

Benvenuto v Kohloser

2011 NY Slip Op 32286(U)

August 19, 2011

Supreme Court, Suffolk County

Docket Number: 06-31625

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-13-11 (#008)
MOTION DATE 6-24-11 (#009)
MOTION DATE 6-30-11 (#010)
ADJ. DATE 6-30-11
Mot. Seq. # 008 - MG #010 - MG
009 - MG

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MICHAEL BENVENUTO, Individually and as
Administrator of the estate of MARY
BENVENUTO, deceased,

Plaintiff,

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- against -

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JAMES G. KOHLROSER, M.D., RALPH
FRANK CASELNOVA, M.D., MARK
GRUDMAN, M.D., MARK GRUDMAN, M.D.,
P.C., MATTHEW T. CHENGOT, M.D.,
MATTHEW T. CHENGOT, M.D., P.C.,
AMITYVILLE HEART CENTER,
VIJAYKUMAR RATILAL SHAG, M.D., ORESTE
JOSEPH BRUNI, M.D., CHARLES FARBER,
M.D., JEFFREY KAUFMAN, M.D., SHEEL
KUMAR VATSIA, M.D., WSNCHS NORTH,
INC., D/B/A NEW ISLAND HOSPITAL and
NORTH SHORE UNIVERSITY HOSPITAL AT
MANHASSET,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (008)1-16; Notice of Cross Motion and supporting papers (009)17-26; (010)27-32; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (008) by Vijaykumar Ratilal Shah, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint as asserted against him is dismissed; and it is further

ORDERED that motion (009) by James G. Kohlroser, D.O. pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint as asserted against him is dismissed; and it is further

ORDERED that motion (010) by WSNCHS North, Inc. d/b/a New Island Hospital pursuant to CPLR 3212 for summary judgment in its favor is granted, and that part of the complaint premised upon vicarious liability for departures or causation of the injuries and death of the plaintiff's decedent attributable to Vijaykumar Ratilal Shah, M.D. and James G. Kohlroser, D.O. is dismissed.

This action has been brought on behalf of the decedent, Mary Benvenuto, and her spouse, Michael Benvenuto. Causes of action for medical malpractice, lack of informed consent, and wrongful death have been asserted against all the defendants. Separate causes of action are asserted against North Shore University Hospital at Manhasset, and WSNCHS North Inc. d/b/a New Island Hospital premised upon theories of negligence. A derivative cause of action is asserted against all the defendants on behalf of the decedent's spouse. It is alleged that the defendants' negligent acts and omissions began on or about January 1, 2001 and continued through November 12, 2004. It is claimed that the defendants failed to properly diagnose and treat the decedent's cardiac condition and acute congestive cardiac failure due to thrombosis of the coronary artery graft, status post-coronary artery bypass graft surgery on October 28, 2004. The death certificate indicates that Mary Benvenuto, 64 years of age, died on November 12, 2004. The cause of her death was "acute and congestive cardiac failure due to Thrombosis of coronary artery graft (status post coronary artery bypass graft surgery, 10/28/04" due to "hypertensive and arteriosclerotic cardiovascular disease."

It is noted that the defendants have not asserted any cross claims in their respective answers.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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" (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]).

In motion (008), the defendant Vijaykumar Ratilal Shah, M.D. (Dr. Shah) seeks summary judgment dismissing the complaint as asserted against him. In support of this application, Dr. Shah has submitted copies of the summons and complaint, plaintiffs' verified bill of particulars, and the amended answers served by defendants Shah, Kohlroser, Caselnova, Grudman, Chengot, Amityville Heart Center, Bruni, Farber, Kaufman, and North Shore University Hospital at Manhasset; copies of the unsigned deposition transcripts of Michael Benvenuto dated March 13, 2008, and defendants Kohlroser dated June 4, 2008, Caselnova dated September 5, 2008, Grudman dated November 14, 2008, Vatsia dated April 5, 2010, and non-party witness Mary Mitchell dated January 21, 2011; an incomplete, uncertified extract of a hospital record from New Island Hospital; an uncertified copy of the decedent's death certificate and autopsy report; and the affidavit of Salvatore Scoma, M.D. Defendant Shah has failed to provide a copy of the amended summons and complaint which he seeks to dismiss, however, a copy has been provided with motion (009).

In motion (009), the defendant James G. Kohlroser, D.O. seeks summary judgment dismissing the complaint asserted against him. In support of this application, Kohlroser has submitted, inter alia, the affidavit of Michael J. Goldstein, M.D.; a copy of the amended summons and amended verified complaint; an uncertified copy of the decedent's death certificate; an uncertified, partial copy of a medical record from New Island Hospital; the unsigned copies of the deposition transcripts of Michael Benvenuto dated March 13, 2008, and James G. Kohlroser, D.O.

In motion (010), WSNCHS North, Inc. d/b/a New Island Hospital seeks summary judgment dismissing the complaint asserted against it premised upon its alleged vicarious liability for the actions of the defendants Vijaykumar Ratilal Shah, M.D. and James G. Kohlroser, M.D. In support of this application, the defendant New Island Hospital has submitted a copy of the amended summons and complaint and its answer.

It is determined that the unsigned deposition transcripts, as set forth above, are not in admissible form to be considered on a motion for summary judgment (*see*, CPLR 3212, *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]) and are not considered. While the deposition transcripts of Dr. Shah and Dr. Kohlroser are unsigned, they are considered by this court as adopted as accurate by the respective moving defendants (*see*, *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). The uncertified copies of the medical records, death certificate and autopsy report are not in admissible form to be considered on a motion for summary judgment (*Friends of Animals v Associated Fur Mfrs.*, supra).

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 Dept 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*, 224 AD2d 674, 638 NYS2d 700 [2nd Dept 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], *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]).

MOTION (008)

In motion (008), counsel for the defendant Vijaykumar Ratilal Shah, M.D. states that Dr. Shah seeks summary judgment on the basis that, as an infectious disease physician, Dr. Shah was called in to conduct an infectious disease consult approximately five hours before the plaintiff's demise from an occluded coronary artery bypass graft resulting in an acute myocardial infarction, and, thus, he played no role in treating the decedent's cardiac condition. He further contends that Dr. Shah did not depart from the accepted standard of care and that the care and treatment rendered by Dr. Shah did not cause or contribute to the decedent's injuries or death. Dr. Shah supports this application with the affidavit of his expert, Salvatore Scoma, M.D. The copy of the consultation note by Dr. Shah is not in admissible form and has a correction made on the copy submitted.

Salvatore Scoma, M.D. states that he is a physician licensed to practice medicine in the state of New York and that he has a specialty in infectious disease, having graduated from the Universita di Roma. He does not testify that he is board certified in infectious disease. It is Dr. Scoma's opinion within a reasonable degree of medical certainty that there was no act or omission by Dr. Vijaykumar Ratilal Shah which caused or contributed to the plaintiff's decedent's injuries or death.

Dr. Scoma states that Ms. Benvenuto was admitted to North Shore University Hospital in Manhasset on October 25, 2004 for an angiogram and subsequent evaluation. She had a medical history of hypertension and mitral valve prolapse, and was status post-stroke with left lower extremity weakness. Ms. Benvenuto had a cardiac catheterization on October 25, 2004 and was found to have coronary artery disease in the left main artery with an ejection fraction of 47 percent. She was diagnosed with coronary artery disease, mitral regurgitation, and shortness of breath. On October 28, 2004, she underwent surgery for two coronary artery bypasses. Postoperatively, Ms. Benvenuto experienced arrhythmias which required defibrillator placement on November 5, 2004 for sustained ventricular tachycardia. A stent was also placed during this hospitalization. She was discharged on November 8, 2004. Subsequent thereto, she was admitted to New Island Hospital on November 11, 2004 for persistent nausea. She was noted to have mild congestive heart failure on physical examination, and laboratory tests were consistent with acute renal failure. Subsequently, Ms. Benvenuto developed profound hypotension with a profound drop in the cardiac ejection fraction.

Dr. Scoma continues that during this hospitalization at New Island Hospital, Dr. Vijaykumar Ratilal Shah saw Ms. Benvenuto on one occasion on November 12, 2004 at approximately 1:00 p.m. on consultation. He states that Dr. Shah noted that there was purulent drainage from the chest wound, she was complaining of nausea and the inability to eat, the laboratory tests revealed acute renal failure, and the chest x-ray revealed congestive heart failure. Dr. Scoma states that Dr. Shah diagnosed the plaintiff's decedent with persistent nausea and vomiting, and acute renal failure and hypotension related to dehydration. Sepsis was doubted by Dr. Shah who wanted to rule out a urinary tract infection. He started her on antibiotics. Dr. Scoma states that Dr. Shah had no further contact with the plaintiff's decedent before her death at approximately 6:12 p.m. that same day.

It is Dr. Scoma's opinion that Dr. Shah had no responsibility in the diagnosis or treatment of the plaintiff's decedent's cardiac condition, that at all times he acted in accordance with good and accepted medical practice, and that there was no act or omission on the part of Dr. Shah which caused injury or death to the plaintiff's decedent.

Based upon the foregoing, Dr. Shah has established prima facie entitlement to summary judgment on the issues that he, at all times, acted in accordance with good and accepted standards of medical practice, and that there were no acts or omissions by him which proximately caused injury to, or the death of, the plaintiff's decedent. The plaintiff has not opposed this motion, and, thus, has not raised factual issue based upon competent evidence, that there were any acts or omissions by Dr. Shah which were a competent-producing cause of the decedent's injuries or death.

Accordingly, motion (008) is granted and the complaint as asserted against Dr. Shah is dismissed.

MOTION (009)

In motion (009), counsel for the defendant James G. Kohlroser, M.D. sets forth that Dr. Kohlroser, a specialist in gastrointestinal diseases, seeks summary judgment dismissing the complaint on the basis that he saw the plaintiff's decedent on consultation on the morning of November 12, 2004, the day that the plaintiff's decedent died, and that there was no finding of any gastrointestinal disorder that caused or contributed to her death.

Dr. Kohlroser testified at his examination before trial to the extent that he is currently a partner in Island Digestive Disease Consultants, and in November 2004, was an employee thereof. He obtained a Doctorate of Osteopathy from the New York College of Osteopathic Medicine. He became an attending physician at New Island Hospital in 2002. He was called in by Dr. Grudman to perform a gastroenterology consult on Ms. Benvenuto, and saw her on only one occasion on November 12, 2004. He wrote a note concerning his consultation at about 3:00 p.m. At that time, Ms. Benvenuto had previously undergone a CABG or coronary artery bypass graft and stent placement. Upon examination, it was his impression that she had persistent nausea and vomiting. In his corresponding note, he wrote that she had possible peptic ulcer disease, possible pancreatitis, or possible medicine effect. His plan was for acid suppression with Protonix IV, Dolasetron, abdominal sonogram, blood tests for amylase, lipase, LFT's, and to pass an NG (nasogastric) tube if the patient agrees. She had a temperature of 102 degrees. He noted that she was hypotensive and had been started on Dopamine to raise her blood pressure. He thought the hypotension could have been related to dehydration, or respiratory or cardiogenic problems, which the cardiologists were addressing, as she was being followed by cardiology, kidney, and infectious disease specialists.

Dr. Kohlroser's expert, Dr. Michael J. Goldstein, has set forth in his supporting affidavit that he is a physician licensed to practice medicine in New York State and is board certified in gastroenterology. It is Dr. Goldstein's opinion with a reasonable degree of medical certainty that there is no merit to the case asserted against Dr. Kohlroser. Dr. Goldstein states that Ms. Benvenuto was a 64 year old woman at the time of her death on November 12, 2004. He continues that the cause of her death was secondary to cardiac disease and was not associated with gastrointestinal disease or pathology, as Ms. Benvenuto had acute and chronic congestive heart failure due to thrombosis of the coronary artery graft. Dr. Goldstein states that Dr. Kohlroser saw Ms. Benvenuto on consultation and made appropriate recommendations with respect to a possible gastrointestinal cause for her symptoms. It was determined that the problems experienced by the decedent were cardiac related and not due to any gastrointestinal condition. He continued that there is no evidence of any deviation on the part of Dr. Kohlroser from the accepted standards of practice of gastroenterology which caused her injuries and death.

Based upon the foregoing, Dr. Kohlroser has established prima facie entitlement to summary judgment dismissing the complaint asserted against him. The plaintiff has not opposed this motion, and, thus, has not raised

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factual issue based upon competent evidence, that there were any acts or omissions by Dr. Kohlroser which were a competent-producing cause of the decedent's injuries or death, to preclude the granting of summary judgment.

Accordingly, motion (009) by defendant Dr. James G. Kohlroser for summary judgment dismissing the complaint as asserted against him is granted.

MOTION (010)

In motion (010), the defendant WSNCHS d/b/a New Island Hospital seeks summary judgment dismissing that part of the complaint, based upon any claims of vicarious liability on the part of WSNCHS for the actions of the defendants Vijaykumar Ratilal Shah, M.D. and James G. Kohlroser, M.D., if it is found that Dr. Shah and Dr. Kohlroser did not depart from accepted standards of care and did not proximately cause the injuries and death of the plaintiff's decedent.

A hospital generally cannot be held liable, other than derivatively, for another's malpractice. Thus, where there is no vicarious liability, the plaintiff must establish that the hospital, through its own agents, was guilty of malpractice or other tort concurring in causing the harm (*Fiortino v Wenger*, 19 NY2d 401, 280 NYS2d 373 [1967]; *Belak-Redi v Bollengier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; *Welch v Scheinfeld*, 21 AD3d 802, 801 NYS2d 277 [1st Dept 2005]). A hospital or other medical facility is liable for the negligence or malpractice of its employees (*see, Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]). Here, the complaint has been dismissed as asserted against defendants Dr. Shah and Dr. Kohlroser. In that there has been no finding of liability for the injuries and death claimed on behalf of the plaintiff's decedent with regard to Dr. Shah and Dr. Kohlroser, vicarious liability may not be imposed as against New Island Hospital. The plaintiff has not opposed this motion and has thus failed to raise any factual issue to preclude granting summary judgment to New Island Hospital.

Accordingly, motion (010) by New Island Hospital is granted and that part of the complaint premised upon vicarious liability for departures or causation of the injuries and death of the plaintiff's decedent attributable to Dr. Shah and Dr. Kohlroser is dismissed.

Dated: August 19, 2011


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION