

Bellinger v Morgenstern

2009 NY Slip Op 32615(U)

October 26, 2009

Supreme Court, Suffolk County

Docket Number: 06-1458

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5-1-09
ADJ. DATE 10-14-09
Mot. Seq. # 003 - MotD

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 15; Replying Affidavits and supporting papers 16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Huntington Hospital and Women's Health Center Huntington Hospital for summary judgment is granted to the limited extent that the plaintiff's direct claims against these defendants are dismissed.

On March 17, 2004, the plaintiff went to defendant Women's Health Center Huntington Hospital, located within and owned by defendant Huntington Hospital (hereinafter collectively referred to as "the Hospital") to have a mammography. The four mammography films taken of the plaintiff were interpreted by defendant Barry Morgenstern, M.D. (hereinafter "Dr. Morgenstern"). The plaintiff was told to return for follow-up imaging of the left breast in six months. When the plaintiff returned as instructed on September 22, 2004, following a further mammography, the plaintiff was diagnosed with lobular cancer which had spread into her lymph nodes.

The plaintiff commenced this action alleging that the defendants' negligence and malpractice caused her to sustain injuries and an advancement and deterioration of her condition. Specifically, as to the Hospital, the plaintiff's Verified Bill of Particulars alleges, *inter alia*, that the Hospital was negligent: in failing to obtain a complete and accurate history of the plaintiff; in failing to accurately interpret the mammography of March 17, 2004, and compare the same to all prior films taken of the plaintiff; in failing to recognize changes in the left breast; in failing to recognize that the increased density was suspicious for cancer; and in depriving the plaintiff of an opportunity for a diagnosis of her cancer at a time when she would have had a reasonable opportunity to be treated before metastasis of the cancer.

The Hospital now moves for summary judgment dismissing the plaintiff's direct claims against it, arguing that the interpreting radiologist of the mammography of March 17, 2004, was defendant Dr. Morgenstern. It claims that it did not employ Dr. Morgenstern and that Dr. Morgenstern was employed by defendant Medical Arts Radiological Group (hereinafter "MARG"). The Hospital asserts that it cannot be liable for the actions of a private physician. In addition, the Hospital contends that there is no evidence that the care and the treatment rendered by any hospital staff member was a substantial factor in the plaintiff's alleged injuries.

In support of its motion, the Hospital submits Dr. Morgenstern's deposition testimony and points to that portion wherein Dr. Morgenstern testified that he interpreted the plaintiff's mammography taken on March 17, 2004, and at that time, he was employed by MARG. Dr. Morgenstern testified to the effect that he never received direct compensation from the Hospital. He explained that MARG had an agreement with the Hospital that MARG would provide radiology services. Dr. Morgenstern alleged that, with the exception of radiation therapy which is a separate practice, all the radiologists at the Hospital were MARG radiologists. He also explained that he would dictate his interpretation of the film and that the Hospital would have someone transcribe that dictation. Dr. Morgenstern further alleged that when he interpreted a mammography, he would be provided with a patient's folder, all the prior mammograms, and in most cases the prior reports. He alleged that there would also be a work sheet as to how the patient presented, whether it was for a screening or a palpable mass or some other symptom. Dr. Morgenstern alleged that if the reports of prior mammographies were not in the patient's chart, there would be a clerical person who could obtain the report, have it printed on the computer, and then provide it to him. He described how he would look at the films on a dedicated mammography view box, comparing the old studies to the new.

In further support of its motion, the Hospital submits the affidavit of Thomas M. Hoeft, who is its Executive Vice President and Chief Operating Officer. Mr. Hoeft alleges that he has conducted a complete search of the Hospital's employment records, and that this search revealed that Dr. Morgenstern has never been employed by the Hospital. Mr. Hoeft explains that on or about June 3, 1985, the Hospital entered into an agreement with defendant MARG, wherein all the radiology services within the Hospital were to be provided by MARG. He states that per this agreement, MARG, at all times, was to be considered an independent contractor, and neither MARG, nor its employees, were to be deemed employees of the Hospital. A copy of the agreement is attached to the Hospital's moving papers.

Additionally, the Hospital submits the affidavit of Gail Phillips, M.D., (hereinafter “Dr. Phillips”) who is Board Certified in Diagnostic Radiology. Dr. Phillips alleges that she has reviewed the records maintained by the Hospital pertaining to the plaintiff, as well as the Verified Bill of Particulars, and Dr. Morgenstern’s deposition transcript. Dr. Phillips states it is her opinion, within a reasonable degree of medical certainty, that it is a radiologist’s obligation to examine the studies submitted to him or her, to make an accurate diagnosis, and to properly and accurately report the findings to the patient. Dr. Phillips alleges it is her further opinion, within a reasonable degree of medical certainty, that the obligation of the facility in which the radiology studies are conducted is to provide the radiologist with all equipment, films, and records requested by the radiologist, in order to allow the radiologist to interpret the studies presented. As to the plaintiff, Dr. Phillips alleges the mammography studies of March 17, 2004 were provided to Dr. Morgenstern, along with all the documents regarding how the patient presented that day. In addition, alleges Dr. Phillips, all prior radiology films and reports relating to this patient were provided to Dr. Morgenstern on March 17, 2004 for his review and comparison. She asserts that Dr. Morgenstern’s interpretation was appropriately documented by the Hospital. Dr. Phillips alleges that, as such, it is her opinion, expressed within a reasonable degree of medical certainty, that the care and treatment provided by the Hospital, as to the plaintiff, met the standards of accepted medical practice as they existed in 2004. She alleges that the interpretation of the March 17, 2004 mammography and follow up care, were the obligation of Dr. Morgenstern. Dr. Phillips states that the Hospital staff acted appropriately in accordance with Dr. Morgenstern’s interpretations and recommendations. Dr. Phillips concludes that based upon all the medical records and documents which she has reviewed, she can express her opinion, within a reasonable degree of medical certainty, that the care rendered by the Hospital was well within accepted medical practice and standards of care, and therefore, there is no causal relationship between the care rendered by the Hospital and the plaintiff’s claimed injuries.

The plaintiff opposes this motion and alleges that the Hospital is vicariously liable for any medical malpractice committed by defendant Dr. Morgenstern and defendant MARG. She alleges that when she appeared at the Hospital in March 2004, and prior and subsequent thereto, she was not told and did not expect that the doctors reading her mammographies were not employed by and the responsibility of the Hospital. She alleges that she relied on the reputation and the representations of the Hospital concerning the quality of care being provided to her, including mammographies. The plaintiff asserts that she did not know Dr. Morgenstern, that she never met Dr. Morgenstern, and that she did not know that Dr. Morgenstern was going to read her mammography. She alleges she did not know, and she was never told by anyone, that Dr. Morgenstern was not part of the Hospital’s organization. The plaintiff contends that it was her desire and expectation that the physicians of the Hospital would be reading her mammography.

In further opposition, the plaintiff highlights certain documents submitted by the Hospital with its moving papers, and points out that these documents, some of which she received, were all on Hospital stationary. The plaintiff alleges that one of the documents entitled “STAT FAX” which was on Hospital letterhead, included Dr. Morgenstern in its list of radiologists, without any indication that these radiologists were other than Hospital doctors. Thus, argues the plaintiff, the Hospital affirmatively represented that these radiologists were part of the Hospital. As to Dr. Phillip’s affidavit, the plaintiff alleges that the Hospital’s expert does not state that the mammography was read correctly; nor, alleges

the plaintiff, does this expert address the failure of the Hospital to inform its patients that it considered the radiologists to be independent contractors. Finally, in opposition to the Hospital's motion for summary judgment, the plaintiff submits a the affirmation of her expert radiologist¹. This radiologist alleges, *inter alia*, that the defendants deviated from reasonable and acceptable standards of radiological practice in the performance and interpretation of the March 17, 2004 mammography studies, in that they failed to recognize that there was an abnormal and concerning area of asymmetry in the left breast which required additional studies. The plaintiff contends that the Hospital is not entitled to summary judgment since Dr. Morgenstern was the apparent agent of the Hospital. She alleges that although no cross motion has been made for affirmative relief, the facts support a finding as a matter of law that the Hospital be estopped from denying its responsibility for Dr. Morgenstern's negligence.

In reply, the Hospital states that the plaintiff has failed to recognize that it is simply asking that the *direct claims* against it be dismissed. The Hospital alleges that while it is understood that the plaintiff claims the Hospital to be vicariously liable for the alleged negligent acts of the co-defendants, it is only moving to have the direct claims of negligence dismissed. In addition, the Hospital contends that the plaintiff's demand for cross-relief in the middle of her opposition papers, is improper.

To make a *prima facie* showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital or physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To rebut a *prima facie* showing by the defendant hospital or physician, a plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries (*see, Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In this case, the evidence submitted by the Hospital is sufficient to establish its entitlement to summary judgment as a matter of law with respect to any direct claims of negligence against the Hospital (*see Bourgeois v North Shore University Hospital*, 290 AD2d 525, 737 NYS2d 101 [2d Dept 2002]). Clearly, the deposition testimony of defendant Dr. Morgenstern and the affidavit of Thomas Hoeft demonstrate, *prima facie*, that Dr. Morgenstern was not an employee of the Hospital when the plaintiff had her mammography on March 17, 2004. A hospital may not be held liable for the acts of a physician who is not an employee of such hospital, but one of a group of independent contractors (*Dragotta v Southampton Hospital*, 39 AD3d 697, 833 NYS2d 638 [2d Dept 2007]). Furthermore, the deposition testimony of Dr. Morgenstern and the affidavit of Dr. Phillips, demonstrate, *prima facie*, the

¹Plaintiff has submitted an unidentified expert's affirmation with her opposition papers and an unredacted copy for in camera review (*see, Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]). The Court has conducted an in camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name and location. The Court has returned the unredacted affirmation to plaintiff's counsel by ordinary mail.

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Hospital staff acted appropriately, providing Dr. Morgenstern with all the necessary records, reports, films, and equipment, and properly transcribing Dr. Morgenstern's findings. Since the plaintiff's opposition fails to demonstrate any evidence that the Hospital or its staff members were negligent, summary judgment is granted with respect to the allegations of direct negligence against the Hospital (*Sosnoff v Jackman*, 45 AD3d 568, 845 NYS2d 391 [2d Dept 2007]; *lv dismissed* 10 NY3d 885 [2008]).

The Court notes that the arguments raised in the plaintiff's opposition papers are directed at the issue of the Hospital's vicariously liability. "[V]icarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel" (*Dragotta v Southampton Hospital*, 39 AD3d 697, 698; 833 NYS2d 638, 640 [2d Dept 2007]). However, since the plaintiff's request for summary judgment on the issue of the Hospital's alleged vicarious liability was not served on the defendants with a notice of cross motion (*see*, CPLR 2215), she is not entitled to the affirmative relief requested in her affirmation in opposition (*Thomas v The Drifters, Inc.*, 219 AD2d 639, 631 NYS2d 419 [2d Dept 1995]).

Accordingly, the Hospital's motion for summary judgment is granted to the extent that the plaintiff's direct claims against it are dismissed.

Dated: 26 October 2009



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION