

O'Gallagher v Dowd

2016 NY Slip Op 32740(U)

August 1, 2016

Supreme Court, Suffolk County

Docket Number: 12E-13827

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 12E-13827
CAL. No. 15-01077MM

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 11-17-15
ADJ. DATE 2-5-16
Mot. Seq. #001- MG; CASEDISP

-----X

JOELLEN O’GALLAGHER and DENNIS O’GALLAGHER,

Plaintiffs,

- against -

ANDREW DOWD, M.D. and JOHN T. MATHER MEMORIAL HOSPITAL OF PORT JEFFERSON, NEW YORK, INC.,

Defendants.

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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 defendant John T. Mather Memorial Hospital, dated October 6, 2015 , and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the , dated , 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 unopposed motion of defendant John T. Mather Memorial Hospital for summary judgment dismissing the complaint against it is granted.

Plaintiff Joellen O’Gallagher commenced this medical malpractice action against defendants to recover damages for injuries allegedly sustained as a result of negligent care and treatment and lack of informed consent. Plaintiff Dennis O’Gallagher, her husband, brought a derivative claim for loss of services

O'Gallagher v Dowd

Index No. 12-13827

Page 2

and companionship. By her bill of particulars, plaintiff alleges that defendants Dr. Andrew Dowd and John T. Mather Memorial Hospital (hereinafter Mather Hospital) were negligent in, among other things, failing to perform proper pre-operative testing, failing to properly perform carpal tunnel release surgery, and failing to advise plaintiff of the risks of the surgery and alternatives. Plaintiff further alleges Dr. Dowd is an employee of defendant Mather Hospital, and that it is vicariously liable for his malpractice. By stipulation dated November 30, 2015, this action was discontinued against Dr. Dowd.

Mather Hospital now moves for summary judgment dismissing the complaint against it on the ground that Dr. Dowd is not an employee and, therefore, it cannot be vicariously liable for his alleged negligence. Further, the hospital argues that its treatment of plaintiff did not depart from accepted medical practice, and that it was not a proximate cause of her alleged injuries. In support of its motion, the hospital submits copies of the pleadings, the verified bill of particulars, the transcripts of the parties' deposition testimony, the affirmation of Christopher Gharibo, M.D., and a report prepared by Lloyd Saberski, M.D., who conducted an independent medical examination of plaintiff.

Plaintiff testified that she presented to Dr. Dowd in February 2010 with complaints of pain in her left wrist, and that he examined her and diagnosed her with carpal tunnel syndrome for which he recommended surgery. She testified that she underwent the surgery on February 19, 2010, and that she was discharged the same day. Plaintiff testified that prior to the surgery she signed several forms and was given instructions for post-operative care. She testified that after the surgery, the pain in her wrist was worse, that she was given pain medication, and that she presented to Dr. Dowd's office one week later. She testified that he removed the bandage and examined her hand and wrist, and it was swollen. Plaintiff testified that she returned to Dr. Dowd's office the following week and he removed the stitches. She testified that she continued to have pain in her wrist and she continued to present to Dr. Dowd on a weekly basis with complaints of pain, swelling, and that she could not move her hand. Plaintiff testified that Dr. Dowd recommended that she obtain physical therapy.

Plaintiff testified that in April 2010, her hand became clenched in a fist position from her fingers being swollen. She testified that she went to the emergency room of Mather Hospital and they gave her pain medication and instructed her to contact Dr. Dowd. She testified that Dr. Dowd told her that she needed physical therapy. Plaintiff testified that she presented to the emergency room on another occasion for the pain and that she went for physical therapy twice a week. She testified that she was still in pain and presented to Dr. Dowd again, and that he told her he was going to perform a modification surgery. She testified that she presented at Mather Hospital for the surgery and was prepped, but that the anaesthesiologist cancelled it. Plaintiff testified that Dr. Dowd recommended that she be treated by pain management doctors, and that she treated with Dr. Steven Litman, who performed two stellate ganglion nerve blocks. Plaintiff testified that she treated with Robert Wilutis, a physical therapist, several times per month until May 2013, and that she has seen several doctors. She testified that she is being treated for issues with her right hand and suffers from rheumatoid arthritis.

Dr. Dowd testified that he is a board certified orthopedist and hand surgeon and that he has performed at least 2,000 carpal tunnel release surgeries. He testified that plaintiff presented to his office on February 9, 2010 with complaints of pain in her left wrist. Dr. Dowd referred to his notes for the testimony and testified that plaintiff filled out patient forms, he obtained her medical history, examined her, and

O'Gallagher v Dowd

Index No. 12-13827

Page 3

performed various tests on plaintiff which indicated she had a "clear cut case of carpal tunnel syndrome." He testified that he discussed conservative treatments with plaintiff and a surgical option, and that they both determined she would have the surgery. Dr. Dowd testified on February 19, 2010, plaintiff presented for the surgery at Mather Hospital, she signed a consent form, and he performed the surgery. He testified that plaintiff was taken to the recovery room and discharged with written instructions for post-operative care. Dr. Dowd testified that plaintiff presented to his office on February 23, 2010, at which time he examined her, changed the bandage and told her to follow up with him in one week. He testified that she presented on March 2, 2010 and March 9, 2010 for routine follow-up visits and that there was nothing unusual in the patient chart; there was no swelling, no infection, but mild sensitivity at the incision area. He testified that on March 23, 2010, plaintiff presented with mild swelling and limited motion, so he referred her to Robert Wilitus for physical therapy treatments. Dr. Dowd testified that plaintiff returned on March 30, 2010 and that his impression was status post carpal tunnel release with slow healing. He testified that typical post carpal tunnel release patients would not return after 6 weeks, and that plaintiff's complaints of stiffness in her fingers when she presented on April 27, 2010 was unexplainable, bizarre and abnormal.

Dr. Dowd testified that he scheduled a manipulation under anaesthesia procedure at Mather Hospital, but that the anaesthesiologist, Dr. Paul, cancelled the surgery. He testified plaintiff was referred to Dr. Litman, a pain management physician, and did not explain why Dr. Paul cancelled the surgery. Dr. Dowd testified that Dr. Litman took over plaintiff's care, and that he had no further contact with her. He testified that plaintiff's clenched fist was atypical and beyond his domain.

Trisha Calvarese testified that she works part time at Mather Hospital as a nurse in the ambulatory surgery unit. She testified that she was plaintiff's pre-operative care nurse on February 19, 2010. Calvarese described the intake procedure for patients undergoing ambulatory surgeries at Mather Hospital. She testified that after a patient checks in with the receptionist they change into a hospital gown and go to the pre-operative area, where they are seated in a recliner and their vital signs are taken by a nurse's aid. She testified that she then greets the patient, puts an identification bracelet on the patient, and confirms that the patient and the procedure match. She testified that she reviews the patient's chart, which she obtains from pre-surgical testing and ensures that the consent form and the doctor's orders match. Calvarese testified that she reads the consent form to the patient and they sign it. She testified that she goes through the pre-operative checklist with the patient and describes in detail what the check list includes. Calvarese testified that when the checklist is complete the operating nurse reviews and signs it. Calvarese testified that she begins the IV. She testified that the surgeon, the anaesthesiologist, and the operating room nurse meet with the patient, mark the surgical site, and confirm the consent form and sign it. Calvarese testified that the patient is then brought to the operating room and to the recovery room once the surgery is complete. She testified that the patient is discharged if they meet certain criteria and the information is contained in a form referred to as "ambulatory surgery flow record." Calvarese was shown a four-page document which she identified as a "presurgical assessment form" created on February 17, 2010 by Nurse Kim Buncke, who conducted plaintiff's pre-surgical testing. Calvarese was also shown a two-page document, the "ambulatory flow record," signed by Nurse Terry McDonald, who was plaintiff's post-operative nurse. She testified that the documents indicate that plaintiff was discharged with instructions at 4:45 a.m.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A hospital owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (*see Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]). “The requisite elements of proof in a medical malpractice are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage” (*Paone v Lattarulo*, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). Therefore, to establish medical malpractice by a hospital through its employees, expert medical testimony must be offered to demonstrate that a staff physician, resident, intern, nurse, technician, or other professional employee violated some accepted standard of good professional practice (*see Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 98 AD3d 545, 949 NYS 2d 714 [2d Dept 2012]).

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (*see Hill v St Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3 [1957]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the hospital. However, “an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing” (*Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]). Under a theory of apparent or ostensible agency, a hospital may be vicariously liable for the malpractice of a physician, who is not an employee of the hospital, if a patient reasonably believes that the physicians treating him or her were provided by the hospital or acted on behalf of the hospital (*Hilsdorf v Tsioulis*, 132 AD3d 727, 17 NYS3d 655 [2d Dept 2015]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2015]).

To establish a prima facie showing of entitlement to summary judgment, a defendant hospital must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant’s treatment of the patient or that any departure was not a proximate cause of plaintiff’s injuries (*see Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy its burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff’s bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

O'Gallagher v Dowd
 Index No. 12-13827
 Page 5

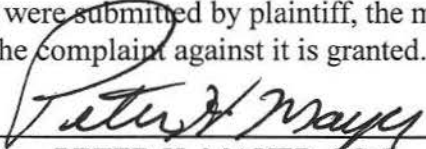
The hospital submits an affirmation of Dr. Christopher Gharibo, who states that he is board certified in anaesthesiology and pain medicine. Dr. Gharibo states that he has reviewed the pleadings, the bill of particulars, the deposition testimony of the parties, plaintiff's medical records and hospital records, and the report of Dr. Lloyd Saberski, who conducted an independent medical examination of plaintiff. Dr. Gharibo opines, with a reasonable degree of medical certainty, that plaintiff does not have nerve damage in her wrist, and that, in any event, the hospital did not breach a duty of care owed to her and was not a proximate cause of her injuries. Dr. Gharibo avers that the carpal tunnel release surgery was performed properly, that the hospital staff acted in accordance with accepted medical standards, and that the care rendered by the staff was not a cause of plaintiff's alleged injuries. He states that plaintiff was properly discharged from the hospital with a pain level of 3 out of 10, and that when she woke from surgery her pain score was 0. He explained that the carpal tunnel release surgery was properly performed and adequately describes the basis for his opinion. Furthermore, having reviewed plaintiff's medical history and treatment by doctors preceding the treatment by Dr. Dowd, Dr. Gharibo opines that plaintiff suffered from rheumatoid arthritis and polyarthralgia prior to the carpal tunnel release surgery.

Dr. Gharibo opines, with a reasonable degree of medical certainty, that the treatment rendered to plaintiff in April at the emergency room was in accord with accepted medical practice as they treated her for pain and advised her to contact Dr. Dowd. He avers that the hospital did not depart from acceptable medical practice when the anaesthesiologist, who was not a hospital employee, decided to cancel the modification procedure, as it is within the anaesthesiologist's role to consult with the surgeon and make recommendations.

Here, Mather Hospital established, prima facie, that Dr. Dowd was not an employee of the hospital (*Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]). The mere status as an attending physician is insufficient to impute any negligence on the part of Dr. Dowd to the hospital (*Hill v St Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904). Plaintiff testified that she retained Dr. Dowd as her surgeon to perform an elective surgical procedure, and presented at Dr. Dowd's office seeking treatment prior to her admission at Mather Hospital. Nothing in the record indicates that plaintiff believed Dr. Dowd was acting on behalf of the hospital.

Mather Hospital also established, prima facie, that its treatment of plaintiff was in accord with accepted medical practice and was not a cause of plaintiff's alleged injury. In addition, the evidence submitted by the hospital also established that plaintiff was informed of the risks of the surgery and of the alternatives to surgery, and that she expressly gave her consent to the surgery. More importantly, the hospital does not have a duty to obtain plaintiff's consent, as she was treated by her private physician, Dr. Dowd (see *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]; *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 [2d Dept 2008]). Having met its burden, the hospital shifted the burden to plaintiff to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176). As no opposition papers were submitted by plaintiff, the motion of defendant Mather Hospital for summary judgment dismissing the complaint against it is granted.

Dated: August 1, 2016


 PETER H. MAYER, J.S.C.

___ FINAL DISPOSITION ___ NON-FINAL DISPOSITION