Giarretto v North Shore Univ. Hosp. at Glen Cove

2009 NY Slip Op 31246(U)

May 28, 2009

Supreme Court, Nassau County

Docket Number: 010736/07

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 4
NASSAU COUNTY

MICHAEL GIARRETTO and PENNY GIARRETTO,

Plaintiff(s),

-against-

NORTH SHORE UNIVERSITY HOSPITAL AT GLEN COVE, PULMONARY CRITICAL CARE AND SLEEP MEDICINE, ARUNABH TALWAR, M.D. and "JANE DOE", Phlebotomist at PULMONARY CRITICAL CARE AND SLEEP MEDICINE,

Defendant(s).

ORIGINAL RETURN DATE:03/26/09
SUBMISSION DATE: 05/05/09
INDEX No.: 010736/07

MOTION SEQUENCE #1,2

The following papers read on this motion:

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Defendants, Glen Cove Hospital s/h/a North Shore University Hospital at Glen Cove ("Glen Cove Hospital"), Pulmonary Critical Care and Sleep Medicine ("PCC"), and Arunabh Talwar, M.D. ("Dr. Talwar"), move for an Order of this Court, pursuant to CPLR 3212, awarding them summary judgment and dismissing the complaint of plaintiff, Michael Giarretto*.

Cross-motion by plaintiff, Michael Giarretto, for an Order of this Court, pursuant to CPLR 3025(b) and CPLR 203(c) and (f), to amend the complaint so as to add North Shore University Hospital at Manhasset ("NSUH at Manhasset"), as a party defendant in this action is denied.

* It is noted at the outset that by stipulation dated October 23, 2008, the action on behalf of Penny Giarretto against these defendants has been discontinued with prejudice.

In this medical malpractice action, plaintiff claims that, as a consequence of defendants' failure to appreciate and take seriously his concern for his history and propensity to faint when having blood drawn, inadequate precautions were taken on September 20, 2005, when after having his blood drawn for testing, he got up to leave the room, became dizzy, fainted and struck his head, sustaining personal injuries.

Plaintiff was first seen by Dr. Talwar, a pulmonologist and specialist in sleep medicine, on June 17, 2005. Dr. Talwar determined that plaintiff evidenced features suggestive of sleep-disordered breathing; thus, he recommended that a sleep study be done at the sleep study center at NSUH at Manhasset. On September 20, 2005, plaintiff returned to Dr. Talwar for a follow up at which time Dr. Talwar discussed the sleep study results and suggested additional testing to rule out narcolepsy.

Dr. Talwar's office is located at 410 Lakeville Road, New Hyde Park, New York, which is also known as "The Center for Pulmonary Critical Care and Sleep Medicine." The Division for Pulmonary Critical Care and Sleep Medicine is a division of the Department of Medicine at non-party, NSUH at Manhasset (*see Aff of Doreen Shroyer*).

Plaintiff claims that on September 20, 2005, Dr. Talwar instructed him to go to a room in his office where a medical office assistant would draw his blood. Plaintiff testified at his oral examination before trial that upon learning that a blood test would be required, he stated to both Dr. Talwar and his assistant, Sophy Dedopoulous, who was in the room with him for the full consult, that "I'm not a big fan of blood tests" (*Giarretto Tr.*, p. 46). When he entered the lab where his blood was drawn, plaintiff claims that he also told the phlebotomist that he had a history of fainting when his blood was drawn.

The phlebotomist drew blood from plaintiff while he was seated in a chair. When the procedure was complete, the phlebotomist told him to sit for two minutes and then authorized him to leave. Plaintiff claims that he took one step, grabbed onto the wall, stated that he felt dizzy and passed out. He states that he hit his head against the wall and fell to the ground. The laboratory at Dr. Talwar's office where plaintiff's blood was drawn was also set up by NSUH at Manhasset and staffed by an independent third party, namely, Lloyd Creative Temporaries, Inc. a/k/a Lloyd Staffing. Pursuant to a contact between Lloyd Staffing and North Shore-Long Island Jewish Health System it was agreed, in pertinent part, that:

> "Lloyd Staffing shall at all times remain the employer of those assignment employees on assignment to NS-LIJ . . . and nothing contained in this agreement shall be deemed to create an employment relationship between NS-LIJ and any staff provided by Lloyd Staffing" (*Staffing Agreement*, ¶¶7-8).

Thus, defendant "Jane Doe" phlebotomist, now identified as Marie Poulard, was employed by Lloyd Staffing and on assignment to PCC at the time of plaintiff's injury. While defendant "Jane Doe" was named as a defendant in this action, in the absence of an affidavit of service confirming that she was served with the summons and the complaint, this Court lacks the requisite jurisdiction over her (*Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 AD2d 135 [2d Dept. 1986]). "Jane Doe" has not appeared in this action. Furthermore, based upon a plain and simple reading of plaintiff's proposed amended complaint, it is clear to this Court that plaintiff no longer asserts any claims against either "Jane Doe" phlebotomist, or, more specifically, Marie Poulard, phlebotomist. Interestingly, plaintiff does not seek leave to amend his complaint to name Marie Poulard as a party defendant.

Upon the instant application, defendants, Glen Cove Hospital, PCC and Dr. Talwar, move for summary judgment dismissal of plaintiff's claims. The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

Notably, plaintiff only opposes the motion for summary judgment made by defendant, PCC. Plaintiff does not oppose defendants, Dr. Talwar and Glen Cove Hospital's application for summary judgment relief. In fact, plaintiff's proposed supplemental summons and amended complaint submitted in support of his cross-motion, does not include Dr. Talwar or Glen Cove Hospital in the caption; said proposed amended summons and complaint only names PCC and the proposed new defendant, NSUH at Manhasset. Nevertheless, this Court finds that even where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movants have demonstrated their entitlement to the relief requested (*see Zecca v. Ricciardelli,* 293 AD2d 31 [2d Dept. 2002]).

In support of their motions for summary judgment, defendants maintain that inasmuch as Dr. Talwar's office is leased premises, the payments for which are being made by NSUH at Manhasset, and insofar as Dr. Talwar is employed at NSUH at Manhasset's Department of Medicine, Division of Pulmonary, Critical Care and Sleep Medicine, and not by defendant, Glen Cove Hospital, Glen Cove Hospital has no connection at all with Dr. Talwar or his division and is a legally separate corporate entity. For these reasons, defendant Glen Cove Hospital claims that it should be awarded summary judgment as a matter of law.

As to Dr. Talwar, defendants maintain that as the record reveals that neither Dr. Talwar nor his nurse practitioner, Sophy Dedepolous, were ever apprised by plaintiff of his history of fainting, or his propensity to do so when he has his blood drawn, and inasmuch as the "Jane Doe" phlebotomist, now known as Marie Poulard, was not Dr. Talwar's employee, or under his direction, control or supervision, Dr. Talwar cannot be held vicariously liable for her actions. On these grounds, defendants maintain that summary judgment should also be granted to Dr. Talwar.

While defendant Glen Cove Hospital has admitted in its answer to plaintiff's complaint that "on certain date[s] employees of defendant [Glen Cove Hospital] and [PCC] rendered care and treatment to the plaintiff, [GIARRETTO]" (*Answer*, ¶5), this Court nevertheless finds that Dr. Talwar and Glen Cove Hospital have made a prima facie showing of entitlement to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, supra). To the extent that their motions for summary judgment are unopposed by plaintiff, Michael Giarretto's complaint as against Dr. Talwar and Glen Cove Hospital is dismissed.

In support of their motion for summary judgment dismissal of plaintiff's complaint as against PCC, defendants maintain that the evidence herein reveals that Marie Poulard, was a temporary assistant on assignment to PCC from her employer, Lloyd Staffing. She was not an employee of Dr. Talwar. Further, pursuant to the contract between Lloyd Staffing and North Shore-Long Island Jewish Health System, she was not an employee of PCC. Thus, defendant, PCC, maintains that it cannot be held liable for the alleged negligence of its non-employee phlebotomist. In further support, defendants submit the expert affirmation of Thomas J. Dowling, Jr., M.D., who states, to a reasonable degree of medical certainty, "that the phlebotomist's actions were entirely appropriate under the circumstances and facts of this case, and that her care of [plaintiff] during the blood draw process was consistent with good and accepted standards of care" (*Expert Aff.*, ¶3). Having established its prima facie showing of entitlement to judgment as a matter of law, the burden shifts to plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, supra).

In opposition, plaintiff submits that the evidence shows that before having his blood drawn by Marie Poulard, plaintiff informed her that when he had blood drawn in he past, he fainted. Plaintiff offers the expert affirmation of Dr. Howard Schwartz who opines, in pertinent part, that:

> In my opinion with a reasonable degree of medical certainty, the increased risk of such reactions should have been addressed by taking [plaintiff's] blood while he was supine, followed by careful supervision as he transferred from the supine position to the sitting and standing positions to be sure that the [hypotension and bradycardia] reaction[s] has subsided (*Aff in Opp.*, Ex B, ¶4).

In holding PCC vicariously liable for the malpractice and negligence of Poulard, plaintiff claims that as a result of Poulard's malpractice and negligence, PCC, as her apparent principal, is also vicariously liable for her actions and omissions. Vicarious liability attaches only if it is found that the "agent" was liable. Here, the battling experts have offered conflicting opinions as to the negligence and malpractice of Poulard. Thus, a question of fact is presented that would require a jury's resolution (*Barbuto v. Winthrop Univ. Hosp.*, 305 AD2d 623 [2d Dept. 2003]; *Fotinas v. Westchester County Med. Ctr.*, 300 AD2d 437 [2d Dept. 2002]). Before this Court, however, is the alleged liability of PCC for the alleged negligence and malpractice of Poulard.

"[A]s a general rule, a principal is not liable for the wrongful acts of an independent contractor it retains" (*Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 877 [2d Dept. 2006]; *cf. Hill v. St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dragotta v. Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept. 2007]). "In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" (*Id*). "The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent" (*Id*). "Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill" (*Id*). Thus, "[t]here are two elements to such a claim of apparent or ostensible agency" (*Id.* at 698-699). "To establish the 'holding out' element, the misleading words or conduct must be attributable to the principal" (*Id.* at 699). "To establish the 'reliance' element, the third party must accept the agent's services and submit to the agent's care in reliance on the belief that the agent was an employee of the principal" (*Id*).

In the context of a medical malpractice action, the patient must reasonably believe that the physicians, nurses and/or other medical personnel treating him or her were provided by the medical facility where he or she was being treated or that they were acting on the facility's behalf (*see gen., Dragotta v. Southampton Hosp.*, supra at 699). In the context of evaluating whether a doctor[, nurse, or other medical personnel] is the apparent agent of a hospital, a court should consider all 'attendant circumstances ... to determine whether the patient could properly have believed that the physician was provided by the hospital' " (*Contu v. Albert*, 18 AD3d 692, 693 [2d Dept. 2005], *quoting Augeri v. Massoff*, 134 AD2d 308, 309 [2d Dept. 1987]).

Here, PCC demonstrated its prima facie entitlement to judgment as a matter of law on the issue of its vicarious liability by establishing that Poulard was not its employee (*see Dragotta v. Southampton Hosp.*, supra at 699; *see generally Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, in opposition, plaintiff has raised a triable issue of fact as to whether PCC may be vicariously liable for Poulard's alleged malpractice and negligence under a theory of apparent or ostensible agency (*see Dragotta v. Southampton Hosp.*, supra at 698-700). The evidence here establishes that plaintiff had no reason to believe that Poulard would be employed by someone other than PCC. There is no indication that Poulard wore a badge from Lloyd Staffing; that there were billing slips from Lloyd Staffing; that the plaintiff had to pay a co-payment to Lloyd Staffing; or, that there were any signs indicating that the blood work was to be performed by an outside agency. In fact, based upon the confidentiality paragraph of the contract between PCC and Lloyd Staffing, these revelations to plaintiff were prohibited. Since plaintiff has raised an issue of fact as to whether PCC may be vicariously liable for Poulard's alleged malpractice and negligence under a theory of apparent or ostensible agency, this Court herewith denies PCC's motion for summary judgment.

With regard to the cross-motion, plaintiff submits that pursuant to the "relation back doctrine" leave to file a supplemental summons and amended complaint should be granted. Plaintiff argues that if PCC is ultimately found vicariously liable for the care and treatment rendered by

Marie Poulard, then it follows that NSUH at Manhasset would be equally liable. Plaintiff maintains that since PCC is a division of the Department of Medicine at NSUH at Manhasset, the allegations, sounding in the alleged malpractice of Marie Poulard, will be identical as to both PCC and NSUH at Manhasset.

It is undisputed by the parties herein that the statute of limitations to bring the within claims against NSUH at Manhasset has expired. The New York statute of limitations for medical malpractice actions is two and one-half years (CPLR 214-a). The Court of Appeals has held that the malpractice statute of limitations applies to any medical professional who gives medical treatment; this includes nurses (*Bleiler v. Bodnar*, 65 NY2d 65 [1985]). In this case, the alleged act of malpractice occurred on September 20, 2005. Thus, the statute of limitations ran on March 20, 2008. While this action was timely commenced as against PCC, there is no doubt that the claims against NSUH at Manhasset are time barred.

The relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where the two defendants are "united in interest" (*Buran v. Coupal*, 87 N.Y.2d 173, 177 [1995]). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well (*Buran v. Coupal, supra* at 178; *Nani v. Gould*, 39 AD3d 508 [2d Dept. 2007]).

In this case, the parties concede that plaintiff has satisfied the first two elements of the relation-back doctrine test; it is the third element that is in dispute.

"Notice to the new defendant within the applicable limitations period is the 'linchpin' of the relation-back doctrine, and thus the third prong of the test focuses, inter alia, on 'whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all 'and that the matter has been laid to rest as far as he [or she] is concerned' " (*Shapiro v. Good Samaritan Regional Hosp. Med. Ctr.*, 42 AD3d 443 [2d Dept. 2007] *citing Buran v. Coupal*, supra). Here, there is no evidence that the proposed defendant, North Shore University Hospital at Manhasset, which was clearly affiliated with defendant, PCC, as evidenced by their stationery, forms, documents and the ubiquitous signs located at the PCC premises, had any knowledge that a malpractice action had been instituted against its subdivision PCC, or for that matter against Dr. Talwar or a "Jane Doe" phlebotomist at PCC, until the instant motion for summary judgment. At this point, more than three and one-half years have elapsed since the date of plaintiff's injury.

Under these circumstances, plaintiff has failed to establish that North Shore knew or should have known that, but for a mistake as to the identity of the proper parties, this action would

[* 7]

have been brought against it as well (*see Cintron v. Lynn*, 306 AD2d 118 [1st Dept. 2003]; *Spaulding v. Mt. Vernon Hosp.*, 283 AD2d 634 [2d Dept. 2001]). Accordingly, plaintiff's cross-motion for leave to amend his complaint is denied.

The caption of this action is amended to read as follows:

"MICHAEL GIARRETTO and PENNY GIARRETTO,

Plaintiffs,

-against-

PULMONARY CRITICAL CARE AND SLEEP MEDICINE and "JANE DOE", Phlebotomist at PULMONARY CRITICAL CARE AND SLEEP MEDICINE,

Defendants."

This decision constitutes the order of the court.

Dated: 5-28-09

HON THOMAS P. PHELAN

J.S.C.

ENTERED

JUN 03 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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