

Contu v Albert

2007 NY Slip Op 31134(U)

May 7, 2007

Supreme Court, Richmond County

Docket Number: 0013098/2000

Judge: Judith N. McMahon

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

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**JOHN CONTU and MARY CONTU,
Plaintiffs,**

- against-

**PETER S. ALBERT, M.D., ADLEY RABOY, M.D.,
STATEN ISLAND UNIVERSITY HOSPITAL, and
STATEN ISLAND UROLOGICAL ASSOICATES, P.C.,
Defendants.**

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The following papers numbered 1 to 3 used on this motion this 3rd day of April, 2007.

	Papers Numbered
Notice of Motion (Affirmation in Support)_____	1
Affirmation in Opposition_____	2
Affirmation in Reply_____	3

In September, 2000, the plaintiffs commenced this action for lack of informed consent arising from several operations performed by defendants Dr. Peter S. Albert and Dr. Adley Raboy at the defendant Staten Island University Hospital to treat the plaintiff John Contu for prostate cancer. Issue was joined by service of an answer by all defendants. Prior to the conduction of discovery, the defendant Hospital moved for summary judgment dismissing the complaint against it. The motion was originally granted, but then upon the granting of reargument, was denied (Ponterio, JSC, October 28, 2003). The reargument order was affirmed, as modified, by the Appellate Division, Second Department, and a provision granting the Hospital leave to renew its motion for summary judgment upon the completion of discovery was added to the Supreme Court's order (18 AD3d 692 [2d Dept. 2005]). After the completion of discovery, the Hospital renewed its motion for summary judgment dismissing

the complaint against it and the remaining defendants joined in the motion for summary judgment dismissing the complaint.

The Hospital established its prima facie entitlement to summary judgment by establishing that the defendant private physicians were not employees of the Hospital (*see*, Hill v. St. Clare's Hosp., 67 NY2d 72, 79 [1986]; Sita v. Long Island Jewish-Hillside Medical Center, 22 AD3d 743 [2d Dept. 2005]; Orgovan v. Bloom, 7 AD3d 770 [2d Dept.2004]). In opposition, however, the plaintiffs raised a triable issue of fact as to whether vicarious liability may be imposed against the Hospital on the basis of an “ostensible agency” or agency by estoppel theory (*see*, Welch v. Scheinfeld, 21 AD3d 802 [1st Dept. 2005]; Santiago v. Archer, 136 AD2d 690). Even in the absence of an employment relationship between the doctors and the hospital, the hospital may still be vicariously liable for the doctors’ malpractice if the doctors acted as agents of the hospital or if the hospital exercised control over them (*see*, Harrington v. The Neurological Institute of Columbia Presbyterian Medical Center, 254 AD2d 129 [1st Dept. 1998]). Here, in addition to the expert’s affidavit stating that the Hospital did not properly advise the plaintiff of the risks and alternatives to the surgeries, the plaintiffs submitted the Hospital’s Radiosurgery Center brochure which lists Dr. Albert as the Hospital’s Director of Urology and Dr. Raboy as the Associate Director of Urology. Additionally, the plaintiff testified at his deposition that he read this brochure prior to making his initial appointment with the physicians at their office at defendant Staten Island Urological Associates, P.C. Under these circumstances, whether the Hospital can be held vicariously liable for any negligence of the defendant physicians on the ostensible agency theory presents a question for the jury (*see*, Williams v. Howe, 297 AD2d 671 [2d Dept. 2002]).

Defendants Albert and Raboy also established as a matter of law their entitlement to summary judgment by submitting the signed written consent forms indicating the plaintiff's understood the risks involved in these procedures (*see, Lynn G. v. Hugo*, 96 NY2d 306 [2001]; *Smith v. Cattani*, 2 AD3d 259 [1st Dept. 2003]) . In opposition, the plaintiffs raised triable issues of fact by presenting the expert's opinion that the information given to the plaintiff was insufficient to satisfy the defendants' medical obligations under the circumstances, and a transcript of the plaintiff's deposition testimony in which he testified that the defendants never explained all the risks of the procedures to him or the alternatives to those procedures (*see, Santiago v. Filstein*, 35 AD3d 184 [1st Dept. 2006]; *Corcino v. Filstein*, 32 AD3d 201 [1st Dept. 2006]; *Laribee v. City of Rome*, 254 AD2d 805 [4th Dept. 1998]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is denied.

This is the Order of the Court.

E N T E R,

Dated: May 7, 2007

J.S.C.