Hilsdorf v Tsioulias
2013 NY Slip Op 34036(U)
November 14, 2013
Supreme Court, Queens County
Docket Number: 17969/10
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

ORIGINAL

----------X

Maureen Hilsdorf as Administrator of the Estate of Lawrence Hilsdorf, and Maureen Hilsdorf, Personally,

Plaintiff,

- against -

Index Number: 17969/10

Motion Date: 10/22/13

George J. Tsioulias, MD, New York Queens Hospital, Emmanual Kourouis, MD, Dimitrios Asters, MD, Asklipios Medical Group, PC and Asklipios Medical Group,LLP,

Defendants.

Motion Cal. Number: 58&59

Motion Seq. No.: 4&5

----------X

The following papers numbered 1 to 12 read on this amended motion by defendant, New York Hospital Medical Center of Queens (NYHMCQ), for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Amended Notice of Motion	5-6
Affirmation in Opposition-Exhibits	7-9
Reply-Exhibit	10-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by NYHMCQ for summary judgment in this medical malpractice action to dismiss the complaint against it is granted.

Movant has met its prima facie burden of showing entitlement to summary judgment by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]).

Plaintiff alleges that the death of her decedent, Lawrence Hilsdorf, was proximately caused, inter alia, by departures from good and accepted medical and radiologic practice of a radiologist

who allegedly misinterpreted a CT scan of decedent's abdomen taken on May 3, 2008 at NYHMCQ and failed to report the presence of inflammation, infection and/or a bowel leak that delayed decedent's treatment leading to colonic perforation and fecal peritonitis. Decedent had undergone anterior resection surgery on March 14, 2008 performed by defendant Dr. George J. Tsoulias. Decedent was discharged from NYHMCQ on March 19, 2008. On April 1, 2008, decedent was seen by Dr. Tsoulias at his office for complaints of abdominal pain and low-grade fever. Dr. Tsoulias told him to go to the hospital emergency room, and decedent presented to NYHMCQ emergency room that day. A CT scan of decedent's abdomen was performed and decedent was advised that he should be admitted. After the surgical residents attempted unsuccessfully to contact Dr. Tsoulias, decedent did not want to stay in the emergency room any longer and decided to leave. He signed a "Departure Against Advice" release and he was discharged with instructions to follow-up with Dr. Tsoulias.

Decedent again presented to the emergency room of NYHMCQ on May 1, 2008 complaining of abdominal pain and diarrhea, whereupon he underwent another CT scan by the hospital's radiology department and, since Dr. Tsoulias was decedent's surgeon, decedent was admitted to the hospital to Dr. Tsoulias' care. The interpretation of the May 1st CT scan is not relevant to the limited issue presented in this motion. Dr. Tsoulias, as part of his care of decedent, ordered the CT scan in question on May 3, 2008, which Noordhoorn read and interpreted on said date. Dr. Tsoulias testified in his deposition that he relied upon the report of the radiologist in determining the course of treatment of decedent.

It is undisputed that neither Dr. Tsoulias nor any of co-defendants is an employee of NYHMCQ, and that the radiologist, Dr. Maura Noordhoorn, was not an employee of NYHMCQ. Moreover, there is no issue as to whether NYHMCQ, through any of its doctors or staff, committed any acts of malpractice. Plaintiff's counsel, in his affirmation in opposition, concedes that plaintiff's medical malpractice claim against NYHMCQ is based solely upon the doctrine of apparent agency under which it is claimed that the hospital may be held vicariously liable for Noordhoorn's negligence.

A hospital may not be held vicariously liable to a patient for the malpractice of a treating physician who was not an employee of the hospital but an independent contractor under a theory of actual agency (see Hill v St. Claire's Hosp., 67 NY 2d 72 [1986]), but may be held vicariously liable under a theory of apparent agency in the limited situation where the patient sought treatment in the hospital's emergency room from the hospital and not a particular physician of his or her own choosing, (see Orgovan v Bloom, 7 AD 3d

770 [2nd Dept 2004]; Brink v Muller, 86 AD 3d 894[3rd Dept 2011]), and where it is shown that the hospital, through words communicated to or conduct towards the patient, created the appearance that the independent physician treating him or her in the emergency room was an actual employee or agent of the hospital so as to give rise to a reasonable belief on the part of the patient that his or her medical care was being provided by the hospital or the physician acting on behalf of the hospital (see Brink v Muller, 86 AD 3d 894[wrd Dept 2011]; Dragotta v Southampton Hosp., 39 AD 3d 697 [2nd Dept 2007]). In addition, the patient must accept the services of the physician in reliance upon the perceived relationship of the physician with the hospital (see id.). In assessing the reasonableness of the patient's claimed belief, "all the attendant circumstances" must be examined(see Brink, supra).

In our case, even though decedent presented to the emergency room, he was assigned almost immediately to the care of his private physician, Dr. Tsoulias, a fact which decedent and plaintiff, his wife Maureen Hilsdorf, were well aware. Moreover, the CT scan in question and Dr. Noordhoòrn's interpretation of it did not take place in an emergency room setting but after decedent was admitted and was under Dr. Tsoulias' care. It was Dr. Tsoulias who ordered the CT scan and made the decisions concerning decedent's course of treatment. The fact that decedent never saw Dr. Noordhoorn does not, as counsel for plaintiff argues, in and of itself create the perception that the radiologist was employed by the hospital's radiology department and, therefore, that the hospital created an apparent agency upon which decedent reasonably relied. Quite the opposite, the fact that decedent never saw, much less interacted with and was treated by, Dr. Noordhoorn, in conjunction with the fact that he was only treated by Dr. Tsoulias, and that the CT scan in question was ordered by Dr. Tsoulias and that decedent and plaintiff deferred to his judgment and followed his advice as to the proper course of treatment, and not Dr. Noordhoorn's, militates against a finding of liability against NYHMCQ upon a claimed apparent agency relationship with Noordhoorn.

Therefore, the record on this motion establishes that neither decedent nor plaintiff relied upon Dr. Noordhoorn's radiographic study at all, much less that they in any way accept his services in reliance upon his perceived relationship with the hospital. Therefore, under the circumstances, neither decedent not plaintiff could have reasonably believed that decedent was receiving care from the hospital rather than from his private physician and, therefore, no liability may attach to NYHMCQ under a theory of apparent authority (see Thurman v United Health Servs. Hosps., 39 AD 3d 934 [3rd Dept 2007]).

Plaintiff's counsel's additional argument that an apparent agency was created by virtue of the fact that Dr. Tsoulias testified in his deposition that he relied upon the radiographic study in determining his treatment of decedent is without merit. It is the patient's reliance that is relevant to a determination of whether an apparent agency relationship was created, not the reliance of the patient's private physician. In any event, there is no testimony by Dr. Tsoulias that he thought that Dr. Noordhoorn was an NYHMCQ radiology department employee and that he accepted the findings of the radiology report based upon the relationship perceived by him between said radiologist and the hospital.

The holding in the case of Contreras v Adeyami (102 AD 3d 720 [2nd Dept 2013]), cited by plaintiff, wherein it was held that the hospital failed to establish prima facie that it was not vicariously liable on the basis of, inter alia, apparent agency, for the malpractice of an offsite radiologist who was not its employee for misreading a patient's CT scan, is inapposite to the facts of the present case. The facts of Contreras are not set forth in the aforementioned opinion of the Appellate Division, Second Department, but are presented in the order of the trial court affirmed in said opinion. The plaintiff in Contreras presented to the emergency room of the hospital which provided the doctors who treated him and read his test results, including the radiologists. Therefore, unlike our case, the Contreras plaintiff was treated in the hospital emergency room, which included both the taking of a CT scan and its interpretation by a radiologist. Moreover, the hospital in that case failed to present any evidence that any of the physicians who treated the plaintiff in the hospital were the plaintiff's private physicians see Contreras v Adeyami, 2011 NY Slip Op 52546[U][Supreme Ct Kings County 2011]).

Finally, this Court is aware of the holdings of those cases wherein summary judgment was denied to the hospital because there was a question of fact as to whether the patient reasonably relied upon a belief that an independent physician was acting on the hospital's behalf based upon the physician's being a member of a group that had an exclusive contract with the hospital, or where the physician's hospital privileges required the physician to participate in the hospital's emergency room on-call program, thereby ostensibly giving the reasonable impression that the doctor was acting on behalf of and under the control of the hospital (see, Dragotta, supra; Brink, supra). No such question is presented in this case. Dr. Noordhoorn is not a party to this action, and no evidence is presented and no allegation is made in the complaint or bill of particulars that Dr. Noordhoorn was a member of co-defendants Asclepios Medical Group. Indeed, Dr. Tsoulias testified in his deposition, and it is undisputed, that Asclepios was the

group of which he was a member. No claim is made that an apparent agency was created by virtue of any exclusive deal between the hospital and any radiology group of which Noordhoorn was a member.

Therefore, NYHMCQ has proffered sufficient evidence that it did not create an apparent agency with Dr. Noordhoorn so as to establish an entitlement to summary judgment as a matter of law.

Accordingly, the complaint and all cross-claims are dismissed against NYHMCQ.

Dated: November 14, 2013

KEVIN J. KERRIGAN, J.S.C.