

Spadafora v Zeidman
2007 NY Slip Op 33868(U)
November 14, 2007
Supreme Court, Queens County
Docket Number: 0022542/2003
Judge: Peter O'Donoghue
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 13
Justice

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JAMES SPADAFORA, etc., et al.	x	Index Number <u>22542</u> 2003
- against -		Motion Date <u>June 20,</u> 2007
DANIEL ZEIDMAN, M.D., et al.		Motion Cal. Numbers <u>33 & 34</u>
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	x	Motion Seq. Nos. <u>3 & 4</u>

The following papers numbered 1 to 34 read on these separate motions by plaintiff-administrator (plaintiff) for the following relief: (1) granting plaintiff leave, pursuant to CPLR 3025(b) and CPLR 203(c), to file and serve a supplemental summons and amended complaint, nunc pro tunc, adding Daniel Zeidman, M.D., P.L.L.C. (Zeidman P.L.L.C.), Apex Medical Associates, P.L.L.C. (Apex), New Gloria's Manor H.F.A. and Gloria's Manor Home For Adults as additional defendants; (2) for partial summary judgment in plaintiff's favor holding New Gloria's Manor Home For Adults, Gloria's Manor L.L.C., New Gloria's Manor H.F.A. and Gloria's Manor Home For Adults vicariously liable for any negligence or malpractice of the adult home staff where decedent Anthony Spadafora (deceased) was a resident and for any negligence or malpractice of Peninsula Hospital Center (Peninsula) where decedent was treated until his death on September 26, 2001; (3) for partial summary judgment in plaintiff's favor holding Daniel Zeidman, M.D., Zeidman P.L.L.C., Apex and Staten Island University Hospital Center (SIUH) vicariously liable for any negligence or malpractice of the adult home staff and the medical providers at Peninsula; and (4) for partial summary judgment in plaintiff's favor holding Peninsula vicariously liable for any negligence or malpractice of the medical providers at Peninsula; and on this motion by Gloria's Manor L.L.C. s/h/a New Gloria's Manor Home For Adults, Gloria's Manor L.L.C. (Home) for summary judgment in its favor dismissing plaintiff's complaint and all cross claims. Daniel Zeidman, M.D. and SIUH cross-move for summary judgment in their favor dismissing the plaintiff's

complaint. Peninsula also cross-moves for summary judgment in its favor dismissing the complaint and all cross claims.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits ..	9-15
Answering Affidavits - Exhibits	16-25
Reply Affidavits	26-34

Upon the foregoing papers it is ordered that these motions and cross motions are consolidated and determined as follows.

In this action for medical malpractice and wrongful death, it is alleged, inter alia, that defendants deviated from the requisite standard of care in failing to diagnose and properly and timely treat decedent for fecal impaction from July 2001 until September 26, 2001, thereby causing his death. Decedent was a resident of the Home from March 1, 1998 until he was transferred to Peninsula on August 24, 2001 for abdominal pain and vomiting. The transfer form which accompanied decedent to Peninsula indicated that decedent suffered from dementia and that his primary doctor was Dr. Zeidman.

While residing at the Home, decedent had been treated at a clinic which operated in a space leased from the Home. SIUH entered into a "Clinic Services Agreement" (Agreement) with non party Zeidman P.L.L.C. as "Contractor" to establish the clinic. Pursuant to the Agreement, the "Contractor" leased the space from the Home and provided physicians, defined by the Agreement as "any physician employee or contractor employed or retained by Contractor who provides physician services at the Clinic." The Agreement contained a provision entitled "Status of Contractor and Contractor Employees" which provided, in pertinent part, as follows:

"It is expressly acknowledged by the parties hereto that Contractor and each Contractor Employee are 'independent contractors' and nothing in this Agreement is intended or shall be construed to create with SIUH an employer/employee relationship or a joint venture relationship."

The nonparty doctors who treated decedent at the clinic and during his stay at Peninsula, Dr. Irina Natalenko and Dr. Mette P. Larsen, were employees of nonparty Apex.

In support of his cross motion for summary judgment, Dr. Zeidman submits his own affidavit, in which he avers that he is an independent contractor of SIUH, that he last treated decedent at the Home on February 15, 2001, and that he did not treat decedent at Peninsula. Dr. Zeidman also submits the expert affirmation of Joseph Tripodi, D.O., board certified in internal medicine and gastroenterology, who concludes that Dr. Zeidman did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and that Dr. Zeidman's care was not the proximate cause of decedent's death. These evidentiary submissions, which indicate that defendant Dr. Zeidman did not deviate from accepted standards of medical care, are sufficient to meet defendant's burden as a proponent of a summary judgment motion (see Alvarez v Prospect Hosp., 68 NY2d 320 [1987]; Berger v Becker, 272 AD2d 565 [2001]; Juba v Bachman, 255 AD2d 492 [1998]; Whalen v Victory Memorial Hosp., 187 AD2d 503 [1983]).

The burden now shifts to plaintiff to respond with rebutting medical evidence demonstrating that Dr. Zeidman's actions were a departure from the accepted standard of care in the medical community (see Alvarez v Prospect Hosp., *supra*; Whalen v Victory Memorial Hosp., *supra*) and a proximate cause in bringing about the injury (see Mortensen v Memorial Hosp., 105 AD2d 151 [1985]).

In opposition to Dr. Zeidman's motion, plaintiff submits the affirmation of Jeffrey S. Freed, M.D., a surgeon, who opines, *inter alia*, that Dr. Zeidman departed from good and accepted standards of medical practice in failing to transfer decedent to a nursing home or skilled nursing facility. Besides this conclusory and speculative allegation, Dr. Freed does not assert that this alleged departure was the proximate cause of decedent's death. Therefore, plaintiff's expert affirmation fails to raise a triable issue of fact regarding the liability of Dr. Zeidman.

With respect to SIUH's cross motion for summary judgment, the aforementioned Agreement specifically provides that all physicians practicing at the clinic were independent contractors and therefore SIUH cannot be held vicariously liable for any alleged negligence committed by the clinic's physicians.

Accordingly, the cross motion for summary judgment motion by Dr. Zeidman and SIUH is granted in its entirety.

The court next turns to the Home's summary judgment motion. The Home asserts, *inter alia*, that pursuant to The Department of Social Services Standards For Adult Homes contained in 18 NYCRR §§ 487 et seq. the Home did not commit medical malpractice because it was not required to provide medical services. However, pursuant to 18 NYCRR § 487.7(6)(iii): "In the event of illness or injury, the operator [Home] shall ... (b) notify the resident's representative, or next of kin, if known" Herein, the Home's records indicate that on the day of decedent's transfer from the Home to Peninsula, August 24, 2001, his son James was called but the number had been disconnected. The Home does not submit any evidence demonstrating its bona fide efforts to contact decedent's son despite the exigent situation and decedent's diagnosis of dementia. In light of the foregoing, the Home has failed to sustain its burden of proof on this motion that it did not commit negligence. Accordingly, the Home's summary judgment motion is denied.

With respect to Peninsula's cross motion for summary judgment, as a general rule, although a hospital or other medical facility is liable for the negligence or malpractice of its employees (Bing v Thunig, 2 NY2d 656 [1957]), a hospital is not vicariously liable for the malpractice of a private attending physician who is not its employee (Orgovan v Bloom, 7 AD3d 770 [2004]; Walter v Betancourt, 283 AD2d 223 [2001]; Padula v Bucalo, 266 AD2d 524 [1999]; *see also* Hill v St. Clare's Hosp., 67 NY2d 72 [1986]; Johanessen v Singh, 259 AD2d 670 [1999]). Herein, Peninsula established its prima facie entitlement to judgment as a matter of law by demonstrating that decedent was treated at Peninsula by his private attending physicians, Dr. Larsen and Dr. Natalenko, as well as Dr. Neysa Valentin-Capeles and Dr. Jay Mehlman, who were called in as consultants by decedent's private attending doctors (*see* O'Regan v Lundie, 299 AD2d 531 [2002]; Ventura v Beth Israel Med. Ctr., 297 AD2d 801 [2002]; Culhane v Schorr, 259 AD2d 511 [1999]; Nagengast v Samaritan Hosp., 211 AD2d 878 [1995]).

However, although a hospital is normally protected from tort liability if its staff follows the orders of the patient's private physician, an exception exists where the hospital staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders (Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y., 253 AD2d 616 [1998]; Warney v Haddad, 237 AD2d 123 [1997]). It is undisputed that Dr. Lawrence Tarasuk, a surgical resident who was an employee of Peninsula, was

also involved in decedent's care under the supervision of Dr. Valentin-Capeles. Herein, the record reflects that decedent repeatedly refused treatment of his bowel impaction for two weeks before decedent's son was contacted for consent to perform emergency surgery on decedent. The affidavit and affirmation of plaintiff's experts, Dr. Jeffrey S. Freed and Claudia Garcenot, RN, BSN, assert that, in light of decedent's dementia, it was a departure from reasonable medical and nursing practices to fail to obtain consent from a family member or administrative directives in order to obtain necessary treatment in a timely manner. Thus, this documentary evidence raises issues of fact with respect to whether the actions of Peninsula staff were contraindicated under these circumstances (see Salter v Deaconess Family Med. Ctr., 267 AD2d 976 [1999]). Accordingly, Peninsula's cross motion for summary judgment is denied to the extent that it may be liable for the alleged negligence of its own employees.

Similarly, with respect to that branch of plaintiff's summary judgment motion which seeks to hold Peninsula vicariously liable for any negligence or malpractice of its medical providers, Peninsula cannot be found vicariously liable for the malpractice of the private attending physicians treating decedent (see Orgovan v Bloom, supra), but can be found vicariously liable for the negligence or malpractice of its employees (see Warney v Haddad, supra). Accordingly, that branch of plaintiff's motion which seeks to hold Peninsula vicariously liable is granted only to the extent that Peninsula may be held vicariously liable for the alleged torts of its own employees.

The court will next consider that branch of plaintiff's motion which seeks partial summary judgment holding the Home vicariously liable for any negligence or malpractice of the Home's staff and for any negligence or malpractice of Peninsula. The documentary evidence demonstrates that the doctors at the clinic and the nurses treating decedent were not employees of the Home but were independent contractors renting space in the Home pursuant to a lease. Therefore, the Home cannot be held vicariously liable for any alleged negligence committed by these separate entities. Similarly, the Home is not vicariously liable for any tort committed by Peninsula as there is no employer/employee relationship between the Home and Peninsula. Furthermore, contrary to plaintiff's assertions herein, the theory of ostensible agency as it relates to vicarious liability is inapplicable in this case because the decedent suffered from dementia. However, the Home can be held vicariously liable for the acts of its own employees. Accordingly, that branch of plaintiff's motion which seeks to hold the Home vicariously liable

is granted only to the extent that the Home may be held vicariously liable for the alleged negligence of its own employees. That branch of plaintiff's motion seeking to hold nonparties New Gloria's Manor H.F.A. and Gloria's Manor Home For Adults liable is denied as these parties have not been served with this action.

The court now turns to that branch of plaintiff's motion seeking partial summary judgment in plaintiff's favor holding Daniel Zeidman, M.D., SIUH, nonparty Zeidman P.L.L.C., and nonparty Apex vicariously liable for any negligence or malpractice of the Home's staff and the medical providers at Peninsula. At the outset, the court denies that branch of the motion seeking to hold nonparties Zeidman P.L.L.C. and Apex vicariously liable for the reason that these parties have not been served with this action. The evidence submitted herein demonstrates that Daniel Zeidman, M.D. was an independent contractor of the clinic, which leased space at the Home, and cannot be held vicariously liable for the acts of the Home's employees. Similarly, SIUH entered into a Clinical Services Agreement with Zeidman P.L.L.C. to maintain a medical office leased from the Home and thus is not vicariously liable for the acts of the Home's employees. Similarly, since there is no employer/employee relationship between Dr. Zeidman and Peninsula, Zeidman cannot be found vicariously liable for the torts of Peninsula's employees. Furthermore, as discussed above, the plaintiff's assertion of ostensible agency as it relates to vicarious liability is irrelevant because of the decedent's dementia. Accordingly, that branch of plaintiff's motion which seeks to hold Dr. Zeidman, SIUH, Zeidman P.L.L.C. and Apex vicariously liable for the torts of the Home's staff and Peninsula is denied in its entirety.

The court will next address that branch of plaintiff's motion which seeks to add New Gloria's Manor H.F.A. and Gloria's Manor Home For Adults as additional defendants. Once a defendant has shown that the Statute of Limitations has run, as defendant Home has demonstrated herein, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine (Spaulding v Mr. Vernon Hosp., 283 AD2d 634 [2001]). There are three conditions that must be satisfied for a claim asserted against a defendant subsequently sought to be joined to relate back to claims asserted against another defendant: (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that he will not be prejudiced in maintaining his defense on the merits and (3) the

new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (see Buran v Coupal, 87 NY2d 173 [1995]; Mondello v New York Blood Ctr., 80 NY2d 219 [1992]; Schiavone v Victory Mem. Hosp., 292 AD2d 365 [2002]).

Herein, plaintiff's only assertion with respect to adding New Gloria's Manor H.F.A. and Gloria's Manor Home For Adults is the conclusory statement that "the various GLORIA'S entities are all inter-related and are different names for the same adult home facility where the alleged acts of negligence and malpractice took place." No documentation is submitted indicating that these entities exist. Thus, plaintiff has failed to meet its burden to substantiate that these additional defendants should be added. Additionally, in opposition, defendant Home does not assert that the wrong entities have been sued.

The court now turns to that branch of plaintiff's motion which seeks to add Zeidman P.L.L.C. and Apex as additional defendants. Plaintiff argues, inter alia, that named defendant Daniel Zeidman, M.D. is united in interest with Zeidman P.L.L.C. and Apex because he "signed various documents" involving Zeidman P.L.L.C. and Apex. Parties are united in interest only where the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other (Prudential Ins. Co. v Stone, 270 NY 154 [1936]; see Mondello v New York Blood Ctr.-Greater N. Y. Blood Program, 80 NY2d 219 [1992]; Desiderio v Rubin, 234 AD2d 581 [1996]). In short, "interests will be united, only where one is vicariously liable for the acts of the other" (Connell v Hayden, 83 AD2d 30, 45 [1981]). Herein, defendant Dr. Zeidman has established that he is the sole shareholder as well as an employee of Apex and Zeidman P.L.L.C., which are both professional services limited liability corporations. It is basic that a shareholder or employee of a business corporation cannot be liable for the negligence of another shareholder or employee (see Connell v Hayden, supra).

Limited Liability Company Law § 1205(b) provides, in relevant part, as follows:

"Each shareholder, director, officer, employee, member, manager, partner and agent of a ... professional service limited liability company ... that is a member, manager, employee or agent of a professional

service limited liability company shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or her or by any person under his or her direct supervision and control while rendering professional services in his or her capacity as a member, manager, employee or agent of such professional service limited liability company."

Herein there has not been a sufficient showing to demonstrate that Dr. Zeidman directly supervised and controlled the nonparty physicians employed by Apex, who treated decedent at the clinic and at Peninsula. Therefore, Dr. Zeidman cannot be vicariously liable for their alleged malpractice. Thus, no unity of interest exists between Dr. Zeidman, Zeidman P.L.L.C. and Apex. As the plaintiff failed to establish that Dr. Zeidman, Zeidman P.L.L.C. and Apex were united in interest, the relation-back doctrine does not apply and these limited liability corporations cannot be added as defendants (see Teer v Queens-Long Island Med. Group, P.C., 303 AD2d 488 [2003]).

Accordingly, that branch of plaintiff's motion which seeks leave to add New Gloria's Manor H.F.A., Gloria's Manor Home For Adults, Zeidman P.L.L.C. and Apex as additional defendants is hereby denied.

Dated: November 14, 2007

J.S.C.