

Hooker v Magill

2015 NY Slip Op 32753(U)

May 14, 2015

Supreme Court, New York County

Docket Number: 800192/11

Judge: Alice Schlesinger

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

-----X
JAMIE HOOKER,

Index No. 800192/11
Mot. Seq. No. 002

Plaintiff,

-against-

DAVID BRYAN MAGILL and NYU LANGONE
MEDICAL CENTER,

Defendants.

-----X
SCHLESINGER, J.:

Before the Court is a motion by defendants to dismiss any medical malpractice claim against defendant David Bryan Magill and to dismiss all claims against defendant NYU pursuant to CPLR §3211(a)7 for failure to state a cause of action. After the action was commenced, Dr. Magill passed away and the New York County Public Administrator was appointed Administrator of the Estate of David Bryan Magill, but the caption was not amended. Plaintiff opposes the motion in all respects.

FILED

Background Facts

Defendant David Bryan Magill, D.O., was a physician specializing in physical and rehabilitative medicine, employed at all relevant times by NYU Langone Medical Center (NYU). Plaintiff Jamie Hooker was being treated by Dr. Magill for severe muscle spasticity and pain related to cerebral palsy with a Baclofen Pump. On May 31, 2010, after adjusting the dosage of the drug delivered by the pump, Dr. Magill drove plaintiff to the Bronx Parkway Motel where he had sexual intercourse with her.

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NEW YORK

Plaintiff commenced this action on or about June 21, 2011 asserting four causes of action; namely, (1) an intentional tort of assault against Dr. Magill, with a request for

punitive damages; (2) medical malpractice against Dr. Magill; (3) medical malpractice and negligent hiring and credentialing against NYU, with a request for punitive damages; and (4) intentional tort against Dr. Magill.¹ (Motion, Exh C). After issue was joined, plaintiff served a Bill of Particulars as to each defendant (Exh E and F). However, defendant has allegedly not yet responded to plaintiff's discovery demands, and no depositions have yet been held.

Discussion

Defense counsel in her motion first addresses the claims against NYU asserted in the third cause of action. Citing various cases such as *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 (1999), counsel asserts that a hospital employer cannot be held vicariously liable under the doctrine of *respondeat superior* for an intentional tort committed by a physician employee. Sexual misconduct of the nature alleged here cannot be the basis for vicarious liability even if the act is committed in the employment context, as such an act cannot be considered to be within the "scope of employment." *N.X. v Cabrini Medical Center*, 97 NY2d 247, 251 (2002).

To the extent plaintiff claims that NYU is liable based on its negligent hiring and credentialing of Dr. Magill, defendant asserts that the claim is not properly pled with the required particularity. More significantly, counsel asserts that a necessary element of a cause of action for negligent hiring is that the employer knew or should have known of the employee's propensity for the conduct that caused the injury. See, e.g., *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878-89 (2nd Dep't 2006).

¹ It is unclear how the fourth cause of action differs from the first, except that the factual predicate is alleged to be the facts alleged in the third cause of action against NYU.

To establish that NYU did not know or have reason to know of any propensity on the part of Dr. Magill for sexual misconduct, defendant has provided two affidavits with the motion. The first is from Justin Lilien, Manager of Employee and Labor Relations for NYU, who is "familiar with the operations of NYU" and who has "reviewed the hiring files of Dr. Magill, which are maintained in the Human Resources Department in the ordinary course at NYU Hospitals Center." (Exh A). Mr. Lilien states (at ¶4) that: "My review of the hiring files of Dr. Magill maintained in the Human Resources Department reveals that there is no documentation or other evidence of any professional or personal misconduct prior to the alleged actions in this lawsuit that would have put NYU Hospitals Center on notice of Dr. Magill's alleged propensity for sexual misconduct or any of the other types of behavior alleged by plaintiff in this matter."

The second affidavit is from Dorothy Zelenik, who is familiar with the operations of NYU in her capacity as Director of the Medical Staff Services for NYU. Ms. Zelenik indicates that, pursuant to Public Health Law §2805j(1)(f), a physician's "departmental and credential files maintained by a hospital contain relevant quality assurance information, application material concerning education, post-graduate education and training, credentials and experience, along with the applicant's health report and information concerning performance," and she adds that her review of Dr. Magill's file confirmed compliance with that section of law (¶ 3,4). Further, she states (at ¶5) based on her review of the departmental and credential files of Dr. Magill that "there is no documentation or other evidence of any professional or personal misconduct prior to the alleged actions in this lawsuit that would have put NYU Hospitals Center on notice of Dr. Magill's alleged propensity for sexual misconduct or any of the other types of behavior alleged by plaintiff in this matter."

In response, plaintiff emphasizes that the instant motion is a pre-note motion to dismiss made before the completion of discovery. Counsel insists that vicarious liability for the acts of Dr. Magill lies based on the doctor's "negligent" administration of an excessive amount of the medication baclofen, which undermined the patient's ability to effectively refuse the doctor's inappropriate sexual advances. This Court must disagree. Accepting the facts alleged in the complaint as true for purposes of the motion, Dr. Magill's conduct was indisputably intentional and cannot be viewed as negligent. Thus, NYU is entitled to the dismissal of any claim for vicarious liability based on the acts of Dr. Magill.

Similarly, this Court rejects plaintiff's opposition to the proposed dismissal of the claim against NYU for negligent hiring and credentialing. The two NYU affidavits are persuasive. In response, plaintiff offers her own affidavit in which she alleges that various NYU nurses observed overly personal and overly attentive behavior by Dr. Magill toward plaintiff, such as providing his cell phone number and visiting plaintiff for an extended time while she was hospitalized in NYU's psychiatric ward for an eating disorder. But the alleged observations by these nurses were not raised by plaintiff until *after* this motion was made. Before the motion was made, plaintiff in her October 2, 2013 response to defendant's Combined Demands stated that her mother was the only witness to Dr. Magill's inappropriate conduct.

What is more, plaintiff in her affidavit in opposition to the motion here herself states that she does not know and cannot say whether any of these nurses ever reported their alleged observations to supervisors or others with authority at NYU. As such, when compared to the NYU affidavits confirming that the official files contain no

evidence of prior misconduct by the doctor, plaintiff's affidavit fails to raise an issue of fact in connection with the claim of negligent hiring and credentialing, and NYU is therefore entitled to the dismissal of that claim as well, leaving no claim in this case against the hospital.

The same cannot be said for Dr. Magill, however. Defendant's motion regarding the doctor seeks only to dismiss the second cause of action sounding in medical malpractice; the motion does not seek dismissal of the intentional tort claims alleged in the first and fourth causes of action. As to the malpractice, defense counsel asserts that "conduct by a physician constitutes malpractice only when the conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment." *Gross v Kurk*, 224 AD2d 582 (2nd Dep't 1996), citing *Scott v Uljanov*, 74 NY2d 673 (1989). Citing *Gross*, a case with facts very similar to the facts here, counsel asserts that alleged sexual misconduct by a physician does not bear a substantial relationship to the rendition of medical treatment, despite the physician-patient relationship.

In response, plaintiff contends that the doctor's "negligent" administration of an excessive amount of baclofen was part and parcel of the medical treatment. Counsel contends also that the motion must fail because defendant has failed to include in the papers an affidavit from a medical expert opining that the doctor did not deviate from accepted standards of care.

Plaintiff's arguments are wholly without merit. As stated earlier, the conduct alleged here was intentional in nature. Again accepting the facts alleged in the complaint as true, the doctor purposely overdosed the plaintiff in order to undermine her

ability to effectively ward off the doctor's sexual misconduct. As the alleged conduct does not sound in negligence or medical malpractice, no expert affidavit is required. Nor can it be said that the conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment. Thus, while the first and fourth causes of action survive dismissal, they do so only to the extent that they are based on an intentional tort, rather than malpractice.

Accordingly, it is hereby

ORDERED that the motion to dismiss by NYU Hospitals Center s/h/a NYU Langone Medical Center is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant David Bryan Magill by the Public Administrator as Administrator of the Estate of Dr. Magill, except that all claims sounding in medical malpractice as against David Bryan Magill are dismissed; and it is further

ORDERED that the caption shall be amended to delete any reference to NYU Hospitals Center s/h/a NYU Langone Medical Center upon the movant's service of a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of Trial Support (Room 119), who are directed to mark the court's records to reflect the change in the caption; and it is further

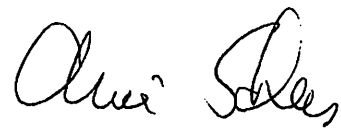
ORDERED that counsel shall appear in Room 222 on May 20, 2015 at 9:30 a.m. for a discovery conference.

Dated: May 14, 2015

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J.S.C.

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