

**Mora v Saint Vincent's Catholic Med. Ctrs. of N. Y.**

2008 NY Slip Op 30257(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0113944/2003

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

WANDA MORA,

Plaintiffs,

Index No.: 113944/03

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

SAINT VINCENT'S CATHOLIC MEDICAL  
CENTERS OF NEW YORK, YUN HSI HSU,

Defendants.

The following papers, 1- 19, were read on this motion by defendant Saint Vincent's Medical Centers of New York's motion for partial summary judgment on the issue of direct liability.

Notice Of Motion - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
Papers Numbered  
-11  
121  
18-19  
JAN 30 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

The plaintiff, Wanda Mora, commenced the instant action against defendant Yun Hsi Hsu, M.D., to recover damages for medical malpractice, alleging that Dr. Hsu injured the plaintiff's lingual nerve while attempting to surgically excise the plaintiff's right submandibular gland. The action was also commenced against defendant Saint Vincent's Catholic Medical Center of New York (hereinafter "Saint Vincent's"), at whose facility the surgical procedure was performed.

According to plaintiff's deposition testimony, she began experiencing right neck pain in or about November or December of 1998. At that time she was referred by her primary physician, a doctor at Bayley Seton Hospital, a facility owned and operated by Saint Vincent's, to the surgery clinic at that facility. It appears that plaintiff was seen by physicians at both the surgery clinic and the ENT clinic at Bayley Seton Hospital with respect to her complaints. Plaintiff testified that her neck pain worsened over time and she was experiencing increased swelling in the area. Plaintiff's medical records indicate that she was diagnosed as having a history of right submandibular gland infection, as well as a stone, which was illustrated on a CT scan. In November of 2000, plaintiff

underwent the excision of her right submandibular gland. This procedure was performed by Dr. David Godin at Saint Vincent's in Manhattan and, according to the operative report, was performed without complication.

At some point in or around October of 2001 plaintiff again began to experience swelling and a tingling sensation in and around the right side of her neck. Plaintiff returned to Saint Vincent's in Manhattan to treat with Dr. Godin, but he was no longer employed by Saint Vincent's, so plaintiff was seen by a Dr. Yoo Bowne. A CT scan was taken and on November 28, 2001 plaintiff underwent an intraoral excision of a right submandibular duct stone performed by Dr. Bowne. According to plaintiff's testimony, Dr. Bowne advised her that she was removing a duct stone and did not make any mention of a retained gland.

Approximately four to five months following the intraoral excision of a right submandibular duct stone, plaintiff again began to experience pain and swelling in her neck, as well as a tugging sensation. Plaintiff's medical file from Bayley Seton Hospital indicates that plaintiff was seen at the adult medical clinic at Bayley Seton Hospital on February 12, 2002, requesting, *inter alia*, an ENT referral. The record from February 12, 2002, which, according to Dr. Hsu's deposition testimony, was prepared by a nurse, states that plaintiff had "3 surgeries for salivary gland," despite the fact that plaintiff, according to the record before this court, only had two prior procedures. Although the record does indicate that plaintiff had "stone extracted" and "gland removed," there is nothing provided in the record that would indicate what gland had been removed, the location of the stones that were extracted, or any details relating to plaintiff's prior surgeries. Moreover, it does not appear that CT scans were ordered or any other testing was performed in relation to plaintiff's neck during this visit to the adult medical clinic. Notwithstanding plaintiff's request for an ENT referral, it appears that plaintiff was referred directly to the surgical clinic, where she was not seen until March 21, 2002, over one month later.

Plaintiff was seen at the surgery clinic at Bayley Seton Hospital on March 21, 2002. Dr. Hsu was the physician on duty at the surgical clinic that day. According to Dr. Hsu's testimony, he worked at the surgery clinic at Bayley Seton Hospital on Thursdays from 1:00 to 3:00 p.m.<sup>1</sup> Plaintiff was first seen by a nurse and then examined by a physician's assistant.<sup>2</sup> The nurse noted,

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<sup>1</sup> Dr. Hsu's arrangement with Saint Vincent's relating to the patients he saw at the surgery clinic at the time he treated plaintiff, as testified to by Dr. Hsu, appears to be somewhat unorthodox. According to Dr. Hsu he was not paid by the facility for seeing patients at the surgery clinic. However, he would be paid by a medical insurance company for the performance of any surgical procedure. Therefore, as testified by Dr. Hsu, "no operation, no pay." It appears that attending physicians were required by Saint Vincent's to see patients in one of its various clinics without pay as a condition of receiving privileges at the facility.

<sup>2</sup> Dr. Hsu acknowledged during his deposition that a physician's assistant would assist him in seeing patients in the surgical clinic. However, contrary to this testimony, Dr. Pyogendra Patel, M.D., The Chairman of the Department of Surgery at Saint Vincent's at the time Dr. Hsu was an attending, testified at his non-party deposition that there were no physician's assistants working in the surgical clinic at Saint Vincent's.

incorrectly, on the record that plaintiff had three prior surgeries relating to her "salivary glands." There was no notation made relating to the removal of plaintiff's submandibular gland, which was performed at Saint Vincent's in Manhattan, an affiliated facility. A notation was made with respect to a surgery being performed on November 28, 2001, however, nothing was written to indicate what type of surgery was performed on that date. The portion of the record completed by the physician's assistant correctly sets forth that plaintiff had previously underwent two prior surgeries in her right "salivary (submandibular)" at Saint Vincent's in Manhattan. Notwithstanding, there was nothing written in the note by the physician's assistant indicating the nature of either of the two prior procedures, specifically, no notation that plaintiff had previously underwent the excision of her right submandibular gland. The assessment of the plaintiff, according to this note, was a calculus (*i.e.*, stone) of the salivary right submandibular gland. The treatment plan called for the excision of plaintiff's right submandibular gland, which according to the operative report of Dr. David Godin at Saint Vincent's in Manhattan was removed without complication in November of 2000.

According to Dr. Hsu, he also examined plaintiff during her visit to the surgery clinic on March 21, 2002. Dr. Hsu testified that he and the physician's assistant discussed the findings stated in the record and he cosigned the record, indicating that he agreed with the findings and diagnosis of the physician's assistant. There is nothing in the medical record indicating whether Dr. Hsu independently examined plaintiff to confirm the findings of the physician's assistant other than his signature and stamp at the bottom of the page. The Court finds it important to note that based upon the deposition testimony of Dr. Hsu it appears that neither he, nor the physician's assistant, ordered a CT scan of plaintiff's neck prior to reaching their medical conclusions. It appears that he, as well as the physician's assistant, were relying on a CT scan performed in September of 2000, prior to plaintiff's surgery in November of 2000 excising her submandibular gland.

Plaintiff was again seen at the surgery clinic at Bayley Seton Hospital March 25, 2002. It appears from the medical records that she was given a pre-operative physical examination during this visit. According to Dr. Hsu, this exam was also conducted by a physician's assistant. The record relating to this examination prepared by the physician's assistant sets forth that plaintiff previously underwent the excision of a "submandibular cyst three times." There is no indication on this record that plaintiff had a history of submandibular gland removal. The "impression" set forth by the physician's assistant in this record was a submandibular cyst with a plan for the excision of that cyst, which, it is important to note, is inconsistent with the record prepared four days earlier, on March 21, 2002, by a physician's assistant and cosigned by Dr. Hsu that called for the excision of plaintiff's submandibular gland. The record of March 25, 2002, was cosigned by Dr. Hsu two days later on March 27, 2002, immediately prior to plaintiff's surgery.

On March 27, 2002, Dr. Hsu performed surgery on plaintiff to excise her right submandibular gland. An operative report, dated March 27, 2002, written by Dr. Hsu states that plaintiff was to undergo the excision of the right submandibular gland under general anesthesia. It is noted that Dr. Hsu's operative report incorrectly states that plaintiff "was treated by surgery about four times including the right parotid gland and drainage of the submandibular." Immediately following this surgery, plaintiff began to experience right sided tongue numbness. Plaintiff alleges that as a result of medical malpractice committed by Dr. Hsu and the nurses and physician's assistants at the defendant facility she was caused to suffer a lingual nerve injury and resulting

deficits.

Saint Vincent's presently moves for partial summary judgment pursuant to CPLR §3212, on the issue of direct liability, arguing there was no deviation from good and accepted medical practice on the part of the Saint Vincent's. "[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).

In support to its motion Saint Vincent's relies on, inter alia, the expert affidavit of a surgeon licensed to practice in the State of New York, and who is presently a professor of surgery at Albert Einstein College of Medicine in New York. According to Saint Vincent's surgical expert, based upon his review of the plaintiff's medical records, as well as plaintiff's bill of particulars and the deposition testimony of both plaintiff and Dr. Hsu, Saint Vincent's "did not deviate from the standard of care regarding the treatment of Wanda Mora, and plaintiff's allegations against the Hospital are wholly without merit." Saint Vincent's surgical expert sets forth that:

"[o]n March 25, 2002, plaintiff, Wanda Moore [sic] sought treatment at the Hospital's Bailey Seton Campus for pain and swelling in her right salivary gland. Ms. Mora was seen by Dr. Yun Hsi Shu [sic]. On March 27, 2002, Dr. Hsu performed a procedure in the area of the right salivary gland. At no time did any of the staff of the Hospital fail to carry out the orders that the physicians at the Hospital gave. There were no departures from acceptable and proper medical care for plaintiff on the part of the Hospital or its employees."

In opposition, plaintiff argues that questions of fact exist with respect to "the propriety of the physician's assistant's plans of action in the treatment of the plaintiff, the improper history taken both by nurses at the plaintiff's clinic visits and the physician's assistants at the surgical clinics, as well as the precise nature of Dr. Hsu's on-call duties vis-a-vis the physicians assistants, physician's assistant students and service patients at the hospital." Plaintiff relies upon, inter alia, the expert affidavit of a physician licensed to practice in the State of New York, who is board certified by the American Board of Otolaryngology. After a review of plaintiff's medical records and the deposition testimony of Dr. Hsu, plaintiff's expert opined that Saint Vincent's deviated from the standard of care in connection with plaintiff's treatment. Plaintiff's expert specifically sets forth that:

"St. Vincent's Hospital deviated from the standard of care regarding the treatment of plaintiff Wanda Mora in that the nurses and physicians assistants who examined the plaintiff on March 21, 2002 and March 25, 2002 failed to take an adequate and careful history and failed to perform a complete and accurate physical examination; the physicians assistants failed to make a proper pre-operative diagnosis or plan for treatment; physicians assistants failed to recommend pre-operative imaging tests and failed to recommend a needle biopsy; the nursing staff and physicians assistants failed to communicate pertinent findings to Hsu (sic); the physicians assistants failed to ensure that adequate informed consent was secured from plaintiff for Dr. Hsu's surgery; failed to properly safeguard original surgical specimens and to maintain original pathology slides."

Additionally, plaintiff's expert states that "Dr. Hsu would have been required to apply to St. Vincent's hospital for privileges to do excision of right submandibular surgery and to be credentialed by the hospital to do that particular surgery. If there is no written credentialing by St. Vincent's of Dr. Hsu for this specific surgical procedure then the hospital was negligent in allowing Dr. Hsu to perform this type of surgery." It is the opinion of plaintiff's expert that the aforementioned departures were a proximate cause of plaintiff's injuries as such departures "led to the performance of a surgery without the benefit of knowledge of what the underlying pathology was in the patient."

Based upon the conflicting expert affidavits submitted by the parties, as well as the other evidence submitted in support and opposition to the instant motion, it appears that issues of fact and credibility exist in connection with whether Saint Vincent's deviated from good and accepted medical practice in the manner in which the nurses and physician's assistants examined the plaintiff immediately prior to the subject surgery, i.e., the adequacy of the history taken from plaintiff and the physical examination performed; the adequacy of the pre-operative diagnosis and plan for treatment; the failure to recommend pre-operative imaging tests and a needle biopsy; the failure to communicate pertinent findings to Dr. Hsu. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). Accordingly, Saint Vincent's motion for partial summary judgment on the issue of direct liability pursuant to CPLR 53212 is denied.

It is difficult to arrive at a conclusion as to whether Dr. Hsu was properly credentialed by Saint Vincent's. By his own admissions, Dr. Hsu does not "know exactly" how to read CT scans and is "not confident" in interpreting them; and "does not know exactly" how to identify a lingual nerve. Further, it is clear from the medical records that Dr. Hsu does not feel diagnostic testing and/or needle biopsies are necessary before making a decision resulting in surgery. Therefore, the court finds that at a minimum, questions of facts exist as to whether Saint Vincent's was negligent in the manner in which they credentialed Dr. Hsu, and in permitting him to perform the surgery at issue. Notwithstanding, as there exists no duty for a mere assistant to obtain a patient's informed consent, no issues of fact exist in relation to whether the staff at Saint Vincent's can be held liable for any alleged failures on the part of Dr. Hsu with respect to the informed consent provided by plaintiff in connection with the subject surgery (see Domaradzki v Glen Cove Ob/Gyn Assoc., 242 AD2d 282 [2d Dept. 1997]; Spinosa v Weinstein, 168 AD2d 32 [2d Dept. 1991]). Lastly, with respect to any alleged failure on the part of Saint Vincent's to properly safeguard the original

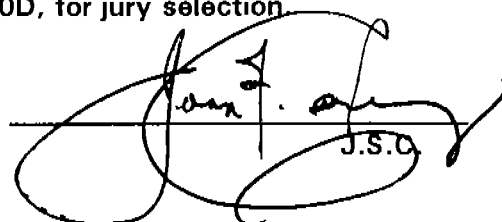
surgical specimens and to maintain the original pathology slides, that issue is presently before this Court in a motion in limine submitted by plaintiff's counsel and will be addressed in a separate decision.

Based on the foregoing, it is hereby

ORDERED Saint Vincent's Medical Centers of New York's motion for partial summary judgment on the issue of direct liability is denied; and it is further,

ORDERED that counsel for all parties are to appear before the court on January 16, 2008, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for jury selection.

Dated: 1/16/2008



Check one:     FINAL DISPOSITION                       NON- FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE

**FILED**  
JAN 30 2008  
NEW YORK  
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