Vojtisek v New York Eye & Ear Infirmary
2007 NY Slip Op 33865(U)
November 9, 2007
Supreme Court, Kings County
Docket Number: 0019972/2005
Judge: Gerard H. Rosenberg
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[* 1]

At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of November, 2007.

PRESENT:

HON. GERARD H. ROSENBERG,
Justice.

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EDWIN VOJTISEK,

Plaintiff,

DECISION & ORDER

-against-

Index No. 19972/05

THE NEW YORK EYE AND EAR INFIRMARY, KENNETH COHEN, REMY MOONTHUNGAL and DANIELLY MUCHIUTTI,

Cal. No. 2007-002035T

Motion Seq. No. 001

Defendants.

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The following papers numbered 1 to 4 read on this motion.	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed	1 - 2
Affirmation in Opposition and Exhibits Annexed	3
Reply Affirmation(s)and Exhibits Annexed	4

Upon the foregoing papers, and upon oral argument, defendant The New York Eye and Ear Infirmary ("NYEEI" or "the Hospital") moves pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint.

Background

This is an action alleging medical malpractice. Plaintiff alleges as to this moving

defendant, inter alia, that NYEEI failed to properly anesthesize and sedate the plaintiff prior to initiating and during the performance of an ambulatory cataract surgery on April 10, 2003, causing plaintiff to suffer a hemorrhage with resulting rupture of the anterior capsule in the eye. Plaintiff additionally alleges a cause of action based on lack of informed consent.

The Timeliness of the Motion

The motion is dated April 18, 2007 and was served by mail on April 19, 2007, which is 84 days after the note of issue was filed on January 25, 2007. This is beyond the 60-day period set forth in Part 13 of the Uniform Rules of the Civil Term, Supreme Court, Second Judicial District, Kings County. Movant argues that the delay in this case is minimal, that plaintiff will not be prejudiced by such delay, and that good cause has been established.

Courts may only entertain an untimely summary judgment motion when the movant demonstrates "good cause" for its delay, which the Court of Appeals has deemed to entail "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State Farm Mut. Auto Ins. Co.,* 3 NY3d 725 [2004]), "rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, id., at 652). Stated otherwise, "[w]hether there is merit to the late motion for summary judgment is not a relevant consideration" (*Czernicki v Lawniczak*, 25 AD3d 581 [2006]).

In claiming that good cause exists in this instance, NYEEI submits the affirmation of Brian M. Brown, Esq., who states that he was the attorney assigned to this case on behalf of movant's counsel, Clausen Miller, P.C., at the time the summary judgment was required to

be filed. In his affirmation, Mr. Brown indicates that he was married on March 17, 2007[1], following which he immediately left for his honeymoon. He did not return to Clausen Miller, P.C. until either April 2 or 6, 2007 (his affirmation inconsistently states both dates), which was after the 60th day (i.e., March 26, 2007) by which the motion was to be filed. Moreover, upon his return he advised Clausen Miller, P.C. that he was leaving the firm, and he states that "[i]n the week following my resignation, I prepared my files for assignment to other associates . . . without discovering the deadline oversight."

Such a proposed basis for good cause is in the nature of a claim of law office failure. Defendant cites *Forward Door of NY, Inc. v Forlander*, 41 AD3d 535 (2007) and *In re Estate of Burick*, 12 AD3d 755 (2004) in support of NYEEI's claim that law office failure can constitute good cause for an untimely filing. In opposition, plaintiff cites *Breiding v Giladi*, 15 AD3d 435 (2005) in support of his argument that perfunctory claims of unspecified clerical inadvertence and reassignment of counsel are insufficient to constitute good cause.

The court notes that Mr. Brown was present at the depositions of the plaintiff on March 7, 2006, Dr. Cohen on September 7, 2006, Dr. Moonthungal on November 2, 2006 and Nurse Muchiutti on November 10, 2006. He thus was actively engaged in the preparation of this matter for trial, and is expected to be aware of court deadlines as they arise. While the Court is cognizant that cases are assigned by firms to individual attorneys who are responsible

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[1] As only members of the legal profession seem able to do, Mr. Brown actually affirms that "[o]n or about March 17, 2007, I was married." One can only hope that his wedding anniversaries are remembered and celebrated with a bit more specificity.

for their orderly and timely prosecution, this does not serve to relieve the firm of its obligation to pay attention to court deadlines. Where, as here, the assigned attorney loses track of a court-imposed deadline due to the events of his wedding and honeymoon,[2] and then upon his return, his resignation from the firm, the responsibility remains with the firm to make sure that it adheres to those deadlines. Delay and inattention to court deadlines is not to be tolerated (see, *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects [Habiterra Assoc.]*, 5 NY3d 514, 521 [2005]), and under the circumstances presented here the Court finds that good cause has not been established for the late submission of the motion. It is therefore denied as untimely.

In any event, were the court to reach the merits of the motion, the result would be the same.

Summary Judgment

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

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[2] The court has found one case where a honeymoon was propounded as an excuse for law office failure. In *Ramos v Gross* (150 AD2d 216 [1989]) counsel claimed to have been on her honeymoon when a conditional preclusion order was received requiring service of a bill of particulars within a specified period of time. She further claimed that no entry was made in her diary and that she was unaware of the deadline when she returned to her office. The court held that "[t]his mishap, however, only accounts for six months of a four-year default and is, therefore, insufficient as an excuse" (id., at 216), thereby leaving unclear whether counsel's excuse would have been sufficient had it accounted for all or most of the default period.

However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

NYEEI seeks summary judgment on the grounds that it is not vicariously liable for the acts and alleged malpractice of co-defendants Dr. Kenneth Cohen, Dr. Remy Moonthungal or Nurse Danielly Muchiutti. In support of the motion, NYEEI relies upon an attorney's affirmation, as well as the pleadings and deposition transcripts.

These submissions establish that Dr. Cohen is a private attending physician with affiliations with NYEEI, Beth Israel Medical Center and the Orthopedic Institute of the Hospital for Joint Diseases. He is a senior attending surgeon at NYEEI. He had first examined plaintiff in April 1999 with a complaint of tearing and twitching in his eye. Dr. Cohen performed an extensive opthalmologic examination of plaintiff, and diagnosed plaintiff, among other things, to have floaters in his eye. Plaintiff was given a prescription for corrective lenses, and was advised of retinal symptoms to be aware of because of the floaters.

Plaintiff returned to Dr. Cohen in February 2001 with a complaint of experiencing glare at nighttime from oncoming motor vehicles. At a subsequent visit in April 2002 Dr. Cohen noted that plaintiff's cataract was progressing. On March 2, 2003 Dr. Cohen performed

another opthalmologic examination and recommended that plaintiff get and wear glasses, plaintiff having not fully complied with Dr. Cohen's previous advisements to wear glasses.

Then, on March 21, 2003 plaintiff returned to Dr. Cohen's office with a complaint of diminished visual acuity, and indicated that he wished to have surgery to correct his cataract. Plaintiff was admitted to NYEEI on April 10, 2003 for ambulatory cataract surgery. Appearing on the admission notes are the names of Dr. Cohen and Dr. Singh, who assisted Dr. Cohen during the surgery. Dr. Cohen testified that the anesthesiologist assigned to the surgery was Dr. Remy Moonthungal. Dr. Cohen believed that assignments were done by the anesthesia department (p 93), but that he "was not aware of how the assignments to the room are done by the anesthesia department" (p 92).

Dr. Remy Moonthungal testified that she is an anesthesiologist who practiced at NYEEI from 1983 until 2003 (p 13), and that after 2003 she practiced "office-based anesthesia" in many different doctors' offices and ambulatory centers as an independent contractor (p 13-14). She testified that on the date of plaintiff's surgery she had no prior contact with Dr. Cohen, the plaintiff, or any of the other physicians involved with the surgery prior to the actual time of the surgery (p 19-20). She was assigned by "the person who was running the floor" to relieve Nurse Muchiutti, the nurse anesthetist, when Nurse Muchiutti's shift ended (p 23-26).

Danielly Muchiutti is a Certified Registered Nurse Anesthetist. She is an employee of an entity at the Hospital called New York Eye & Ear Anesthesia Associates (p 15). She testified that at NYEEI there were no differences between the duties and responsibilities of

a nurse anesthetist and an anesthesiologist with respect to the administration of sedatives during a procedure such as a cataract surgery (p 13-14). On April 10, 2003 she was on duty as a certified nurse anesthetist on a 7:00 a.m. to 3:00 p.m. shift (p 27). She was assigned by the Hospital to a particular operating room and accordingly would undertake the anesthetic care of any patient who was undergoing a procedure in that particular room (p 27-28). Assignments were usually done by a Dr. Girnar, whom Nurse Muchiuttu testified was the Chief of Anesthesiology (p 28), and Nurse Muchiutti would be apprised of her assignment at 6:45 a.m.

Nurse Muchiutti did not speak to anyone with respect to plaintiff's case, but in preparation for participating in plaintiff's surgery she reviewed the anesthesiologists's pre-op, the nursing record and the medical clearance (p 31). Her custom and practice would have been to speak to the patient just prior to surgery to go over the patient's history and explain to the patient what was going to happen once the patient comes into the operating room (p 33). According to the chart, plaintiff was brought into the OR at 2:40 p.m., and the procedure began at 2:55 p.m. Nurse Muchiutti testified that the Anesthesia Care Plan was determined in the pre-op by the surgeon and the anesthesiologist to be "MAC" (i.e., monitored anesthesia care) and that she did not change that plan (p 39). She administered Midazolam, a sedative, at 2:50 and again at 3:00 p.m., and then left the OR between 3:00 and 3:05 p.m., as her shift had ended (p 44-48).

Analysis

A hospital generally will not be held vicariously for the malpractice of a private

attending physician who is not its employee (*Quezada v O'Reilly-Green*, 24 AD3d 744, 746 [2005]; appeal denied, 7 NY3d 703 [2006]; *Orgovan v Bloom*, 7 AD3d 770 [2004]). Further, "[i]n general, a hospital may not be held [liable] for the acts of an [anesthesiologist] who is not an employee of the hospital, but one of a group of independent contractors" (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2007], quoting *Hill v St. Clare's Hosp*, 67 NY2d 72, 79[1986]). However, an exception to the general rule may make the hospital vicariously liable for the alleged malpractice and negligence of the anesthesiologists under a theory of apparent or ostensible agency (see *Hill v St. Clare's Hosp*, id., at 79-80).

While it is not contested that plaintiff retained Dr. Cohen as his physician to treat his opthalmologic conditions and to perform the cataract surgery, questions of fact exists as to the status of both Dr. Moonthungal and Nurse Muchiutti. Dr. Moonthungal's testimony indicates that she had practiced anesthesiology at NYEEI as an employee for some twenty years at the time of the surgery on April 10, 2003. She did not become an independent contractor until after the surgery, as she testified that she became an independent contractor "after 2003." She testified that she had no contact with the plaintiff, Dr. Cohen or any of the other surgeons prior to the surgery, and that she was assigned to plaintiff's surgery by the person "running the floor" at the hospital, and took over when Nurse Muchiutti's shift ended.

While Nurse Muchiutti testified that she was an employee of "New York Eye & Ear Anesthesia Associates", the status of "New York Eye & Ear Anesthesia Associates" and its relationship to the Hospital has not been definitively explained by movant's submissions. No contract explaining the relationship between the Hospital and this group has been submitted,

and Nurse Muchiutti's testimony was not illuminating on this subject. Nurse Muchiutti clearly had no pre-existing relationship with the plaintiff, as she was assigned by the Hospital to a particular operating room and undertook the anesthetic care of any patient who underwent a procedure in that particular room. She testified that those assignments were usually done by the hospital's Chief of Anesthesiology (p 28), and Nurse Muchiutti would not know her assignment until just 15 minutes before her shift began.

While NYEEI seeks to rely upon the case of *Hill v St. Clare's Hosp.* and its progeny, the Hospital has failed to establish its prima facie entitlement to summary judgment (see *Filemyr v Lombardo*, 11 AD3d 581 [2004]). It is clear that neither Dr. Cohen nor the plaintiff played any part in selecting the anesthesiologist and nurse anesthetist for plaintiff's surgery. There are questions of fact whether Dr. Moonthungal was an employee of the hospital on the date of the surgery, as well as with the status and relationships of Nurse Muchiutti, the Hospital, and "New York Eye & Ear Anesthesia Associates." The plaintiff did not meet Nurse Muchiutti and Dr. Moonthungal until the day of the surgery, and it is unclear how much interaction he had, if any, with Dr. Moonthungal. Under these facts, there are triable questions of fact as to whether the plaintiff reasonably believed that the anesthesiologist and nurse anesthetist were provided by the Hospital or acted on its behalf (see, *Sosnoff v Jackman,* 2007 NY Slip Op 8439, at *3 [2007]; *Dragotta v Southampton Hosp.*, 39 AD3d 697, supra, at 700; *Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834 [2006].

One last issue remains to be addressed. The Hospital seeks to have the cause of action based on lack of informed consent dismissed against it, and argues that plaintiff has failed to

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proffer opposition to this part of the motion. While the failure to oppose part of a motion may entitle the Court to grant the motion as to that part (see, *Slone v Salzer*, 7 AD3d 609 [2004]; *Candida v Estepan*, 289 AD2d 38 [2001]), it is also true that a court entertaining a summary judgment motion has broad power to search the record in order to determine if summary judgment is warranted (*see Ween v Dow*, 35 AD3d 58, 62 [2006]; CPLR 3212 (b); *Wohl v Miller*, 5 AD2d 126 [1957]; *Battle Brand Products Inc. v Consolidate Edison Co. of N.Y. Inc.*, 31 Misc 2d 181 [1961]). "A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Tunison v D.J. Stapleton, Inc.*, 2007 NY Slip Op 6666 [2007], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348[2002]). Questions of fact exist in the record before the court, as the deposition testimony of Dr. Cohen and the plaintiff are at odds as to the nature and sufficiency of the informed consent obtained prior to the surgery.

Conclusion

Accordingly, the motion by NYEEI for summary judgment is denied.

This constitutes the decision and order of the court.

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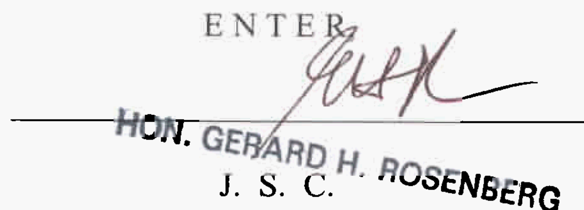

J. S. C.