

Zelada v Singh

2011 NY Slip Op 31334(U)

May 12, 2011

Supreme Court, Nassau County

Docket Number: 020405/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

CONCEPCION ZELADA, X

Plaintiff,

Index No.: 020405/08
Motion Seq...01, 02
Motion Date...04/06/11

-against-

RANJIT SINGH, M.D., RICHARD DORF,
RICHARD ADDES, M.D. and 54 MAIN
STREET MEDICAL PRACTICE, P.C.,

Defendants.

X

- Papers Submitted:
- Notice of Motion (Mot. Seq. 01).....X
- Affirmation in Opposition.....X
- Memorandum of Law.....X
- Reply Affirmation.....X
- Notice of Motion (Mot. Seq. 02).....X
- Affirmation in Opposition.....X
- Memorandum of Law.....X

Upon the foregoing papers, the Defendant, Ranjit Singh, M.D.’s (“Dr. Singh”), motion seeking an order pursuant to CPLR § 3212, granting summary judgment dismissing the Plaintiff’s complaint (Mot. Seq. 01) and the Defendants, RICHARD DORF, RICHARD ADDES, M.D. and 54 MAIN STREET MEDICAL PRACTICE, P.C.’s motion, seeking an Order pursuant to CPLR § 3212 granting them summary judgment against the Plaintiff and

dismissing the Complaint in its entirety are decided as hereinafter provided..

In this medical malpractice action, the Plaintiff alleges that the Defendants departed from the accepted standard of care and failed to diagnose the Plaintiff's condition of appendicitis, and that such failure caused her appendix to rupture, and also caused her to undergo surgery and the "subsequent sequella that resulted therefrom".

The Plaintiff commenced the underlying action by filing a Summons and Complaint in February, 2009, alleging, inter alia, that the Defendants were careless and negligent in their provision of medical treatment to the Plaintiff in that they failed to diagnose an appendicitis and departed from accepted standards of medical treatment thereby resulting in the Plaintiff being severely and permanently harmed.

The Defendant, 54 MAIN STREET MEDICAL PRACTICE, P.C. ("54 Main"), is a professional corporation located in Hempstead, New York. The Defendants, RANJIT SINGH, M.D., RICHARD DORF, RICHARD ADDES, M.D. were employed by the clinic at all times referenced herein.

The Plaintiff, a 68-year-old female with a prior history of gastroesophageal reflux disease and arthritis, presented to 54 Main for a checkup on April 9, 2008 when she was treated by Dr. Singh. Her pre-existing medical conditions were previously addressed by medications which included Mobic, Zyrtec and Nexium. Dr. Singh conducted a physical exam examining the Plaintiff's heart, lungs, and abdomen. According to the medical record, the Plaintiff exhibited clear lungs, normal heart rate and a normal abdominal exam. The

Plaintiff was, however, diagnosed with hypertension. Dr. Singh changed her medication from Nexium to Prilosec and from Zyrtec to Claritin for insurance purposes. He ordered a urinalysis and blood tests which later revealed no abnormalities except for a slightly elevated cholesterol level. The Plaintiff was instructed to return to the clinic in two weeks.

The Plaintiff returned to the clinic on April 24, 2008. However, there is some dispute as to who examined her on this date.¹ The clinic record indicated that the Plaintiff's blood pressure was still elevated and this condition was being monitored. She was to return to the clinic in four weeks and she returned on May 9, 2008. The Plaintiff was treated by Dr. Singh and he added a new medication, Norvasc, to address her still elevated blood pressure. There is no notation in either the April 24 or May 9 clinic notes indicating that the Plaintiff exhibited any pain or expressed any complaints.

The Plaintiff was to return to the clinic in one week and she appeared on May 16, 2008. The clinic record references her intolerance of Norvasc, and according to Dr. Singh, the side effects of Norvasc included gastrointestinal discomfort. He then changed that medication to Enalapril. The Plaintiff was to return to the clinic in two weeks.

On May 19, 2008, the Plaintiff presented to the clinic where she was seen by the Defendant, Richard Dorf, a Physician's Assistant. There is no clinical notation as to the reason for her appearance so soon after her appointment of May 16. According to the Plaintiff, she was experiencing abdominal pain and indicated the same to Dr. Singh on May

¹It is noted the signature of the examiner on that date, does not match the signature of Dr. Singh which appears on other clinic records in evidence.

16, and because the pain was “stronger” and now radiating to her right leg, she returned to the clinic before the two week time period. There is no notation in the record that the Plaintiff complained of these symptoms at this visit. There is some dispute as to whether Mr. Dorf actually examined the Plaintiff. He contends that he conducted a focused examination where he palpated the Plaintiff’s abdomen, but the Plaintiff alleges that he did not examine her at all and instead, engaged her in small talk about his family. The Plaintiff also testified that Mr. Dorf recommended that she take Motrin for the pain.

The record indicates that the Defendant, Richard Dorf ordered additional blood tests which later revealed only the abnormality of a slightly elevated red blood cell count and cholesterol level. It is noted that there were no signs of infection as the white blood cell count was determined to be within normal limits. After the Defendant, Richard Dorf developed a plan to address what he determined to be uncontrolled hypertension, which included changes to her diet and the implementation of an exercise regime, he directed the Plaintiff to return to the clinic in one week.

On or about May 23, 2008, the Plaintiff presented at the Nassau University Medical Center’s emergency room with complaints of acute abdominal pain. She was admitted with a diagnosis of a perforated appendix. Her operative report indicates that she was experiencing symptoms for 6-7 days with nausea, vomiting and a low grade fever. The hospital examination also revealed a pelvic abscess, extensive adhesions, and inflammation in the pericecal area. Surgery was recommended based on the foregoing findings and an open

appendectomy was successfully performed on the Plaintiff on May 23, 2008. She was discharged from the hospital on June 1, 2008 with the appropriate outpatient referrals and antibiotic regimen.

In support of his motion, (Mot. Seq. 01) the Defendant, Dr. Singh submits his, Richard Dorf's, and the Plaintiff's transcripts of testimony from their Examinations Before Trial. Additionally, the Defendant submits copies of the Plaintiff's medical records from 54 Main and Nassau University Medical Center as well as an affirmation from Howard D. Kolodny, M.D., a physician licensed in Internal Medicine and Endocrinology. Counsel for Dr. Singh argues that the Plaintiff did not present any symptoms of appendicitis nor did she complain of any pain in her abdomen during any time that Dr. Singh treated her as a patient at the 54 Main Street Clinic. As such, he argues that his treatment of her comported with accepted medical standards and any alleged departure was not the proximate cause of her perforated appendix and ensuing surgery.

In support of their motion, (Mot. Seq.02) the Defendants, RICHARD DORF, RICHARD ADDES, M.D. and 54 MAIN STREET MEDICAL PRACTICE, P.C. attach the same exhibits as co-defendant, Dr. Singh, as well as an affirmation from William Miller, D.O., who specializes in Osteopathic Medicine and General Surgery. They argue that the Plaintiff did not complain of any abdominal pain during any of the dates and times they treated her and the laboratory results support that she was not suffering from any infection at the times she presented to the clinic. Richard Dorf argues that he appropriately treated the

Plaintiff for her hypertensive condition and that his treatment did not depart from any acceptable standard of care. Dr. Addes contends that he was an employee of the clinic, and not the owner as alleged by the Plaintiff, and as he never treated the Plaintiff, the motion should be granted as to him.

In opposition to the Defendant, Dr. Singh's motion, the Plaintiff contends that she complained to Dr. Singh, particularly on May 16, 2008, about a pain in the right side of her abdomen and returned three days later as the pain became sharper. The Plaintiff alleges that Dr. Singh and Richard Dorf, failed to conduct a comprehensive examination and failed to appropriately perform specific tests and examinations which may have revealed her appendicitis. The Plaintiff, in addition to the exhibits already submitted by the Defendants, submits the Affirmation of Michael Golding, M.D., certified in general and thoracic surgery.

In opposition to the Defendants, Dorf, Addes, and 54 Main Street's motion, the Plaintiff submits the Affirmation of Michael Golding, M.D. The allegations against Richard Dorf are similar to those alleged against Dr. Singh, except that the Plaintiff alleges that Mr. Dorf did not conduct any examination of her on May 19, 2008, and the Plaintiff avers that Dr. Addes has an ownership interest in the 54 Main Street facility as well as being Richard Dorf's direct supervisor. Consequently, the Plaintiff argues that Dr. Addes is vicariously liable for the acts or non acts committed by Richard Dorf in regard to the Plaintiff and that 54 Main Street Clinic is liable for the acts and non acts of its employees regarding the treatment and care of the Plaintiff.

On a motion for summary judgment, the moving party bears the initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (see *Beck v. Westchester County Health Care Corp.*, 52 A.D.3d 555 [2d Dept. 2008]). The defendant has the burden of affirmatively demonstrating the merits of its defense. Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied. Further, the courts are required upon a defendant's motion for summary judgment to view the evidence in the light most favorable to the plaintiff (see *Healy v. Spector* 287 A.D.2d 541[2d Dept. 2001]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (see *Pierson v. Good Samaritan Hosp.*, 208 A.D.2d 513 [2d Dept. 1994]).

These standards are of course equally applicable to motions for summary judgment in medical malpractice actions. The requisite elements of proof in such actions are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (see *Rebozo v. Wilen*, 41 A.D.3d 457 [2d Dept 2007]). A defendant physician seeking summary judgment in a medical malpractice action must make a *prima facie* showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby (see *Alvarez v. Gerberg* 2011 WL 1631237 [2d Dept. 2011]).

In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, and such departure was a competent producing cause of the injury. General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, [1986]; *Zak v. Brookhaven Memorial Hosp. Medical Center*, 54 A.D.3d 852 [2d Dept. 2008]).

Based on the foregoing standard, the Defendant, Dr. Singh has sufficiently established his entitlement to summary judgment. His actions and medical treatment are supported by his expert, Dr. Kolodony, who affirmed that Dr. Singh did not depart from an accepted standard of care in his treatment of the Plaintiff.

In opposition, the Plaintiff claims to have complained to Dr. Singh on May 16 about her abdominal pain. She testified that she appeared without an appointment because she was experiencing pain. It is noted that the Plaintiff's expert takes issue with her entire treatment at the clinic dating back to the date of her first appearance on April 9, 2008. He also states facts that are not in evidence. For example, Dr. Golding affirms that the May 16 date was unscheduled, yet the May 9 clinic note instructs the Plaintiff to return to the clinic within one week due to the change in her medication (see Singh Notice of Motion, Exhibit F, see also Singh Affirmation in Opposition, Exhibit F, p. 5). Further, the May 9 and May 16 dates are the focus of the instant motion as the Plaintiff alleges, pursuant to her testimony and her NUMC medical chart, that she was exhibiting symptoms of appendicitis for about

one week prior to her hospital admission on May 23, 2008.

However, even viewing the facts in a light most favorable to the non-moving Plaintiff, the clinic note from May 9 recommended that she return to the clinic in one week and the May 16 note supports that the purpose for that visit was for a follow up appointment. Further, there is no reference or notation in the May 16 clinic note to support that the Plaintiff complained of abdominal pain. The Plaintiff has not sufficiently rebutted Dr. Singh's prima facie entitlement to summary judgment and the motion (Mot. Seq. 01) as to him, is **GRANTED**.

As to the Defendant, Richard Dorf, the evidence submitted in support of his motion is insufficient to sustain his prima facie burden. The medical record is silent as to why the Plaintiff appeared at the clinic on May 19, 2008, three days after being seen on May 16, 2008, when she was to return in two weeks. This is particularly noteworthy as the Plaintiff returned to the clinic without an appointment, a point that is undisputed. It is also noteworthy that Richard Dorf testified at his Examination Before Trial that he did not recall the Plaintiff as a patient, and was therefore unable to cite a reason for this unscheduled visit.

Additionally, his expert, Dr. Miller, contends that the Plaintiff was afebrile on the May 19, 2008 date, although there is no notation of what her temperature actually was on that date (see Dorf Notice of Motion, Exhibit F). As such, Dr. Miller is assuming facts that were not part of the record. With respect to the expert opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness,

and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (see *Gomez v. New York City Hous. Auth.*, 217 A.D.2d 110 [1st Dept. 1995]; *Matter of Aetna Cas. & Sur. Co. v. Barile*, 86 A.D.2d 362[1st Dept. 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment submits conclusory medical affidavits or affirmations, fails to establish its prima facie entitlement to summary judgment (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]; *Cregan v. Sachs*, 65 A.D.3d 101 [1st Dept. 2009]).

Further, Dr. Miller contends that Mr. Dorf examined the Plaintiff's abdomen by palpating the abdomen although Mr. Dorf specifically testified that there was no notation in the record detailing this method of examination. Further, his testimony was based upon what he typically would do in a case such as the Plaintiff's as the clinic record was devoid of any details or facts regarding any examination performed on the Plaintiff on May 19, 2008.

Even if the Defendant, Dorf, did meet his burden, the Plaintiff raises issues of fact as to whether she was actually examined by him on May 19, whether she complained regarding sharp or strong abdominal pains, and whether he, if he did indeed examine the Plaintiff, conducted a comprehensive and proper examination.

In addition, the issue remains as to whether the Defendant, Dorf's failure to diagnose appendicitis on May 19, 2008 was a proximate cause of the perforation of the appendix and ensuing medical issues resulting from surgery. The Defendant, Dorf's expert

opines that a “laparoscopic approach could not have been made at any point in the [plaintiff’s] presentation as the appendix was significantly involved in adhesions both in the pelvis as well as the small intestine” (see Dorf Notice of Motion, Exhibit F); however, he does not cite a basis for this conclusion. Even if this statement was accurate, the expert failed to address whether the delay in diagnosing appendicitis impacted upon whether the Plaintiff’s appendix would have ruptured, the extent of the surgery and treatment required, or affected the Plaintiff’s prognosis after the surgery and treatment. Stated another way, even if the Plaintiff was correctly diagnosed on May 19, 2008, would the appendix have ruptured and/or would the treatment for this condition have been the same if not similar. Consequently, the Defendant failed to demonstrate, prima facie, that his alleged malpractice was not a proximate cause of any of the Plaintiff’s alleged damages.

Accordingly, the motion for summary judgment as to the Defendant, Richard Dorf is **DENIED** regardless of the sufficiency of the Plaintiff’s opposition papers (see *Carew v. Urological Surgeons of Long Island, P.C.*, 292 A.D.2d 484 [2d Dept. 2002], *Francis v. Mishra*, 60 A.D.3d 806 [2d Dept. 2009]).

Even if this defendant met his burden, the Plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant. In sum, where a failure to timely treat and diagnose is alleged, as in the instant case, the plaintiff simply must show that it was probable that some diminution in a more favorable outcome had occurred (see *Borawski v.*

Huang, 34 A.D.3d 409 [2d Dept 2006]).

The Plaintiff's expert opined that if the Defendant correctly and timely diagnosed the Plaintiff's condition, she could have been treated through a laparoscopic procedure which would have resulted in significantly less inflammation and the production of fibrous tissue (see Dorf Affirmation in Opposition, Exhibit F, p. 8). As such, drawing all reasonable inferences from the affirmation of the Plaintiff's expert in the Plaintiff's favor, one could reasonably infer a nexus between the alleged departures from acceptable medical practice and the Plaintiff's perforated appendicitis and ensuing surgical treatment (see *Olgun v. Cipolla*, 82 A.D.3d 1186 [2d Dept. 2011]). This is sufficient to rebut a prima facie entitlement to Summary Judgment, and the motion is **DENIED** as to the Defendant, Richard Dorf.

Under the doctrine of respondeat superior, a corporation is liable for a tort committed by its employee. Even as a professional corporation, an employer is vicariously liable for the torts of its employees (see *Keitel v. Kurtz*, 54 A.D.3d 387 [2d Dept. 2008], see also *Deltoro v. Arya*, 44 A.D.3d 896 [2d Dept. 2007]). The doctrine, however, does not impose vicarious liability upon supervisors (see *Connell v. Hayden*, 83 A.D.2d 30 [1st Dept. 1981]). While the doctrine of respondeat superior imposes liability on a corporation for the torts of its employees, the doctrine imposes no such liability upon an employee of the corporation for a tort committed by a fellow employee.

In sum, the Defendant, Richard Addes, M.D., contends that he was merely a

fellow employee of the clinic at the time and dates of the Plaintiff's treatment. He claims no ownership or shareholder interest and the Plaintiff has not submitted any evidence to the contrary. Although the Defendant, Richard Dorf has named Dr. Addes as his supervising physician, there is nothing in the record indicating that he Mr. Dorf any instructions or guidance as to how to treat the Plaintiff nor did he treat the Plaintiff himself.

In the capacity of employee and supervisor, Dr. Addes would be subject to liability for the acts of a fellow employee or an employee under his charge, where, under the circumstances, there is "an unreasonable risk of physical harm to others ... resulting from a risk which his direction or permission creates" (see *Connell v. Hayden, supra*, at 51). There is nothing in the record to support that he gave such directive through the Defendant, Richard Dorf that ultimately caused any alleged harm to the Plaintiff.

As such, the motion is **GRANTED** as to the Defendant, Richard Addes, M.D. and the motion as to the Defendant, 54 Main Street Medical Practice, P.C., is **DENIED**.

Accordingly, summary judgment is **GRANTED** as to the Defendants, Ranjit Singh, M.D. and Richard Addes, M.D. and so much of the Plaintiff's Complaint is dismissed against these Defendants. Summary Judgment is **DENIED** as to the Defendants, Richard Dorf and 54 Main Street Medical Practice, P.C.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
May 10, 2011

ENTERED

MAY 12 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

(Signature)

Hon. Randy Sue Marber, J.S.C.