

Hernandez v Wenof

2011 NY Slip Op 31504(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 8632/09

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

MARIA HERNANDEZ,

Plaintiff,

- against -

MICHAEL WENOF, M.D., MERCY MEDICAL
CENTER and NORTH SHORE-LONG ISLAND
JEWISH HEALTH SYSTEM NORTH SHORE
UNIVERSITY HOSPITAL AT SYOSSET,

Defendants.

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 8632/09

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MOTION SUBMISSION
DATE: 4/6/11

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

Notice of Motions and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmations.....	<u> X </u>

The defendant, North Shore Long Island Jewish Health System North Shore University Hospital at Syosset, (hereinafter referred to as "NSUH-S"), moves for an order pursuant to CPLR §3212 dismissing plaintiff's action. The defendant, Mercy Medical Center, (hereinafter referred to as "Mercy"), moves for an order pursuant to CPLR §3212 dismissing plaintiff's action. Plaintiff submits opposition to NSUH-S's motion for summary judgment. The movants each submit reply affirmations.

MERCY'S SUMMARY JUDGMENT MOTION

The defendant, Mercy's, unopposed motion for summary judgment dismissing plaintiff's complaint as and against Mercy is granted.

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NSUH-S'S SUMMARY JUDGMENT MOTION

The defendant, NSUH-S, seeks summary judgment dismissing plaintiff's action as and against NSUH-S. The plaintiff initiated this medical malpractice action as and against NSUH-S for failure to perform a timely and appropriate work-up and pre-operative testing, physical examination, review appropriate diagnostic studies, timely diagnose and treat bowel injury, delaying the performance of corrective surgery to repair and treat peritonitis, failure to rule out perforation, and failing to obtain timely and appropriate consultations with appropriate specialists, from May 31, 2007 through July 9, 2007.

The plaintiff sought treatment from defendant, Michael Wenof, M.D., in May of 2007 for consultation regarding her potential to get pregnant. Plaintiff underwent a transvaginal sonogram at Dr. Wenof's office which revealed a fluid filled portion of the right proximal tube and cystic area behind the uterus. Plaintiff underwent a second sonogram at Dr. Wenof's office which revealed two large cysts in the area of the right ovary. Dr. Wenof advised the plaintiff that the cysts had to be surgically removed, and plaintiff agreed to undergo a laparoscopic procedure to remove the ovarian cysts. The procedure was performed at Mercy on May 29, 2007, by the attending physician, Dr. Wenof. The procedure apparently was completed without complications, and Dr. Wenof discharged the plaintiff from Mercy on May 30, 2007.

Apparently, while plaintiff was home, on May 31, 2007, she developed sharp abdominal pain shortly after eating her first solid food, called Dr. Wenof, and after medication did not alleviate plaintiff's symptoms, Dr. Wenof instructed plaintiff to go to the Emergency Department at NSUH-S. Plaintiff was admitted. Dr. Wenof requested a surgical consult from Dr. Erin Price, who ordered a second CT scan of the abdomen and pelvis on June 4, 2007, which indicated a bowel leak or perforation, whereby plaintiff, on June 4, 2007, underwent an exploratory laparotomy. Dr. Price, a non-party, general surgeon, performed the laparotomy resection with primary anastomosis to repair the perforation to the small bowel. Plaintiff underwent a second repair procedure on June 21, 2007 performed by Dr. Price on June 21, 2007, whereby another small tear was identified and repaired. Eventually, the wound healed and plaintiff was discharged to a rehabilitation center on July 9, 2007.

The plaintiff settled with Dr. Wenof.

The defendant, NSUH-S, maintains that the plaintiff, was at all times, the private patient of Dr. Wenof who was never an employee of NSUH-S. The defendant provides that throughout plaintiff's admission, Dr. Wenof was plaintiff's attending physician who ordered laboratory tests, radiological studies, consultations by specialists throughout the hospitalization, and medical therapy including antibiotics. The defendant also provides that Dr. Wenof continued to follow plaintiff's treatment when she was discharged from NSUH-S to Cold Spring Harbor Nursing Home, and thereafter.

[* 3]

The defendant submits the affirmed medical report of Dr. Gregory Mazarin, M.D., board certified in the field of emergency medicine. Dr. Mazarin opines that during the emergency visit of May 31, 2007, there was insufficient clinical, laboratory and radiological evidence to confirm a diagnosis of a bowel perforation, the diagnosis of postoperative abdominal pain made by the emergency room physician was appropriate, and Dr. Wenof was still considering a possible bowel perforation after he became aware of the results of the chest x-ray and CT scan.

The defendant, NSUH-S, submits the affirmed medical report of Dr. David Fisher, M.D., board certified in the field of Diagnostic Radiology. Dr. Fisher opines that all of the radiological studies performed by NSUH-S were correctly read and corresponding reports appropriately written. More specifically, Dr. Fisher opines that the chest x-ray and CT scans of the abdomen and pelvis performed on May 31, 2007 at NSUH-S were correctly interpreted. Dr. Fisher submits that plaintiff essentially claims that the radiological study performed and interpreted on May 31, 2007 was misread, and inappropriately written, causing the delay of the June 4, 2007 surgery performed by non-party, Dr. Erin Price. Dr. Fisher provides that plaintiff's claims essentially assert that NSUH-S's radiologists should have included "rule out bowel perforation" in their report of the May 31, 2007 CT scan of plaintiff's abdomen and pelvis, and should have recommended additional studies be performed. Dr. Fisher avers that as per his review of the record, he could not find one scintilla of evidence that Dr. Wenof would have treated the plaintiff differently if NSUH-S's radiological report included the words "rule out bowel perforation". Dr. Fisher maintains that a radiologist is a consultant and the standard of care does not require the radiologist to assume the overall care for a patient after the radiographic study has been interpreted and reported on, and therefore recommend additional studies. Dr. Fisher submits that Dr. Wenof was plaintiff's private attending physician and was responsible for plaintiff's overall care and treatment, and Dr. Wenof's orders and plain of treatment were appropriately carried out by the staff at NSUH-S.

Here, the defendant, NSUH-S, has demonstrated that plaintiff was a private patient of Dr. Wenof prior to her admission at NSUH-S, was admitted under Dr. Wenof's service, Dr. Wenof fully managed and controlled the plaintiff's medical care and treatment, and the hospital staff at NSUH-S properly carried out Dr. Wenof's orders during the May 31, 2007 through July 9, 2007 admission. It is well established that a patient admitted to a hospital by their personal attending physician is a "private patient" and is not considered the patient of the hospital and its employee doctors, whereby such a patient is considered a patient of the attending physician who is affiliated with the hospital. (*Rodrigo v. Brookdale Hospital*, 194 AD2d 774). In the absence of an employment relationship between the physician and the hospital, the hospital cannot be held legally responsible for the actions of the private physician. (*Rodrigo, supra*). Additionally, the radiologist has the limited role of interpreting films, (*Mosezzhnik v. Berenstein*, 33 AD3d 895), and here, the defendant has demonstrated that the NSUH-S's radiologist has reviewed the subject films appropriately.

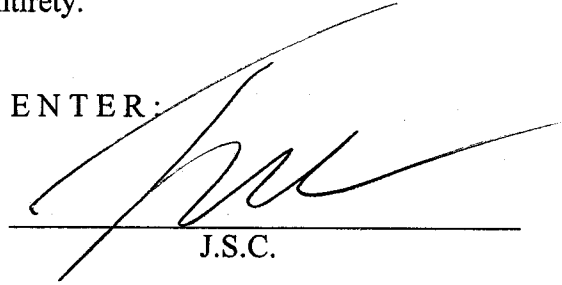
The defendant, NSUH-S, has made a *prima facie* showing of entitlement to summary judgment. The plaintiff, in opposition, has failed to raise a genuine issue of fact to warrant denial of this summary judgment motion. The plaintiff submits that although Dr. Wenof was not deposed, as plaintiff settled with Dr. Wenof, and there is "no clear evidence reflecting Dr. Wenof's interpretation of the CT scan findings . . .", his notes "*may or may not be based upon Dr. Wenof's review*" of findings by Dr. Winn of NSUH-S. (emphasis added). Plaintiff suggests that one could argue that Dr. Wenof placed the bowel problem low on the differential diagnosis because the CT scan findings reported to him showed no evidence of leak or perforation. The affidavits submitted

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by plaintiff's experts are speculative, conclusory and not supported by evidentiary foundation. (*Selmensberg v. Kaleida Health*, 45 AD3d 1435; *Grzelecki v. Slippery*, 2 AD3d 939, and *Simmons v. Brooklyn Hospital Center*, 74 AD3d 1174). The plaintiff has not offered any evidence to indicate that NSUH-S, or its staff, controlled, or managed plaintiff's medical care, or failed to carry out Dr. Wenof's orders.

In light of the foregoing, the defendant, NSUH-S's, motion for summary judgment is granted, and therefore plaintiff's action is dismissed, in its entirety.

ENTER:



J.S.C.

Dated: May 24, 2011

cc: The Law Firm of Alan W. Clark & Associates, LLC
Wilson Elser Moskowitz Edelman Dicker, LLP
Geisler & Gabrielle, LLP
Aaronson Rappaport Feinstein & Deutsch, LLP

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MAY 27 2011
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