

Jones v St. Luke's Roosevelt Hosp. Ctr.

2014 NY Slip Op 33646(U)

October 22, 2014

Supreme Court, New York County

Docket Number: 107559/10

Judge: Joan B. Lobis

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

EA
10/24/14
E

PRESENT: LOBIS
Justice

PART 6

JONES, LEM

INDEX NO. 107559/10

MOTION DATE 7/15/14

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
ST. LUKE'S - ROOSEVELT
HOSPITAL CENTER, RTA.

The following papers, numbered 1 to _____ were read on this motion to/for sum. judg.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	
2, 3	4 (x x mot)
5 (x off to 3)	6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &
ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/22/14

JOAN B. LOBIS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

WITH THE FOLLOWING RECOMMENDATION DECISION
THE BOARD OF DIRECTORS IN ACCORDANCE

FOR THE BOARD

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
Lerai Jones,

Plaintiff,

Index No. 107559/10

-against-

Decision and Order

ST. LUKE'S ROOSEVELT HOSPITAL CENTER and
ALAN I. BENVENISTY, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

This medical malpractice case arises out of surgery performed to place an arteriovenous fistula in the upper left arm of Lerai Jones. Jones sues St. Luke's Roosevelt Hospital Center (Hospital) and Alan I. Benvenisty, M.D. The Defendant Hospital moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, that motion is denied.

In June 2008, Lerai Jones was diagnosed with renal failure. In October 2008, she first visited Dr. Benvenisty. Dr. Benvenisty has a full-time appointment with Columbia University, where he is Professor of Clinical Surgery and Director of its Transplant Program. His office is at 1090 Amsterdam Avenue, 12th floor in Manhattan. He directs the third-year medical students' clerkship for the University's clinical site, St. Luke's Roosevelt Hospital Center.

Ms. Jones had been referred to Dr. Benvenisty by her primary care physician. She was complaining of swelling in her legs. She also reported a prior history of uncontrolled diabetes since 1985 and neuropathy. Ms. Jones indicated that she smoked one to one and one half packs of

cigarettes each day.

At that appointment, Dr. Benvenisty ordered a scan of her veins. A venous duplex scan was performed at St. Luke's Roosevelt Vascular Laboratory (Laboratory), which shares the same address and telephone number as Dr. Benvenisty. Dr. Benvenisty wanted to rule out any deep vein thrombosis or venous insufficiency for the swelling.

Over the course of the next several months, Ms. Jones began to pursue placement of an arteriovenous fistula (AVF) for dialysis treatment of her end-stage kidney disease. In May 2009, she was scheduled to have AVF placement by Dr. David Fox, but that procedure was cancelled due to Ms. Jones's above-normal potassium levels.

Shortly thereafter, Ms. Jones was again seen by Dr. Benvenisty. He ordered vein mapping by the Laboratory in preparation for considering her candidacy for AVF. There was further delay in scheduling the procedure, however.

Ultimately the AVF procedure was performed on July 16, 2009. Dr. Benvenisty operated and was assisted by Dr. Alena Sergejev, who was a resident of the Hospital at the time. The Hospital records show that Dr. Sergejev obtained Ms. Jones's consent. Dr. Benvenisty did not sign the consent form.

Following the procedure, Ms. Jones refused to be discharged due to left hand pain. The nurse's note in Ms. Jones's chart for that same day refers to pain in her left, upper, inner arm.

Ms. Jones remained hospitalized overnight and was discharged the next day, after receiving hemodialysis.¹ Before her discharge, however, Ms. Jones was visited by Dr. Sergejev. Dr. Sergejev documented Ms. Jones's complain of pain in the left upper extremity due to AVF. She further noted that Ms. Jones complained of pain overnight and increased numbness from her baseline. Dr. Sergejev documented "coldness in the patient's hand." She reported the findings to Dr. Benvenisty by telephone.

Ms. Jones visited Dr. Benvenisty at his office in the week following her surgery. Dr. Benvenisty's notes indicate that Ms. Jones complained of numbness in her index finger. He opined that she "probably does have some degree of steal."² His records further indicate that within days he ordered flow studies performed to rule out steal syndrome.

The next day, Dr. Benvenisty readmitted Ms. Jones to the Hospital for severe pain in her left hand. A radiologic consultation and study did not find a cause for her symptoms, but Dr. Benvenisty noted that her choices were ligation or DRIL, which in his deposition he indicated stands for distal revascularization interval ligation. Dr. Benvenisty saw Ms. Jones again on the evening of July 31, 2009, when she again complained of pain.

Dr. Benvenisty performed further surgery on Ms. Jones on August 3, 2009. The next day, however, Ms. Jones was still in pain. Flow studies showed moderate to severe left-hand digital

¹By this time, Ms. Jones had begun receiving hemodialysis approximately three to four times each week.

²Steal is a condition involving a diversion of blood by alternate routes or reversed flow.

disease. The report noted that Ms. Jones had complained of numbness and weakness in her left hand since placement of the AVF. The following day, Dr. Benvenisty opined that her sensation in the hand was more affected than her motor skills. Ms. Jones was discharged from the Hospital on August 10, 2009.

Ms. Jones did not treat with Dr. Benvenisty further. He recalled that she came to the office on August 13, 2009, but refused to be examined. In attempts to speak with her telephonically, he testified that she had refused to come to the telephone.

On October 19, 2009, Ms. Jones was diagnosed with ischemic monolemic neuropathy by Dr. David Sternman, a neurologist. In June 2010, this lawsuit followed. In alleging medical malpractice, Ms. Jones claims that the Dr. Benvenisty negligently placed the AVF, which caused, among other injuries, permanent nerve damage. She further alleges that Dr. Benvenisty failed to timely tie off the fistula and failed to timely appreciate her complaints of pain and numbness. In her complaint and bill of particulars, she alleges that agents of the Hospital were negligent and departed, that Dr. Benvenisty is an employee of the Hospital, and the Hospital is vicariously liable for his conduct. She alleges loss of strength, grip and sensation in her left hand.

Following disclosure in this action, the Hospital moved for summary judgment. In claiming that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law, it attaches various portions of the record, including the deposition of Dr. Benvenisty, as well as certain medical records. The Hospital asserts that Dr. Benvenisty was Ms. Jones's private attending physician. Yet it concedes that Dr. Benvenisty contests that status, noting

that he testified he was “an employee of the hospital.”³ The deposition transcript shows that Dr. Benvenisty also testified that he has been a full-time, salaried faculty member since 1984 and that he has always been “hospital-based.” He denied that he has any personal employees. The staff assisting him works for the Hospital. His office records, contained as an exhibit to the moving papers, show a Hospital letterhead. The Hospital’s counsel, not Dr. Benvenisty’s, deposed Plaintiff in this action.

In further support of its motion, the Hospital provides an expert opinion by Dr. Jeffrey Stein. Dr. Stein is a New York-licensed, board-certified vascular surgeon. In preparation for his opinion, he affirmed that he reviewed the pleadings, medical records and deposition transcripts. The Hospital, however, did not provide Plaintiff’s deposition in its moving papers.

Dr. Stein opines that the Hospital and Dr. Servejev did not depart in their care of Ms. Jones or proximately cause her injuries. In asserting his opinion, Dr. Stein contends that Ms. Jones “was a private patient” of Dr. Benvenisty’s, whom he further characterizes as “the private attending.” The defense expert does not opine regarding Dr. Benvenisty’s care.

Plaintiff opposes the Hospital’s motion, claiming that genuine issues of material fact remain regarding whether the Hospital is vicariously liable, either as employer or on a theory of apparent authority. She notes that Dr. Benvenisty testified that he is an employee of the Hospital.

³The movant fails to provide any pinpoint citation to the record to show where that assertion was made. This Court notes that it appears at page 203 of Dr. Benvenisty’s deposition transcript.

She offers the expert opinion of Dr. Ralph W. DeNatale. Dr. DeNatale is a vascular surgeon with more than twenty years of experience and has performed hundreds of AVF placements. Dr. DeNatale opines that Dr. Benvenisty's failure to timely diagnose Ms. Jones's post-operative claims of pain likely resulted in her permanent injury.

Co-Defendant Dr. Benvenisty filed a partial opposition to the Hospital's motion. He requested that any order granting relief to the Hospital preserve his rights under Article 16 of the Civil Practice Law and Rules. In response, Plaintiff cross-moved to dismiss Defendant Benvenisty's first affirmative defense in his answer, asserting rights under Article 16, on the grounds that Article 16 relief may not be pursued where summary judgment has been granted to a co-defendant. Dr. Benvenisty did not respond to Plaintiff's cross-motion.

In reply to Plaintiff's opposition to the Hospital's motion for summary judgment, the Hospital claims that even assuming Dr. Benvenisty were its employee, he did not depart from proper standards of care. It does not proffer any medical expert opinion in raising this issue for the first time on reply, however. The Hospital further claims that Dr. Benvenisty's billing records, which were attached as an exhibit to the original motion, rebut Plaintiff's claim that the Hospital is vicariously liable for Dr. Benvenisty's conduct.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit

must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer’s Estate, 93 A.D.2d 355 (1st Dep’t 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep’t of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

This Court finds that the Hospital has failed to establish as a prima facie case that it is not vicariously liable in this action. Its own moving papers present a dispute of material fact regarding whether Dr. Benvenisty is its employee or a private attending physician. Cf., e.g., Alvarado v. Beth Israel Med. Ctr., 78 A.D.3d 873, 875 (2d Dep’t 2010) (hospital must show as a prima facie case physician alleged to have committed malpractice was not employee). As Plaintiff properly pointed out, the Hospital acknowledged that the doctor testified that he is an employee. The Hospital disputes that testimony by characterizing him as a private attending physician, but it fails to support that characterization with the evidence before this Court. Indeed this Court’s sua sponte examination shows that additional evidence undermines the Hospital’s claim that Dr. Benvenisty is a private attending physician. These indicia include his sharing an office and telephone number with the Hospital’s Laboratory, his use of Hospital letterhead in his correspondence, as well as his testimony that he has always been hospital-based and none of the staff assisting him are his employees. Belatedly the Hospital in its reply claims without any specificity that the billing records show that Dr. Benvenisty is a private attending physician. But these records only confirm that the

bills were sent from the same address as the Hospital Laboratory or the Hospital itself. Even assuming the Hospital were to have established a prima facie case showing that Dr. Benvenisty were not a Hospital employee, it would fail to rebut Plaintiff's allegation that the Hospital is liable under the theory of agency by estoppel. See, e.g., Malcolm v. Mount Vernon Hosp., 309 A.D.2d 704, 705-06 (1st Dep't 2003) (proponent of motion for summary judgment must demonstrate the absence of any material facts regarding agency by estoppel to prevail).

This Court next turns to the motion and cross-motion submitted in response to the Hospital's motion for summary judgment. This Court's denial of the principal motion renders both remaining motions moot. Accordingly, it is

ORDERED that the Hospital's motion for summary judgment is denied; and it is further

ORDERED that Dr. Benvenisty's motion to preserve his Article 16 rights upon granting of the motion for summary judgment is dismissed as moot, and it is further

ORDERED that Plaintiff's cross-motion to strike Dr. Benvenisty's first affirmative defense raised in his answer is dismissed as moot, and it is further

ORDERED that the parties shall appear for a pretrial conference on November 25, 2014, at 9:30 am.

Dated: October 22, 2014

FILED

OCT 24 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:



JOAN B. LOBIS, J.S.C.