

Kaufman v Oppenheimer

2014 NY Slip Op 31931(U)

July 23, 2014

Supreme Court, Suffolk County

Docket Number: 11-13617

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 1-16-13 (#001)
MOTION DATE 12-19-13 (#002)
ADJ. DATE 3-06-14
Mot. Seq. # 001 - MD
002 - MD

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STACY KAUFMAN, :
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 Plaintiff, :
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 :
 -against- :
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 :
 JOHN K. OPPENHEIMER, M.D., JUSTIN R. :
 ZACK, M.D. and SOUTHAMPTON HOSPITAL, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment ; Notice of Motion/
Order to Show Cause and supporting papers 1 - 32; 33 - 50 ; Notice of Cross Motion and supporting papers _____ ;
Answering Affidavits and supporting papers 51 - 60 ; Replying Affidavits and supporting papers 61 - 62 ; Other
_____ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Southampton Hospital for summary judgment
and the motion (#002) by defendant John Oppenheimer, M.D., for summary judgment are consolidated
for the purposes of this determination; and it is further

ORDERED that the motion (#001) by defendant Southampton Hospital for summary judgment
dismissing the complaint as against it is denied; and it is further

ORDERED that the motion (#002) by defendant John Oppenheimer, M.D., for summary judgment dismissing the complaint as against him is denied.

This action seeks to recover damages for medical malpractice arising from defendants' purported failure to diagnose and properly treat plaintiff's lung cancer on or about February 23, 2009. Plaintiff went to the office of her primary care physician, defendant John Oppenheimer, M.D., on July 28, 2008 for her annual examination, with concerns relating to her liver, thyroid and smoking. Dr. Oppenheimer ordered a chest x-ray to rule out lung cancer, which was performed at Southampton Hospital on July 31, 2008. Dr. Jack Morgani interpreted the chest x-ray films and found no abnormalities. Plaintiff continued to seek treatment from Dr. Oppenheimer for various complaints, and was last examined by him on February 23, 2009. Meanwhile, plaintiff sought treatment at the emergency department of Southampton Hospital on February 20, 2009 with complaints of shortness of breath and chest tightness. A chest x-ray was ordered by the emergency room physician, and the x-ray films were interpreted by co-defendant Justin Zack, M.D., a radiologist, who found the heart to be normal, the lungs clear, and determined that there was "no active disease." Plaintiff was diagnosed with bronchitis, given a prescription and told to follow-up with her primary care physician. On May 26, 2009, a chest x-ray was performed on plaintiff at the WTC Environmental Health Center, which revealed a "very prominent right hilum." On June 22, 2009, a CT scan was conducted, showing a "large right upper lobe mass...to the anterior segmental bronchi of the right upper lobe and medial to the apical segmental bronchi." Subsequently, a bronchoscopy was performed, plaintiff underwent chemotherapy to reduce the size of the mass, and then a right thoracotomy was performed.

Defendant Southampton Hospital now moves for summary judgment dismissing the complaint against it, arguing that it cannot be held vicariously liable for any malpractice that was allegedly committed by Dr. Zack, as he works at the hospital as an independent contractor. Southampton Hospital also argues that the claims regarding treatment rendered before October 20, 2008 are barred by the statute of limitations, and that its doctors, nurses and staff did not deviate or depart from accepted medical practice in the care of plaintiff. In support of its motion, Southampton Hospital submits, among other things, copies of the pleadings, transcripts of the deposition testimony of plaintiff, Dr. Oppenheimer, Dr. Zack, and Dr. Jack Morgani, copies of plaintiff's medical records, an affidavit of Sharon DiSunno, Vice President of Quality Management at Southampton Hospital, and expert affidavits of Dr. James Naidich and Dr. Timothy Haydock.

Dr. Oppenheimer moves for summary judgment dismissing the complaint against him, arguing that he did not deviate or depart from accepted medical practice in the care of plaintiff, and that his treatment of plaintiff was not the proximate cause of plaintiff's injuries. In support of his motion, Dr. Oppenheimer submits, among other things, copies of the pleadings, copies of plaintiff's medical records, the deposition testimony of plaintiff, Dr. Morgani, his own deposition testimony, and an expert affidavit of Dr. Howard Kolodny.

Plaintiff opposes both motions for summary judgment. In opposition to the motion by Southampton Hospital, plaintiff argues that a triable issue of fact exists as to whether it can be held vicariously liable for the malpractice committed by Dr. Zack. Counsel for plaintiff states that the claims against Southampton Hospital will only encompass treatment of plaintiff from on or about February 20,

2009. In opposition to the motion by Dr. Oppenheimer, plaintiff argues that a triable issue of fact exists as to whether he was negligent in the care and treatment of plaintiff. Plaintiff submits her medical records, the radiology services agreement between Southampton Hospital Association and Southampton Radiology, P.C., and a computer printout of the Radiology Department's web page from Southampton Hospital's website.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841, 871 NYS2d 617 [2d Dept 2008]; *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]; *Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.*, 51 AD3d 769, 770, 858 NYS2d 280 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458, 838 NYS2d 121 [2d Dept 2007]). On a motion for summary judgment dismissing a medical malpractice action, a defendant physician has the initial burden of establishing the absence of any departure from good and accepted medical practice or, if there was a departure, that the plaintiff was not injured thereby (*Shectman v Wilson*, 68 AD3d 848, 849, 890 NYS2d 117 [2d Dept 2009]; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801, 850 NYS2d 519 [2d Dept 2008]; *Thompson v Orner*, 36 AD3d 791, 792, 828 NYS2d 509 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368, 783 NYS2d 664 [2d Dept 2004]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her evidentiary proof in admissible form and demonstrate the existence of a triable issue of fact (*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841, 871 NYS2d 617; *Chance v Felder*, 33 AD3d 645, 645-646, 823 NYS2d 172 [2d Dept 2006]; *Kaplan v Hamilton Med. Assoc.*, 262 AD2d 609, 610, 692 NYS2d 674 [2d Dept 1999]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 358-359, 669 NYS2d 631 [2d Dept 1998]).

“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 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]). In addition, vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel (*Sullivan v Sirop*, 74 AD3d 1326, 1328, 905 NYS2d 240 [2d Dept 2010], quoting *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698, 833 NYS2d 638 [2d Dept 2007]). In the context of medical malpractice, the plaintiff must have reasonably believed that the physician treating him or her was provided by the hospital or acted on the hospital's behalf (see *Dragotta v Southampton Hosp.*, *supra*; *Sampson v Contillo*, *supra*), and must have accepted the physician's services in reliance upon the doctor's relationship with the hospital as opposed to the doctor's particular skill (see *Brink v Muller*, 86 AD3d 894, 927 NYS2d 719 [3d Dept 2011]; *Keitel v Kurtz*, 54 AD3d 387, 866 NYS2d 195 [2d Dept 2008]).

In Dr. Naidich's affirmation, he states that plaintiff presented to the emergency department at Southampton Hospital on February 20, 2009, complaining of shortness of breath. He states that a chest x-ray was ordered by the emergency department physician, Dr. Hunt, and interpreted by Dr. Zack, who found "no active disease." He opines within a reasonable degree of medical certainty that the radiology services rendered by radiology technologists, nurses and staff at Southampton Hospital to plaintiff were not the proximate cause of her alleged injuries. He states that plaintiff's chest x-ray was interpreted by Dr. Zack, which was timely conveyed to the emergency room physician and timely transcribed on February 22, 2009, with a final report provided to Dr. Oppenheimer. Dr. Naidich indicates that his affirmation is not intended to render any opinion regarding the radiological interpretations of Dr. Zack, concerning the chest radiographs performed on February 20, 2009.

In Dr. Haydock's affirmation, he opines within a reasonable degree of medical certainty that the radiology services rendered by radiology technologists, nurses and staff at Southampton Hospital to plaintiff were not the proximate cause of her alleged injuries. He opines that plaintiff did not present to the emergency room with an emergent condition that required a CT Scan be conducted, and that the chest x-ray interpreted by Dr. Zack was reported to be normal. Dr. Haydock states that it was appropriate for Dr. Hunt to discharge plaintiff with instructions to follow up with her general practitioner. He states that the results of plaintiff's examinations and testing on February 20, 2009 did not indicate that plaintiff suffered from lung cancer.

In Sharon DiSunno's affidavit, she states that she is the Vice President of Quality Management at Southampton Hospital and is familiar with the business relationship between Southampton Hospital and Southampton Radiology, P.C. She states that Southampton Hospital is a separate and distinct not-for-profit domestic corporation, which is not related to Southampton Radiology, P.C. She states that Southampton Radiology, P.C., employs the radiologists who interpret diagnostic studies, including chest x-rays, that are performed at Southampton Hospital. DiSunno states that Dr. Zack is a radiologist who is employed by Southampton Radiology, P.C., and that Southampton Hospital did not compensate him for interpretations of the chest x-rays performed on plaintiff. She states that Southampton Radiology, P.C., was responsible for supervising and controlling the actions of Dr. Zack, and that it billed for the interpretations of the chest x-rays performed by Dr. Zack.

The evidence submitted by Southampton Hospital is insufficient to establish as a matter of law that it may not be held vicariously liable for any negligence of Dr. Zack (*see Giambona v Hines*, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]; *Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 922 NYS2d 388 [1st Dept 2011]; *Augeri v Massof*, 134 AD2d 308, 520 NYS2d 787 [2d Dept 1987]). While Southampton Hospital submits evidence that Dr. Zack was an independent contractor rather than an employee of the hospital, plaintiff went to the emergency room of Southampton Hospital seeking treatment from the hospital and not from a particular physician of her choosing. Furthermore, the expert affirmations submitted by Southampton Hospital state that the radiology technologists, nurses and staff at the hospital were not the proximate cause of plaintiff's injuries, and the experts did not render any opinion regarding the interpretations of Dr. Zack regarding plaintiff's chest x-ray on February 20, 2009. Thus, the motion by Southampton Hospital is denied.

With regard to the motion by Dr. Oppenheimer, he established a prima facie case that he did not

deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the transcripts of the parties' deposition testimony, and the expert affirmation of Dr. Kolodny (*see Sandmann v Shapiro*, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *Jonassen v Staten Island Univ. Hosp.*, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). Dr. Kolodny opines that the care rendered by Dr. Oppenheimer was at all times appropriate and in accordance with good and accepted medical practice, and was not the proximate cause of the injuries alleged by plaintiff. Dr. Kolodny states that based on a review of Dr. Oppenheimer's notes and testimony, there was no indication plaintiff was experiencing any pulmonary symptoms that would indicate the need for a chest x-ray prior to July 2008. He states that after an annual examination of plaintiff on July 28, 2008, plaintiff had a chest x-ray performed at Southampton Hospital. He states that the films interpreted by Dr. Jack Morgani noted no "active parenchymal disease in the chest," and that Dr. Oppenheimer was in accordance with good and accepted medical practice in relying upon the interpretation of the chest x-ray by a radiologist. Dr. Kolodny states that when plaintiff was seen by Dr. Oppenheimer on August 1, 2008, the results of the x-ray were discussed, and plaintiff had no respiratory complaints on that visit. He states that plaintiff first mentioned chest symptoms during a visit to Dr. Oppenheimer on October 27, 2008, when she complained of a cold with coughing and slightly brown sputum. He states that plaintiff was diagnosed with an upper respiratory infection, and that plaintiff was subsequently seen by another physician and did not return to visit Dr. Oppenheimer until January 26, 2009. He states that during that visit, plaintiff had no respiratory issues, and Dr. Oppenheimer advised a gastrointestinal follow up for upper and lower endoscopy. During a February 20, 2009 emergency room visit, a chest x-ray was performed on plaintiff and Dr. Zack, who interpreted the films found no active disease. Dr. Kolodny states that Dr. Oppenheimer acted in accordance with good and accepted medical practice in relying upon the interpretation of the chest x-ray by Dr. Zack. Dr. Kolodny explains that most patients who develop lung cancer do not present with symptoms until the disease is in the advanced stages, and that the medical records reveals that plaintiff had no complaints of any chest symptoms until October 27, 2008. He further states that as all the chest studies were interpreted as normal/negative, there was no need for Dr. Oppenheimer to seek consultation or perform further tests.

In opposition, plaintiff submits the affirmation of Dr. Joseph Bottino who opines within a reasonable degree of medical certainty that Dr. Oppenheimer departed from the standard of care when he ordered a chest x-ray rather than a low dose CT study. He explains that the standard of care for a high risk patient such as plaintiff was to order a CT study rather than a chest x-ray, because chest x-rays are inadequate for discerning subtle abnormalities and nodules consistent with lung cancer. Dr. Bottino states that Dr. Oppenheimer departed from the standard of care when he failed to inform plaintiff about the limitations of chest x-rays in the detection of lung cancer. He states that Dr. Oppenheimer also departed from the standard of care by not creating a differential diagnosis, which is a listing of possible conditions that could be causing a patient's symptoms, and then testing to rule them out to reach a diagnosis. Dr. Bottino opines that despite plaintiff's symptoms, Dr. Oppenheimer took no steps to evaluate plaintiff for lung cancer after the chest x-ray performed on July 31, 2008. Dr. Bottino further opines that the chest x-ray performed at Southampton Hospital on February 20, 2009, and interpreted by Dr. Zack was misread, and that this was a departure from the standard of care.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce

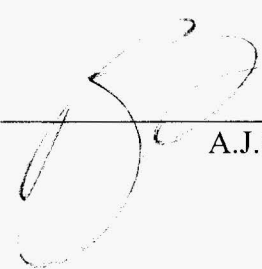
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conflicting medical expert opinions (*see Hayden v Gorden*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Barnett v Fashakin*, 85 AD3d 832, 925 NYS2d 168 [2d Dept 2011]; *Graham v Mitchell*, 37 AD3d 408, 829 NYS2d 628 [2007]). Such credibility issues can only be resolved by a jury (*see Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]). Here, Dr. Bottino's affirmation contradicts the opinions of Dr. Oppenheimer's expert and raises a triable issue of fact as to whether Dr. Oppenheimer departed from the standard of care by not ordering a low does CT study (*see Contreras v Adeyemi*, 102 AD3d 720, 958 NYS2d 430 [2d Dept 2013]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Accordingly, the motion by Dr. Oppenheimer for summary judgment dismissing the complaint against him is denied.

Dated: 7/23/14



A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION