Gosse v St. Peter's Hosp. of the City of Albany

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August 28, 2009
Supreme Court, Albany County
Docket Number: 3768-08
Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHANNON GOSSE as Executrix of the Estate of RONALD GOSSE, and SHANNON GOSSE, individually,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 3768-08
RJI NO. 01-08-093150

SAINT PETER'S HOSPITAL OF THE CITY OF ALBANY d/b/a ST. PETER'S HOSPITAL, PAUL FORREST, M.D., LEE STETZER, M.D., MICHAEL J. ESPOSITO, M.D., ERIC S. KORENMAN, M.D., LEE RATNER, M.D., THE ENDOCRINE GROUP, LLP, MARK L. FRUITERMAN, M.D., GREGG G. GERETY, M.D., ALBANY GASTROENTEROLOGY CONSULTANTS, P.C., and RICHARD CLIFT, M.D.,

Defendants.

Supreme Court Albany County All Purpose Term, August 3, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

By this action, Plaintiffs seek damages due to Defendants claimed ordinary negligence, medical malpractice and statutory duty violations relative to medical treatment Mr. Gosse received between September 3rd and 6th, 2005 and again on July 31st, 2006. On July 23, 2008, this Court issued a Decision and Order (hereinafter "Decision and Order #1"), which held that the portion of Plaintiffs' complaint sounding in medical malpractice against Dr. Clift, Albany Gastroenterology Consultants, PC, Erick S. Korenman, M.D. and Lee Ratner, M.D. was barred by the statute of limitations. Thereafter, on February 11, 2009, this Court issued a second Decision and Order (hereinafter "Decision and Order #2"), which in part relevant to this motion, denied defendants Lee Ratner, MD and Eric Korenman, MD's (hereinafter collectively the "Ratner Defendants") motion seeking summary judgment of Plaintiffs' ordinary negligence claims. Both decisions outlined the relevant facts, which are incorporated in this decision by reference and need not be restated.

Here, the Ratner Defendants again move for summary judgment of Plaintiffs' ordinary negligence claims, and Plaintiffs oppose the motion. Because the Ratner Defendants have, on this record, demonstrated that they breached no ordinary negligence duty of care to Plaintiffs, and no issue of fact is raised, their motion is granted.

Additionally, Saint Peter's Hospital of the City of Albany d/b/a St. Peter's Hospital (hereinafter "St. Peter's") and Lee Stetzer, M.D. also move to dismiss, as time barred, portions of Plaintiffs' claims and for summary judgment. Plaintiffs oppose St. Peter's motion, but have stipulated to discontinue the action against Dr. Stetzer. As Plaintiffs have discontinued their action against Dr. Stetzer, his motion for summary judgment is denied as moot. St. Peter's

motion is granted, in part, dismissing all of Plaintiffs' claims based upon the treatment Mr. Gosse received between September 3-6, 2005, and is otherwise denied.

Summary Judgment Standard

This court is mindful that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]). The movant must establish, by admissible proof, their right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

The Ratner Defendants

The Ratner Defendants established their entitlement to judgment as a matter of law by demonstrating the extent of their ordinary negligence duty and showing that they did not breach such duty. As was discussed in Decision and Order #2, a medical professional has a duty, sounding in ordinary negligence, to relay important medical information after "a risk of harm has been identified through the exercise of medical judgment." (Caracci v. State of New York, 178 AD2d 876 [3d Dept. 1991]; Mosezhnik v. Bernstein, 33 AD3d 895 [2d Dept. 2006]). However, each individual physician's duty is limited "to those medical functions undertaken by the

physician and relied upon by the patient." (Dombroski v. Samaritan Hosp., 47 AD3d 80, 84 [3d Dept. 2007]; Markley by Markley v. Albany Medical Center Hosp., 163 AD2d 639 [3d Dept. 1990]).

Here, the Ratner Defendants' ordinary negligence duty was limited by the functions they undertook in the care of Mr. Gosse. Dr. Ratner and Dr. Korenman are both radiologists, who interpreted Mr. Gosse's ultrasound and CT scan, respectively. They demonstrated that upon their reviewing an ultrasound or CT scan, the established practice and procedure was (and still is) to dictate a report into the hospital's phone transcription system. The treating physician had access to the dictated report, and once the dictation was transcribed the report was included in the patient's hospital chart and a copy of the report faxed to the patient's treating physician. Only in cases where the requesting physician specifically requests immediate communication of the findings, or where an "immediate threat to the life and limb of the patient" was found, would the radiologist telephone the ordering physician or primary care doctor. The Ratner Defendants affidavits demonstrated that in no event would the radiologist contact the patient directly, as the radiologist has insufficient information about the patient's whole medical history to engage in such communication.

The foregoing established practice and procedure for a radiologist to communicate their findings, amply define the limits of their ordinary negligence duty. Because of the lack of radiologist-patient contact, it is eminently reasonable for the radiologist to communicate their report through a dictation system. The system directs a copy of that report to both the hospital chart, i.e. treating physicians at the hospital, and the patient's primary care physician. The patient's treating doctors then have sufficient knowledge of both the report and the patient to

effectively communicate the report's contents. On this record, the Ratner Defendants demonstrated that the limit of their ordinary negligence duty was to communicate their findings to other medical professionals caring for Mr. Gosse, in accord with the established practice and procedure.

The Ratner Defendants, by their affidavits and supporting documentation, demonstrated that they did not breach their ordinary negligence duty to Mr. Gosse. Each of the Ratner Defendants, upon reviewing the ultrasound and CT scan, communicated their findings into the hospital's phone dictation system. Their reports were thereafter transcribed. A copy of each report was inserted into Mr. Gosse's hospital chart, with a copy of each forwarded to his treating physician. Neither Ratner Defendant had a duty, sounding in ordinary negligence or otherwise, to communicate their findings directly with Mr. Gosse nor to telephone Mr. Gosse's treating physician. As such, the Ratner Defendants demonstrated their entitlement to judgment as a matter of law.

In opposition, Plaintiffs have raised no issue of fact. Plaintiffs characterize this Court's Decision and Order #2, as previously finding the existence of fact issues relative to the Ratner Defendants. Contrary to Plaintiffs' contention, however, this Court did not find that issues of fact existed in its Decision and Order #2. Rather, on that record, the Ratner Defendants failed to demonstrate their entitlement to judgment as a matter of law. Decision and Order #2 did not reach an issue of fact determination. On this record, Plaintiffs have raised no issue of fact, and the Ratner Defendants have demonstrated their entitlement to judgment as a matter of law. Accordingly, the Ratner Defendants' motion for summary judgment is granted.

St. Peter's

Plaintiffs' claims against St. Peter's are based upon Mr. Gosse's treatment at St. Peter's from September 3rd through September 6th, 2005 and again on July 31st, 2006. Plaintiffs claim that St. Peter's is liable due to its nurses' discharge of Mr. Gosse on September 6, 2005, due to the negligence and medical malpractice of the doctors who treated Mr. Gosse in 2005 and 2006 under the doctrine of ostensible/apparent agency, due to St. Peter's failure to comply with Public Health Law §2803-c (Patient's Bill of Rights) in both 2005 and 2006, and under a lack of informed consent theory[1]. St. Peter's seeks dismissal of such claims under statute of limitations and summary judgment theories. Because St. Peter's demonstrated that the statute of limitations expired on Plaintiffs' medical malpractice claims arising from Mr. Gosse's September 2005 treatment (inclusive of St. Peter's nurses' treatment of him), it is dismissed. St. Peter's also demonstrated that the statute of limitations expired on Plaintiffs' Public Health Law §2803-c September 2005 claim, but not on Plaintiffs' July 2006 claim. Similarly, St. Peter's demonstrated its entitlement to judgment as a matter of law on plaintiffs' causes of action arising from its alleged ostensible/apparent agency relationship with the doctors who treated Mr. Gosse in September 2005, but not in July 2006.

Turning first to St. Peter's motion to dismiss the Plaintiffs' medical malpractice causes of action arising from Mr. Gosse's September 2005 treatment, St. Peter's duly demonstrated their

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[1] As Plaintiffs' opposition papers neither address nor oppose this portion of St. Peter's motion, its motion for summary judgment of Plaintiffs' "informed consent" cause of action is granted and the cause of action dismissed. Moreover, as "the wrong [Plaintiffs] complain of [do not arise] out of some affirmative violation of plaintiff's physical integrity" they have failed to set forth a viable claim. (Iazzetta v. Vicenzi, 200 AD2d 209 [3d Dept. 1994]; Schel v. Roth, 242 AD2d 697 [2d Dept. 1997]).

entitlement to judgment. As set forth in this Court's Decision and Order #1 "[w]hen a party moves pursuant to CPLR §3211(a)(5) for a judgment dismissing a claim on the ground that it is barred by the Statute of Limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed." (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept. 1990], Gravel v. Cicola, 297 A.D.2d 620 [2d Dept. 2002]). Decision and Order #1 held that the Plaintiffs' medical malpractice action against numerous doctors who treated Mr. Gosse in September 2005 was "time barred by CPLR §214-a." The medical malpractice claim accrual and commencement analysis in Decision and Order #1, are equally applicable to Plaintiffs' medical malpractice claims against St. Peter's. As such, just as the medical malpractice claims of the co-defendant doctors were time barred by the statute of limitations, so too are Plaintiffs' claims sounding in medical malpractice arising from the treatment Mr. Gosse received at St. Peter's in September 2005.

While medical malpractice claims against St. Peter's are clearly time barred, unresolved is whether St. Peter's nurses discharge of Mr. Gosse in 2005 constituted ordinary negligence or medical malpractice. "[N]ot every negligent act of a nurse would be medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice." (Bleiler v. Bodnar, 65 NY2d 65, 72 [1985]). It is the duty owed by St. Peter's nurses to Mr. Gosse, in relation to the acts alleged, that determine whether a claim sounds in medical malpractice or ordinary negligence. (See generally Bleiler, supra; Weiner v. Lenox Hill Hospital, 88 NY2d 784 [1996]).

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On this record, St. Peter's demonstrated that its nurses' conduct toward Mr. Gosse constituted medical malpractice, not ordinary negligence. The nurses' allegedly negligent act was their failure to inform Mr. Gosse that the results of a CT scan, taken while Mr. Gosse was admitted at the hospital, were not complete at the time of his discharge. The St. Peter's nurse who discharged Mr. Gosse admitted, at her deposition, that the discharge process includes educating and informing the patient about their "plan of care". She testified that this included, relative to Mr. Gosse, the fact "that the results of the CT scan were not available". It is not disputed on this record that the St. Peter's discharging nurse did not inform Mr. Gosse about the unavailability of the CT scan results at the time of his discharge. However, the nurse's communication of such information falls directly within her medical duties.

The nurse's medical duty, in part, was to discharge Mr. Gosse with specific information. The nurse was to use her medical judgment and skill in conveying such information, and her failure to do so constitutes medical malpractice, not ordinary negligence. Whether the nurse is conveying discharge information or (as in Bleiler) taking a patient's medical history, both "unquestionably constitute medical malpractice." (Bleiler, supra at 72). A physician's duty to convey medical information already ascertained may, as it does in this action, constitute ordinary negligence because the physician's professional skill and judgment has already been exercised. A nurse's duty to convey discharge information, however, specifically requires the use of that nurse's professional skill and judgment, in her nursing capacity. It accordingly constitutes medical malpractice not ordinary negligence. As such, Plaintiffs' cause of action premised upon the acts of St. Peter's nurses in September 2005 are time barred under CPLR §214-a, and dismissed.

St. Peter's also demonstrated that it is not liable for the care Mr. Gosse received in September 2005 under an ostensible/apparent authority theory. While "a hospital is not ordinarily liable for the negligent acts of an independent treating physician who is not an employee of the hospital... a hospital may be held vicariously liable for the acts of [an] independent physician[ ] if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician." (St. Andrews v. Scalia, 51 AD3d 1260, 1261-62 [3d Dept. 2008] quoting Citron v. Northern Dutchess Hosp., 198 AD2d 618 [3d Dept. 1993][internal quotations omitted]). St. Peter's submits the deposition transcripts of Dr. Gerety and Dr. Esposito. Dr. Gerety testified that he was treating Mr. Gosse, as his primary care physician, prior to his September 2005 hospitalization. Dr. Esposito testified that he admitted Mr. Gosse to the hospital, under the care of Dr. Gerety, because he was covering for Dr. Gerety at St. Peter's when Mr. Gosse was admitted. Additionally, Mr. Gosse's September 2005 hospital chart indicates that, upon his admission, he was "Admit[ted] to Gerety". Based upon the foregoing, St. Peter's made a prima facie showing that Mr. Gosse was admitted to St. Peter's, through its emergency room, seeking treatment from his physician, Dr. Gerety, not the hospital itself. Nor, on this record, have Plaintiffs raised any issue of fact relative to St. Peter's ostensible/apparent authority in September 2005. As such, Plaintiffs' ordinary negligence claims against St. Peter's for care provided Mr. Gosse in September 2005, based upon an alleged ostensible/apparent authority theory, are dismissed.

St. Peter's failed to demonstrate, however, that it is not liable under an ostensible/ apparent authority theory for the care Mr. Gosse received in July 2006 . In July 2006 Mr. Gosse again entered St. Peter's through their emergency room. For this treatment, however, St. Peter's

made no showing that Mr. Gosse sought treatment from his "particular physician". St. Peter's offers the deposition testimony of Dr. Forrest and Dr. Stetzer, who both acknowledged their treatment of Mr. Gosse on July 31, 2006. Neither doctor, however, offered any testimony that Mr. Gosse had come to see them individually, as opposed his simply seeking and receiving treatment from the hospital. Nor did they testify that they were covering for a different doctor, from whom, Mr. Gosse sought care. Thus, because St. Peter's "failed to submit prima facie proof entitling it to summary judgment on plaintiff[s'] claim against it premised upon its vicarious liability for [the] alleged negligen[t]" medical treatment Mr. Gosse received on July 31, 2006, its motion in this regard is denied. (St. Andrews, supra at 1263).

Nor did St. Peter's demonstrate its freedom from liability by establishing that Dr. Forrest's treatment of Mr. Gosse, in July 2006, was not negligent. Dr. Forrest's deposition testimony establishes that, while he was treating Mr. Gosse in July 2006, he reviewed Mr. Gosse's 2005 CT scan which stated "this could be a tumor" and "worrisome for a focal liver lesion." Dr. Forrest acknowledged that the 2005 CT scan report was abnormal and contained life threatening information. In July 2006, Dr. Forrest did not see, however, the "tumor" or "liver lesion" notations when he scanned the report. As he explained, Mr. Gosse's July 2006 complaint of back pain led Dr. Forrest to limit his review of the 2005 CT scan to a "scan" of the document for the words "aortic aneurysm". Dr. Forrest acknowledged that if a physician in the emergency department thought a patient had a "potential liver tumor, it was the physician's job to inform the patient of that". It is uncontested on this record that Dr. Forrest did not so inform Mr. Gosse. St. Peter's expert opines that Dr. Forrest's scanning of Mr. Gosse's September 2005 CT Scan was appropriate. Such expert opinion is wholly speculative, inadequately explained, unsupported by

any factual demonstration, and insufficient to demonstrate St. Peter's lack of liability and entitlement to judgment as a matter of law.

Lastly, St. Peter's demonstrated that Plaintiffs' cause of action alleging a violation of Mr. Gosse's Public Health Law §2803-c rights in September 2005 is time barred. A cause of action alleging a violation of a hospital Patient's Bill of Rights (Public Health Law §2803-c) "actually pleads a medical malpractice action" and is thus governed by CPLR §214-a's two and a half year statute of limitations. (Catapano v. Winthrop University Hosp., 19 AD3d 355 [2d Dept. 2005]). As such, as has been previously discussed with Plaintiffs' other causes of action arising from his September 2005 medical treatment, this cause of action is also time barred and dismissed. Notwithstanding Plaintiffs' characterization of St. Peter's motion, it neither argued nor factually demonstrated entitlement to summary judgment of Plaintiffs' cause of action alleging a violation of Mr. Gosse's Public Health Law §2803-c rights in July 2006. As such, this Decision and Order declines to address the viability of such claim.

St. Peter's remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for the Ratner Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 28, 2009
Albany, New York

Joseph C. Teresi, J.S.C.

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PAPERS CONSIDERED:

1. Notice of Motion, dated June 30, 2009, Affidavit of Mandy McFarland, dated July 1, 2009, with attached Exhibits "A" - "Y".
2. Affirmation in Opposition of George Sarachan, dated July 24, 2009, Affirmation of Roger Malebanche, dated July 21, 2009.
3. Affidavit of Mandy McFarland, dated July 30, 2009.
4. Notice of Motion, dated June 30, 2009, Affidavit of Adam H. Cooper, dated June 30, 2009, with attached Exhibits "A" - "Q"; Affirmation of Eric Korenman, dated June 28, 2009, with attached Exhibits "1" - "2"; Affirmation of Lee Ratner, dated June 25, 2009, with attached Exhibits "1" - "3".
5. Affirmation of Bruce A. Sutphin, dated July 24, 2009
6. Affidavit of Adam H. Cooper, dated July 31, 2008.