

Feder v Mackool

2014 NY Slip Op 30513(U)

March 3, 2014

Supreme Court, New York County

Docket Number: 805006/12

Judge: Alice Schlesinger

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.

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

-----X

AARON E. FEDER and SHIRLEY M. FEDER,

Plaintiffs,

-against-

Index No. 805006/12
Mot. Seq. No. 001

RICHARD J. MACKOOL, a/k/a RICHARD JAMES
MACKOOL, RICHARD MACKOOL, M.D., P.C.,
THE MACKOOL EYE INSTITUTE, LLC and JAY
TENDLER, A/k/a JAY M. TENDLER,

Defendants.

-----X

SCHLESINGER, J.:

Before the Court in this medical malpractice action is a motion for summary judgment by the defendants Richard J. Mackool, a/k/a Richard James Mackool, Richard Mackool, M.D., P.C., and The Mackool Eye Institute, LLC, dismissing the claims against them, including any claims of vicarious liability of the Mackool defendants for co-defendant Dr. Jay Tendler. Dr. Mackool is an ophthalmologist and Dr. Tendler is an anesthesiologist.

The underlying claim relates to a cataract extraction procedure with intraocular lens implant that Dr. Mackool performed on the left eye of the plaintiff Aaron Feder. Dr. Tendler provided the anesthesia services for that procedure. Specifically, when the patient did not respond to pre-procedure anesthetic drops or an anesthetic pledget administered by Dr. Mackool, the doctor requested that Dr. Tendler, a board certified anesthesiologist, perform a block on Mr. Feder, also known as a peribulbar anesthetic injection. Dr. Mackool did not participate in the block, nor remain in the room when Dr. Tendler performed the block.

Plaintiff alleges here that Dr. Tendler's block resulted in a globe perforation of the left eye, discovered by Dr. Mackool upon his return to the operating room. Plaintiff underwent a total of four subsequent surgeries by non-parties Dr. Peter Weseley and Dr. John Seedor to address the injury.

In support of his motion dismissing the vicarious liability claim, Dr. Mackool submits an affidavit from Jeanne Mackool, the Administrator of The Mackool Eye Institute. She describes the institute as a licensed, diagnostic and treatment center and an ambulatory surgery center offering ophthalmic care and treatment to patients of various physicians, not just Dr. Mackool. She explains that in January 2011 when the procedure was performed on the patient, Dr. Tendler had privileges to perform anesthesia services for the Institute, but not for Dr. Mackool individually or for his professional corporation. When anesthesia services were rendered, Dr. Tendler rendered them as an independent contractor for the Institute. He was not an employee of the Institute, and he always billed his patients separately. These facts were confirmed by Dr. Mackool in his examination before trial (Exh G, pp 73-74) and by Dr. Tendler in his EBT (Exh H, p 112).

In support of his motion for summary judgment dismissing the malpractice claims, Dr. Mackool has submitted an affirmation from Norman B. Medow, M.D., a board certified ophthalmologist licensed in New York since 1966. Dr. Medow states that he has reviewed all the relevant medical records and litigation papers, as well as the deposition transcripts of all the parties and the report of an eye exam performed by plaintiff's expert Dr. Cykiert. He states (at ¶ 3) that he has "expertise in cataract extraction procedures and their associated pre-operative anesthesia techniques, including peribulbar anesthesia injections." He then opines (at ¶ 4) with a reasonable degree of medical certainty that Dr. Mackool's care and treatment was "at all times within acceptable standards of ophthalmic care and did not cause any of the injuries alleged by plaintiffs."

Dr. Medow then explains the basis for his opinion in detail. He indicates that it was appropriate for Dr. Mackool to bring in Dr. Tendler to provide anesthesia services based

on the patient's nervous state, and he had no need to remain present in light of Dr. Tendler's experience. Further, Dr. Mackool had no duty to obtain consent for the particular anesthesia service being provided, as that task fell to Dr. Tendler.

Upon his return to the operating room, Dr. Mackool promptly detected a problem, discussed the possible causes with Dr. Tendler, and then appropriately explored the site of Dr. Tendler's injection. Dr. Medow opines at 14 that it was "then appropriate for Dr. Mackool to make an incision into the eye, and to try to increase the pressure by slowly injecting balanced salt solution into the anterior chamber of the eye." When that procedure did not restore pressure to the eye, Dr. Mackool appropriately suspected a perforated globe and "timely and appropriately" called a vitreoretinal specialist he knew, Dr. Shabto, and arranged for the patient's transfer to Dr. Shabto's office. Ultimately, the patient received surgery to correct the perforation caused by Dr. Tendler. However, Dr. Mackool acted in a timely and appropriate manner at all times and did not cause or contribute to the plaintiff's injuries.

By means of Dr. Medow's detailed affirmation and his credentials and experience, and by means of the affidavit of Jean Mackool and the deposition testimony confirming Dr. Tendler's status as an independent contractor, the defendants have made a *prima facie* showing of entitlement to summary judgment as a matter of law. *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The burden then shifts to the plaintiff opposing the motion to produce evidentiary proof in admissible form sufficient to create a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980).

However, plaintiff's counsel confirmed in a writing to the Court on February 28, 2014 that plaintiff was not interposing any opposition to the motion for summary judgment.

Without submitting an affirmation or affidavit from a qualified medical expert opining as to departures from accepted standards of care based on the medical records and testimony in this case, and without any evidence of vicarious liability on the part of the Institute, plaintiff has failed to create an issue of fact to defeat the motion for summary judgment. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

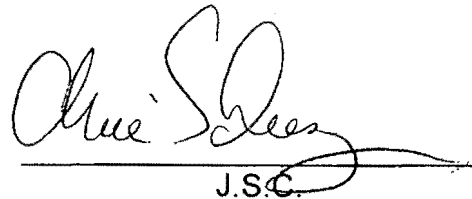
Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Richard J. Mackool, a/k/a Richard James Mackool, Richard Mackool, M.D., P.C., and The Mackool Eye Institute, LLC, is granted in its entirety, and the Clerk is directed to enter judgment dismissing the complaint as to those defendants; and it is further

ORDERED that counsel for the remaining parties shall appear in Room 222 on March 26, 2014 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: March 3, 2014

MAR 03 2014



J.S.C.

ALICE SCHLESINGER