

Pratt v Haber

2012 NY Slip Op 30323(U)

February 6, 2012

Supreme Court, New York County

Docket Number: 107761/07

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

PRATT, ADAM
HABER, GREGORY M.D.

INDEX NO. 107761/07
MOTION DATE 11/22/12
MOTION SEQ. NO. 005

The following papers, numbered 1 to 19, were read on this motion for summary judgment.
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-8
Answering Affidavits — Exhibits _____ | No(s). 9-15
Replying Affidavits _____ | No(s). 16-19

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/6/12

JBL
JOAN B. LOBIS J.S.C.

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

- 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
NEW YORK COUNTY: IAS PART 6**

-----X

ADAM PRATT,

Plaintiff,

Index No. 107761/07

-against-

Decision and Order

GREGORY HABER, M.D., WILLIAM CHEN,
M.D., LENOX HILL HOSPITAL and BOSTON
SCIENTIFIC CORPORATION,

Defendants.

-----X

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

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Lenox Hill Hospital ("LHH") moves for an order granting it summary judgment, pursuant to C.P.L.R. § 3212, dismissing all claims as against it, on the grounds that there are no triable issues of fact as a matter of law. Plaintiff Adam Pratt opposes the summary judgment motion.

Plaintiff commenced this combination medical malpractice and products liability action on or about June 4, 2007 by filing a summons and verified complaint. Plaintiff alleges that he sustained injuries as a result of an Enteryx procedure performed at LHH by co-defendant Gregory Haber, M.D., with the assistance of William Chen, M.D. Dr. Haber is the Director of Gastroenterology at LHH. Plaintiff first presented to Dr. Haber, at his office at LHH, on February 4, 2005, complaining of heartburn that had persisted for six years. Plaintiff was referred by Dr. Charnjit Singh, who diagnosed plaintiff with having a high level of acid reflux, and recommended that he see Dr. Haber, a specialist and expert in the field. Plaintiff underwent an esophageal motility

study on February 17, 2005, and Dr. Haber presented plaintiff with options to correct his acid reflux. Plaintiff elected to undergo the Enteryx procedure, which was scheduled for April 8, 2005. Dr. Haber performed the procedure with Dr. Chen, an anesthesiologist, and a staff nurse. The procedure took roughly forty (40) minutes, with no significant complications, and plaintiff was discharged thereafter. Subsequent to the procedure, plaintiff returned to have his follow-up visits with Dr. Haber at LHH.

The Enteryx Procedure Kit is a product manufactured by co-defendant Boston Scientific Corporation ("BSC"), and was approved by the Food and Drug Administration ("FDA") in April 2003. It is an endoscopic, injectable chemical polymer used to alleviate symptoms of gastroesophageal reflux disease ("GERD"), a condition where stomach contents flow into the esophagus, causing pain in the chest or throat. The device helps keep stomach contents away from the esophagus by reinforcing the muscle that separates the lower esophagus from the stomach. At the time the FDA approved Enteryx, the most common side effects included pain beneath the breastbone, difficulty breathing, fever, and sore throat, all of which were temporary. On September 23, 2005, BSC issued a voluntary recall of all Enteryx Procedure Kits and Enteryx Injector Single Packs, and issued an advisory directing physicians to cease the injection of Enteryx immediately, due to serious adverse events associated with the procedure involving "unrecognized transmural injections of Enteryx into structures surrounding the esophagus," which resulted in death and serious injury. One death had been reported due to a transmural injection into the aorta, where the Enteryx migrated to and occluded vessels which supply blood to vital organs. Other adverse events not associated with transmural injections or user technique had also been reported, such as dysphagia

from esophageal stenosis, weight loss, and strictures requiring dilation procedures. Plaintiff alleges that he suffers injuries resulting from the negligent administration of the Enteryx procedure by Dr. Haber and Dr. Chen. As to LHH, plaintiff alleges that LHH is vicariously liable for the acts of Dr. Haber, as Dr. Haber was an agent of LHH.

LHH moves for summary judgment to dismiss the vicarious liability claim and the negligence claim. It is “a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law.” Ostrov v. Rozbruch, ___ A.D.3d ___, 2012 N.Y. Slip Op. 22, **9-10 (1st Dep’t January 3, 2012), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). To be entitled to summary judgment, a defendant in a medical malpractice action must demonstrate “the absence of any deviation or departure from accepted medical practice, or that any such departure was not a proximate cause of the injury or damage alleged.” King v. St. Barnabas Hosp., 87 A.D.3d 238, 246 (1st Dep’t 2011). Once a defendant meets this burden, it is incumbent upon the plaintiff to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, at **10, citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

As to plaintiff’s claim that LHH is vicariously liable for the acts of Dr. Haber, LHH asserts that Dr. Haber is an attending physician who is merely affiliated with LHH. Further, LHH maintains that plaintiff was Dr. Haber’s private patient. LHH appends Dr. Haber’s examination before trial (“EBT”) testimony and Dr. Haber’s chart for plaintiff in support of its argument that

plaintiff was Dr. Haber's private patient. LHH argues that plaintiff came to LHH for the sole purpose of receiving treatment from Dr. Haber. Additionally, LHH sets forth that Dr. Haber had all the decision-making power as to the Enteryx procedure, and that any care rendered by other employees was done at Dr. Haber's direction and under his supervision. LHH maintains that those employees who worked with Dr. Haber did not take any actions in contravention of accepted medical practice. Citing a number of cases standing for the proposition that a hospital cannot be held liable for an independent physician's malpractice, LHH argues that it should be granted summary judgment on plaintiff's claim that LHH is vicariously liable for the acts of Dr. Haber.

In opposition, plaintiff argues that LHH's contention that plaintiff was the private patient of Dr. Haber is without merit; that Dr. Haber was indeed an employee of the hospital; and that the case law LHH cites is misapplied as to this case. Plaintiff asserts that the doctrine of respondeat superior allows a hospital to be vicariously liable for the medical malpractice of a physician who acts in an employment or agency capacity. Furthermore, plaintiff alleges that under the theory of agency by estoppel, LHH may be liable for the acts of Dr. Haber, as Dr. Haber was acting on behalf of the hospital. Plaintiff asserts that Dr. Haber's conduct gave rise to the appearance and belief that he was acting at the behest of LHH, given the fact that Dr. Haber held the position of Director of Gastroenterology at LHH; Dr. Haber's media and conference appearances displayed his position at LHH; Dr. Haber's office was located at LHH; plaintiff underwent an esophageal motility study at LHH; plaintiff underwent his procedure at LHH, with the assistance of other LHH employees; and plaintiff returned to LHH to complete his follow-up visits. Plaintiff maintains that even if Dr. Haber was an independent contractor, plaintiff reasonably believed that Dr. Haber was

* 6]

provided by LHH, given the circumstances. Plaintiff asserts that, at the very least, there remains a question of fact as to whether Dr. Haber held himself out to be an agent and/or employee of LHH.

LHH, in its reply affirmation, urges the court to consider their motion unopposed, as plaintiff failed to serve LHH in the manner agreed to by the parties. By stipulation dated September 21, 2011, the parties agreed that plaintiff would serve opposition papers *in hand* to defendant on or before October 4, 2011; that defendants would serve reply papers by October 11, 2011; and that the return date of the motion would be adjourned to October 12, 2011. LHH states that on October 4, 2011, plaintiff faxed his opposition papers to LHH's attorneys, despite the fact that LHH had expressly objected to the service of papers via electronic means four years earlier in a notice pursuant to C.P.L.R. Rule 2103. LHH further asserts that although plaintiff's affidavit of service indicates that on October 4, plaintiff's attorney also mailed a copy of the papers to LHH's attorney, he mailed it to the previous address of their office and not the current address. There is no indication that LHH's attorney made an attempt to contact the court to seek further time to reply once faced with service of the opposition papers by fax. Defendants have also failed to articulate any prejudice that they have incurred as a result of plaintiff's defective service of the opposition papers, and indeed timely submitted reply papers expressly addressing the arguments that plaintiff raised in his opposition papers. Accordingly, the court will consider the merits of plaintiff's opposition papers. See C.P.L.R. § 2001; Guzetti v. City of New York, 32 A.D.3d 234, 234 (1st Dep't 2006); Lawrence v. Celtic Holdings, LLC, 85 A.D.3d 874, 875 (2d Dep't 2011) (citations omitted).

LHH further argues in its reply papers that plaintiff's application of the theory of

agency by estoppel is misplaced. LHH maintains that agency by estoppel only applies if a patient could have reasonably believed that the physician was provided by the hospital. Here, though, plaintiff testified that he came to be Dr. Haber's patient through a referral from Dr. Singh; that he met specifically with Dr. Haber to discuss the Enteryx procedure; and that plaintiff was not a service patient at LHH. Given these facts, LHH argues that plaintiff's assertion that he reasonably believed that Dr. Haber was provided by LHH is incredulous.

It is well settled that

[a] hospital may not be held concurrently liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits "independent acts of negligence or the attending physician's orders are contraindicated by normal practice."

Suits v. Wyckoff Hgts. Med. Ctr., 84 A.D.3d 487, 488 (1st Dep't 2011) (citations omitted).

However, courts have recognized "apparent or ostensible agency," also known as "agency by estoppel," as a "predicate for medical malpractice liability." Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 79 (1986); citing Hannon v. Siegel-Cooper, 167 N.Y. 244 (1901). The theory of ostensible agency "has been applied to hold a hospital or clinic responsible to a patient who sought medical care at the hospital or clinic rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital or clinic[.]" Hill, 67 N.Y.2d at 80-81. "[A] hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was

acting at the hospital's behest." Saravola v. Brookdale Hosp. & Med. Ctr., 204 A.D.2d 245, 245-46 (1st Dep't); app. denied, 85 N.Y.2d 805 (1995); citing Soltis v. State of New York, 172 A.D.2d 919 (3d Dep't 1991). "To establish the 'holding out' element, the misleading words or conduct must be attributable to the principal. To establish the 'reliance' element, the third party must accept the agent's services and submit to the agent's care in reliance on the belief that the agent was an employee of the principal." Dragotta v. Southampton Hosp., 39 A.D.3d 697, 699 (2d Dep't 2007).

As to actual agency, plaintiff never asserts in his opposition papers that Dr. Haber is an actual agent of LHH. Although in one of his headings in his opposition papers, plaintiff asserts that "Dr. Haber was an employee of [LHH]," he never disputes that Dr. Haber was an attending physician as asserted by LHH and supported by the exhibits annexed to the motion. The bare conclusory statement in the heading that Dr. Haber was an employee, without any further argument or any accompanying proof that he was not an attending physician, does not raise an issue of fact as to Dr. Haber's status as an attending physician. But, as to ostensible agency, plaintiff testified that prior to the performance of the Enteryx procedure, he watched a news broadcast about Dr. Haber referring to the "new procedure" to cure heartburn that Dr. Haber was performing at LHH. Plaintiff further testified that it was his understanding that Dr. Haber was "the best" and "[h]ead of the gastro division at [LHH]." Accordingly, plaintiff's papers do raise issues of fact as to whether Dr. Haber held himself out as an agent of LHH and whether plaintiff reasonably believed that Dr. Haber was an agent of LHH, which is sufficient to survive summary judgment on the issue of vicarious liability. Accordingly, LHH's motion for an order granting it summary judgment on the issue of vicarious liability is denied.

In his opposition papers, plaintiff asserts that LHH was negligent in allowing the Enteryx procedure to be conducted at its facilities. Plaintiff asserts that, in light of the voluntary recall on September 23, 2005, the Enteryx procedure was ill-conceived and destined to fail from the beginning, and that even with proper administration, extensive side effects would nonetheless ensue. Although plaintiff's opposition papers are not supported by an expert affidavit, plaintiff states that he anticipates to obtain an expert who will testify that "endoscopic injections of substances into a thin esophageal muscle layer has a significant rate of error, with injected substances going places that they were not intended to go in the patient's body." Plaintiff further alleges that LHH failed to conduct due diligence before determining whether the Enteryx procedure was safe for patients. Additionally, plaintiff argues that LHH should not have permitted the procedure to occur at the hospital, as it was not subject to peer review or oversight by other doctors or hospital administrators. In its reply papers, LHH argues that plaintiff's attorney's own opinion of the Enteryx procedure is insufficient to prove that a triable issue of fact exists, and that, nonetheless, plaintiff's claim is preempted by federal law.

After a review of plaintiff's pleadings, together with the bill of particulars as to LHH, the court finds that, prior to this motion, plaintiff never alleged that LHH was negligent in allowing the Enteryx procedure to be conducted at its facilities. Plaintiff raised this theory of negligence against LHH for the first time in his opposition papers, which is impermissible, and the claim cannot be considered on the merits. Ostrov v. Rozbruch, ___ A.D.3d ___, 2012 Slip Op. 22, *14 (1st Dep't 2012). Accordingly, the court need not reach the issue of whether this claim would be pre-

empted by federal law.

Accordingly, it is hereby

ORDERED that the branch of Lenox Hill Hospital's motion which seeks an order granting it summary judgment dismissing the claim that it is vicariously liable for the acts of Gregory Haber, M.D. is denied.

Dated: February 6, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

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