

Botelho v Pan

2014 NY Slip Op 33825(U)

September 15, 2014

Supreme Court, Westchester County

Docket Number: 51538/12

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
PAULETTE BOTELHO,

Plaintiff,

-against-

EDWIN PAN, M.D., SPENCER AMORY, M.D.,
MIGUEL SILVA, M.D., and LAWRENCE
HOSPITAL CENTER,

Defendants.
-----X

DECISION & ORDER

Index No. 51538/12
Motion Date: Sept. 15, 2014

Seq. no. 3

LEFKOWITZ, J.

The following papers were read on this motion by defendant Lawrence Hospital Center for a protective order as to the deposition of a witness on behalf of Lawrence Hospital Center regarding “how the hospital acted in providing these surgeons to its patients.”

Order to Show Cause - Affirmation in Support - Exhibits A-M
Affirmation in Opposition - Exhibit A

Upon the foregoing papers and the proceedings held September 15, 2014, the motion is decided as follows:

Factual and Procedural Background

In this medical malpractice action, plaintiff alleges that during her pregnancy, there was, inter alia, a failure to timely diagnose a herniation of an earlier Gastric bypass and failure to timely perform a Cesarean section. Plaintiff alleges the malpractice occurred at Lawrence Hospital Center (hereinafter “Lawrence Hospital”) between September 13, 2010 and September 14, 2010, as well as between September 19, 2010 and October 27, 2010.

Plaintiff appeared for a deposition on September 18, 2013. Plaintiff testified as follows: Defendant Dr. Pan had been her private physician for many years. Dr. Santry and Dr. Buttari were her primary care physicians since 1998. During her pregnancy, plaintiff went to the Emergency Room at Lawrence Hospital (hereinafter “Emergency Room”) on May 3, 2010, and was admitted by Dr. Buttari through May 5, 2010. Thereafter, she went to the Emergency Room on July 2, 2010, where she was seen by Dr. Pan and admitted by Dr. Santry until July 4, 2010.

She again went to Lawrence Hospital on September 13, 2010, was seen by Dr. Pan and Dr. Buttari, and was admitted by Dr. Buttari. Plaintiff was again admitted to Lawrence Hospital on September 19, 2010 to October 27, 2010 by Dr. Santry. During that admission she was treated by Dr. Pan and other physicians.

Dr. Pan appeared for a deposition on October 31, 2013. Dr. Amory and Dr. Silva appeared for depositions on February 7, 2014 and March 10, 2014, respectively. They both testified that they were employees of Columbia University at the time of plaintiff's treatment. They further testified that they were affiliated with the Center for Advanced Surgery, which provides surgical services at Lawrence Hospital. Dr. Amory testified that the Center for Advanced Surgery is an arrangement between Lawrence Hospital and Columbia University for services to be provided at Lawrence Hospital. Dr. Silva testified that the Center for Advanced Surgery is composed of physicians employed by Columbia University, who provide surgical care to patients at Lawrence Hospital.

Dr. Amory also testified that he would see patients at Lawrence Hospital when another doctor asked him or his office for a consultation. He did not have office hours or an on-call schedule with Lawrence Hospital. He testified that he saw plaintiff during her September 13, 2010 admission to Lawrence Hospital at the request of the admitting physician, Dr. Buttari. He also saw plaintiff during her final admission.

Dr. Silva testified that he would see patients at Lawrence Hospital when a patients' internist would call his office, and the admitting physician coordinated all the other specialists attending to the patient. Dr. Silva saw plaintiff for the first time at the request of Dr. Santry. Dr. Silva participated in plaintiff's surgery during her final admission.

Thereafter, plaintiff demanded the deposition of an administrator from Lawrence Hospital regarding the relationship between the Center for Advanced Surgery and Lawrence Hospital. Defendant Lawrence Hospital objected since Dr. Silva and Dr. Amory had already testified about the relationship, and there were no additional administrative witnesses with direct knowledge of the facts at issue in the case.

Plaintiff then demanded the deposition of an officer, agent or employee of Lawrence Hospital with knowledge of Lawrence Hospital's relationships with the Center for Advanced Surgery, Columbia University and the surgeons who staff the Center for Advanced Surgery, as well as any representations made by Lawrence Hospital to third parties regarding those relationships.

On June 26, 2014, defendant Lawrence Hospital disclosed the contract between itself and Columbia University, which outlined their relationship regarding the Center for Advanced Surgery. The contract provides that Columbia University shall provide "Clinical leadership, clinical oversight, supervision and management of Columbia's physicians ..."

By letter dated June 30, 2014, plaintiff demanded the deposition of a witness from Lawrence Hospital regarding “how the hospital acted in providing these surgeons to its patients.”

After a compliance conference where the issue of deposition was discussed, a briefing schedule for the present motion was issued. To date, Lawrence Hospital has not provided a witness for deposition.

The Parties’ Contentions

Defendant Lawrence Hospital now seeks a protective order regarding the demanded deposition. Lawrence Hospital contends that the testimony of Dr. Silva and Dr. Amory, as well as the contract between Lawrence Hospital and Columbia University, establishes that Dr. Silva and Dr. Amory were not employees of Lawrence Hospital. Lawrence Hospital asserts that it is uncontested the Dr. Pan was plaintiff’s private attending physician, and plaintiff’s private physicians requested Dr. Silva and Dr. Amory to treat plaintiff. Therefore, Lawrence Hospital contends that it cannot be held vicariously liable for treatment rendered by Dr. Silva, Dr. Amory and Dr. Pan since they were not and are not employees of Lawrence Hospital. Lawrence Hospital relies on case law wherein the courts held that a hospital was not vicariously liable where the patient’s treatment is directed by his or her own private physician or physicians. Lawrence Hospital further contends that the testimony of Dr. Silva and Dr. Amory, as well as the contract between Lawrence Hospital and Columbia University, establishes the relationship between Dr. Silva, Dr. Amory, Columbia University and Lawrence Hospital. Lawrence Hospital also asserts that there is no witness who can testify as to “how the hospital acted in providing these surgeons to its patients,” since Lawrence Hospital did not “act” and “provide” surgeons to plaintiff. The deposition testimony of Dr. Silva and Dr. Amory, Lawrence Hospital contends, demonstrates that the surgeons were called by plaintiff’s private physicians.

Plaintiff opposes the motion. Plaintiff does not challenge defendant Lawrence Hospital’s recitation of the facts. Similarly, plaintiff concedes that the contract provided by defendant Lawrence Hospital establishes that Dr. Silva and Dr. Amory were not employees of the hospital. Plaintiff, however, contends that although ordinarily a hospital cannot be held vicariously liable for physicians it does not employ, there are exceptions to the general rule. Plaintiff asserts that, as noted in the case law relied upon by defendant Lawrence Hospital, “vicarious liability may be imposed for medical malpractice of an independent attending physician under a theory of apparent or ostensible agency by estoppel” (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; see *Sampson v Contillo*, 55 AD3d 588 [2d Dept 2008]). Accordingly, plaintiff contends that she is entitled to discovery on the issue of vicarious liability, including whether Lawrence Hospital held the doctors out as being part of their staff and whether there was “ostensible” agency. Plaintiff notes that at the nonparty deposition of Dr. McCarthy Smith, he testified that he was given information from Lawrence Hospital about the availability of surgeons from the Center for Advanced Surgery, including brochures and newsletters, and there were signs in the hospital where their offices were located. He further testified that the purpose of publicizing the Center was to have people aware that these surgeons were “on staff and available.”

Plaintiff further contends that although other witnesses provided evidence of Lawrence Hospital's vicarious liability for Dr. Silva and Dr. Amory, these witnesses are not employees of the hospital and their testimony is not binding upon them. Plaintiff also contends that since Lawrence Hospital's website identifies Dr. Silva and Dr. Amory as being part of "our staff," someone in the hospital's administration must have been involved in determining what representations were made on the website. Plaintiff also contends that someone from the hospital's administration must have knowledge about the representations in the newsletters about which Dr. Smith also testified.

Analysis

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). CPLR 3103(a), however, provides the Court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Defendant Lawrence Hospital correctly contends that generally a hospital cannot be held vicariously liable for the malpractice of a private physician who is not employed by the hospital (*Sampson v Contillo*, 55 AD3d 588, 589 [2d Dept 2008]). Plaintiff, however, also correctly contends that there are exceptions to the general rule. Where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician, the courts have held that a hospital may be vicariously liable for a private physician's negligence (*Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887 [2d Dept 2007]; *Orgovan v Bloom*, 7 AD3d 770, 771 [2d Dept 2004]). Moreover, the courts have held that a hospital may be vicariously liable for the negligence of a private physician under a theory of apparent or ostensible agency by estoppel 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 at the hospital's behest" (*Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245, 245-246 [1st Dept 1994], *lv denied* 85 NY2d 805 [1995]; *see Dragotta v Southampton Hosp.*, 39 AD3d 687, 698 [2d Dept 2007]; *Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 706 [2d Dept 2003]). To create such apparent agency, there must be words or conduct by the hospital directed to third-parties which give rise to the appearance and belief that the private physician has authority to act on behalf of the hospital, and the patient must accept the services of the private physician based upon the reasonable belief

that the physician was an employee of the hospital or provided by the hospital (*Sampson v Contillo*, 55 AD3d at 590; *Dragotta v Southampton Hosp.*, 39 AD3d at 698-699).

Accordingly, in *Malcolm v Mount Vernon Hospital (Id.)* the court found an issue of fact existed as to whether the hospital was vicariously liable for negligence of cardiologist, who was not a hospital employee, where plaintiff's private physician chose the cardiologist from the cardiologists "on staff" at the hospital, and cardiologist was called to ICU in response to page by hospital.

An issue of fact was also found to exist as to the vicarious liability of a hospital under similar circumstances as in the present case. In *Sheffield v North Shore-Long Island Jewish Health System* (2009 WL 4099332 [Sup Ct NY County Nov. 16, 2009]), the court held that an issue of fact existed as to whether the hospital was vicariously liable for a private physician/surgeon where plaintiff sought emergency treatment at the hospital and was admitted by her private treating physician, who then called the private physician/surgeon for a consultation. The *Sheffield* court found an issue of fact existed as to vicarious liability even though plaintiff had previously been treated by the private physician/surgeon at the hospital.

The record on the present motion demonstrates that an issue of fact exists as to whether defendant Lawrence Hospital is vicariously liable for any alleged negligence of Dr. Silva and Dr. Amory, surgeons at the Center for Advanced Surgery which is located at Lawrence Hospital. Accordingly, plaintiff is entitled to discovery as to this issue, including a deposition of a witness on behalf of the hospital as to whether the hospital held out Dr. Silva and Dr. Amory to be "on staff" and any representations by the hospital as to its relationship with the Center for Advanced Surgery, Dr. Silva and Dr. Amory. Notably, plaintiff is entitled to the discovery despite the fact that plaintiff conceded on the present motion that the contract provided by defendant Lawrence Hospital establishes that the surgeons from the Center for Advanced Surgery, including Dr. Silva and Dr. Amory, are not employed by defendant Lawrence Hospital.

In view of the foregoing, it is

ORDERED that the motion for a protective order is denied; and it is further

ORDERED that, on or before October 27, 2014, Defendant Lawrence Hospital shall produce for deposition a witness with knowledge of the representations made by Lawrence Hospital to third parties, including private physicians who admitted patients to Lawrence Hospital, regarding the Center for Advanced Surgery, the surgeons who staff the Center for Advanced Surgery, including Dr. Silva and Dr. Amory, and its relationship with the Center for Advanced Surgery and its surgeons; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, October 29, 2014 at 9:30 A.M.; and it is further

ORDERED that movant shall serve a copy of this decision and order with notice of entry upon all parties within 10 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
September 15, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.

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