

Martin v Healy
2012 NY Slip Op 32591(U)
October 5, 2012
Supreme Court, Suffolk County
Docket Number: 08-40254
Judge: W. Gerard Asher
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INDEX No. 08-40254
CAL. No. 11-01535MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-19-11
ADJ. DATE 2-21-12
Mot. Seq. # 001 - MG

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JOHN MARTIN,	DAVIS & FERBER, LLP
	Attorney for Plaintiff
Plaintiff,	1345 Motor Parkway, Suite 201
	Islandia, New York 11749
	SHAUB, AHMUTY, CITRIN & SPRATT, LLP
- against -	Attorney for Defendant William Healy, III, M.D.
	1983 Marcus Avenue
	Lake Success, New York 11042
WILLIAM A. HEALY, III, M.D., and	FUREY, KERLEY, WALSH, MATERA and
HUNTINGTON HOSPITAL,	CINQUEMANI, P.C.
	Attorney for Defendant Huntington Hospital
Defendants.	2174 Jackson Avenue
	Seaford, New York 11783
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Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18 - 20; 21 - 24 ; Replying Affidavits and supporting papers 25 - 29 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the defendant Huntington Hospital seeking summary judgment dismissing the complaint against it is granted.

The plaintiff John Martin commenced this action against the defendants William Healy, III, M.D., and Huntington Hospital to recover damages for medical malpractice. The gravamen of the plaintiff's complaint against Huntington Hospital is that its staff was negligent in failing to prevent the plaintiff from developing a deep vein thrombosis and a staph infection following his surgery on May 18, 2006. The plaintiff further alleges that as a result of the treatment and care rendered to him by the defendants, he was required to undergo several procedures to treat the subsequent infection and deep vein thrombosis.



On May 18, 2006, the plaintiff was admitted into Huntington Hospital under the care of his private physician, Dr. Healy, to undergo a surgical procedure to repair a torn Achilles tendon in his right ankle. The right Achilles tendon surgery was performed by Dr. Healy without any complications being noted and the plaintiff was discharged later that day with a prescription for pain medication, wound care instruction and instructions to follow up with Dr. Healy in seven to ten days. The plaintiff also was instructed to call his doctor or the emergency room if his temperature went above 101 degrees, if there were any signs of an infection developing, or increased pain, swelling or drainage at the wound site. Prior to the surgery, on May 15, 2005, the plaintiff underwent pre-surgical testing at Huntington Hospital, which was conducted by Roshan Arikupurathu, a nurse practitioner, and Penny Wood, a registered nurse. Nurse Arikupurathu noted in the plaintiff's hospital charts that he had a history of deep vein thrombosis ("DVT") following a left knee arthroscopy in 2001. In addition, the plaintiff's primary care physician, Alan Lampert, M.D, conducted a pre-admission clearance, which was sent over to Huntington Hospital for review by Dr. Healy prior to the surgery. Dr. Lampert indicated in his pre-admission clearance that the plaintiff had developed DVT after the 2001 surgery, and that post-operative precautions may need to be taken to prevent the plaintiff from suffering a reoccurrence. Subsequent to the surgery, the plaintiff developed a DVT and a pulmonary embolism, requiring hospitalization from May 20, 2006 through May 25, 2006.

On May 20, 2006, the plaintiff returned to Huntington Hospital after he experienced a DVT and a pulmonary embolism, and was immediately placed on Heparin, but later switched to Coumadin. The plaintiff was discharged from Huntington Hospital on May 25, 2006. On June 1, 2006, the plaintiff presented to Dr. Healy's office with secondary blistering related to a hematoma on his right ankle, and Dr. Healy changed the dressings on the wound. On June 14, 2006, the plaintiff once again presented to Dr. Healy, who observed that there was drainage at the surgical site, which appeared to be consistent with seroma. On June 15, 2006, the plaintiff was readmitted into Huntington Hospital for a wound infection at the surgical site, and an infectious disease consultant was called in, because the plaintiff's infection developed while he was taking the antibiotic Ciprofloxacin. In addition, the plaintiff was treated with intravenous ("IV") Unasyn and Vancomycin, but later switched to Ancef. Blood samples were taken by Dr. Anne Sacks-Berg, an internist and infectious disease expert, and the results were negative; however, the wound cultures showed that the plaintiff had methicillian sensitive staph aureus ("MSSA"). Dr. Sacks-Berg diagnosed the plaintiff with cellulitis and right heel MSSA wound infection, and noted that debridement may be required. On June 22, 2006, Dr. Healy performed an irrigation and debridement on the plaintiff's right heel. On June 27, 2006, the plaintiff was discharged from the hospital with a prescription for Keflex and instructions to follow up with Dr. Healy and Dr. Sacks-Berg. On July 5, 2006, the plaintiff followed up with Dr. Healy, who found that the central portion of the wound had not closed, but that there was no gross cellulitis or infectious drainage that previously was present at the wound site. As a result, Dr. Healy referred the plaintiff to Dr. Ian Bourhill, a plastic surgeon, at John T. Mather Hospital for possible skin grafting of the leg. On July 6, 2006, the plaintiff presented to Dr. Sacks-Berg for a follow up, and it was noted that his wound was open, that the base of the wound had a "yellowish exudative slough" in the tissue, and that Dr. Healy already had referred him to Dr. Bourhill. On July 14, 2005, Dr. Bourhill performed an irrigation and debridement on the plaintiff at Huntington Hospital. During the irrigation and debridement, Dr. Bourhill found a suture in the wound site, which was removed, and then packed the site with Xerofoam gauze. On July 26, 2006, the plaintiff presented to Dr. Healy, and it was noted that he also was seeing Dr. Bourhill and that the wound was

healing with granulation. On January 3, 2007 and February 15, 2007, Dr. Healy recommended that the plaintiff begin a course of physical therapy for the inflammation in his bursa in the posterior aspect of the heel. Dr. Healy's last contact with the plaintiff was on June 27, 2007, and at that time the wound was not fully closed and there still was a small amount of discharge from the site. Thereafter, the plaintiff commenced this medical malpractice action.

Huntington Hospital now moves for summary judgment on the bases that its staff did not deviate from any standards of good and acceptable medical care when it rendered care to the plaintiff during his stay in the hospital, and that the care provided by its staff did not, in any way, proximately cause the injuries sustained by the plaintiff. Huntington Hospital also alleges that the plaintiff's subsequent infection at the wound site developed after he was discharged from the hospital and while he was under the continued care of Dr. Healy. Huntington Hospital further alleges that its staff was not responsible for the plaintiff's post-surgical care, instead such care was under the auspices of Dr. Healy. In support of the motion, Huntington Hospital submits copies of the pleadings, the parties' deposition transcripts, certified copies of the plaintiff's medical records, and the affirmation of its expert, Salvatore Scoma, M.D.

The plaintiff opposes the motion on the ground that Huntington Hospital failed to meet its prima facie burden, because the nurses' entries of DVT in the pre-surgical clearance note and pre-surgical nursing assessment were insufficient and not in accordance with the Joint Commission 2006 National Patient Safety Goals (hereinafter referred to as the "Joint Commission report"). The plaintiff further contends that the nurses were required by the Joint Commission report to directly advise Dr. Healy of any and all of his relevant medical history and that the failure to do so resulted in the exact problems that the Joint Commission report sought to prevent. Dr. Healy, in partial opposition to the motion, argues that Huntington Hospital has not submitted a copy of his answer, since it recognizes that there are no claims between him and itself and that he has the right to a future action based upon contribution, which should be preserved.

It is fundamental that the primary duty of a hospital's nursing staff is to follow the physician's orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders (*Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; see *Sledziewski v Cioffi*, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (*Toth v Bloshinsky*, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; see *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Cerny v Williams*, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). However, "an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the of the patient's choosing" (*Schultz v Shreedhar*, 66 AD3d 666, 666, 886 NYS2d 484 [2d Dept 2009] quoting *Salvatore v Winthrop Univ. Med. Ctr.* 36 AD3d 887, 888, 829 NYS2d 183 [2d Dept 2007]; see *Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]).

On a motion for summary judgment in a medical malpractice action, a medical professional has the initial burden of demonstrating that the medical treatment rendered to a plaintiff was within the acceptable standards of medical care, or that any departure or deviation was not a proximate cause of the alleged injury or damage sustained by the plaintiff (see *Maki v Bassett Healthcare*, 85 AD3d 1366, 924 NYS2d 688 [3d Dept 2011]; *Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 922 NYS2d 388 [1st Dept 2011]). Where the defendant has met his or her burden, the plaintiff, in opposition, must submit an expert affidavit of merit attesting to the fact that there was a deviation from the accepted medical standards and that such deviation was the proximate cause of the plaintiff's alleged injuries (see *Caruso v Northeast Emergency Med. Assoc., P.C.*, 85 AD3d 1502, 926 NYS2d 702 [3d Dept 2011]; *Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]). An expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable (see e.g. *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; *Mustello v Berg*, 44 AD3d 1018, 845 NYS2d 86 [2d Dept 2007]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a medical provider's summary judgment motion (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]).

Upon review of the affidavit of Huntington Hospital's expert, Dr. Salvatore Scoma, the parties' deposition testimonies and the additional exhibits submitted in support of the motion, the Court finds that Huntington Hospital has established, as a matter of law, that its staff did not deviate from good and acceptable medical practice in rendering care to the plaintiff during his admissions to its facility in 2006, and that the treatment provided by its staff was not the proximate cause of the alleged injuries sustained by the plaintiff (see *Shahid v New York City Health & Hospitals Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; *Mattis v Keen*, 54 AD3d 610, 864 NYS2d 6 [1st Dept 2008]; *Fernandez v Elemam*, 25 AD3d 752, 809 NYS2d 513 [2d Dept 2006]; *Ericson v Palleschi*, 23 AD3d 608, 806 NYS2d 667 [2d Dept 2005]). Huntington Hospital also demonstrated that its staff properly and timely followed the orders of Dr. Healy, the plaintiff's attending physician, that its nursing staff did not commit any independent acts of negligence, and that there is no evidence to demonstrate that the plaintiff developed his infection while admitted to Huntington Hospital (see *Schultz v Shreedhar, supra*; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]).

In his affidavit, Dr. Salvatore Scoma states that he is a physician licensed to practice medicine in the State of New York and that he is board eligible in infectious disease medicine. Dr. Scoma states that in his opinion, within a reasonable degree of medical certainty, the care and treatment rendered to the plaintiff during his admittance at Huntington Hospital was at all times within the confines of good and acceptable medical practice. Dr. Scoma explains that Dr. Healy was responsible for all of the surgical decisions, including all post-surgical prophylactic measures and procedures. In addition, Dr. Scoma states that Dr. Healy was responsible for planning a post-surgical prophylactic course of treatment, for monitoring the plaintiff's wound for subsequent infection, for supervising the surgical staff, and for the post-operative care of the plaintiff. Dr. Scoma states that there is no indication that the plaintiff's chart was not full, complete and accurate, and that Dr. Healy was responsible for reviewing the pre-surgical

Martin v Healy
 Index No. 08-40254
 Page No. 5

examination notes to determine whether or not any additional pre-surgical steps or post-surgical prophylactic measures were required. Moreover, Dr. Scoma states that there is no evidence that the plaintiff's infection developed while he was a patient at Huntington Hospital. Instead, Dr. Scoma states that the evidence demonstrates that the plaintiff's infection developed after he was discharged from the hospital. Dr. Scoma states that post-operatively, there was no evidence of any complications having occurred immediately after the right Achilles tendon surgery; the plaintiff was discharged from Huntington Hospital the same day; and the staff at the hospital did not deviate from the confines of good and accepted medical practice while the plaintiff was admitted to its care. Dr. Scoma further states that there is no evidence that any of the injuries that the plaintiff sustained were causally related to the treatment rendered to him by the staff at Huntington Hospital.

The plaintiff has failed to raise a triable issue of fact in opposition to Huntington Hospital's prima facie showing (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Rizzo v Staten Is. Univ. Hosp.*, 29AD3d 668, 815 NYS2d 162 [2d Dept 2006]; *Sheridan v Bieniewicz*, 7 AD3d 508, 776 NYS2d 318 [2d Dept 2004]). The plaintiff failed to submit an expert affidavit opining that the staff at Huntington Hospital deviated from good and accepted standards of medical practice in rendering treatment to him during his admissions to the hospital (*see Alvarez v Prospect Hosp.*, *supra*; *D'Elia v Menorah Home & Hosp. for the Aged and Infirm*, 51 AD3d 848, 859 NYS2d 224 [2d Dept 2008]; *Murdock v Center for Special Surgery*, 199 AD2d 482, 605 NYS2d 387 [2d Dept 1993]; *Gourdet v Hershfeld*, 277 AD2d 422, 716 NYS2d 714 [2d Dept 2000]; *see generally Domoroski v Smithtown Ctr. for Rehabilitation & Nursing Care*, 95 AD3d 1165, 945 NYS2d 345 [2d Dept 2012]). The plaintiff also failed to demonstrate that the Joint Commission report submitted in opposition to the motion is an authoritative text, which sets guidelines that are required to be followed by the staff at Huntington Hospital, or that the pre-surgical clearance notes and assessments performed by the nurses at Huntington Hospital are not valid ways to convey a patient's medical history to a physician and, therefore, constituted an invalid "handoff" between healthcare providers.

Accordingly, Huntington Hospital's motion for summary judgment is granted. The action is severed and continued as against the remaining defendant.

Dated: October 5, 2012

W. Gerard Arhe
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION