

McCue v Weissberg

2011 NY Slip Op 30471(U)

February 2, 2011

Supreme Court, Suffolk County

Docket Number: 08-19517

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 1/6/11 (#001)
MOTION DATE 1/6/11 (#002)
ADJ. DATE 2/3/11
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MG

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BARBARA McCUE, as the Attorney-in-fact for :
FRANCES CALLAN, :

Plaintiff, :

- against -

DAVID J. WEISSBERG, M.D., DAVID J. WEISSBERG, M.D., P.C., MICHAEL PATRICK LESLIE, D.O., "JOHN/JANE DOE, M.D." (First and Last Name being fictitious), HUNTINGTON HOSPITAL ASSOCIATION, MAUREEN M. ORSEN, M.D., and ST. JOHN LAND NURSING CENTER, INC.

Defendants. :

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Upon the following papers numbered 1 to 44 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-16 ; Notice of Cross Motion and supporting papers (002) 17-44 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ and it is,

ORDERED that this motion (001) by the defendant Huntington Hospital and this cross motion (002) by the defendant Michael Patrick Leslie, D.O., are consolidated for purposes of this determination; and it is

ORDERED that this motion (001) by the defendant Huntington Hospital s/h/a Huntington Hospital Association for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted to the extent that the complaint is dismissed with prejudice, and that part of the motion which seeks dismissal of any cross claims asserted against is denied as academic in that Huntington Hospital has not submitted any answers with cross claims against it; and it is further

ORDERED that this motion (002) by the defendant Michael Patrick Leslie, D.O. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against him is granted to the extent that the complaint is dismissed with prejudice, and that part of the motion which seeks dismissal of any cross claims asserted against him is denied as academic in that Dr. Leslie has not submitted any answers with cross claims against him.

The plaintiff, Barbara McCue, has commenced this medical malpractice action in her capacity as the sister of, and the Attorney-in-Fact for, Frances Callan, having been appointed on February 7, 2006.¹ This action is premised upon the alleged negligence of defendants, lack of informed consent, and vicarious liability and negligent hiring by the defendants Huntington Hospital and St. Johnland Nursing Center and their employees and agents. It is claimed that commencing on or about January 13, 2007 through on or about February 27, 2007, Frances Callan was a patient under the care and treatment of the defendants herein and that the defendants negligently failed to diagnose and properly repair and treat a complex right hip and femur fracture, failed to insert the correct hardware, failed to properly affirm satisfactory stability of the hardware after insertion, failed to timely and properly diagnose and treat hardware breakdown, and otherwise departed from accepted standards of care causing her to sustain permanent injury.

The defendant Huntington Hospital seeks summary judgment dismissing the complaint and all cross-claims asserted against it on the bases that it did not deviate from the standard of care during the treatment of Frances Callan, that Frances Callan was the patient of her private attending physician Dr. David Weissberg, and that the care and treatment rendered at the hospital by its employees did not cause or contribute to the plaintiff's injuries.

The defendant Michael Patrick Leslie, D.O., seeks summary judgment dismissing the complaint and all cross claims asserted against him on the bases that he was a resident during the period of time relative to the care and treatment rendered to Frances Callan; that he assisted the attending physician and did not exercise any independent medical judgment; and that the care and treatment directed by the treating physician did not deviate from normal practice wherein he should be held liable for failure to intervene, and, therefore, he cannot be held liable for the alleged negligence herein.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact"

¹ The hospital record indicates that this sixty-six year old lady suffered a traumatic brain injury four years ago, resulting in basal skull fractures with subdural hematoma and bifrontal and bitemporal intraparenchymal hemorrhages, followed by good recovery with residual mild cognitive deficits and probable focal motor seizures. She was fully functional with a sporadic gait instability. She presented to Huntington Hospital, status post fall which resulted in a right hip fracture for which surgery was performed on January 14, 2007.

(CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2nd 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475[1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the 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 of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]).

In support of motion (001), Huntington Hospital has submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, answer (without cross-claims) and demands for disclosure, and plaintiff's verified bill of particulars and supplemental verified bill of particulars; plaintiff's medical records; the affirmation of the defendant's expert Dr. L. Paul Brief, M.D.; and the unsigned transcripts of the examinations before trial of Barbara McCue dated April 14, 2009, Francis Callan dated June 26, 2009, and Jay Weissberg, M.D. dated September 16, 2009. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

L. Paul Brief, M.D., has set forth in his supporting affidavit that he is licensed to practice medicine in the State of New York and is certified in orthopedic surgery. He set forth the materials he reviewed in forming his opinions and sets forth those opinions with a reasonable degree of medical certainty. He states that it is the responsibility of the patient's physician to provide informed consent to the plaintiff and therefore the hospital is not responsible for providing informed consent to the patient. He states that at all times, the hospital staff followed all physician orders in a timely and efficient manner. When Ms. Callan was admitted to Huntington

Hospital with a fractured hip, the standard of care required that the patient be properly processed through the emergency room, operating room, recovery and nursing floor by the hospital employees involved in the patient's care, and that at all times this was properly and professionally done, and all orders were completed appropriately and timely.

Dr. Brief continues that the nursing staff and physical therapy staff at Huntington Hospital provided proper care, and according to the chart, Ms. Callan was comfortable after the surgical procedure of January 14, 2007. He states that the record does not reflect any early signs of hardware failure from January 14, 2007 through Ms. Callan's discharge on January 23, 2007, and that during her admission, Ms. Callan performed physical therapy, ambulated on the leg in question and performed weight bearing as tolerated. He further states that at no time did the staff at Huntington Hospital deviate from the standard of care and that none of the injuries claimed by the plaintiff can be causally related to the treatment rendered to her by members of the Huntington Hospital staff during her admission thereto.

Based upon the foregoing, it is determined that Huntington Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint. In that Huntington Hospital has not submitted any answers with cross claims asserted against it, that part of the hospital's application is denied as academic. The plaintiff has not opposed this motion and thus has not raised a factual issue to preclude summary judgment.

Accordingly, motion (001) is granted to the extent that the complaint as asserted against Huntington Hospital is dismissed with prejudice.

In support of motion (002), Michael Patrick Leslie, D.O., has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers (which do not contain cross-claims), and plaintiff's verified bills of particulars and supplemental bills of particulars; plaintiff's hospital record; affidavit of Michael P. Leslie, D.O.; expert affirmation of Philip A. Robins, M.D.; and the unsigned transcripts of the examinations before trial of Barbara McCue dated April 14, 2009, Francis Callan dated June 26, 2009, Jay Weissberg, M.D. dated September 16, 2009, Maureen M. Orsen, M.D. dated January 7, 2010. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp., supra; McDonald v Maus, supra; Pina v Flik Intl. Corp., supra*), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

It is noted that the affidavit of Michael Leslie, D.O. was notarized in the State of Connecticut and is not in proper or admissible form pursuant to CPLR 2106 and 2309(c). It lacks a certificate of conformity as required by N.Y. Real. Prop. Law. § 299-a(1) (*see, Ford Motor Credit Company v Prestige Gown Cleaning Service*, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct Queens County 2002]). Therefore, it is not considered on this motion for summary judgment.

Philip A. Robins sets forth in his supporting affirmation that he is a physician duly licensed to practice medicine in the State of New York and is board certified in orthopedic surgery. He sets forth the materials he reviewed to render an opinion in this action, and sets forth his opinion with a reasonable degree of medical certainty. Dr. Robins states that Ms. Callan was admitted to Huntington Hospital on January 13, 2007 after having fallen and sustaining a right intertrochanteric fracture of the hip. He states that upon his review that he determined that Dr. Weissberg was Ms. Callan's admitting doctor who ordered Buck's traction until she was cleared for surgery, which was ultimately performed on January 14, 2007. Prior to surgery, Dr. Weissberg discussed the risks of the procedure and possible complications with the patient, as is his duty and responsibility in accordance with the applicable standard of care. Dr. Robins continues that Dr. Weissberg determined and

formulated the treatment plan, the surgical procedure, and determined the appliance to be inserted into Ms. Callan's femoral shaft after it was noted during the procedure that she had also sustained a fracture of the femoral shaft. Michael Leslie, D.O. was the third year orthopedic resident who assisted Dr. Weissberg during the procedure. He states that postoperative orders were written by Dr. Leslie at the direction of Dr. Weissberg, including orders relating to weight-bearing and physical therapy. On January 23, 2007, Ms. Callan was discharged from Huntington Hospital and transferred to St. Johnland Nursing Center for rehabilitation. Ultimately, the surgical hardware failed and Ms. Callan required revision surgery.

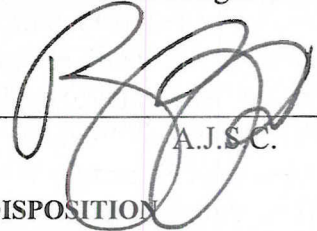
Dr. Robins continues that at all times Dr. Leslie was working under the direction, instruction and supervision of Dr. Weissberg, the attending surgeon. At no time did Dr. Leslie exercise independent medical judgment with respect to the care and treatment of the patient. Dr. Weissberg made the diagnosis, planned and performed the surgery, chose the hardware and informed the patient of the risks and complications of the procedure. Dr. Robins described the functions which Dr. Leslie performed during the surgical procedure in assisting Dr. Weissberg as per Dr. Weissberg's directions and instructions. He states there is no evidence that Dr. Weissberg's directions departed from normal practice and thus there was no cause for Dr. Leslie to question those directions or otherwise intervene in Dr. Weissberg's care and treatment of the patient. Dr. Robins continues that Dr. Weissberg determined the physical therapy the patient would have postoperatively, including the weight-bearing parameters. He further opines that there is nothing that Dr. Leslie did or did not do that proximately caused any of the injuries claimed by the plaintiff.

A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Muniz v Katiowitz* 49 AD3d 511, 856 NYS2d 120 [2nd Dept 2008]). A private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*Freeman v Mercy Medical Center*, 2008 NY Slip Op 31337U, 2008 Misc Lexis 10141 [Sup. Ct., Nassau County]). Here, Dr. Leslie's expert has demonstrated that Dr. Leslie, as a third year resident, did not exercise independent medical judgment. Here, the record supports that he was working under the supervision and control of the attending physician, Dr. Weissberg, and only acted within the scope relating to the care and treatment that was approved by the attending physician. The plaintiff has not opposed this motion and has raised no factual issue to preclude summary judgment.

Based upon the foregoing, it is determined that Dr. Leslie has established prima facie entitlement to summary judgment dismissing the complaint asserted against him. In that Dr. Leslie has not submitted any answers with cross claims against him, that part of his application for dismissal of the cross claims is denied as academic.

Accordingly, motion (002) is granted to the extent that the complaint as asserted against Dr. Leslie is dismissed with prejudice.

Dated: 2-2-11



A.J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION