Angueira v New York Univ. Med. Ctr. Hosp. for Joint Diseases
2015 NY Slip Op 32298(U)
November 6, 2015
Supreme Court, New York County
Docket Number: 102420/09
Judge: Alice Schlesinger

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

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LORAINE ANGUEIRA,

Index No. 102420/09

Plaintiff,

-against-

NEW YORK UNIVERSITY MEDICAL CENTER
HOSPITAL FOR JOINT DISEASES,

Defendant.

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SCHLESINGER, J.:

In the course of this 2009 action which was set to go to trial sometime in mid-November of 2015, at a pretrial conference held before this Court on September 16, 2015, counsel for the defendant NYU Hospital made it clear that a primary defense that his client would be utilizing at trial would be the lack of vicarious responsibility that the Hospital had for the actions of Ms. Angueira's surgeon, Dr. John-Pierre Farcy. Dr. Farcy was never a defendant in this action.

It is without dispute that Dr. Farcy was the plaintiff's chosen spine surgeon. She had consulted with him earlier and after conservative treatment had failed, Dr. Farcy suggested spinal surgery which she agreed to. Since Dr. Farcy was an Attending at two New York hospitals, NYU being one of those, Dr. Farcy elected to have Ms. Angueira go to NYU.

In July 2012, this Court decided a summary judgment motion made by the Hospital. In limiting the claims, I specifically upheld for trial two departures regarding the dispensing of prophylactic antibiotics on the day of the surgery, February 5, 2007. Specifically, pursuant to the expert opinion of Dr. William R. Jarvis, he said that accepted standards of surgical care required that prophylactic antibiotics be administered within 1 hour of the first

incision into the patient and then redosing the patient with this antibiotic within 3-6 hours of the first dose. Here, the actual infusion began, as noted by a nurse employed by NYU, at 9:00 a.m. However, the actual incision did not occur until 10:09 a.m. With regard to the second dose, while the surgery concluded at about 3:00 p.m., a second dose of Clindamycin was not given until 5:00 p.m. This was about 2 hours after the surgery was completed or 8 hours after the first dose. In other words, it was not given during the 3-6 hour window urged by Dr. Jarvis.

Even though the plaintiff had made it clear in her Bill of Particulars that this claim, the improper dispensing of preventive antibiotics was a departure from accepted standards of care, it was implicitly suggested that it was Dr. Farcy as the surgeon who was responsible for these failures. The Bill of Particulars, in response to #3, the relevant part said "defendant NYU hospital centers... by and through its agents .... was negligent .... in failing to prevent a Methicillin Resistant Staphylococcus Aureus (MRSA) infection in plaintiff's surgical wound; (and) in failing to provide prophylactic antibiotics to Plaintiff prior to, and after her surgery". During our September conference, when defense counsel asserted that Dr. Farcy was a private physician and not an employee of NYU, there was some uncertainty as to what plaintiff's position would be. Was it that Dr. Farcy was responsible in making the decisions regarding administering antibiotics during the surgery and if he was responsible for those decisions, was NYU responsible for him as his employer. (Although, the above quote from the Bill of Particulars spoke in general terms of "agents" not specifically "doctors".)

I asked the attorneys to brief this issue as it could be a dispositive one. Since the trial was going to be tried sometime in mid to late November, I thought it was necessary

to discuss and decide this issue expeditiously. I directed simultaneous submissions of memoranda. The first two memos I received were from opposing counsel and then a third one from defendant, arguably in response to claims that the plaintiff was making. Then, I directed that counsel and the Court have a conference call at 10:00 on the morning of November 2, 2015.

I believe it is clear at this point that despite Dr. Farcy's statement at his deposition, when asked who was his employer and he answered "I think it was NYU JD", that this was incorrect. He later corrected this on an errata sheet dated April 3, 2015, served on plaintiff's counsel two days later. In that sheet, Dr. Farcy changed his answer to "I was employed by the NYU School of Medicine."

At our telephone conference this morning, counsel for NYU said that he had obtained a contract between the School of Medicine and Dr. Farcy. I also asked him to obtain either a tax return or W-2 or a check showing that money was paid to Dr. Farcy by the School of Medicine or the University. Based on this relationship, it would appear that plaintiff can not rely on vicarious responsibility, as the Hospital is not his employer.

However, that does not mean that the action has no merit. Because another argument made by plaintiff's counsel was that NYU, as a Hospital, who had to be concerned with the prevention of and/or spread of infections in its institution had an independent duty to take necessary steps to do that, i.e., prevent infections.

Counsel for defendant on page 4 of their initial memorandum of law, the second full paragraph, says that while the hospital chart did not contain a specific order for the pre-operative dose of Clindamycin, the proof at trial would show that the antibiotic was a "part of Dr. Farcy's standing ordered for spinal fusion surgery, when performed on a patient, such as the plaintiff, who had an allergy to penicillin." "Further", continued the defense, "at

no point during the surgery did Dr. Farcy issue any direction or order to give the plaintiff a second order." It appears from that same chart that an order was written post-operatively by Dr. Burt Yaszaw, a Fellow at the Hospital, who assisted Dr. Farcy, as to when the second dose of antibiotics was administered.

I interpret this statement of what Dr. Farcy did or did not do vis-a-vis the prophylactic antibiotic that Dr. Farcy, as the surgeon, did not specifically instruct the nurses or anyone else present at the surgery to give this medicine by infusion to this patient. I also believe that under certain Rules and Regulations articulated in the New York State Public Health Law and affirmed by the New York State Department of Health and Hospitals that N.Y.U. had a non-delegable duty in providing for the safety and welfare of their patients and of the quality of care the patients receive. Specifically, 10 NYCRR §405.11 (ii), cited by counsel for plaintiff, speaks directly to infection control. I interpret this to mean that the Hospital has a duty, elaborated upon by Dr. Jarvis, to the effect that the Hospital shares in the obligations to the patient together with the surgeon, via its nursing staff and Residents and Fellows to make sure that steps are taken to prevent surgical patients from acquiring infections at their hospitals. This seems to have been what happened to Ms. Angueira in February 2007, that she acquired MRSA at that time.

Case law supports the view that while the surgeon is generally the supervisor of what occurs in the operating room, and others present are to follow these instructions, when these staff members note that a surgeon's orders or failure to make orders are contradicted by normal practice, or are contraindicated, it is the staff's obligation to intervene and prevent injury to the patient. *Toth v. Community Hosp.*, 22 NY2d 255 (1968) *Fiorentino v. Wenger*, 19 NY2d 4007 (1967) and *Christopher v. St. Vincent's Hosp.*, 121

AD2d 303 (1986).

And therefore, I make the following findings. There is no factual support for the idea that Dr. Farcy was employed by NYU or that he was anything but a privately retained surgeon by the plaintiff Lorraine Angueira. Therefore, to the extent that Dr. Farcy himself was solely responsible for the orders and administration of prophylactic antibiotics, the Hospital is not responsible for those acts of alleged negligence, under theories of vicarious responsibility. However, to the extent that the Hospital, via its staff, which includes nurses, Residents and Fellows, also has a responsibility with regard to infection control, which I find they do, the plaintiff can argue that the standard of surgical/medical care with regard to the timing of antibiotic dosage during surgery was not followed here and that the failure to follow those standards was at least in part "theirs", meaning the Hospital's responsibility.

To further explain, it may be that Dr. Farcy did articulate his orders, as to when the antibiotics were to be administered and that these were in accord with proper surgical/medical standards but that the nurses failed to properly follow those orders. Or it could be that Dr. Farcy did not explicitly provide such a direction leaving it to the Hospital staff to implement arguably well-known standards of proper infection prevention. Or there are, of course, other possibilities. The finding that I make here is that the Hospital itself has an independent duty to protect patients from acquiring infections in their institutions. Therefore, depending on the factual circumstances which occurred here, the Hospital was jointly responsible to the extent of carrying out Dr. Farcy's instructions, assuming they were not contra indicated or independently fulfilling its own duties to make sure a proper dosage of antibiotic medicine was timely given to Ms. Angueira.

As I stated to the attorneys on Monday morning, the plaintiff can maintain her action assuming that she adopts this standard. In other words, the hospital is not responsible for what Dr. Farcy did or did not do. Rather, it is responsible for what it did or did not do, independent or at least not dependent solely on Dr. Farcy's actions.

Dated: November 6, 2015

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J.S.C.
ALICE SCHLESINGER