

Steinman v Good Samaritan Hosp. Med. Ctr.

2014 NY Slip Op 32859(U)

October 21, 2014

Supreme Court, Suffolk County

Docket Number: 30889/2010

Judge: William B. Rebolini

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.

Short Form Order

COPY**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
JusticeMargaret Steinman and Richard Steinman,
Plaintiffs,

-against-

Good Samaritan Hospital Medical Center,
Manal Hegazy, M.D., James G. Kohlroser, D.O.
and Island Surgical & Vascular Group, P.C.

Defendants.

Motion Sequence No.: 003; MD
Motion Date: 5/21/14
Submitted: 6/11/14Index No.: 30889/2010Attorney for Plaintiff:Ronemus & Vilensky
112 Madison Avenue, 2nd Floor
New York, NY 10016Attorney for Defendant
James G. Kohlroser, D.O.:Santangelo, Benvenuto & Slattery
1800 Northern Boulevard
Roslyn, NY 11576Clerk of the CourtAttorney for Defendant
Good Samaritan Hospital
Medical Center:Lewis Johs Avallone Aviles, LLP
One CA Plaza, Suite 225
Islandia, NY 11749Attorney for Defendants
Manal Hegazy, M.D. and Island
Surgical & Vascular Group, P.C.:Shaub, Ahmuty, Citrin & Spratt, LLP
1983 Marcus Avenue
Lake Success, NY 11042

Upon the following papers numbered 1 to 19 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 -
19; it is



Steinman v. Good Samaritan, et al.

Index No.: 30889/2010

Page No. 2

ORDERED that the motion by defendant Good Samaritan Hospital Medical Center seeking summary judgment dismissing the complaint is denied.

In July 2008, Margaret Steinman presented to her primary care physician, Dr. Robert Sica, with complaints of intermittent right upper quadrant abdominal pain with radiation to the back and right shoulder, occasional nausea, and fatty food intolerance. Following a physical examination by Dr. Sica, she underwent an abdominal sonogram, which was negative, and a cholescintigraphy (“HIDA”) scan, which revealed decreased ejection fraction of the gallbladder. As a result of the HIDA scan results, Dr. Sica made a differential diagnosis of cholecystitis and referred Steinman to defendant Dr. Manal Hegazy, a general surgeon and member of defendant Island Surgical Vascular Group, P.C. On September 16, 2008, Steinman presented to Dr. Hegazy at the private offices of Island Surgical & Vascular Group. Steinman reported that her past medical history included hyperthyroidism, four cesarean sections, an appendectomy, and allergies to shellfish and sulfa. She also reported that she was taking Synthroid and Lasix. After Dr. Hegazy examined her and reviewed the results of the HIDA scan and a computerized tomography (“CT”) scan, which she had previously undergone, she recommended that Steinman undergo an upper gastrointestinal series (“UGI”) test.

On April 21, 2009, Steinman, once again, presented to Dr. Hegazy. After a physical examination revealed that plaintiff was alert and oriented, had a soft abdomen and a clear chest, and no edema in her extremities, Dr. Hegazy recommended that she undergo an ambulatory laparoscopic cholecystectomy (surgical removal of the gallbladder) as soon as possible. On April 27, 2009, Steinman presented at defendant Good Samaritan Hospital Medical Center for pre-surgical, and on April 29, 2009, Dr. Hegazy performed the laparoscopic cholecystectomy at Good Samaritan Hospital. Prior to surgery, Dr. Hegazy authored a pre-surgical note indicating that Steinman had “a history of biliary dyskinesia associated with abdominal pain, mostly to the upper right quadrant after eating.” During the surgery, the gallbladder was retracted upwardly and laterally, and Dr. Hegazy clipped and cut what was assumed to be the cystic duct. However, a closer examination revealed that the hepatic duct had been cut instead. As a result, a decision was made to convert the procedure from a laparoscopy to an open laparotomy, and the “gallbladder was removed off the liver bed” and the common bile duct was sutured and repaired. Thereafter, defendant Dr. James Kohlroser, a gastroenterologist, was brought in to perform an endoscopic retrograde cholangiopancreatography (“ERCP”) with sphincterotomy and stent placement. Dr. Kohlroser also placed a Jackson-Pratt drain in the right upper quadrant of the abdomen to prevent any fluid build-up at the surgical site.

Following the procedure, Steinman was taken to recovery and placed on a patient-controlled analgesia (“PCA”) pump. Dr. Hegazy authored a surgical operation report wherein she stated that there was minimal blood loss during the operation, that there had been a complication, a common bile duct tear, and that an open common bile duct repair and an ERCP had been performed. At approximately 12:50 p.m., a post anesthesia nursing note indicated that Steinman was aroused by verbal stimuli and complained of pain, that her vital signs were stable and her abdomen was soft and non-distended, and that serosanguineous drainage was observed in the Jackson-Pratt drain. At approximately 4:30 p.m., Steinman’s vital signs remained stable and her pain level was a 5 out of 10. At approximately 6:10 p.m., Steinman is described in a nursing note as being awake and alert,

Steinman v. Good Samaritan, et al.

Index No.: 30889/2010

Page No. 3

and as having consumed a small amount of clear liquid. The note also states that her abdomen remained soft and non-distended, that the Jackson-Pratt drain was emptied of 60ccs of bilious colored liquid, and that she was administered Zofran after complaining of nausea. At approximately 6:15 p.m., Dr. Hegazy examined Steinman and issued orders to transfer her to a regular floor later in the evening.

On April 30, 2009, after bile was observed in the Jackson-Pratt drain, Dr. Kohlroser ordered an HIDA scan, which indicated that there was a leak in the common bile duct. After discussing the findings from the HIDA scan with Steinman, Dr. Hegazy began making arrangements to transfer her to Mount Sinai Hospital for the performance of a hepatobiliary surgery. On May 2, 2009, Steinman was transferred to Mount Sinai Hospital with an admitting diagnosis of biliary leak post laparoscopic cholecystectomy, ERCP and stenting. On May 6, 2009, Steinman was discharged from Mount Sinai Hospital.

Thereafter, Steinman and her husband, Richard Steinman, commenced this action against Good Samaritan Hospital, Dr. Hegazy, Dr. Kohlroser and Island Surgical & Vascular Group to recover damages for medical malpractice and lack of informed consent. The gravamen of the complaint is that defendants failed to treat Steinman's acute cholecystitis and were negligent in their performance of the laparoscopic cholecystectomy procedure that she underwent on April 29, 2009.

Good Samaritan Hospital now moves for summary judgment on the basis that its staff did not deviate from any standards of good and acceptable medical practice when it rendered care to Steinman during her admission in the hospital from April 30, 2009 to May 2, 2009, and that the care provided by its staff did not, in any way, proximately cause the injuries allegedly sustained by plaintiff. Good Samaritan Hospital also asserts that consent for the procedure was obtained from plaintiff by Dr. Hegazy prior to the surgery, and that such consent is contained in the physician's certification, which was properly memorialized in the hospital's record. Plaintiffs oppose the motion on the ground that Good Samaritan Hospital failed to establish a prima face case that it is not vicariously liable for Dr. Kohlroser's malpractice or that Dr. Kohlroser did not deviate from acceptable standards of medical practice when he performed the ERCP and stent placement after Steinman's hepatic duct was clipped during the surgery.

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

Steinman v. Good Samaritan, et al.

Index No.: 30889/2010

Page No. 4

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]).

Moreover, "not every negligent act of a nurse [is] considered medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (*Bleiler v Bodnar*, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; see *Spiegel v Goldfarb*, 66AD3d 873, 889 NYS2d 45[2d Dept 2009]). This conclusion is no different with respect to the emergency room nurse, functioning in that role as an integral part of the process of rendering treatment to a patient (*Bleiler v Bodnar*, *supra* at 72, 489 NYS2d 885). 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 Good Samaritan Hospital's expert, Dr. Robert Ward, the parties' deposition testimony, and the additional exhibits submitted in support of the motion, the Court finds that Good Samaritan Hospital has established, as a matter of law, that its staff did not deviate from good and acceptable medical practice in rendering care to Steinman during her admission in April 2009, and that the treatment provided by its staff was not the proximate cause of the alleged injuries sustained by Steinman (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]). Good Samaritan Hospital also demonstrated that its staff properly and timely followed the orders of Dr. Kohlroser and Dr. Hegazy, and that its nursing staff did not commit any independent acts of negligence (see *Schultz v Shreedhar*, *supra*; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; *Cook v*

Steinman v. Good Samaritan, et al.

Index No.: 30889/2010

Page No. 5

Reisner, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]). In addition, both Steinman and her husband testified at their examinations before trial that they did not have any complaints about the care and treatment that was rendered to Steinman by the staff at Good Samaritan Hospital, nor did they file any complaints about said care.

In his affidavit, Dr. Robert Ward states that he is a physician licensed to practice medicine in the State of New York and that he is board certified in the field of general surgery. Dr. Ward states that in his opinion, within a reasonable degree of medical certainty, the care and treatment rendered to Steinman during her admittance at Good Samaritan Hospital was at all times within the confines of good and acceptable medical practice. Dr. Ward states that the standard of medical care requires that all surgical care and treatment is within the exclusive and strict confines of a patient's operative surgeon, that the staff at Good Samaritan properly carried out the orders and directives issued by Steinman's surgeons, and that the staff did not participate in any of the decisions that were made by Dr. Hegazy or Dr. Kohlroser. Dr. Ward further states that, within a reasonable degree of medical certainty, the staff at Good Samaritan Hospital did not depart from accepted standards of medical care in obtaining Steinman's informed consent for the surgical procedure she underwent on April 29, 2009, and that it was not the duty of the staff at Good Samaritan Hospital to obtain Steinman's informed consent prior to the procedure. Dr. Ward explained that it was the duty of Steinman's private physician, Dr. Hegazy, to obtain her informed consent for the procedure, and that such consent, which was quantitatively sufficient, was obtained by Dr. Hegazy and properly memorialized in the hospital's records. Finally, Dr. Ward states within a reasonable degree of medical certainty that the treatment and care provided by the staff at Good Samaritan Hospital did not cause or contribute to the injuries allegedly sustained by Steinman.

However, Good Samaritan Hospital failed to establish, as a matter of law, that it was not vicariously liable for the alleged malpractice of Dr. Kohlroser (see *Boutin v Bay Shore Family Health Ctr.*, 59 AD3d 368, 872 NYS2d 523 [2d Dept 2009]; *Rose v Horton*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2005]). At his deposition, Dr. Kohlroser testified that he is a partner at Island Digestive Disease Consultants and that he is an attending physician with privileges in gastroenterology at Good Samaritan Hospital. Dr. Kohlroser testified that a doctor from his practice was "usually" at Good Samaritan Hospital, that they maintained a regular schedule at Good Samaritan Hospital, and that he was "usually" at Good Samaritan Hospital two days a week and "did whatever needed to be done, including consults and procedures." Dr. Kohlroser testified that whenever a physician in the operating room required a gastroenterological evaluation or intraoperative consult he was paged via the hospital's overhead system or his beeper. Dr. Kohlroser testified that on the day of Steinman's operation he was paged into the operating room by Dr. Hegazy, who requested an intraoperative cholangiogram to assess the patency of a repaired common bile duct. Dr. Kohlroser testified that when he arrived in the operating room the common bile duct already had been sutured and that he performed an ERCP to ascertain whether there was a leak in the repair of the anastomosis of the common bile duct. Dr. Kohlroser testified that he placed a stent from the duodenum into the intrahepatic bile duct to bridge the anastomosis, allowing the bile to travel from the liver into the duodenum in the event the area became swollen. Dr. Kohlroser testified that he examined Steinman on April 30th and, after discovering fluid in the Jackson-Pratt

Steinman v. Good Samaritan, et al.

Index No.: 30889/2010

Page No. 6

drain, requested the performance of another HIDA scan, which indicated the presence, but not the exact location, of a leak. He testified that it was his recommendation that Steinman be transferred to a hospital where biliary surgeries were performed frequently, because she required another surgery to stop the leak. Dr. Kohlroser further testified that after Steinman was released from Good Samaritan Hospital he did not have any additional contact with her, and that he did not treat her as a patient in his private office at Island Digestive Consultants.

A hospital is not exempt from liability for the negligence of physicians utilizing its facilities to practice medicine based upon the particular doctor's status as a private attending physician, or independent contractor (*see Mduba v Benedictine Hosp.*, 52 AD2d 450, 384 NYS2d 527 [1976]). "Instead, 'a hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting a the hospital's behest'" (*Malcolm v Mount Vernon Hosp.*, *supra* at 705, quoting *Soltis v State of New York*, 172 AD2d 919, 919, 568 NYS2d 470 [3d Dept 1991]; *see Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245, 245-46, 612 YS2d 151 [2d Dept 1994, *lv denied* 85 NY2d 805, 626 NYS2d 756 [1995]). Moreover, whether a person is an employee or independent contractor is an ultimate fact to be determined by the trier of fact based upon the evidence presented (*see Santiago v Archer*, 136 AD2d 690, 524 NYS2d 106 [2d Dept 1988]). The record demonstrates that Dr. Hegazy chose Dr. Kohlroser, who is one of the available gastroenterologist consultants at Good Samaritan Hospital, to assist her in the operating room with Steinman's procedure, and that he was called to assist in the operating room via page by a hospital employee. Collectively, the adduced evidence, including Dr. Kohlroser's deposition testimony, raises triable issues as to whether he was an employee-in-fact or otherwise acting on behalf of Good Samaritan Hospital, and as to whether plaintiffs believed that he was acting at the hospital's behest, so as to render it vicariously liable for his alleged malpractice (*see Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 766 NYS2d 185 [1st Dept 2003]). Accordingly, Good Samaritan Hospital's motion for summary judgment is denied.

Dated:

10/21/2014


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ NON-FINAL DISPOSITION