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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

FRIEDMAN, SANDOR

Plaintiff(s),

- v -

LOWY, JOSEPH, M.D.

Defendant(s).

INDEX NO. 117868-06

MOTION DATE 3/10/09

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 57, were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause – Affidavits – Exhibits	1-16
Answering Affidavits – Exhibits XMOT 48-49	17-31, 32-33, 34-47, 50-504
Replying Affidavits	51-57

Cross-Motion: [X] Yes [ ] No

FILED
APR 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 4/3/09

JBL

JOAN B. LOBIS, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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SANDOR M. FRIEDMAN, Administrator of the Estate of HELENE JOSEPH,

Plaintiff,

- against -

JOSEPH LOWY, M.D., NEW YORK PULMONARY ASSOCIATES, P.C. and DAVID A. SILVERMAN, M.D. SUSIE CHUNG, M.D., NEW YORK UNIVERSITY MEDICAL CENTER, and NYU HOSPITALS CENTER,

Defendants.

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Index No. 117868/06

Decision and Judgment

JOAN B. LOBIS, J.S.C.:

In Motion Sequence Number 004, defendant NYU Hospitals Center s/h/a New York University Medical Center and NYU Hospitals Center ("NYU") seeks summary judgment pursuant to C.P.L.R. Rule 3212, on the ground that no triable issues of fact exist. The motion is opposed by plaintiff and by defendants Joseph Lowy, M.D., New York Pulmonary Associates, P.C. ("NYPA"), and David A. Silverman, M.D. By cross motion, Susie Chung, M.D., seeks summary judgment on the basis that NYU is vicariously liable for the acts of Dr. Chung; thus, should this court find that NYU is entitled to summary judgment, Dr. Chung would likewise be entitled to summary judgment. For the reasons set forth herein, both motions are denied.

This action for medical malpractice and wrongful death arises out of plaintiff decedent's March 22, 2005 admission to NYU for complaints of shortness of breath. Ms. Joseph, who was 54 years old at the time, had a long history of asthma and smoking. She entered the hospital via the emergency room and was noted to be diaphoretic, with wheezes, rales, and hypoxia, She was treated with a nebulizer, intravenous steroids, and oxygen. Ms. Joseph was admitted by Dr.

Chung for exacerbated asthma and chronic obstructive pulmonary disease ("COPD"). Her breathing stabilized, but she continued to have intermittent chest tightness, congestion, and coughing episodes. On March 23, Ms. Joseph had a chest CT scan (the "March 2005 Scan"), which was notable for "indeterminate pulmonary nodules": a 6 mm nodule in the right upper lobe; a lobulated 7 mm nodule in the right lower lobe; subpleural left apical nodule density; and, tiny subpleural left lower lobe nodular densities. Additionally, an 8 mm well-circumscribed granular glass nodule was seen in Ms. Joseph's right upper lobe. The radiologist's impression was that the nodules may be infectious or inflammatory in etiology; however, a follow-up CT scan within 2-3 months was recommended, as well as comparison of this scan with any prior chest CT scans, if available, to assess the chronicity of the findings.

On March 25, Michael Jager, M.D., a pulmulnology fellow, and Michael Frankenthaler, M.D., a pulmonologist from NYPA, saw Ms. Joseph for a pulmonary consultation that had been ordered by Dr. Chung on March 24. Dr. Jager recommended that Ms. Joseph start taking Advair, continue taking Albuterol as needed, and taper steroids over two weeks. His notes reflect his recommendation that she have a repeat chest CT scan in two months, and emphasize his recommendation that she cease smoking. Dr. Frankenthaler also noted that Ms. Joseph should have a follow-up CT scan in two months. Dr. Lowy took over for Dr. Frankenthaler for the weekend of March 26-27. Dr. Lowy saw Ms. Joseph at least twice over the weekend, and recommended discharge on March 27. She was discharged on March 27 by Dr. Chung; Nurse Amanda Philip was the nurse who physically discharged Ms. Joseph.

On April 22, 2005, Dr. Lowy saw Ms. Joseph for her first follow-up appointment. She had further appointments approximately every or every other month (May, June, July, September, October, and December). Over the same period, she was also seeing her primary care physician, Dr. Silverman. Ms. Joseph testified that at each visit to Dr. Lowy, she complained that her breathing was getting worse. Dr. Lowy performed tests at each visit, but did not order a CT scan. Ms. Joseph did not have a repeat CT scan until December. She testified that during her December appointment, Dr. Lowy scheduled her for an immediate CT scan; this scan took place on December 23, 2005 (the "December 2005 Scan"). The next day, Ms. Joseph learned the results of the December 2005 Scan during an appointment with Dr. Silverman for something unrelated; the December 2005 Scan showed malignant lung cancer. The radiologist who read the December 2005 Scan did a comparison study to the March 2005 Scan, which showed, *inter alia*, that a nodular spiculated density in the right upper lobe had increased in size from 0.6 cm to 1.7 x 1.4 cm, and a spiculated nodule in the right lower lobe had increased in size from 0.6 cm to 1.5 x 1.3 cm. Plaintiff commenced this action on December 1, 2006. She died on September 14, 2007, and thereafter, her estate was substituted.

Plaintiff alleges that Ms. Joseph's physicians' failure to inform Ms. Joseph that the report from her March 2005 Scan recommended a follow-up CT scan within 2-3 months led to a delay in diagnosing her lung cancer. Ms. Joseph testified at her 2007 deposition that no one informed her that there was a problem with the March 2005 Scan, and that Dr. Lowy told her that the March 2005 Scan was "fine" or something similar to that. Dr. Silverman testified that Ms. Joseph told him that the March 2005 Scan was "negative".

The allegations of negligence against NYU, as set forth in plaintiff's bills of particulars, include, *inter alia*: failing to notify, alert or otherwise inform Ms. Joseph of the seriousness and significance of the March 2005 Scan at any time during her admission or prior to her discharge from the hospital; failing to compare the March 2005 Scan to Ms. Joseph's prior chest CT scans; failing to provide Ms. Joseph with proper discharge instructions; failing to notify, alert or otherwise inform Ms. Joseph of the need for a follow-up CT scan in two months' time; and, delaying the issuance of a discharge summary. In the bills of particulars as to NYU, plaintiff includes Dr. Chung as an employee of NYU.

In seeking summary judgment, NYU asserts that Drs. Chung and Lowy are private attending physicians and were not employed by NYU, that all of the treatment provided to Ms. Joseph during her admission was provided by private attending physicians, and that the NYU staff members properly followed the directions of these physicians; as such, NYU claims that it is not vicariously liable for the acts of Dr. Chung or Dr. Lowy. NYU also asserts that even if the court found NYU liable for the acts of Dr. Chung under an ostensible agency theory, Dr. Chung appropriately discharged her duties as a hospitalist. Further, NYU argues that even had Dr. Chung departed from accepted practice by failing to provide Ms. Joseph with the results from the March 2005 Scan, this departure was not a proximate cause of Ms. Joseph's injuries, because Dr. Silverman and Dr. Lowy knew of her need for follow-up CT scans and assumed responsibility for her care after her discharge from NYU.

It is well-established that a hospital cannot be held liable for the acts of a patient's private physician. See Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 79 (1986); Welsh v. Scheinfeld, 21

A.D.3d 802, 807 (1st Dep't 2005). However, courts have recognized "apparent or ostensible agency," also known as "agency by estoppel," as a predicate for medical malpractice liability. Hill, supra, citing Hannon v. Siegel-Cooper, 167 N.Y. 244 (1901). The theory of ostensible agency "has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic. . . ." Hill, supra, 80-81 (citations omitted). "[A] hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting at the hospital's behest." Saravola v. Brookdale Hosp. & Med. Ctr., 204 A.D.2d 245 (1st Dep't), app. denied, 85 N.Y.2d 805 (1995).

NYU has met its burden, supported by defendants' deposition testimony, to demonstrate that neither Dr. Lowy nor Dr. Chung were employed by NYU at the time of the alleged malpractice. See Warden v. Orlandi, 4 A.D.3d 239, 241-42 (1st Dep't 2004). The burden shifts to the parties opposing this motion to raise a triable issue of fact, supported by competent evidence, as to agency by estoppel. Id. at 242. In opposition to a *prima facie* showing of the absence of actual agency, the opposing party "'cannot rely on conjecture and inference to establish agency, either actual or ostensible.' Indeed, '[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment.'" Id. (internal citation omitted).

Plaintiff and co-defendants, in opposition, raise the fact that Ms. Joseph entered NYU via the emergency room and that her physicians were assigned to her by NYU. Indeed, Dr. Chung testified:

> Q. How are you affiliated, if you remember, regarding Helene Joseph?
> A. By the emergency room.
> Q. Do you remember who contacted you?
> A. No.
> Q. Do you remember whether it was a physician or a nurse or someone else?
> A. It was either a physician, an attending physician or a house staff physician from the ER.
> Q. And were you contacted in person or over the phone by page?
> A. Over the phone by page.
> Q. And did you have a conversation at that time with the person who called you from the ER?
> A. Yes.
> Q. And what did they tell you?
> A. They told me they had a patient in the hospital who is coming in who looked like she may have COPD exacerbation. They weren't clear if she had a primary care physician who was admitted to NYU and I was on call that day for admitting patients who are unassigned from the emergency room and they asked me to accept her.
> Q. Could you please just tell me what the procedure was at NYU for patients who didn't have a primary care doctor at NYU?
> A. They called the hospitalist on call that day, whoever the doctor is listed as on call to accept unassigned patients, they would call that physician and they would tell that physician, this patient needs admission, and that patient will then get admitted to that physician's service.

Under Mduba v. Benedictine Hosp., 52 A.D.2d 450 (3d Dep't 1976), where a physician is an independent contractor retained by the hospital for certain services, the hospital may be liable for that physician's negligence in some circumstances, including the instance when a patient enters the hospital for emergency treatment seeking treatment from the hospital and not from a particular

physician. In this case, Ms. Joseph entered NYU via the emergency room and did not seek treatment from a particular physician. It appears that she was assigned to Dr. Chung because Dr. Chung was "the hospitalist on call that day . . . to accept unassigned patients." Although Dr. Chung eventually contacted Ms. Joseph's primary care physician, Dr. Silverman, Ms. Joseph was not referred to the hospital by him, nor did he assume responsibility over her care during her admission. At the very least, the parties opposing NYU's motion for summary judgment have raised material issues of fact, supported by competent evidence such as deposition testimony, as to whether NYU is vicariously liable for the acts of Dr. Chung under the theory of ostensible agency.

Turning to NYU's argument that Dr. Chung appropriately discharged her duties as a hospitalist, the party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law." Grant v. Hudson Val. Hosp. Ctr., 55 A.D.3d 874 (2d Dep't 2008). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, supra at 324 (citation omitted). Specifically, this requires, in a medical malpractice action, that a plaintiff opposing a physician's summary judgment motion

> must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in

> treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

In support of NYU's argument that Dr. Chung was not negligent, NYU annexes the affirmation of Michael Grossbard, M.D., a physician duly licensed to practice medicine in the State of New York and board certified in internal medicine and medical oncology. He bases his opinions on his review of the pertinent medical records, pleadings, and deposition testimony, and also on his training and experience. He opines, to a reasonable degree of medical certainty, that the care and treatment rendered to Ms. Joseph by NYU and by Dr. Chung was proper in all respects and well within the accepted standards of good medical practice. Dr. Grossbard contends that Dr. Chung appropriately contacted Dr. Silverman after receiving the results of the March 2005 Scan and apprised him of the results, properly requested a consultation by NYPA, and conveyed all relevant information to the consulting pulmonolgist. NYU's expert avers that Dr. Chung appropriately treated Ms. Joseph's acute symptoms—shortness of breath and chest congestion—and satisfied her obligation as a hospitalist by contacting Ms. Joseph's primary care physician, Dr. Silverman. Finally, Dr. Grossbard asserts that the care and treatment provided to Ms. Joseph did not proximately cause her ultimate injuries. He opines that once Ms. Joseph was discharged, her relationship with Dr. Chung ended and Dr. Silverman and Dr. Lowy assumed responsibility for Ms. Joseph's care, both of whom, Dr. Grossbard asserts, were aware of the need for follow-up CT scans. Dr. Grossbard submits that Dr. Chung's involvement in Ms. Joseph's care was not a factor in her outcome.

NYU has not met its burden as the proponent of summary judgment to eliminate all material issues of fact. Plaintiff alleges, *inter alia*, that Dr. Chung was negligent in failing to convey the results of the March 2005 Scan to Ms. Joseph. Nowhere in his affirmation does Dr. Grossbard address this allegation; he asserts that Dr. Chung properly discharged her duties as a hospitalist by informing Dr. Silverman of the March 2005 Scan results, but does not address whether it was or was not a departure from the accepted standard of care for Dr. Chung allegedly to fail to convey the results to Ms. Joseph, the patient. Dr. Grossbard does not affirmatively state that Dr. Chung did not have a duty, as the hospitalist assigned to Ms. Joseph's care, to inform Ms. Joseph of the results of the March 2005 Scan and the need to have a follow-up CT scan within two to three months. Telling the patient to follow-up with her primary physician and pulmonologist is not the same as informing the patient of the results of her tests and the recommendation to have repeat testing; there is an element of importance and necessity that is not conveyed by simply telling the patient to follow-up with other physicians. Other courts have found that a physician who is presented with a radiologist's report with recommendations for follow-up studies is under a duty to tell the patient of such findings and suggestion for follow-up studies, even if that physician is treating the patient for a different illness or condition. See, Mikus v. Rosell, 19 Misc. 3d 178 (Sup. Ct. Richmond Co. 2008).

As to the issue of proximate cause, Dr. Grossbard does not address plaintiff's allegation that Dr. Chung departed from accepted standards of care by delaying in providing a written discharge summary. Dr. Lowy testified that he attempted to access Ms. Joseph's complete discharge report at her first outpatient appointment on April 22, 2005, but it was not available. Dr. Chung did not dictate her full discharge summary until May 5, 2005; this discharge summary

contained the instructions for Ms. Joseph to have a repeat CT scan within two months. Because Dr. Grossbard does not address this allegation, it is unclear whether Dr. Chung's delay in issuing a discharge summary constituted a departure, and whether the departure was a proximate cause of Ms. Joseph's ultimate injuries. Material questions of fact remain as to what Dr. Chung's duty was to Ms. Joseph, and whether Dr. Chung breached that duty.

Since NYU did not meet its burden as proponent of summary judgment, the burden did not shift to the parties opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, supra, at 324 (citation omitted). Assuming, *arguendo*, that the burden had shifted, all parties in opposition raise an issue that was not addressed in NYU's motion: the vicarious liability NYU may have for the alleged departures of Nurse Amada Philip who, in discharging plaintiff, failed to include in Ms. Joseph's Discharge Instructions the need for a follow-up chest CT scan in two to three months. Nurse Philip testified that if a patient had a test and was being discharged with instructions related to that test, then she would put those instructions in the patient's Discharge Instructions. Nurse Philip testified that she would have read the report of the March 2005 Scan and the consultation report from Drs. Jager and Frankenthaler, which both indicated the need for follow-up. Despite this, Nurse Philip did not include those findings or recommendations in the Discharge Instructions that she prepared for Ms. Joseph. Plaintiff's expert, a physician duly licensed to practice medicine in the State of New York and board certified in surgery, with a subspeciality in surgical oncology (physician's name redacted), opines, within a reasonable degree of medical certainty, that

> Nurse Philip also had the opportunity to notify Ms. Joseph of the need for the recommended Chest CT Scan in 2-3 months[']time by putting

> that instruction in her Discharge Instructions, however failed to do so and similarly NYU departed from good and accepted medical practices in failing to include those recommendations in her written discharge instructions.

Plaintiff's expert contends that these instructions to follow-up for a CT scan in two to three months were instructions that were required to be included in Ms. Joseph's written discharge instructions. As a result of the failure to include these instructions, plaintiff's expert affirms that Ms. Joseph lost any chance to cure her cancer. Had she been properly informed of the findings and been advised of the need for a follow-up CT scan in two months' time, plaintiff's expert maintains that the test would have been performed and the interval growth of the nodules seen, thereby leading to an earlier cancer diagnosis and a chance for long term survival and cure. Instead, the cancer grew and spread to an incurable stage. The fact that the nodules increased in size from March to December 2005 reflects that it is not pure speculation to find that an earlier referral may have led to a better prognosis. Berlinger v. Kraft, ___ A.D.2d ___, 2009 WL 670435 (1st Dep't Mar. 17, 2009).

Material issues of fact remain as to NYU's liability for the alleged negligence of Dr. Chung and other employees. The motion and cross-motion are denied. The parties are directed to appear for a pre-trial conference on May 5, 2009, at 9:30 a.m., in courtroom 345 at 60 Centre St., New York, New York.

This constitutes the decision and order of the court.

Dated: April 3, 2009

JOAN B. LOBIS, J.S.C.