

Downey v North Shore Univ. Hosp. at Manhasset

2012 NY Slip Op 31279(U)

April 27, 2012

Sup Ct, Nassau County

Docket Number: 5046/10

Judge: Thomas Feinman

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SHORT FORM ORDER

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

Present:

Hon. Thomas Feinman
Justice

KATHLEEN DOWNEY,

Plaintiff,

- against -

NORTH SHORE UNIVERSITY HOSPITAL AT
MANHASSET, NORTH SHORE UNIVERSITY
HOSPITAL AT SYOSSET, DR. JEFFREY F.
SHAPIRO, DR. PETER A. KECHEJIAN,

Defendants.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 5046/10

MOTION SUBMISSION
DATE: 3/6/12

MOTION SEQUENCE
NOS. 2, 3

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmations..... X

The defendant, North Shore University Hospital s/h/a North Shore University Hospital at Manhasset, (hereinafter referred to as "NSUH"), moves for an order granting NSUH summary judgment dismissing all causes of action in plaintiff's complaint as and against NSUH. The defendant, Dr. Jeffrey F. Shapiro, (hereinafter referred to as "Shapiro"), cross-moves for partial summary judgment in favor of Shapiro on the issue of the informed consent and vicarious liability. The plaintiff submits opposition. The defendants submit a reply affirmation.

Plaintiff Consents to Dismissal of Vicarious Liability

Plaintiff consents and concurs to the dismissal of any and all claims of vicarious liability as and against NSUH and Shapiro. Notably, by way of Short Form Order dated May 18, 2011, all causes of action and cross-claims as and against defendants, Dr. Peter Kechejian and North Shore University Hospital at Syosset, were discontinued.

NSUH's Motion for Summary Judgment

The plaintiff initiated this action against NSUH sounding in medical malpractice. The plaintiff alleges that NSUH was negligent in allowing non-medical personnel in the operating room on September 14, 2007, in allowing the plaintiff to sign a consent form for an "I & D" procedure, and allowing a foreign body to be placed in plaintiff's body without her knowledge and/or consent, in contributing to the misdiagnosis of plaintiff by improperly stating plaintiff had a staph infection during the November 22, 2007 hospital stay, and in stating that plaintiff had RSD syndrome during her December 4, 2007 hospital stay. Plaintiff provides she was admitted to NSUH on September 14, 2007 for a total knee replacement of the left knee and although plaintiff signed an informed consent form, there was no explanation that there may be an exchange of prosthesis resulting in a new foreign body being implanted in plaintiff.

It is well established that in order to sustain a claim for medical malpractice, the plaintiff must demonstrate both a departure from accepted medical practice and that such departure was a proximate cause of plaintiff's injury. (*Amsler v. Verrilli*, 119 AD2d 786).

The defendant, NSUH, in support of its motion, submits the affirmed report of Dr. Roger N. Levy, M.D., orthopedic surgeon. Dr. Levy opines that the care and treatment provided to the plaintiff by the staff at NSUH was proper in all respects, within the standards of good and accepted hospital practice, and the staff properly carried out the orders of her private attending, none of which were contraindicated. Dr. Levy provides that duly signed consent forms for the presence of company representatives were obtained by Shapiro authorizing Shapiro to have in the operating room representatives from the computer and implant manufacturers for the September 14, 2007 surgery. Dr. Levy submits that it is standard practice among some orthopedic surgeons to have company representatives in the operating room during knee replacement surgeries. Dr. Levy opines that it was not contraindicated for the infectious disease consultant to recommend irrigation and debridement in November 2007, given the evidence that the plaintiff had a left knee infection and antibiotics alone may be insufficient to successfully treat a bacterial infection following a knee replacement.

The defendant, NSUH, in support of its motion, also submits the affidavit of Marianne Ambookan, Director of Medical Staff Services at North Shore - LIJ Health System, of which NSUH is a member facility. Ms. Ambookan affirms that Shapiro was not an employee of NSUH at any time from September 2007 through December 2007, and did not receive a salary from NSUH. Rather, Shapiro had voluntary attending privileges that allowed him to admit patients into the hospital, practice orthopedic surgery, and practice pain management at the hospital.

NSUH has made a *prima facie* showing of entitlement to summary judgment by demonstrating that NSUH has met the accepted standards of care and treatment of the plaintiff and that NSUH cannot be held vicariously liable for the alleged negligence of a private attending physician. 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*).

NSUH has also demonstrated that the plaintiff signed three consent forms authorizing Shapiro to have the computer and implant manufacturer representatives in the operating room and authorizing Shapiro to perform the irrigation and debridement on November 24, 2007. NSUH has also established that the staph infection and RSD were diagnosed before the plaintiff was admitted to NSUH by Shapiro.

Here, as NSUH has submitted sufficient proof, the burden shifts to the plaintiff to demonstrate sufficient facts to warrant a trial. (*Zuckerman v. City of New York*, 49 NY2d 557). As already provided, plaintiff must demonstrate both a departure from accepted medical malpractice and that the departure was a proximate cause of plaintiff's injury. (*Amsler v. Verrilli, supra*). Generally, an attorney's affirmation alone is insufficient to defeat a motion for summary judgment. (*Zuckerman v. City of New York, supra*). A party opposing a motion for summary judgment is obligated "to lay bear his proofs" to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist. (*LoBreglio v. Marks*, 105 AD2d 621; *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065). A shadowy semblance of an issue is not enough to defeat a motion for summary judgment. (*LoBreglio, supra*).

The plaintiff, in opposition, has failed to raise an issue of fact to warrant denial of the summary judgment motion. Plaintiff's counsel's affirmation alone is insufficient. Contrary to plaintiff's ascertain, the defendant, NSUH, has made a *prima facie* showing of entitlement to summary judgment. Plaintiff failed to submit an expert's affidavit to demonstrate a departure and causation in this medical malpractice action. (*Carter v. Isabella Geriatric Center*, 71 AD3d 443; *Mosberg v. Elahi*, 80 NY2d 941). "A plaintiff cannot rebut a defendant's showing that he was not negligent by offering expert testimony that makes '[g]eneral allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of the claim.'" (*Taylor v. Nyack Hospital*, 18 AD3d 537, citing *Holbrook v. United Hospital Medical Center*, 248 AD2d 358).

In light of the foregoing, NSUH's motion for summary judgment is granted.

Shapiro's Motion for Partial Summary Judgment

Shapiro moves for partial summary judgment dismissing plaintiff's claims as and against Shapiro on the issue of informed consent and vicarious liability. As already provided, plaintiff consents to that branch of Shapiro's motion concerning dismissal of plaintiff's vicarious liability claim as and against Shapiro.

Shapiro, in support of his motion to dismiss plaintiff's claim of lack of informed consent, submits and refers to the affirmation of Dr. Roger N. Levy, orthopedic surgeon. As already established, Dr. Levy provides that duly signed consent forms for the presence of company representatives were obtained by Shapiro authorizing Shapiro to have in the operating room representatives from the computer and implant manufacturers for the September 14, 2007 surgery. Dr. Levy submits that it is standard practice among some orthopedic surgeons to have company representatives in the operating room during knee replacement surgeries. Dr. Levy opines that it was not contraindicated for the infectious disease consultant to recommend irrigation and debridement in November 2007, given the evidence that the plaintiff had a left knee infection and antibiotics alone may be insufficient to successfully treat a bacterial infection following a knee replacement. It is undisputed that Shapiro obtained the consent forms.

Here, as NSUH has submitted sufficient proof, the burden shifts to the plaintiff to demonstrate sufficient facts to warrant a trial. (*Zuckerman v. City of New York*, 49 NY2d 557). As already provided, plaintiff must demonstrate both a departure from accepted medical malpractice and that the departure was a proximate cause of plaintiff's injury. (*Amsler v. Verrilli, supra*). Generally, an attorney's affirmation alone is insufficient to defeat a motion for summary judgment. (*Zuckerman v. City of New York, supra*). A party opposing a motion for summary judgment is obligated "to lay bear his proofs" to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist. (*LoBreglio v. Marks*, 105 AD2d 621; *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065). A shadowy semblance of an issue is not enough to defeat a motion for summary judgment. (*LoBreglio, supra*).

The plaintiff, in opposition, has failed to raise an issue of fact to warrant denial of the summary judgment motion. Plaintiff's counsel's affirmation alone is insufficient. Contrary to plaintiff's ascertain, the defendant, NSUH, has made a *prima facie* showing of entitlement to summary judgment. Plaintiff failed to submit a expert's affidavit to demonstrate a departure and causation in this medical malpractice action. (*Carter v. Isabella Geriatric Center*, 71 Ad3d 443; *Mosberg v. Elahi*, 80 NY2d 941).

In light of the foregoing, Shapiro's motion for partial summary judgment is granted.

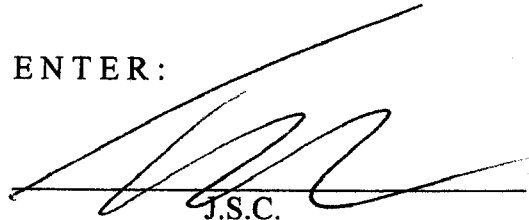
Conclusion

Upon the foregoing, it is hereby

ORDERED that NSUH's motion for summary judgment dismissing plaintiff's complaint as and against NSUH is hereby granted, and it is hereby

ORDERED that Shapiro's motion for partial summary judgment in favor of Shapiro on the issue of informed consent and vicarious liability is hereby granted.

ENTER:



Dated: April 27, 2012

cc: Law Offices of Richard Schirmer, Esq.
Heidell, Pittoni, Murphy & Bach
Marulli, Lindenbaum, Edelman & Tomaszewski, L.L.P.

ENTERED
MAY 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE