

**Capuano v Goodwin**

2011 NY Slip Op 32933(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 108825/08

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

Justice

PART IA PART 16

Index Number : 108825/2008

CAPUANO, LOUIS

vs.

GOODWIN, CHARLES B.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

**FILED**

NOV 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

No(s). \_\_\_\_\_

No(s). \_\_\_\_\_

No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*by defendant New York Physicians, LLP is denied in accordance with the accompanying memorandum decision.*

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

Dated: NOV 03 2011

*Alice Schlesinger*  
\_\_\_\_\_  
ALICE SCHLESINGER, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
LOUIS CAPUANO and EVE CAPUANO,

Plaintiffs,

Index No. 108825/08  
Motion Seq. Nos. 003 & 004

-against-

CHARLES B. GOODWIN, M.D., NEW YORK  
PHYSICIANS, LLP, DANIEL OSEI, M.D., and  
THE HOSPITAL FOR SPECIAL SURGERY,  
PHO, INC.,

Defendants.

**FILED**

NOV 07 2011

-----X  
SCHLESINGER, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this medical malpractice action, two motions for summary judgment are before this Court. The issue in the first motion, brought by defendant New York Physicians, LLP (hereinafter "LLP"), concerns which section of the New York State Partnership Law controls. Moving counsel strongly urges that Section 26 of that law controls and that pursuant to that section, this Court should not only dismiss all claims against the LLP, but also impose costs and sanctions against the plaintiff. The other motion, one by defendants Dr. Daniel Osei, a resident at defendant Hospital for Special Surgery (hereinafter "HSS"), and HSS seeks summary judgment on the merits. The plaintiff, supported by the first named defendant Dr. Charles Goodwin, emphatically opposes the dismissal of Dr. Goodwin's LLP. The plaintiff asserts that it is Section 24 of the Partnership Law that governs this controversy. As to the summary judgment motion by HSS and Dr. Osei, plaintiff opposes, but not with any medical affidavit.

As stated above, the LLP makes its argument based on essentially one fact which is not disputed by anyone. That fact is that on the three occasions when Dr. Goodwin first

saw and examined the plaintiff Louis Capuano in July and August 2007, he did that in Massapequa, New York, at the offices of Island Orthopedic & Sports Medicine, P.C. That entity is not a defendant here. Mr. Capuano then saw Dr. Goodwin in September 2007 at HSS where he had surgery on his back. That surgery and its aftermath is the subject of this action.

The LLP's office is not on Long Island. Rather, the office is at 635 Madison Avenue in New York City. The LLP argues that since the plaintiff never went to the Madison Avenue office, never saw Dr. Goodwin except in Massapequa and at the Hospital, and never had any face to face contact with any other members of the LLP, the LLP should not be a defendant here. Making this argument, counsel for the LLP relies on subsection 2(b) of Section 26 of the New York Partnership Law, which states in relevant part that:

No partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any defendants, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner or acting (or omitting to act) in such capacity or rendering professional services or otherwise participating (as an employee, consultant, contractor or otherwise) in the conduct of the other business or activities of the registered limited liability partnership.

The LLP argues that based on the place where Mr. Capuano was seen and examined, the above language allows him to argue that whatever care and treatment Dr. Goodwin provided had nothing to do with the business of the LLP and therefore the LLP has no

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liability. Counsel urges that the language cited above makes it clear that an LLP such as the defendant LLP here would not be liable for anything done by any partner.

Before getting to the plaintiff's position, as noted earlier Dr. Goodwin himself opposes the LLP's motion and he does this by providing his own affidavit. There he states, contrary to the argument by counsel for his LLP, that at all times when he provided care to the plaintiff, he was always acting within the scope of his partnership, the moving LLP. Both he and the plaintiff point to the fact that all records and documents, outside the hospital records, are on the LLP's stationery. This includes billing records, insurance records and prescriptions given to Mr. Capuano by Dr. Goodwin.

Plaintiff's counsel and Dr. Goodwin's counsel argue that the examinations of the plaintiff in Massapequa were done merely as a convenience for the plaintiff who lived on Long Island. However, they say that all the contact Mr. Capuano had was with employees of the LLP. The pre-operative instructions were on the stationery of the LLP, and the patient was told that if he had any questions or issues to discuss, he should contact Dr. Goodwin via e-mail or phone at the New York City office. It also is pointed out that all post-operative visits, which were to occur in Massapequa as well, were scheduled by the LLP in New York City.

The opponents of the LLP's motion point to Section 24 of the New York State Partnership Law. That section reads in its entirety as follows:

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is occurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

In other words the argument is made that when an individual partner, here Dr. Goodwin, acts within the scope of his work in that partnership, then the partnership itself, pursuant to Section 24, has vicarious liability for the acts of each of these partners. Section 26, on the other hand, talks about situations where one individual partner of the partnership cannot himself or herself be held liable for the tortious acts of another individual partner. That is what subdivision 2(b) of Section 26 stands for. The only one liable in those circumstances would be the individual partner who is charged with committing the tortious act, pursuant to subdivision 2(c).

The plaintiff and Dr. Goodwin are correct in their interpretation of which section applies in these certain circumstances. As long as an individual partner is in fact performing services within the scope of his work for the partnership, then it really makes no difference where that work is performed. It is the nature of the work that controls. That would mean that if Dr. Goodwin had another partner in the LLP, for our purposes we will call that partner Dr. Doe, then Dr. Doe could not be sued here for the allegedly tortious acts committed by Dr. Goodwin. Dr. Doe's motion under such circumstances would be granted, but again not the LLP's.

Further, all the treatment provided by Dr. Goodwin to Mr. Capuano was provided by Dr. Goodwin as a member of the LLP. As noted earlier, all the documents refer to the LLP and all the contacts that Mr. Capuano was instructed to have were with members of the LLP, meaning its secretarial staff and other such individuals.

Finally, in Reply, moving counsel argues the doctrine of ostensible agency and cites cases regarding that principle. However, that principle has nothing to do with the circumstances here. Ostensible agency focuses on what the patient himself assumed. For example, that would come into play if an individual went to the emergency room of a

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hospital and believed that the care he received by the doctor there was in fact care provided by the hospital. But in many instances the doctor in the emergency room does not actually work for the hospital. Under such circumstances the law provides that the hospital may well still be liable to the patient under this principle and the hospital should be estopped from arguing otherwise.

Ostensible agency has nothing to do with partnership law. In this action, what the patient believes is irrelevant. Rather, it is what the law provides. And the law here provides that a partnership is in fact responsible for the tortious acts of its partners as long as the partner is working within the scope of his employment with the partnership. Again, that is Section 24. But pursuant to Section 26, a partner of Dr. Goodwin in the LLP, if he had one, would not be responsible for any malpractice by Dr. Goodwin. Therefore, the LLP's motion for summary judgment is denied and of course sanctions are denied as well.

On the other hand, HSS and its resident Dr. Osei do put forth a meritorious argument in favor of summary judgment. Dr. Osei provides an affidavit in support of the motion. While he has no independent recollection of this surgery, he does acknowledge that he was a second year resident at HSS at the time and that he did in fact assist Dr. Goodwin in the back surgery on Mr. Capuano on September 7, 2007. However, he points out that his duties and responsibilities as a second year resident were "minimal". He says that those duties mostly included watching, learning and providing assistance when necessary. He did not incise tissues, view through the endoscope or perform any of the osteotomies. He had nothing to do with determining the placement of pedicle screws or fixation hardware, nor any other substantive part of this operation. He emphasizes as well that he made no intra-operative or surgical decisions or judgments. Everything he did was

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under the direct supervision and instruction of Dr. Goodwin. Dr. Goodwin in his deposition corroborates this statement.

Further, with regard to the post-operative care, Dr. Osei again acknowledges, pursuant to the hospital records, that he saw the patient and made notes on September 8<sup>th</sup> through 12<sup>th</sup>, the twelfth being the day of Mr. Capuano's discharge. He states that it is his custom and practice, which he assumes he followed, to note all the subjective and objective complaints and findings and to communicate all pertinent and relevant clinical information to the treating physician, here Dr. Goodwin. There is a progress note from Dr. Osei for every post-operative day.

The hospital and Dr. Osei argue that the law provides that when a resident merely assists a private treating surgeon and does not exercise any independent medical or surgical judgment, he cannot be held liable for medical malpractice as long as the surgeon himself does not so greatly deviate from normal surgical practice that the resident should be held liable for failing to intervene. That is a correct statement of the law, which the plaintiff does not dispute.

Counsel for HSS also points out that the plaintiff's claim here primarily focuses on placement or misplacement and misalliance of the screws. These are activities that Dr. Osei had nothing to do with. Finally, the papers from Dr. Osei and the hospital include an affidavit from Dr. Michael Bronson, who is a board certified Orthopedic Surgeon. He says that everything that Dr. Osei did in assisting at the operation and in his post-operative care, as well as all the nursing care given here, was within the acceptable standards of surgical and hospital care.

HSS and its resident have in their papers made out a prima facie case in their favor. Therefore, the burden shifts to the plaintiff to establish factual issues with regard to his care

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and treatment. As noted earlier, the plaintiff in opposition did not submit any opinion from either a doctor or nurse attesting to the insufficiency of the care and/or treatment of the resident or the hospital staff. Rather, the plaintiff relies on the hospital records themselves and on an affidavit from Mr. Capuano who speaks to what occurred during the weekend of September 8-9, 2007.

In this affidavit, Mr. Capuano says that he was effectively abandoned by HSS over that weekend. He says that no one on the hospital staff effectively responded to his complaints of pain and that he was given no effective pain medication or for that matter food for a 12-hour period between 7 :00 a.m and 7:00 p.m on Saturday, September 8. His counsel points out that the records show no nursing examination or evaluations between those two times on September 8.

First of all, it is clear that the plaintiff is not opposing Dr. Osei's motion and that his opposition to the HSS motion is extremely limited. What seems to be left, vis-a-vis the hospital, is a claim that post-operatively Mr. Capuano was effectively abandoned or at least not given the kind of attention and medication that he was entitled to receive. Apparently, Mr. Capuano finally spoke to Dr. Goodwin, who had not appeared over the weekend, on the morning of Monday, September 10. In response to complaints of a burning pain, Dr. Goodwin ordered a CT scan and steroids for what appeared to be inflammation. Later that evening, Dr. Goodwin did see his patient and told him that one of the screws was crooked and apparently had hit a nerve.

In Reply, counsel for HSS points out that there are in fact nursing entries for September 8. Counsel argues that although there is one entry on September 8 indicating that plaintiff was "really hungry", the plaintiff has not met his burden to show that he was abandoned or that the post-operative care was below standards.

Without any opposition to Dr. Osei's motion, and because Dr. Osei merely assisted Dr. Goodwin, his motion should be granted and it is. It is clear here that Dr. Osei played a very limited role in the surgery and there is nothing to show that anything that Dr. Goodwin did was so egregious as to command Dr. Osei's intervention.

With regard to the hospital's motion, that is granted as well. There is simply not enough here, in the absence of any affidavit by a healthcare provider, to connect any of the events that happened over the weekend of September 8 and 9 to any injury suffered by the plaintiff. Of course it is possible that if Dr. Goodwin, who says he was not contacted over the weekend, had been contacted earlier, some earlier intervention with regard to pain medication might have been done. But that is all conjecture and conjecture does not sustain a plaintiff's burden. Therefore, HSS has made out a prima facie case with the aid of Dr. Osei's affidavit and Dr. Bronson's affidavit and is entitled to have this action dismissed against it.

**FILED**

**NOV 07 2011**

Accordingly, it is hereby

ORDERED that the motion for summary judgment by ~~defendant~~ New York Physicians, LLP is denied; and it is further

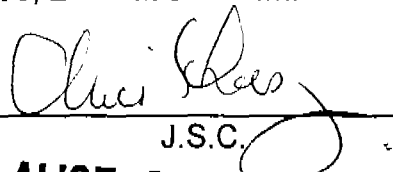
COUNTY CLERK'S OFFICE

ORDERED that the motion for summary judgment by defendants Daniel Osei, M.D. and The Hospital for Special Surgery, PHO, Inc. is granted and the Clerk is directed to sever and dismiss all claims against those two defendants; and it is further

ORDERED that the remaining parties shall appear in Room 222 for a pre-trial conference prepared to select a trial date on November 30, 2011 at 9:30 a.m.

Dated: November 3, 2011

**NOV 03 2011**

  
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J.S.C.  
**ALICE SCHLESINGER**