

Diaz v Winthrop Univ. Hosp.

2008 NY Slip Op 31475(U)

May 19, 2008

Supreme Court, Suffolk County

Docket Number: 0016969/2005

Judge: Peter H. Mayer

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CAL. No. 07-02097-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 12-6-07

ADJ. DATE 1-17-08

Mot. Seq. # 001 - MD

-----X			CHRISTOPHER CASSAR, P.C.
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	:		
	:		FUREY, KERLEY, WALSH, et al.
	:	- against -	Attorneys for Deft Winthrop University Hospital
	:		2174 Jackson Avenue
	:		Seaford, New York 11783
WINTHROP UNIVERSITY HOSPITAL and	:		
DR. FRANK GRESS,	:		VARDARO & HELWIG, LLP
	:		Attorneys for Defendant Dr. Frank Gress
	:	Defendants.	732 Smithtown Bypass
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Upon the reading and the filing of the following papers in this matter: (1) Notice of Motion by the Defendant Winthrop University Hospital, dated November 5, 2007, and supporting papers; (2) Affirmation in Opposition by the Plaintiff, dated January 2, 2008, and supporting papers; and (3) Reply Affirmation by Defendant Hospital, dated January 17, 2008; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the Motion is decided as follows: it is

ORDERED that this motion by defendant Winthrop University Hospital for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for the alleged malpractice of the defendants in rendering medical treatment to the plaintiff in the course of a balloon dilation for achalasia¹ that was performed by

¹ *Stedman's Medical Dictionary* (27th edition) at page 13 defines esophageal achalasia as the failure of the normal relaxation of the lower esophageal sphincter associated with uncoordinated contractions of the thoracic esophagus resulting in functional obstruction and difficulty in swallowing.

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defendant Frank Gress, M.D. at defendant Winthrop University Hospital (Winthrop Hospital) on July 3, 2003. It is alleged that the plaintiff suffered a perforation of his esophagus during the procedure which required him to undergo emergency surgery at St. Charles Hospital to repair the rupture. The gravamen of the plaintiff's claim is that the defendants improperly performed the procedure and improperly provided post procedure care to the plaintiff.

Defendant Winthrop Hospital now moves for summary judgment on the basis that it bears no culpability for any malpractice in the treatment rendered to the plaintiff. In essence, the hospital maintains that it cannot be held vicariously liable for any malpractice on the part of Dr. Gress as he was acting as a private attending physician and not an employee of the hospital when he performed the procedure upon the plaintiff. Defendant Hospital further asserts that the actions of its own employees including its nursing staff did not deviate from the appropriate standard of care. In support, defendant Winthrop Hospital submits, *inter alia*, the complaint and defendant Hospital's answer, counsel's affirmation, portions of the plaintiff's medical records related to the procedure, a copy of the transcript of the examination before trial testimony given by defendant Gress and the affidavit of defendant Winthrop Hospital's expert, Mark J. Kirchblum, M.D.

With regard to its contention that Dr. Gress acted as a private attending physician in rendering treatment to the plaintiff, defendant Winthrop Hospital points to the deposition testimony given by Dr. Gress to the effect that he was employed as a member of the faculty of Winthrop Gastroenterology, P.C. which he explained meant he was employed as a physician. When asked whether he was employed through the hospital or the group he responded that the salary he received from Winthrop Hospital would basically be for administrative responsibilities and not for patient care and that his salary for patient care came "mainly" from Winthrop Gastroenterology, P.C. (Gress ebt testimony at pp. 98, 99). The Court also notes that in response to a question regarding his affiliation with Winthrop Hospital, Dr. Gress testified that he started working at the hospital in 1996 as director of endoscopy and was a full time employee of the hospital. In 2002, he began working part time becoming part-time faculty and doing work at two other hospitals. In July, 2003, he was a part time employee at Winthrop Hospital and "just had reduced hours"(Gress ebt testimony at pg. 19).

As to his relationship with the plaintiff, Dr. Gress testified that he was briefly introduced to the plaintiff at the hospital by another physician, Dr. Kongara, with whom he shared office space in the G.I. Division at the hospital. Dr. Gress explained that the plaintiff had seen Dr. Kongara for a consult and that she had introduced the plaintiff to Dr. Gress as a patient of hers that Dr. Gress might be seeing for a possible balloon dilation and endoscopic ultrasound. Dr. Gress further testified that the next time he saw the plaintiff was the day of his procedure in the holding area of the hospital where the doctor re-introduced himself to the plaintiff, confirmed that the plaintiff was to undergo an endoscopic ultrasound and a balloon dilation and discussed the risks and benefits of the procedure whereupon the plaintiff executed a consent form for the procedure.

"Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician" (*O'Regan v Lundie*, 299 AD2d 531, 751 NYS2d 274 [2002]; *see also, Orgovan v Bloom*, 7 AD3d 770, 776 NYS2d 879 [2004]). "Although vicarious liability for medical malpractice generally turns upon agency or control, apparent or ostensible agency may also serve as a predicate for such liability"

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(*Williams v Howe*, 297 AD2d 671, 747 NYS2d 251 [2002]). “ Despite a physician’s independent contractor status, a hospital may be held vicariously liable for such physician’s negligence if it maintained control over the manner and means of the physician’s work and the plaintiff reasonably believed that the treating physician was provided by the hospital or was acting on its behalf” (*Torns v Samaritan Hospital*, 305 AD2d 965, 761 NYS2d 126 [2003]). Moreover, a hospital may be held concurrently liable with a private physician for the independent negligence of its medical staff (*Pearce v Klein*, 293 AD2d 593, 741 NYS2d 89 [2002]; *Barnes v Sheehan, Memorial Hospital*, 275 AD2d 1028, 714 NYS2d 917 [2000]; *Gerner v Long Island Jewish Hillside Med. Ctr.*, 203 AD2d 60, 609 NYS2d 898 [1994]). As the moving party herein, the hospital is required to make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issue of fact. Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Delprete v Victory Memorial Hospital*, 191 AD2d 673, 595 NYS2d 809 [1993]).

Here, the Court concludes that defendant Winthrop Hospital has failed to sustain its burden of demonstrating the absence of any material issue of fact with regard to Dr. Gress’ employment status. Notably absent from defendant Winthrop Hospital’s moving papers is the affidavit of any representative of the hospital with personal knowledge of the facts attesting to the nature of Dr. Gress’ relationship with the hospital. Nor has the hospital produced a copy of any contract to clarify its professional relationship with either Dr. Gress or Winthrop Gastroenterology, P.C. As to the testimony given by Dr. Gress, the Court finds it susceptible to differing interpretations regarding his employment relationship with the Hospital and by no means definitive proof of his status as a private attending physician. Thus, defendant Winthrop Hospital has not submitted sufficient proof to establish a prima facie showing that Dr. Gress was not actually or ostensibly an agent of the hospital.

With respect to the defendant Hospital’s acknowledged staff, the hospital maintains that its employees did not deviate from the standard of care required of them in their treatment of the plaintiff. “To establish malpractice by a hospital, expert medical testimony must be offered to demonstrate that a resident, intern, nurse or technician as the case may be, violated some accepted standard of good professional practice and injured the patient” (see, *De Falco v Long Island College Hospital*, 90 Misc2d 164, 393 NYS2d 859 [1977] aff’d 62 AD2d 1180, 403 NYS2d 608).

By his personal affidavit, defendant’s expert Mark J. Kirchblum, M.D. avers that he is board certified in internal medicine and maintains a sub-specialty in gastroenterology and that he reviewed the bill of particulars, the parties’ deposition testimony and plaintiff’s medical records from both Winthrop Hospital and St. Charles Hospital. Dr. Kirchblum’s opinion is predicated upon the supposition that Dr. Gress performed surgery upon the plaintiff as a private attending physician. The expert states that such procedure was performed without assistance and that post-operatively plaintiff was brought to the recovery room where he was continuously monitored by the hospital staff. Dr. Kirchblum also states that when plaintiff complained of abdominal pain Dr. Gress was notified and plaintiff was taken for an x-ray to rule out a perforation. The x-ray was read and revealed no pneumothorax² or

² *Stedman’s Medical Dictionary* (27th Edition) at page 1412 defines pneumothorax as the presence of free air or gas in the pleural cavity.

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pneumomediastinum³ which indicated that there was no evidence of perforation. Dr. Kirchblum continues that plaintiff was given medication for pain relief whereupon plaintiff made no further complaints of pain up to and including the time of his discharge by his private attending physician. At the time of his discharge he was given appropriate instructions. Dr. Kirchblum concludes that the care and treatment provided by the employees of defendant Winthrop Hospital was in accordance with the applicable standards of care. Based upon the foregoing, defendant Hospital has made a prima facie showing of entitlement to summary judgment on the basis that its acknowledged staff did not deviate from the required standard of care.

In opposition, the plaintiff submits, *inter alia*, portions of his medical records from Winthrop Hospital and St. Charles Hospital, copies of his own deposition testimony and that of his father who accompanied him on the day of the procedure as well as their personal affidavits and the affidavit of plaintiff's medical expert, Maxwell Chait, M.D. Dr. Chait avers that he is board-certified in internal medicine with a sub-specialty in gastroenterology and that he reviewed the deposition testimony given by the plaintiff, his father and by Dr. Gress as well as the medical records regarding the plaintiff from both Winthrop and St. Charles hospitals. Dr. Chait avers that the standard of care requires that when a patient who has just had a balloon dilation has continuous complaints of severe pain, and/or is vomiting blood, a diagnostic study must be undertaken to rule out a perforation. When the plaintiff continued to complain of excruciating pain and of vomiting blood after a negative x-ray study was performed, Dr. Chait opines that a CT scan should have performed and the plaintiff should not have been released from the hospital. Dr. Chait further states that when plaintiff's father initially advised the hospital staff in person at the hospital that his son was in severe pain and throwing up black fluid in the hospital parking lot, and later by telephone, advised the hospital staff that plaintiff was still in severe pain and had been vomiting "black fluid", that the hospital staff should not have advised plaintiff's father that plaintiff's condition was "normal". Dr. Chait asserts that the hospital should have readmitted the plaintiff, informed his treating physician of his complaints and sent the plaintiff for a CT scan. Dr. Chait concludes that the hospital's failure to take the aforementioned actions constitutes a deviation from the required standard of care and that had the hospital staff not deviated from the standard of care, the perforation would have been discovered and plaintiff would have received proper treatment in a timely fashion.

In reply, defendant Winthrop Hospital submits the affirmation of counsel who, among other things, challenges the accuracy of plaintiff's expert's opinion. Inasmuch as counsel has not established himself as a medical expert, his evaluation of plaintiff's expert's opinion is without any probative value.

In any event, summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. Where, as here, medical experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2005]; *Shields v*

³ *Stedman's Medical Dictionary* (27th Edition) at page 1409 defines pneumomediastinum as the abnormal presence of air in mediastinal tissues; the multiple causes of which include perforation of the cervical or thoracic esophagus or airways.

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Baktidy, 11 AD3d 671, 783 NYS2d 652 [2004]). The request by defendant Winthrop Hospital for summary judgment on plaintiff's claim for medical malpractice based upon an alleged departure from the standard of care by the acknowledged members of the hospital staff is, therefore, denied.

Accordingly, defendant Winthrop Hospital's motion for summary judgment is denied in its entirety.

Dated: 5/19/08


PETER H. MAYER, J.S.C.