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| Peluso v C.R. Bard, Inc. |
| 2011 NY Slip Op 31427(U) |
| May 27, 2011 |
| Sup Ct, NY County |
| Docket Number: 117378/08 |
| Judge: Joan B. Lobis |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

ANDREW PELUSO

INDEX NO. 117378/08

MOTION DATE 3/22/11

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -
C.R. BAMA, INC

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-13

Answering Affidavits — Exhibits _____

14-26

Replying Affidavits _____

27

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 5/27/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ANDREW PELUSO and MICHELE PELUSO,

Plaintiffs,

Index No. 117378/08

-against-

Decision and Order

**C.R. BARD, INC., DAVOL, INC., AKBAR F. AHMED,
M.D., CRYSTAL RUN HEALTHCARE, LLP and
ORANGE REGIONAL MEDICAL CENTER,**

FILED

Defendants.

JUN 02 2011

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Akbar F. Ahmed, M.D., Orange Regional Medical Center ("ORMC"),
and Crystal Run Healthcare ("Crystal") move, by order to show cause, for an order granting them
summary judgment dismissal of the complaint against them pursuant to C.P.L.R. Rule 3212.
Alternatively, defendants seek a transfer of venue to either Orange or Sullivan County.

This case sounds broadly in medical malpractice and lack of informed consent. As
to Crystal, plaintiff's claims sound in vicarious liability for Dr. Ahmed and negligent hiring and/or
supervision. As to ORMC, plaintiffs' claims sound in vicarious liability for Dr. Ahmed. There is
also a loss of consortium claim asserted on behalf of Mrs. Peluso. The case originally included
claims sounding in products liability against C.R. Bard, Inc. and Davol, Inc., but the parties entered
into a stipulation of discontinuance as to these two entities on November 23, 2010, which was filed
with the County Clerk on December 20, 2010.

As an initial matter, plaintiffs do not oppose those branches of the motion related to
the claims for lack of informed consent. Public Health Law § 2805-d(1) sets forth that lack of

informed consent is

the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

Defendants demonstrated that Dr. Ahmed, the person who treated Mr. Peluso, provided Mr. Peluso with the reasonably foreseeable risks and benefits of the procedure he performed, and that Mr. Peluso signed a consent form. Plaintiffs have failed to rebut defendants' showing or even address the claim at all. Accordingly, defendants are entitled to summary judgment on the lack of informed consent claim and this claim is hereby dismissed against all of defendants.

Second, defendants also assert that the claim against Crystal for negligently hiring/supervising Dr. Ahmed must be dismissed, as Dr. Ahmed gave sworn testimony that he is a physician in good standing; that he is licensed to practice medicine in New York and has never had his license to practice medicine withdrawn, suspended, or revoked; and that he has been board certified in general surgery since 1996. Accordingly, to the extent that plaintiffs assert a such claim against Crystal for negligently hiring or supervising Dr. Ahmed, Crystal is entitled to summary judgment on this claim and this claim is hereby dismissed.

Third, defendants ask the court to dismiss plaintiff's claim that defendants used or allowed to be used a hernia patch that was recalled by the Food and Drug Administration ("FDA"), since discovery has revealed that the hernia patch was not recalled by the FDA, plaintiffs have

voluntarily discontinued their claims against the manufacturers of the patch, and it appears to defendants that plaintiffs are no longer pursuing claims related to the allegedly recalled hernia patch. Plaintiffs failed to address defendants' contention that this claim is moot. Given the fact that plaintiffs do not dispute that the subject patch was not recalled by the FDA, defendants are entitled to summary judgment on this claim and this claim is hereby dismissed as to all defendants.

The remaining claims against Dr. Ahmed, ORMC, and Crystal sound in medical malpractice or vicarious liability for Dr. Ahmed. In their reply papers, defendants concede that in opposition to their motion, plaintiffs have raised issues of fact as to the claims sounding in medical malpractice against Dr. Ahmed. Accordingly, summary judgment as to the claims sounding in medical malpractice is denied as to Dr. Ahmed. Further, it is uncontested by defendants that Dr. Ahmed was an employee of Crystal at the time of the alleged malpractice. Accordingly, summary judgment is denied as to the claims against Crystal sounding in vicarious liability for Dr. Ahmed.

Defendants do assert that ORMC is not vicariously liable for the acts of Dr. Ahmed. They assert that it is uncontroverted that, at the time of the surgery that forms the basis for plaintiffs' claims against Dr. Ahmed, Dr. Ahmed was not an employee of ORMC but an independent physician hired by Mr. Peluso. Relying on case law that establishes that, in general, a hospital is not liable for the negligence or malpractice of an independent physician, defendants assert that ORMC is not liable for any alleged negligence by Dr. Ahmed.

In opposition, plaintiffs contend that "it is well established that the liability of a hospital, medical group or association under the theory of respondeat superior cannot be determined

solely from the nature of legal relations." Plaintiffs' attorney maintains that Mr. Peluso first met Dr. Ahmed during a surgery consult at OCME and was "consequently unaware of [Dr. Ahmed's] employment status other than to believe that he was an employee of the hospital." Although not stated specifically, plaintiffs seem to be advancing a theory of apparent or ostensible agency.

It is well-established that a hospital cannot be held liable for the acts of a patient's private physician. Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 79 (1986); Welsh v. Scheinfeld, 21 A.D.3d 802, 807 (1st Dep't 2005). However, under the theory of apparent or ostensible agency, a hospital may be liable to a "patient who sought medical care at the hospital . . . rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital . . ." Hill, 67 N.Y.2d at 80 (citations omitted). When the independent physician is provided to the patient by the hospital and the patient reasonably believes that the physician is working at the hospital's behest, the hospital may be held vicariously liable for the acts of that independent physician. Sarjola v. Brookdale Hosp. & Med. Ctr., 204 A.D.2d 245 (1st Dep't), app. denied, 85 N.Y.2d 805 (1995). As pertains to a summary judgment on the issue of apparent or ostensible agency, a defendant must first demonstrate that there was no actual agency, and then the burden shifts to plaintiff to raise a triable issue of fact as to apparent or ostensible agency. Warden v. Orlandi, 4 A.D.3d 239, 241-42 (1st Dep't 2004). In opposition to a prima facie showing of the absence of actual agency, the opposing party "'cannot rely on conjecture and inference to establish agency, either actual or ostensible.' Indeed, '[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment.'" Id. at 242 (citations and internal citations omitted).

It is undisputed that there was no actual agency between ORMC and Dr. Ahmed, so defendants met their initial burden in moving to dismiss the claims against ORMC for vicarious liability for Dr. Ahmed. It was incumbent on plaintiffs to raise an issue of fact through competent evidence as to apparent or ostensible agency. The statement by plaintiffs' attorney that Mr. Peluso believed that Dr. Ahmed was an employee of the hospital is conclusory, speculative, and belied by the records. The records and deposition testimony show that Mr. Peluso received most of his medical care from Crystal's various physicians for years before the alleged malpractice. While he did first meet Dr. Ahmed during a hospitalization at ORMC in April 2006, the procedure (exploratory laparotomy and sigmoid colectomy) that Dr. Ahmed performed during the April 2006 hospitalization is not the subject of this lawsuit. Mr. Peluso then saw Dr. Ahmed on two or three occasions for medical appointments at Crystal between April and July 2006. The surgery (incisional hernia repair) that plaintiff alleges was negligently performed by Dr. Ahmed took place on July 17, 2006. So, for three months before the alleged malpractice, Dr. Ahmed treated Mr. Peluso as an independent physician. Mr. Peluso's sworn testimony indicates that, even in April 2006, he understood that Dr. Ahmed was a physician at Crystal and not employed by ORMC. In response to questioning about when he first met Dr. Ahmed in April 2006, Mr. Peluso testified:

When I first met [Dr. Ahmed], I had already met a surgeon at Crystal Run that suggested surgery in August of 2005. I didn't want surgery. When my time came to be hospitalized in April [2006], I guess Dr. Ahmed was the man that was making the rounds.

Plaintiffs have not rebutted defendants' prima facie showing that there was no actual agency between ORMC and Dr. Ahmed with any competent showing of ostensible agency. Accordingly, the claims against ORMC sounding in vicarious liability for Dr. Ahmed must be dismissed.

The remaining branch of defendants' motion seeks a transfer of venue to either Orange County, where the alleged negligence took place, or Sullivan County, where the town of White Lake, New York is located. Mr. Peluso testified at his deposition that he currently resides and has resided for close to thirty (30) years at the same address in White Lake. The basis for venue as set forth in the summons for this action is plaintiffs' residence, an address for an apartment on Riverside Boulevard in Manhattan. Defendants set forth that, given Mr. Peluso's testimony about plaintiffs' residence, and that none of the remaining defendants reside in New York County, New York County is not a proper venue.

Plaintiffs oppose the transfer of venue. They argue that the motion to change venue is untimely, as it was not made in a reasonable time after the commencement of the action. Additionally, Mr. Peluso sets forth in an affidavit that when plaintiffs commenced this lawsuit, he considered his daughter's address in Manhattan "to be a second permanent and genuine residence." He states that his wife and he paid approximately \$20,000 towards the mortgage for this residence, and that they contributed money towards the apartment with the intention that they would use it as a second residence. Mr. Peluso sets forth that at the time the lawsuit was filed, he spent a considerable amount of time at the residence in Manhattan due to ongoing treatment at Mount Sinai Hospital in Manhattan. He states that with his multiple admissions to Mount Sinai Hospital in 2007 and 2008, "it made sense to use [his] daughter's Manhattan home as a second permanent residence."

In reply, defendants assert that the motion to transfer venue is timely because it was made after plaintiffs discontinued their action against the medical device manufacturers on

December 20, 2010. Prior to that date, defendants maintain that a motion for a change of venue would have been a waste of time, as the manufacturers had a presence in New York County and venue was sustainable here on that basis, despite Mr. Peluso's testimony that he resides in White Lake, New York. However, once the action against the manufacturers was discontinued, that basis for venue was lost, so defendants promptly made this motion afterwards. With respect to Mr. Peluso's contention that he considered his daughter's apartment in Manhattan to be his residence, defendants argue that plaintiffs have failed to submit any evidence of a residence in New York County except for that self-serving affidavit, which they contend is inadequate to establish venue in New York County. They point out that plaintiffs have failed to support the statements in the affidavit with any independent evidence, such as information about the money they allegedly contributed towards the mortgage for the Manhattan apartment, or any driver's license, voter's registration, utility bill, or post office notification indicating their residency at the Manhattan apartment.

Generally, trial shall be venued in a county in which one of the parties resided when the action was commenced. C.P.L.R. § 503(a). A person who is a resident in more than one county shall be deemed a resident of each county. *Id.* "For venue purposes, a residence is where a party stays for some time with the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency." *Sibrizzi v. Mt. Tom Day Sch.*, 155 A.D.2d 337 (1st Dep't 1989) (internal quotation and citation omitted); *see also Katz v. Siroty*, 62 A.D.2d 1011, 1012 (2d Dep't 1978). A person's temporary, brief stays at the home of another for the convenience of that person do not establish residency. *See Sibrizzi*, 155 A.D.2d at 337; *Katz*, 62 A.D.2d at 1012.

While residency may be established by an affidavit, the affidavit must be supported "by documentary evidence, such as a driver's license, voter's registration card or utility bill." Martinez v. Semicevic, 178 A.D.2d 228 (1st Dep't 1991).

Mr. Peluso's sworn deposition testimony establishes that he was a resident of Sullivan County at the time this action was commenced, December 30, 2008. His statement in the affidavit annexed to the opposition papers that he considered the Manhattan apartment his second permanent residence is unsupported by any documentary evidence. In the same affidavit, Mr. Peluso refers to the Manhattan apartment as his "daughter's Manhattan home." The fact that he stayed at his daughter's home for the convenience of his medical treatment at Mount Sinai Hospital does not evidence plaintiffs' intent to reside in New York County with any degree of permanency. The Mount Sinai Hospital records themselves list Mr. Peluso's White Lake home as his address. Moreover, the Mount Sinai Hospital records indicate that Mr. Peluso was not receiving treatment there when the action was commenced in December 2008; as annexed to defendants' papers, the records from that facility end in March 2008. Finally, Mr. Peluso's statement that plaintiffs contributed money towards their daughter's purchase of the Manhattan apartment is not evidence that plaintiffs intended to establish their own residence at the Manhattan apartment. As brief visits, with no evidence of permanency, do not establish residency, Mr. Peluso's affidavit is insufficient to show that plaintiffs resided in New York County at the time this action was commenced.

Defendants' motion is timely. A motion to change venue upon dismissal of a party whose residence provided the basis for venue must be made "within a reasonable time after the

movant obtains knowledge of the facts supporting the request.” Moracho v. Open Door Fam. Med. Ctr., 79 A.D.3d 581 (1st Dep’t 2010) (citations omitted). Even though discovery revealed that plaintiffs did not reside in New York County early on in the litigation, a motion for a change of venue would have been futile given the manufacturers’ presence in New York County. However, once the parties agreed to discontinue the action against the manufacturers in or around November 2010 (and which stipulation of discontinuance was filed in December 2010), the remaining defendants filed this instant motion, by order to show cause, in January 2011. The motion was made within a reasonable amount of time after the discontinuance of parties who rendered venue in New York County proper. See Fernandez v. NYLCare Health Plans, Inc., 276 A.D.2d 268 (1st Dep’t 2000).

A transfer of venue is proper, given that defendants have sufficiently challenged plaintiffs’ venue selection and plaintiffs have failed to show their intent to permanently reside in New York County at the time this action was commenced. Venue is proper in Sullivan County, where defendants have shown that plaintiffs actually reside. Accordingly, it is hereby

ORDERED that the branch of defendants’ motion seeking summary judgment is partially granted, to the extent that (1) the claims for lack of informed consent, negligent hiring/supervision, and negligent use of a recalled hernia patch are dismissed as against all defendants, and (2) the claim for vicarious liability is dismissed solely as to Orange Regional Medical Center, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as there are no remaining claims against Orange Regional Medical Center, the complaint against Orange Regional Medical Center is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants, Akbar F. Ahmed, M.D., and Crystal Run Healthcare, LLP, except as to the claims dismissed above; and it is further

ORDERED that the caption be amended to reflect the dismissal of Orange Regional Medical Center and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the venue of this action, as it remains after the dismissal of the claims and parties as set forth above, is changed from this Court to the Supreme Court, County of Sullivan, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Sullivan.

Dated: May 27, 2011

FILED

JUN 02 2011



JOAN B. LOBIS, J.S.C.