Amendola v Brookhaven Health Care Facility, LLC
2015 NY Slip Op 30419(U)
March 24, 2015
Supreme Court, Suffolk County
Docket Number: 12-32260
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 12-32260

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-12-14
ADJ. DATE 9-2-14
Mot. Seq. # 005 - MD

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RAYMOND AMENDOLA and ANNE AMENDOLA,

Plaintiffs,

- against -

BROOKHAVEN HEALTH CARE FACILITY, LLC, and THE MCGUIRE GROUP,

Defendant.

---X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated July 22, 2014 , and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated August 26, 2014 , and supporting papers; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other __ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants for an order granting summary judgment in their favor is denied.

On January 26, 2010, plaintiff Raymond Amendola underwent total right hip replacement surgery at Brookhaven Memorial Hospital. Shortly thereafter, he was transferred to an extended care facility operated by defendant Brookhaven Health Care Facility, LLC, to continue his rehabilitation treatment. Plaintiff alleges that in February 2010, while practicing ambulation during a physical therapy session, he sustained perioprosthetic fractures of the right hip and right femur. According to his deposition testimony, plaintiff's alleged injuries occurred as he was ambulating on a small physical therapy staircase, when his body twisted and shifted forward as he attempted to walk down a step using his left foot.

Subsequently, plaintiff and his wife, Anne Amendola, commenced this action against defendants Brookhaven Health Care Facility, LLC, and The McGuire Group, Inc., the apparent owner of such limited

liability company, seeking damages for negligence. More particularly, the complaint alleges plaintiff's injuries were caused by a dangerous condition on the property, and by the negligent operation and management of the facility. The bill of particulars further alleges defendants and their employees were negligent, among other things, in failing to properly supervise plaintiff during the physical therapy session, in failing to use a safety belt or other device when plaintiff was on the therapy stairs, and in failing "to take all necessary steps to prevent injury" to plaintiff.

Defendants now move for summary judgment dismissing the complaint, arguing that they cannot be held liable for any negligence on the part of the assistant physical therapist who was working with plaintiff on the therapy stairs, as she was an employee of St. Charles Hospital. According to defendants, the assistant physical therapist, Virginia Nugent-Zeicr, was assigned to the rehabilitation facility pursuant to a services agreement between Brookhaven Health Care Facility and St. Charles Hospital of Port Jefferson. Defendants further argue that the physical therapy plan devised for plaintiff and the actions of the assistant physical therapist conformed with accepted physical therapy practices, and that there is no evidence plaintiff's injuries were due to a dangerous condition on the premises. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars; transcripts of the deposition testimony of plaintiff, plaintiff's wife and daughter, and Ms. Nugent-Zeicr; the Rehabilitation Services Agreement between Brookhaven Health Care Facility and St. Charles Hospital; and an affidavit of Frances Corio, a licensed physical therapist.

Plaintiffs oppose the motion, arguing that, under the terms of the services agreement, Brookhaven Health Facility assumed responsibility for the services provided to its patients by the rehabilitation professionals assigned to the facility by St. Charles Hospital. Plaintiffs further contend that issues of fact exist as to whether the physical therapy program created for plaintiff and the stair training provided by Ms. Nugent-Zeicr deviated from accepted practices. In opposition, plaintiffs submit an affidavit of Vibhor Makkar, a licensed physical therapist.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (***Friends of Animals v Associate Fur Mfrs.***, 46 NY2d 1065, 1067-1068, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Solan v Great Neck Union Free School Dist.***, 43 AD3d

1035, 842 NYS2d 52 [2d Dept 2007]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Although proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Garcia v Pepe***, 11 AD3d 654, 783 NYS2d 406 [2d Dept 2004], *lv dismissed in part, denied in part* 5 NY3d 821, 804 NYS2d 31 [2005]). Proximate cause may be inferred from the facts and circumstances surrounding the injury; however, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

"An allegation that a party failed in the proper performance of services related primarily to [his or her] profession is a claim of professional malpractice" (***Travelers Indem. Co. v Zeff Design***, 60 AD3d 453, 455, 875 NYS2d 456 [1st Dept 2009]). To establish liability for professional malpractice, a plaintiff must prove the defendant deviated or departed from the accepted practices of such profession, and that such deviation or departure was a proximate cause of the plaintiff's injury (***Archer v Haeri***, 91 AD3d 685, 685, 936 NYS2d 559 [2d Dept 2012]; ***Georgetti v United Hosp. Med. Ctr.***, 204 AD2d 271, 272, 611 NYS2d 583 [2d Dept 1994]; *see* ***43 Park Owners Group, LLC v Commonwealth Land Title Ins. Co.***, 121 AD3d 937, 995 NYS2d 148 [2d Dept 2014]; ***Bruno v Trus Joist a Weyerhaeuser Bus.***, 87 AD3d 670, 929 NYS2d 163 [2d Dept 2011]). On a motion for summary judgment dismissing a professional malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted practice in such profession or that the plaintiff was not injured thereby (*see e.g.* ***Archer v Haeri***, 91 AD3d 685, 936 NYS2d 559; ***Shank v Mehling***, 84 AD3d 776, 922 NYS2d 495 [2d Dept 2011]; ***Kung v Zheng***, 73 AD3d 862, 901 NYS2d 334 [2d Dept 2010]; ***Shahid v New York City Health & Hosps. Corp.***, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]).

It is well settled that 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 (*see* ***Myers v Ferrara***, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]; ***Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.***, 51 AD3d 769, 858 NYS2d 280 [2d Dept 2008]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; ***Biggs v Mary Immaculate Hosp.***, 303 AD2d 702, 758 NYS2d 83 [2d Dept], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). However, as the practice of physical therapy is distinct from the practice of medicine, a physical therapist will be held to the standard of care of a reasonably prudent physical therapist (*see* ***Archer v Haeri***, 91 AD3d 685, 936 NYS2d 559; ***Shank v Mehling***, 84 AD3d 776, 922 NYS2d 495; ***Latona v Roberson***, 71 AD3d 1498, 897 NYS2d 378 [4th Dept 2010]). Thus, a physical therapist accused of malpractice moving for summary judgment must establish as a matter of law that he or she did not deviate from the good and accepted practices of physical therapy, or that any deviation therefrom was not a proximate cause of the plaintiff's injuries (*see* ***Barlev v Bethpage Physical Therapy Assoc., P.C.***, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]; ***Shank v Mehling***, 84 AD3d 776, 922 NYS2d 495; ***Bickom v Bierwagen***, 48 AD3d 1247, 852 NYS2d 542 [4th Dept 2008]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue as to whether the defendant

deviated from accepted practices and whether such deviation was a proximate cause of the plaintiff's injuries (*see* ***Latona v Roberson***, 71 AD3d 1498, 897 NYS2d 378; ***Bickom v Bierwagen***, 48 AD3d 1247, 852 NYS2d 542; ***Ives v Allard Chiropractic Off.***, 274 AD2d 910, 711 NYS2d 85 [3d Dept 2000]; *see also* ***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

As to defendants' claim that they cannot be held liable for any negligence that may have been committed by the physical therapy assistant, Ms. Nugent-Zeicr, as she was an employee of St. Charles Hospital, a hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, with such duty measured by the patient's ability to provide for his or her own safety and circumscribed by those risks that are reasonably foreseeable (*see* ***N.X. v Cabrini Med. Ctr.***, 97 AD3d 247, 739 NYS2d 348 [2002]; ***Alexander v American Med. Response***, 68 AD3d 1026, 893 NYS2d 87 [2d Dept 2009]; ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, 51 AD3d 848, 859 NYS2d 224 [2d Dept 2008]). And while a principal generally is not liable for the wrongful acts of an independent contractor it retains, a hospital or health care facility may be vicariously liable for the negligence committed by an independent contractor or by employee of an independent contractor under the theory of ostensible or apparent agency by estoppel if the patient presented at the hospital or facility for treatment and accepted treatment under a reasonable belief that the independent physician or employee was acting for the hospital or the facility or with the authority to act on its part (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Hannon v Siegel-Cooper Co.***, 167 NY 244, 60 NE 597 [1901]; ***Sampson v Contillo***, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]; ***Dragotta v Southampton Hosp.***, 39 AD3d 697, 833 NYS2d 638 [2d Dept 2007]). Apparent agency may be found to exist when a hospital or other health care facility represents, through word or conduct, that another is its servant or other agent, thereby causing a third person to reasonably rely upon the care or skill of the apparent agent to act on behalf of the principal (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904; ***King v Mitchell***, 31 AD3d 958, 819 NYS2d 169 [3d Dept 2006]; ***Contu v Albert***, 18 AD3d 692, 795 NYS2d 740 [2d Dept 2005]). Thus, contrary to defendants' counsel's assertion, evidence in the record that the physical therapists and assistant physical therapists working in the physical therapy department of Brookhaven Health Care Facility in February 2010 actually were employees of St. Charles Hospital is not decisive of the issue of whether defendants may be held vicarious liability for any malpractice allegedly committed during plaintiff's physical therapy sessions (*see* ***Harrington v Neurological Inst. of Columbia Presbyt. Med. Ctr.***, 254 AD2d 129, 679 NYS2d 17 [1st Dept 1998]; ***Santiago v Archer***, 136 AD2d 690, 524 NYS2d 106 [2d Dept 1988]). Moreover, while Ms. Nugent-Zeicr testified she worked for St. Charles Hospital and had been assigned to work at Brookhaven Health Care Facility at the time of plaintiff's admission, the copy of the Rehabilitation Services Agreement annexed to the moving papers indicates that while the hospital agreed to "[s]upervise and coordinate all of its employees assigned to the physical therapy and occupational therapy areas," the health care facility agreed to "retain ultimate professional and administrative responsibility for the services rendered."

Defendants, however, met their burden on the motion with evidence establishing a prima facie case that the physical therapy program created by the physical therapists working at the rehabilitation facility and the actions of Ms. Nugent-Zeicr as she assisted plaintiff during his physical therapy session did not deviate from accepted physical therapy practice (*see* ***Marra v Hughes***, 123 AD3d 1307, 999 NYS2d 576 [3d Dept 2014]; ***Shank v Mehling***, 84 AD3d 776, 922 NYS2d 495; ***Bickom v Bierwagen***, 48 AD3d 1247, 852 NYS2d 542 [4th Dept 2008]). Here, the affidavit of Frances Corio states, in relevant part, that it was appropriate to incorporate stair therapy into plaintiff's rehabilitation program approximately two weeks after

his hip replacement surgery, as plaintiff needed to regain function and use of his right leg, he was able to walk 40 feet with contact guarding from a therapist approximately one week before commencing stair therapy, and he was able to ascend and descend the stairs without assistance before the incident that allegedly caused his injuries. It further states that Ms. Nugent-Zeicr, the assistant physical therapist working with plaintiff, properly demonstrated how to perform the stair therapy and adequately supervised plaintiff as he was performing such therapy, and that there was no basis for using a safety belt on plaintiff.

Moreover, as to the allegations in the complaint and the bill of particulars that plaintiff's injury was due to a dangerous condition on the property, to impose liability based on a failure to keep premises in a reasonably safe condition, a plaintiff must show the existence of a dangerous or defective condition on the property, that such condition caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Sama v Sama***, 92 AD3d 862, 939 NYS2d 113 [2d Dept 2012]; ***Winder v Executive Cleaning Servs., LLC***, 91 AD3d 865, 936 NYS2d 687 [2d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 AD3d 947, 621 NYS2d 511 [1994]). While proximate cause generally is a matter for the jury (*see* ***Deirdiaran v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]), defendants' submissions, namely the deposition testimony, demonstrated that the alleged incident was not related to a dangerous or defective condition on the staircase on which plaintiff was performing stair therapy.

The burden, therefore, shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). In opposition, plaintiff submitted the affidavit of physical therapist Vibhor Makkar, which raises a triable issue of fact as to whether the assistant physical therapist properly instructed plaintiff how to perform the stair therapy and whether she properly supervised his activity while he was on the therapy staircase. The Court notes as defendants failed to submit evidence on the issue of whether the alleged departures were a proximate cause of plaintiff's injuries, plaintiff was not obligated to address this question (*see* ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Accordingly, the motion for summary judgment in defendants' favor is denied.

Dated: March 24, 2015

PETER H. MAYER, J.S.C.