

**Belzer v Good Samaritan Hosp. Med. Ctr.**

2009 NY Slip Op 33179(U)

December 21, 2009

Supreme Court, Suffolk County

Docket Number: 06-20204

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

COHALAN

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 5-1-09  
ADJ. DATE 9-2-09  
MNEMONIC: # 002 - MotD

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	:	
GOOD SAMARITAN HOSPITAL MEDICAL CENTER, THARUN P. SHETTY, M.D., JAMES KOHLROSER, D.O., AND EDWARD CUSSATTI, M.D.,	:	VARDARO & HELWIG, LLP
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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross-Motion and supporting papers    ; Answering Affidavits and supporting papers 16 - 18; Replying Affidavits and supporting papers 19 - 23; Other           ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the defendants Good Samaritan Hospital Medical Center and Edward Cussatti, M.D. for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing the complaint as against them is determined herein.

This is a medical malpractice action to recover damages, personally and derivatively, for injuries allegedly sustained by the then 64 year old Henrietta Belzer (hereinafter plaintiff) on November 25, 2004 and December 28, 2004 during her admission at Good Samaritan Hospital Medical Center (hereinafter Hospital) located at 1000 Montauk Highway in West Islip, New York. The plaintiff was admitted to the Hospital after initially presenting herself to the Hospital's emergency room with complaints of severe back pain shooting down her right thigh and leg. She had a history of chronic obstructive pulmonary disease, anxiety disorder and bipolar disease. The plaintiff was initially scheduled for back

surgery. However, the back surgery was postponed and never occurred because the plaintiff developed a fever, diarrhea, and a possible infection whose source was undetermined, when she suffered a perforation of her mid-transverse colon and diffuse purulent peritonitis. On December 14, 2004, the defendant surgeon Edward Cussatti, M.D. (hereinafter Cussatti), performed emergency surgery on the plaintiff at the Hospital that involved locating the perforation, a subtotal colectomy<sup>1</sup> and creation of an ileostomy.<sup>2</sup>

In their complaint the plaintiffs allege a first cause of action on behalf of the plaintiff for medical malpractice based on negligence; a second cause of action on behalf of the plaintiff for medical malpractice based on lack of informed consent; and a third cause of action on behalf of Kenneth Belzer, the plaintiff's husband, for loss of services. With respect to the defendants Hospital and Cussatti, the plaintiffs allege in their bills of particulars that they were negligent in, among other things, failing to timely appreciate the plaintiff's symptoms of a distended abdomen and lack of bowel sounds; failing to timely and properly address inflammatory bowel disease; failing to properly perform and interpret the December 9, 2004 radiology studies; and failing to prevent a resulting perforation of the colon by failing to timely diagnose and aggressively treat an ileus<sup>3</sup> by decompressing the bowel, performing a colonoscopy, performing a suction to remove the build-up of gas and liquids caused by the ileus, and modifying the plaintiff's diet.

The Hospital and Cussatti now move for summary judgment in their favor dismissing the complaint as against them as both did not depart from good and accepted medical practice in their treatment of the plaintiff and that the majority of the allegations of negligence as against Cussatti pertain to a period prior to his treatment of the plaintiff. In addition, they assert that they obtained the prior consent of the plaintiff for the procedures performed by Cussatti as evidenced by her executed consent form. Also, they assert that prior to her surgery, the plaintiff was treated by private attending physicians at the Hospital for whose negligence the Hospital is not liable.

In a medical malpractice action, a plaintiff must prove that there was a deviation or a departure from good and accepted practice and that such departure or deviation was a proximate cause of injury or damage (see, *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2nd Dept 2008]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see, *Luu v*

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<sup>1</sup> Colectomy is defined as the excision of a segment or all of the colon (Stedman's Medical Dictionary 377 [27<sup>th</sup> ed 2000]).

<sup>2</sup> An ileostomy is the creation of a fistula through which the ileum discharges directly to the outside of the body (Stedman's Medical Dictionary 874 [27<sup>th</sup> ed 2000]).

<sup>3</sup> Ileus is defined as the mechanical, dynamic or adynamic obstruction of the bowel (Stedman's Medical Dictionary 874 [27<sup>th</sup> ed 2000]).

**Paskowski**, 57 AD3d 856, 871 NYS2d 227 [2nd Dept 2008]; **Mendez v City of New York**, 295 AD2d 487, 744 NYS2d 847 [2nd Dept 2002]). In opposition, a plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries (see, **Luu v Paskowski**, *supra*).

In his deposition testimony of February 5, 2008, Cussati stated that he first treated and saw the plaintiff the evening of the surgery on December 14, 2004 as the private attending surgeon on-call and obtained the plaintiff's treatment history from his employer, non-party surgeon Eli Anker, M.D. His deposition testimony and the submitted Hospital records indicate that prior to the surgery Cussatti discussed the plaintiff's condition and her need for urgent surgery with the plaintiff, her daughter and her husband, what post-surgical care might entail, the alternatives and the risks involved, and answered their questions and obtained a written consent from the plaintiff. The Hospital's and Cussatti's expert physician, board certified in general surgery, (hereinafter expert) in his affirmation, dated March 13, 2009, opined with a reasonable degree of medical certainty that by the time Cussatti was involved in the plaintiff's care and treatment, her colon had already perforated and she required emergency surgery so that all the allegations relating to his purported failure to diagnose and treat an ileus or inflammatory bowel disease are inapplicable. In addition, the expert opined that Cussatti selected the appropriate surgery and properly obtained consent from the plaintiff for surgery. The expert also stated that Cussatti employed excellent surgical technique in conformity with good and accepted standards of care which was necessary to save the plaintiff's life inasmuch as an abdominal x-ray performed earlier on the date of the surgery showed free air, consistent with a bowel perforation. The expert further opined that Cussatti appropriately treated the plaintiff post-operatively. The expert stated with a reasonable degree of medical certainty that Cussatti's surgery and treatment were in accordance with good and accepted standards of surgical practice, that the plaintiff did not experience any complications directly related to Cussatti's surgery and that Cussatti's surgery was not the proximate cause of any of the plaintiff's alleged injuries.

Here, Cussatti has demonstrated prima facie entitlement to summary judgment dismissing the complaint as against him by submitting his own as well as the plaintiffs' deposition transcripts, extensive medical records, and an expert affirmation which established, to a reasonable degree of medical certainty, that Cussatti did not depart from good and accepted standards of care with respect to the plaintiff and that nothing he did or failed to do was a competent producing cause of the plaintiff's injuries (see, **Thurston v Interfaith Med. Ctr.**, 66 AD3d 999, 887 NYS2d 655 [2nd Dept 2009]; **Burgos v Rateb**, 64 AD3d 530, 883 NYS2d 115 [2nd Dept 2009]). In addition, Cussatti has established his prima facie entitlement to summary judgment dismissing the cause of action against him to recover damages for lack of informed consent (see, **Luu v Paskowski**, *supra*). In opposition to the motion, the plaintiffs indicate that they do not oppose that portion of the motion with respect to Cussatti. Thus, as the plaintiffs have failed to raise a triable issue of fact as to Cussatti (see, *id.*), that portion of the motion for summary judgment dismissing the complaint as against Cussatti is granted.

A hospital cannot be held concurrently liable with a private attending physician who is negligent unless the hospital's employees commit independent acts of negligence or the attending physician's orders are contraindicated by normal practice (see, **Martinez v La Porta**, 50 AD3d 976, 857 NYS2d 194 [2nd Dept 2008]). In addition, a hospital cannot ordinarily be held vicariously liable for the malpractice of a private attending physician who is not its employee unless a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing and there is created an apparent or ostensible agency by estoppel (see, **Salvatore v Winthrop Univ. Med. Ctr.**, 36 AD3d 887, 888, 829 NYS2d 183 [2nd Dept 2007]; **Dragotta v Southampton Hosp.**, 39 AD3d 697, 833 NYS2d 638 [2nd Dept 2007]; see also, **Schultz v Shreedhar**, 66 AD3d 666, 886 NYS2d 484 [2nd Dept 2009]).

The deposition testimony of Cussatti, Tharun Shetty, M.D. and James Kohloser, D.O. indicate that they were not employees of the Hospital. The Hospital's expert surgeon opined in his affirmation, dated March 13, 2009, that the treatment the plaintiff received at the Hospital was proper and in accordance with good and accepted standards of care and that no action or inaction on the part of the Hospital caused any injury, sequelae or damages to the plaintiff. The Hospital's expert specified that the plaintiff was seen in a timely manner in the emergency room and that proper consultations, diagnostic studies and laboratory work up were ordered to explore the possible causes of the plaintiff's pain such as disc pathology and/or renal stones. In addition, the Hospital's expert emphasized that the plaintiff was followed during her admission by a myriad of private attending physicians from different specialties and that the Hospital staff properly followed the orders and directives of said physicians. The Hospital's expert also pointed out that the Hospital radiologist Mark Wax, M.D. properly interpreted the December 9, 2004 CT scan of the plaintiff's abdomen and pelvis as showing a severe dilation of the entire colon with no air within the colonic wall demonstrating that the plaintiff's colon was not perforated at the time and immediately made his findings available upon dictation and with a hard copy of his report in the plaintiff's chart the following morning.

In opposition to the motion, the plaintiffs oppose the portion of the motion solely with respect to the Hospital because the Hospital is vicariously liable for any negligence of the private attending physicians in delaying the diagnosis and treatment of the plaintiff's ileus inasmuch as the plaintiff entered its emergency room seeking treatment from the Hospital and did not know that the physicians were not Hospital employees and that the Hospital records do not contain the films or report of the abdominal x-rays performed on December 14, 2004 purportedly showing free air. In his affirmation, dated July 13, 2009, the plaintiffs' expert surgeon questions whether the "recent" x-rays referred to in notes and relied on by the surgeons on December 14, 2004 really are those of December 9, 2004 that were initially misread by the Hospital radiologists resulting in a four day delay in surgical intervention. In its reply, the Hospital submits a copy of the December 14, 2004 x-ray report without explaining why it was not submitted with its motion papers.

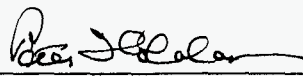
Based on the submissions of the Hospital it is unclear who ordered the December 14, 2004 abdominal x-rays that led to the plaintiff's surgery, when the x-rays were ordered,

why they were ordered and whether the films existed as well as the extent of the Hospital's involvement in these events. In addition, no explanation is given for the statement in the December 14, 2004 abdominal x-ray report within the section entitled "impression" that "[t]he floor nurse in charge informed" and no reason is given as to why unlike the other radiological reports contained in the Hospital record that all show the discharge date in blank, the December 14, 2004 abdominal x-ray report provides the plaintiff's discharge date, fourteen days after the x-ray was purportedly performed and read. Also, the Hospital's expert failed to specifically address the performance of the December 14, 2004 x-rays as they related to the Hospital staff. Thus, the Hospital failed to establish its prima facie entitlement to summary judgment with respect to its own alleged negligence (see, **Vera v Soohoo**, 41 AD3d 586, 838 NYS2d 154 [2nd Dept 2007]; see also, **Bjorke v Rubenstein**, 53 AD3d 519, 861 NYS2d 757 [2nd Dept 2008]).

Moreover, a triable issue of fact exists as to whether the plaintiff sought treatment from the Hospital rather than from a particular physician, reasonably believing that the defendant physicians were provided by the Hospital or acting on its behalf such that the Hospital may be vicariously liable for the alleged malpractice and negligence of the remaining defendant physicians under a theory of apparent or ostensible agency (see, **Boutin v Bay Shore Family Health Ctr.**, 59 AD3d 368, 872 NYS2d 523 [2nd Dept 2009]; **Sosnoff v Jackman**, 45 AD3d 568, 845 NYS2d 391 [2nd Dept 2007], lv to appeal dismissed 10 NY3d 885, 860 NYS2d 481 [2008]). Therefore, that portion of the motion for summary judgment dismissing the complaint as against the Hospital is denied.

Accordingly, the complaint is dismissed solely as against Cussatti and the action is severed and continued as against the remaining defendants.

Dated December 21, 2009




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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_ X \_\_\_ NON-FINAL DISPOSITION