclusively by doctors at the

Hospital. Aff., Ex. G, at ¶ 5. Dr. Neuman concludes, moreover, that he cannot be held personally liable because he did not meet with or examine Ms. Ramos. Aff., Ex. G, at ¶¶ 3,6.

Plaintiff does not oppose summary judgment.

The Hospital does, arguing that there is a question of fact as to whether Dr. Neuman and Heights treated Ms. Ramos for wrist injuries and whether they departed from accepted standards of medical care. Opp., at ¶ 2. It submits no expert affidavit in support of its position. Instead, the Hospital avers that Dr. Neuman's affidavit is conclusory and insufficient to prove his entitlement to judgment. Opp., at ¶ 3. It points out, moreover, that Dr. Neuman's affidavit is inaccurate because, contrary to Dr. Neuman's assertions, Heights staff treated Ms. Ramos for left wrist complaints. Opp., at ¶ 4. Finally, the Hospital states that Dr. Neuman may be liable for plaintiff's injuries because he is responsible for supervising Mr. Higley. Opp., at ¶ 8.

Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary

disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

Further, "on a defendant's motion for summary judgment * * * [the court is] required to accept the [non-movant's] pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [the non-movant].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). In a medical malpractice action, the proponent of summary judgment must present evidence that the defendant physician comported with good and accepted medical practice and did not proximately cause plaintiff's injuries. *Masucci v. Feder*, 196 A.D.2d 416, 418-19 (1st Dept. 1993). This evidence must generally be set forth through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003).

Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. "Failure to make such a *prima facie* showing [of entitlement to judgment] requires denial of the motion, regardless of the sufficiency of the opposing papers." *Masucci v. Feder*, 196 A.D.2d, at 419.

An affidavit that is merely conclusory is insufficient to demonstrate entitlement to judgment. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). A conclusory affidavit is one that is unsupported by competent evidence addressing each of the essential elements of medical malpractice or one that fails to refer to the medical record. *Sheridan v. Bieniewicz*, 7 A.D.3d 508, 510 (2d Dept. 2004); *James v. Crystal*, 267 A.D.2d 429, 430 (2d Dept. 1999).

Here, Dr. Neuman and Heights have failed to submit sufficient proof to establish entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. Although Dr. Neuman concludes with a reasonable degree of medical certainty that he and Heights did not depart from accepted standards of medical practice in treating Ms. Ramos, his affirmation is wholly insufficient and conclusory.

To begin, Dr. Neuman makes several broad statements that the treatment of Ms. Ramos was proper. For example, Dr. Neuman avers in very general terms that, "Ana Ramos' treatment of Heights Medical Care, P.C. was within the standard of care in the medical community at the time of her treatment in 2002." Aff., Ex. G, at ¶ 7. He does not, however, explain what treatment Ms. Ramos actually received or why that treatment was appropriate under the circumstances. Furthermore, he neither states the basis for his opinions nor supports his allegations with the medical record.

Dr. Neuman, moreover, does not even address plaintiff's primary complaint that staff at Heights should have treated and diagnosed her left-wrist fracture. He merely states that Heights did not provide treatment for plaintiff's wrist complaints – despite medical reports that suggest otherwise. Noticeably, Dr. Neuman does not acknowledge in his affidavit that Mr. Higley examined plaintiff's wrist and ordered x-rays of it on February 21, 2002 or that Dr. Mikelis examined plaintiff's wrist and recommended physical therapy for it on June 5, July 3, July 31, September 9, October 7 and November 27, 2002. *See*, Aff., Ex. G.

Finally, Dr. Neuman incorrectly asserts that he is not liable as a matter of law because no physician-patient relationship existed between himself and Ms. Ramos.

A medical malpractice action cannot be maintained against a doctor in absence of a physician-patient relationship. *Violandi v. City of New York*, 184 A.D.2d 364 (1st Dept. 1992). Such a relationship is established when a physician undertakes medical functions that are relied upon by a patient. *Wasserman v. Staten Island Radiological Associates*, 2 A.D.3d 713, 714 (2d Dept. 2003). Even if a physician does not meet with a particular patient, however, that physician may be liable for the actions of a third-party who treats the patient if the physician has sufficient authority and ability to control the conduct of the third party. *Purdy v. Public Admr. of County of Westchester*, 72 N.Y.2d 1, 8 (1988) (explaining that such a relationship is created when physician and third party are employer and employee), *rearg. denied*, 72 N.Y.2d 953.

In the end, the determination of whether there is a physician-patient relationship is a question of fact for the jury to decide at trial. *Campbell v. Haber*, 274 A.D.2d 946, 947 (4th Dept. 2000); *Cogswell v. Chapman*, 249 A.D.2d 865, 866 (3d Dept. 1998); *Bienz v. Central Suffolk Hospital*, 163 A.D.2d 269 (2d Dept. 1990).

Here, there is a triable issue of fact, namely, whether Dr. Neuman may be held liable for Mr. Higley's alleged negligence in failing to diagnose plaintiff's left-wrist fracture. Dr. Neuman – as Medical Director of Heights – signed Mr. Higley's evaluation of Ms. Ramos. This evidence suggests that Dr. Neuman may have had a duty to oversee Mr. Higley's treatment of patients. Indeed, Dr. Neuman stated at his deposition, "I supervised the physician's assistant, Russell Higley." Opp., Ex. B, at 9.

In the end, Dr. Neuman has not demonstrated that there is no question of fact as to his vicarious liability for Mr. Higley's alleged negligence and the issue must be determined by a jury at trial.

Because Dr. Neuman and Heights have not met their burden of establishing a *prima facie* showing of entitlement to judgment as a matter of law, the burden never shifted to plaintiffs or co-defendants to rebut that showing. *See, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d, at 853 (summary judgment denied based on defendant's conclusory affidavit); *Masucci v. Feder*, 196 A.D.2d, at 420.

Accordingly, it is

ORDERED that summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 22 2007

ENTER

Hon. Eileen Bransten

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APR 02 2007
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NOTICE OF APPEARANCE

March 22, 2007

Case Name: *Ramos v. Columbia Presbyterian*

Index Number: 111263/04

Nature of Appearances: **Trial April 16, 2007 at 9:30am.**

Date & Time: The should be prepared for an **April 16, 2007** trial date. The parties and witnesses should clear their calendars for the April 16, 2007 trial.

Unless an earlier trial date is assigned, the April 16, 2007 date should be used for purposes of CPLR 3101(d) expert exchange. Pursuant to the Preliminary Conference Order Plaintiff should exchange expert information no later than 60 days before April 16, 2007 and defendants no later than 45 days before the 16th.

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