

Posada v Pelaez

2007 NY Slip Op 32068(U)

June 25, 2007

Supreme Court, New York County

Docket Number: 0106387/2004

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

MARGARITA POSADA,

Plaintiff,

Index No.: 106387/04

MOTION DATE _____

-v-

MOTION SEQ. NO. 15-16

MOTION CAL. NO. _____

OSCAR PELAEZ, M.D., MOUNT SINAI MEDICAL CENTER, "F. NASEH", a/k/a "F. NACEL", a/k/a "F. NASER", DANIEL GAINSBURGH, M.D., CENTRO MEDICO DE LAS AMERICAS, ALBERTO ROZO, M.D., GREGORY LOPEZ, M.D., THE PARKWAY HOSPITAL, and JOHN DOE,

Defendants.

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, 1- 53, were read on this motion by defendant Mount Sinai Medical Center for a protective order striking plaintiff's Notice to Admit, dated April 18, 2007; a cross-motion by plaintiff for an order, inter alia, directing defendant Mount Sinai Medical to produce a person knowledgeable in hospital procedures and administration to give testimony at a deposition; a separate motion by defendant Mount Sinai Medical Center for summary judgment dismissing the complaint; cross-motion by plaintiff to strike the answers of defendants Oscar Pelaez, M.D. and Mount Sinai Medical Center on the grounds of spoliation of essential evidence; and separate motion by defendant Mount Sinai Medical Center, via letter application to the Court, to quash the Subpoena Ducas Tecum served upon them by plaintiff.

Motion Sequence #15

Notice of Motion - Affidavits - Exhibits
Cross-Motion - Opposition -
Replying Affidavits

<u>Papers Numbered</u>	
1-6	_____
7-12	_____
13-15	_____

Motion Sequence #16

Order To Show Cause - Affidavits - Exhibits
Cross-Motion - Opposition -
Opposition to Cross-Motion by Mount Sinai Medical Center
Opposition to Cross-Motion by Oscar Pelaez, M.D.
Replying Affidavit

<u>Papers Numbered</u>	
16-35	_____
36-41	_____
42-44	_____
45-46	_____
47-49	_____

Motion To Quash -Made By Letter Application

Letter Application - Exhibits
Opposition -

<u>Papers Numbered</u>	
50-51	_____
52-53	_____

Cross-Motion: Yes No

Plaintiff commenced the instant action to recover damages for medical malpractice alleging negligence in the performance of cataract surgery on her right eye on or about October 30, 2001. This action, which was commenced on or about April 23, 2004, by the filing of a summons and complaint, was brought against, among others, Drs. Oscar Pelaez and Farhad Naseh¹, the two ophthalmologists alleged to have performed the surgical procedure, as well as Mount Sinai Medical Center ("Mount Sinai"), the medical treatment facility at which the subject surgery was performed.

A request for judicial intervention was filed in this action in June of 2004 and a preliminary conference was held before Justice Sklar in February of 2005. This action was then transferred to this court in April of 2005, and, thereafter, a compliance conference was held on July 29, 2005. At this compliance conference defense counsel for Mount Sinai represented to the court that both of the ophthalmologists alleged to have performed plaintiff's surgery at its facility, i.e., Drs. Pelaez and Naseh, were private attending physicians who were in no way connected to the facility. Based upon this representation, the court advised counsel for Mount Sinai that it would permit it to submit a summary judgment motion, despite the fact that depositions had not yet been completed.

By motion, dated September 2, 2005, Mount Sinai moved for summary judgment dismissing the complaint as asserted against it, arguing, inter alia, that it could not be liable for the alleged medical malpractice committed by Dr. Naseh or Dr. Pelaez as they were private attending physicians. By decision, dated October 21, 2005, the court granted Mount Sinai's motion, holding that Mount Sinai could not be held liable for the alleged malpractice of plaintiff's private attending physicians, i.e., Dr. Naseh or Dr. Pelaez, as plaintiff failed to allege that the orders and/or decisions of these physicians were clearly contraindicated.

Thereafter, plaintiff moved to renew Mount Sinai's prior summary judgment motion based upon the deposition testimony of non-party witness Dr. Naseh, wherein Dr. Naseh

¹ It is noted that by decision and order, dated July 20, 2005, Dr. Naseh's motion to dismiss pursuant to CPLR 3211(a)(8) (want of personal jurisdiction) was granted and the complaint was dismissed as asserted against him.

stated that at the time of the subject surgery he was employed by Mount Sinai as a Clinical Instructor on the Faculty of the Department of Ophthalmology.² This Court, in a decision dated January 18, 2007, reinstated the case as against Mount Sinai, holding that triable issues existed relating to whether Dr. Naseh was acting in the scope of his employment as a Clinical Instructor while performing plaintiff's surgery, and, thus, whether Mount Sinai may be held vicariously liable for his alleged malpractice (see Frazier v. State, 64 NY2d 802 [1985][whether an employee was acting within the scope of his or her employment is a jury question]; White v. Alkoutayni, 18 AD3d 540 [2d Dept. 2005][“[t]he determination of whether a particular act was within the scope of employment is so heavily dependent on factual considerations that the question is ordinarily one for the jury”]. At a status conference conducted on January 19, 2007, the Court granted Mount Sinai's application to conduct depositions of, inter alia, plaintiff and Dr. Naseh, as well as granting leave to renew its summary judgement motion following the completion of the discovery which it sought.

Mount Sinai has conducted further discovery and presently moves for summary judgment dismissing the complaint as asserted against it. “[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court” (Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]). Initially, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). A failure by the movant in demonstrating, prima facie, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers (see Alvarez v. Prospect, supra; Winegrad v. New York Univ. Med. Center, supra). Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra).

² During the oral argument in connection with plaintiff's motion to renew, the Court stated that Mount Sinai was permitted to move for summary judgment in advance of the completion of discovery because counsel for Mount Sinai represented to the court that Dr. Naseh had no connection with its facility. In response to same, counsel for Mount Sinai stated that although it was not her that made these representations to the court at that time, she was “familiar with that conversation.” She set forth that such “conversation” “was not with [her], but it was with one of the partners in [her] office and [she] was aware of it.”

Mount Sinai moves for summary judgment, arguing that it may not be held vicariously liable for the acts of Dr. Naseh in connection with the plaintiff's surgery because such surgery was performed by him in his capacity as plaintiff's private attending physician, and not in his capacity as Clinical Instructor on the Faculty of the Department of Ophthalmology at the Mount Sinai School of Medicine. According to the deposition testimony of Dr. Pelaez, plaintiff began treating with Dr. Pelaez in 1997 and saw him periodically through October of 2001. She treated with Dr. Pelaez at his private offices, and had never been a patient at Mount Sinai prior to the subject procedure. It is noted that plaintiff had a cataract extraction procedure performed in her left eye two years prior to the time she began treating with Dr. Pelaez.

Plaintiff and Dr. Pelaez first discussed the need for cataract surgery in her left eye on October 5, 2001. It appears that on October 8, 2001, Dr. Pelaez discussed the risks, benefits and complications of the procedure with plaintiff, in the presence of her son. Thereafter, on October 25, 2001, Dr. Pelaez again discussed the risks, benefits and complications of the procedure with plaintiff, at which time she signed a form relating to same. Also on October 25, 2001, Dr. Pelaez informed plaintiff that her surgery would be performed by Dr. Farhad Naseh, who was a private attending physician at Mount Sinai, because he was more experienced in performing the subject procedure. According to Dr. Pelaez, Dr. Naseh had performed surgery on a number of his patients. On October 26, 2001, plaintiff received pre-operative medical clearance from Dr. Albert Rozo. Dr. Rozo's examination of plaintiff took place at Dr. Rozo's private office.

Dr. Pelaez testified that Dr. Naseh first met with plaintiff on October 30, 2001, the day of the subject procedure. Dr. Naseh examined plaintiff immediately prior to her surgery. Dr. Pelaez testified that although Dr. Naseh typically examined those patients of Dr. Pelaez who Dr. Naseh was going to perform surgery on, in Dr. Pelaez's office in advance of the surgery, plaintiff was examined in the operating room on the day of her surgery. Dr. Naseh would typically examine Dr. Pelaez's patients in Dr. Pelaez's office on Wednesdays; the reason that Dr. Naseh examined plaintiff in the operating room the day of the surgery was because an opening became available in the operating room, approximately five days before the surgery was performed. As a result, Dr. Naseh was unable to examine plaintiff in Dr. Pelaez's office. With respect to payment for the subject procedure, it appears that Dr. Naseh billed Medicare for the surgery that he performed. As part of his agreement with Dr. Pelaez, Dr. Naseh paid Dr. Pelaez one-half of what he received from Medicare.

Dr. Naseh expressly stated at his May 16, 2007 deposition that he treated plaintiff in his capacity as a private attending physician. He further stated that he was the primary surgeon in connection with the subject procedure. Dr. Naseh testified that he was in control of the instruments utilized during the surgery, made the decision as to what instruments were to be utilized throughout the surgery, and made the decision to discharge plaintiff from the hospital following her surgery. The surgery was not performed by any

ophthalmology residents, nor were any decisions relating to the surgery or discharge of plaintiff made by any ophthalmology residents. According to Dr. Naseh, the presence of a resident in the room at the time of the surgery does not change the fact that he was treating plaintiff as a private patient, as opposed to a patient of the ophthalmology clinic.

Dr. Shu testified that he was a third-year resident at Mount Sinai Medical Center in October of 2001, at the time of plaintiff's surgery. Dr. Shu testified that as a third-year resident he would learn by performing surgery on patients who had been seen at the Ophthalmology Clinic at Mount Sinai or by observing surgeries performed by private attending physicians. According to Dr. Shu, as a resident he could not perform surgery on a private patient. Although plaintiff's medical records indicate that Dr. Shu was present during plaintiff's surgery, he has no recollection of the procedure. Notwithstanding, Dr. Shu testified that plaintiff's chart indicated that she was a private patient, and, thus, he did not perform or assist in her surgery of October 30, 2001.

Mount Sinai also submitted an affidavit from Dr. Shu, in which he set forth that "based upon a reasonable degree of medical certainty, that the management of the medical care of Margarita Posada during the presentation to Mt. Sinai Hospital on October 30, 2001, was the responsibility of, and under the supervision of, the patient's private attending physicians, Oscar Pelaez, M.D. and Farhad Naseh, M.D." Dr. Shu stated that plaintiff was not a clinic patient, and his only involvement with her surgery was that of observation. Dr. Shu further set forth in his affidavit that within a reasonable degree of medical certainty "Dr. Naseh's involvement with Ms. Posada's care and treatment was not in his capacity as a clinical instructor."

According to Dr. Shu, for Dr. Naseh to have rendered care to Ms. Posada in his capacity as a clinical instructor, certain circumstances must be present. First and foremost, plaintiff would have been a patient of the Ophthalmology Clinic at Mount Sinai, which she was not. If plaintiff was a clinic patient, a full ocular examination would have been performed by a junior resident, thereafter a senior resident would perform a second exam and determine if surgical intervention was an option. A clinic attending would then evaluate the patient at the clinic and render an opinion regarding surgical options. Informed consent would be obtained by the senior resident in the presence of a clinic attending. The senior resident would then be responsible for scheduling the operation. The senior resident would perform the surgery in the presence of an assigned clinic attending or clinical instructor. Basically, the care and treatment of a clinic patient is rendered in large part by the residents of the facility, while being supervised by a clinic attending. According to Dr. Shu, none of these factors were present in connection with the care and treatment of plaintiff, because plaintiff's surgery was performed by Dr. Naseh in his capacity as a private attending physician.

In addition, Mount Sinai submitted the affidavit of Robert Cykiert, M.D., a board certified ophthalmologist, who "through [his] education, training and professional

experiences, [is] familiar and knowledgeable of the distinctive roles of clinical instructors and private attending physicians, the role it plays in patient care, and the applicable standards of care of the community." In his affidavit, Dr. Cykiert set forth that, based upon his review of plaintiff's medical records, the transcripts of the depositions taken in connection with this action, as well as the bill of particulars, "Farhad Naseh, M.D. rendered treatment to Ms. Posada at Mt. Sinai Hospital on October 30, 2001 as the patient's private attending physician. Dr. Naseh did not render any treatment to Ms. Posada in his capacity as a clinical instructor." Similar to the affirmation of Dr. Shu, Dr. Cykiert affirms that none of the circumstances were present in this case to establish that Dr. Naseh rendered care to plaintiff in his capacity as a clinical instructor.

Based upon the foregoing evidence, Mount Sinai has made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate that plaintiff's surgery was performed by Dr. Naseh in his capacity as plaintiff's private attending physician, and, thus, Mount Sinai cannot be held vicariously liable for the alleged negligence of Dr. Naseh. Therefore, the burden shifts to plaintiff to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra).

Plaintiff opposes Mount Sinai's summary judgment motion, arguing that even though plaintiff was a private patient of Dr. Naseh during her cataract surgery of October 30, 2001, Dr. Naseh was also fulfilling his obligations as a clinical instructor during this procedure in demonstrating the procedure to Dr. Shu. In opposition to Mount Sinai's motion, plaintiff relies upon, inter alia, the expert affidavit of a board certified ophthalmologist. Plaintiff's expert opines, to a reasonable degree of medical certainty, "that the teaching of resident physicians uses clinical material in the form of both private patients and clinic patients." The expert states that "[t]he Clinical Instructor teaches clinical skills to residents without reference to whether the patient is a private patient [or] a clinical patient."

According to plaintiff's expert, "the purpose of a resident in the operating room is to observe, to learn, to listen, to take part in the conversation taking place and, if requested or agreed upon, to participate in the surgery under way." As a result, in the instant action, "Dr. Naseh was nonetheless fulfilling his obligation as a Clinical Instructor in demonstrating the procedure to Dr. Shu." Plaintiff contends that based upon Dr. Naseh's fulfillment of his obligation as a Clinical Instructor during the subject procedure, Mount Sinai may be held vicariously liable for his alleged negligence.

It appears that plaintiff attempts to hold Mount Sinai vicariously liable for the alleged negligence of Dr. Naseh, based upon the mere presence of a resident, i.e., Dr. Shu, in the operating room during the performance of plaintiff's cataract surgery on October 30, 2001. "Underlying the doctrine of vicarious liability - the imputation of liability to

defendant for another person's fault, based upon defendant's relationship with the wrongdoer - is the notion of control. The person in a position to exercise some degree of control over the wrongdoer must do so or bear the consequences." Kavanaugh v. Nussbaum, 71 NY2d 535 [1988], citing Prosser and Keeton, Torts §69, at 500 [5th ed 1984]; see also Steiner v. Brookdale Hospital Medical Center, 241 AD2d 516 [2d Dept. 1997]["[t]he premise for imputing liability is the element of control". The evidence demonstrates that plaintiff was a private patient of Dr. Naseh and he performed her cataract surgery as a private attending physician, and not in his capacity as a clinical instructor at Mount Sinai. Thus, despite the fact that Dr. Naseh was employed by defendant Mount Sinai as a clinical instructor, Mount Sinai did not exercise any control over Dr. Naseh in connection with the performance of the subject surgery. As a result, defendant Mount Sinai should not be held vicariously liable for the alleged negligence of Dr. Naseh in connection with the performance of that surgery³. Accordingly, defendant Mount Sinai's motion for summary judgment is granted.

Plaintiff presently cross-moves for summary judgment as against Dr. Pelaez, as well as Mount Sinai, on the grounds of spoliation of essential evidence, arguing that defendants negligently lost or intentionally destroyed the operative report created in connection with the subject procedure. This cross-motion is denied. As pointed out by plaintiff, "under the common-law doctrine of spoliation, '[w]hen a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." Denoyelles v. Gallagher, 2007 NY Slip Op. 04588 [2d Dept. May 29, 2007], quoting Baglio v. St. John's Queens Hospital, 303 AD2d 341 [2d Dept. 2003]. Although a physician's failure to properly maintain medical records warrants the striking of an answer (see Herrera v. Matlin, 303 AD2d 198 [1st Dept. 2003]), plaintiff in the instant action has not provided any evidence that such an operative report was ever created in connection with the subject surgery.⁴ Therefore, his contention that defendants

³ With respect to the policy concerns involved herein, to impute liability upon Mount Sinai for the negligence of Dr. Naseh merely because Dr. Shu was present in the room while Dr. Naseh performed a surgical procedure on a private patient would tend to discourage a medical facility from permitting any medical student, resident, or attending to simply observe a more experienced physician while he treats a private patient at that facility. Such a result may hamper the education of young physicians. On the other hand, patients are not left at risk by denying vicarious liability in this situation, as the physicians will, of course, be held liable for their own negligence in the performance of a surgical procedure. Unfortunately, in the instant action, the complaint as asserted against Dr. Naseh was dismissed based upon plaintiff's failure to properly serve Dr. Naseh.

⁴ It is noted that in opposition to plaintiff's cross-motion, Mount Sinai submitted an affidavit of the facility's Health Information Management/Medical Records Director, which set forth that "[t]he Hospital does not require physicians to dictate an operative report for

negligently lost or intentionally destroyed key evidence is without merit.

In plaintiff's reply papers she appears to argue that she is entitled to summary judgment because defendant breached a statutory duty by failing to create an operative report. It is well settled that a movant is not permitted to introduce new arguments in support of, or new grounds for the motion in the reply papers. See Dannasch v. Bifulco, 184 AD2d 415; Ritt v. Lenox Hill Hospital, 182 AD2d 560 [1st Dept. 1992]. Therefore, such argument was not considered in the determination of the instant motion. Notwithstanding, Dr. Naseh completed and signed a form relating to the subject procedure entitled "Brief Operative Note ," which was included in the plaintiff's Mount Sinai Hospital records. This note set forth, albeit in abbreviations, that Dr. Naseh performed a phacoemulsification, anterior vitrectomy and posterior chamber intra-ocular implant, which according to other records contained in the hospital chart began at 9:43 a.m. and was completed at 10:25 a.m. The operative note further sets forth that the plaintiff was in stable condition upon completion of her surgery, and indicates that there were no findings or intraoperative complications. Although this note is not a detailed narrative of the subject surgery, it is a written note that states, inter alia, the techniques used by Dr. Naseh during the course of the procedure, as well as the general condition of plaintiff. Therefore, the operative note prepared by Dr. Naseh appears to satisfy the New York Code, Rules and Regulations cited by plaintiff in her reply.

As a result of the granting of Mount Sinai's motion for summary judgment, its separate motion for a protective order striking plaintiff's Notice to Admit, dated April 18, 2007, is rendered moot. Plaintiff's cross-motion for an order (i) directing defendant Mount Sinai to produce a person knowledgeable in hospital procedures and administration to give testimony at a deposition and (ii) directing Mount Sinai to provide further credential information relating to its expert is also rendered moot. It is noted that any application by plaintiff to take a non-party deposition of a person employed by Mount Sinai that is knowledgeable in hospital procedures and administration will be denied as the time to conduct discovery has long since passed and this matter is now trial ready.

Lastly, although it now appears to be moot, the Court will address Mount Sinai's motion to quash the Subpoena Duces Tecum served by plaintiff upon Mount Sinai. This motion was made via a written application to the Court, and was opposed by plaintiff. The Court finds that plaintiff is improperly utilizing an overbroad subpoena as a belated discovery device to secure from Mount Sinai wide-ranging discovery that plaintiff's counsel neglected to obtain during the unusually prolonged discovery phase of this case. See Matter of Terry, 81 NY2d 1042 [1993]; Mestel & Company v. Smythe Masterson & Judd, Inc., 215 AD2d 329 [1st Dept. 1995]. As a result, Mount Sinai's motion to quash plaintiff's Subpoena Duces Tecum is granted. Notwithstanding, the Court directs Mount

an ambulatory cataract surgery, such as that performed in the instant matter."

Sinai to provide plaintiff, within one (1) week of the date of this decision and order, with any and all rules, regulations, bylaws, etc. regarding what is required to be contained in the medical chart of a patient who is to undergo, or has undergone, ambulatory cataract surgery.

Based on the foregoing, it is hereby

ORDERED that defendant Mount Sinai Medical Center's motion for summary judgment is granted in its entirety, and the complaint is hereby severed and dismissed as against defendant Mount Sinai Medical Center, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant Mount Sinai Medical Center's motion for a protective order striking plaintiff's Notice to Admit, dated April 18, 2007, is rendered moot by the instant decision and order; and it is further

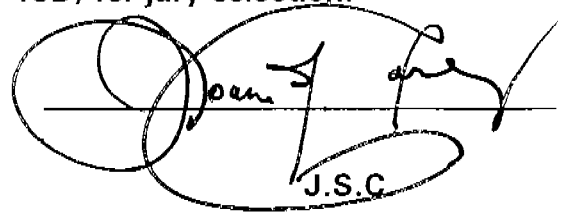
ORDERED that plaintiff's cross-motion for an order directing defendant Mount Sinai Medical Center to produce a person knowledgeable in hospital procedures and administration to give testimony at a deposition is rendered moot by the instant decision and order; and it is further

ORDERED that the motion by defendant Mount Sinai Medical Center, via letter application to the Court, to quash the Subpoena Duces Tecum served upon them by plaintiff is rendered moot by the instant decision and order, but, in any event, is denied; and it is further

ORDERED that Mount Sinai is to provide plaintiff, within one (1) week of the date of this decision and order, with any and all rules, regulations, bylaws, etc. regarding what is required to be contained in the medical chart of a patient who is to undergo ambulatory cataract surgery; and it is further

ORDERED that counsel for all parties are to appear before the court on July 9, 2007, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for jury selection.

Dated: 6/25/2007



J.S.C.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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