S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

FRANCIS TUNNEY and HILDEGARD TUNNEY,

Plaintiffs,

-against-

STANLEY ASNIS, M.D., DAVA KLIRSFELD, M.D., ORTHOPAEDIC ASSOCIATES OF MANHASSET, P.C., NORTH SHORE UNIVERSITY HOSPITAL, NORTH SHORE INFECTIOUS DISEASE CONSULTANTS, P.C. and TRAVEL MEDICINE CONSULTANTS OF LONG ISLAND, P.C.,

Defendants.

Motion Sequence #1
Submitted March 4, 2009

INDEX NO: 4610/07

The following papers were read on this motion:

Notice of Motion, Affirmation and Memorandum of Law.....1

Requested Relief

Defendant, NORTH SHORE UNIVERSITY HOSPITAL (hereinafter referred to as "NSUH"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing plaintiffs' complaint and all cross-claims and counter-claims, with prejudice, on the ground that there are no triable issues of fact, amending the caption by deleting defendant, NSUH, and entering judgment accordingly on behalf of NSUH. An Affidavit of Service reflects that counsel for all other parties were duly served with the instant motion,

on December 17, 2008, but no papers are submitted in opposition to the motion, which is determined as follows:

Background

In this medical malpractice action, plaintiff, FRANCIS TUNNEY (hereinafter referred to as "plaintiff"), seeks to recover for personal injuries allegedly sustained as a result of the defendants' negligence with respect to total right knee replacement surgery performed on plaintiff and his follow up care. HILDEGARD TUNNEY, his wife, has interposed a derivative cause of action for loss of services. In the bill of particulars with respect to NSUH, plaintiff alleges that said defendant failed to properly perform a right total knee replacement, failed to prevent an infection during the knee replacement surgery, failed to timely administer antibiotics, failed to diagnose an infection in the right knee prosthesis, failed to eradicate the infection and follow up with a repeat operation to implant a new prosthesis, and failed to adequately supervise and train its staff.

The record reflects that plaintiff was a private patient of co-defendant, STANLEY ASNIS, M.D., a member of co-defendant, ORTHOPAEDIC ASSOCIATES OF MANHASSET, P.C., who recommended that plaintiff undergo a total right knee replacement. On November 12, 2004, plaintiff was admitted to NSUH as Dr. ASNIS' private patient and, on said date, Dr. ASNIS, as the attending physician, performed the surgery with the assistance of two (2) residents who were under his immediate supervision. On November 16, 2004, plaintiff was discharged to a non-party rehabilitation center, where Dr. ASNIS visited him and monitored his complaints of increased swelling and pain in the replaced knee. On December 15, 2004, based upon Dr. ASNIS' assessment that plaintiff was "getting better", he was discharged from the rehabilitation center, with a follow up visit

to Dr. ASNIS scheduled for January 3, 2005. Prior to that visit, on December 31, 2004, plaintiff returned to the Emergency Room at NSUH complaining of discoloration, swelling, drainage and decreased range of motion in the right knee. At that time, he was admitted to the hospital as a private patient of Dr. Sgaglione, an associate of Dr. ASNIS, who diagnosed plaintiff with superficial cellulitis and possibly infected hardware. Dr. Sgaglione ordered an infectious disease consultation, which was performed by co-defendant NORTH SHORE INFECTIOUS DISEASE CONSULTANTS, P.C., and its members (including co-defendant, DAVA KLIRSFELD, M.D.) and, upon plaintiff's improvement, he was discharged on January 11, 2005. It appears that plaintiff followed up with both co-defendant private groups subsequent to his discharge.

From January 21, 2005 through February 8, 2005, plaintiff was readmitted to NSUH as a private patient of Dr. ASNIS complaining of continuing drainage from the right knee. During that period of time, Dr. ASNIS explored the right knee and concluded that it had become infected as a result of the breakdown of the scabbed area which became infected with MRSA bacteria. The members of NORTH SHORE INFECTIOUS DISEASE CONSULTANTS, P.C., continued to consult with Dr. ASNIS and administer antibiotics and, on February 7, 2008, concluded that the MRSA bacteria had been cleared. Thereafter, plaintiff was again discharged to a rehabilitation center where antibiotics were continued and, on February 11, 2005, plaintiff's family requested a second opinion. Thereafter, on February 16, 2005, non-party Bruce Seideman, M.D., Dr. ASNIS' associate, examined plaintiff and decided that possible removal of the hardware was in order. On February 17, 2005, plaintiff was readmitted to NSUH as a private patient of Dr. Seideman, who removed the knee hardware, cleaned out the joint and put an antibiotic spacer in place. Over the

following months, while plaintiff recovered at the rehabilitation center, Dr. Seideman monitored plaintiff's progress and, after holding off on additional surgery until improvement of the soft tissue following the infection, he performed a right knee arthrodesis and patellectomy with no complications.

On the instant motion, it is NSUH's position that the records and extensive deposition testimony demonstrate that the entirety of plaintiff's care, including the total knee replacement surgery, the infectious disease consultations, the decision to continue antibiotic therapy, the decision to explore the knee after MRSA bacteria appeared in the cultures, the removal and implantation of new hardware, the fusion of the knee and all treatment during admissions to NSUH, were orchestrated, overseen, directed and managed by the various private attending physicians and their private groups and employees, none of whom were employed by NSUH. Counsel for NSUH states that, while plaintiff did have contact with hospital staff during his admissions to the hospital, the private attending physicians and their private groups were present in the hospital and directly oversaw, managed and controlled the medical care. Moreover, counsel states that none of the management decisions of the attending physicians were so clearly contraindicated so as to legally require the intervention of the hospital's residents or nursing staff to challenge the decisions. It is NSUH's position that it is entitled to dismissal of the action as against it because none of the allegations of malpractice can be attributed to NSUH, and because the hospital cannot be held vicariously liable for the acts of private attending physicians under these circumstances.

The Law

Generally, a hospital will not be held liable for an act of malpractice performed by an independently retainer healer. *Fiorento v Wegner*, 19 NY2d 407, 280 NYS2d 373, 227 NE2d 296(C.A. 1967). "When treatment is rendered by a private attending physician, not an employee of the hospital, the general rule is that the hospital is not liable for the acts of malpractice which are committed in carrying out the independent physician's orders". *Sarivola v Brookdale Hospital and Medical Center,* 204 AD2d 245, 612 NYS2d 151 (1st Dept. 1994). As the Court of Appeals noted in *Mondello v New York Blood Center,* 80 NY2d 219, 590 NYS2d 19, 604 NE2d 8 (C.A. 1992), "[w]hen treatment is provided by an independent physician, the physician, not the hospital, is regarded as rendering a direct professional service to the patient. . . The relationship between an independent physician and the hospital does not thrust vicarious liability on the hospital for all actions of the doctor".

The affiliation of a physician with the hospital or a medical facility which does not amount to employment is not alone sufficient to impute the doctor's negligent conduct to the hospital or facility. *Hill v St Claire's Hospital,* 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (C.A. 1986). No liability can attach to the hospital unless they have been shown to be independently negligent. *Hill v St Claire's Hospital, supra.* A physician's affiliation with a hospital in the form of admitting privileges does not by itself give rise to vicarious liability on the part of the hospital. *Ruane v Niagra Falls Memorial Medical Center*, 60 NY2d 908, 470 NYS2d 576, 458 NE2d 1253 (C.A. 1983). Additionally, the Court of Appeals has also recognized that in cases where an attending physician gives direct and explicit orders to

the hospital staff, nurses are not authorized to determine for themselves what is the proper course of medical treatment, however an exception exists "where the hospital staff knows that the doctors orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders". *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (C.A. 1968). "The law is clear that a hospital is protected from liability when it follows the direct and explicit orders of the attending physician unless its staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness". *Killeen v Reinhard*, 71 AD2d 851, 419 NYS2d 175 (2nd Dept. 1979).

"On a motion for summary judgment pursuant to CPLR §3212, the proponent 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". *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2nd Dept. 2004), aff'd. as mod., 4 NY3d 627 (C.A. 2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A. 1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 476 NYS2d 642 (C.A. 1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers". *Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra.* Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra,* at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick*

v Community Housing Management Corp., 34 AD3d 518, 824 NYS2d 166 (2nd Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591, 551 NYS2d 563 (2d Dept. 1990).

Conclusion

After a careful reading of the submissions herein, it is the judgment of the Court that NSUH has made a *prima facie* showing of its entitlement to summary judgment. The Court concludes that the negligence alleged in the lawsuit is specifically limited to the care and treatment rendered by the private attending physicians and their private groups. There has been no showing of vicarious liability or any alleged breach by NSUH and its employees. Indeed, no opposition to the motion has been submitted. Accordingly, it is hereby

ORDERED, that NSUH's motion for summary judgment dismissing plaintiffs' complaint and all cross-claims and counter-claims against it, with prejudice, is granted; and it is further

ORDERED, that the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

FRANCIS TUNNEY and HILDEGARD TUNNEY,

Plaintiffs,

-against-

INDEX NO: 4610/07

STANLEY ASNIS, M.D., DAVA KLIRSFELD, M.D., ORTHOPAEDIC ASSOCIATES OF MANHASSET, P.C., NORTH SHORE INFECTIOUS DISEASE CONSULTANTS, P.C. and TRAVEL MEDICINE CONSULTANTS OF LONG ISLAND, P.C.,

Defendants.

---

and it is further

ORDERED, that the action is severed and continued against the remaining defendants.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court. Submit judgment as to NSUH.

Dated: May 15, 2009

WILLIAM R. LaMARCA, J.S.C.

TO: Scaffidi & Associates
Attorneys for Plaintiffs
747 Third Avenue, Suite 10B
New York, NY 10017

Aaronson Rappaport Feinstein & Deutsch, LLP
Attorneys for Defendant North shore University Hospital
757 Third Avenue
New York, NY 10017

McHenry Horan & Lapping, Esqs.
Attorneys for Defendants Dava Klirsfeld, MD, North Shore Infectious Disease Consultants, PC and Travel Medicine Consultants of Long island, PC
6800 Jericho Turnpike
Syosset, NY 11791

Santagelo & Slattery, Esqs.
Attorneys for Defendants Stanley E. Asnis, MD and Orthopaedic Associates of Manhasset, PC
1999 Marcus Avenue, Suite 200
Lake Success, NY 11042

tunney-asnis,nsuh,etal,#2/sumjudg