

DeIVecchio v Huntington Hosp.
2017 NY Slip Op 31162(U)
May 30, 2017
Supreme Court, Suffolk County
Docket Number: 13-5416
Judge: Denise F. Molia
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INDEX No. 13-5416
 CAL. No. 16-00985MM

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
 Acting Justice of the Supreme Court

MOTION DATE 8-26-16
 ADJ. DATE 8-26-16
 Mot. Seq. # 003 - MotD

JOHN DELVECCHIO and PATRICK
 DELVECCHIO as Co-executors of the Estate of
 JOSEPH DELVECCHIO,

Plaintiff,

- against -

HUNTINGTON HOSPITAL AND BOBBY
 CHANDOK, M.D.,

Defendants.

JONATHAN MOORE, ESQ.
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 Syosset, New York 11791

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Upon the following papers numbered 1 to 67 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-42 ; Notice of Cross Motion and supporting papers ____ ; Answering Affidavits and supporting papers 43- 65 ; Replying Affidavits and supporting papers 66-67 ; Other ____ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion of defendants Huntington Hospital and Dr. Bobby Chandok for summary judgment dismissing the complaint against them is granted to the extent set forth below, and is otherwise denied.

Plaintiffs John DelVecchio and Patrick DelVecchio, as co-executors of the estate of their father, Joseph DelVecchio, commenced this action to recover damages for personal injuries allegedly caused by defendants' medical malpractice during their treatment of plaintiffs' decedent from August 17, 2011 through August 22, 2011. The complaint alleges, among other things, that defendant Dr. Bobby Chandok rendered medical services to Joseph DelVecchio in a negligent manner, causing personal injuries, and that defendant Huntington Hospital is vicariously liable as the employer of Dr. Chandok. Further, the complaint alleges a cause of action against both defendants for lack of informed consent,

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and a cause of action alleging defendants were negligent, among other things, in failing to follow fall prevention procedures, in failing to supervise and assist Joseph DelVecchio, and in allowing and causing him to fall and sustain injuries.

Huntington Hospital and Dr. Chandok now move for summary judgment dismissing the complaint on the ground that they did not deviate from acceptable standards of medical care and were not a proximate cause of decedents' injuries. In support of the motion, defendants submit copies of the pleadings, the verified bill of particulars, an expert affidavit, certified copies of Joseph DelVecchio's hospital records, and transcripts of the parties' deposition testimony.

Initially, the court notes that Joseph DelVecchio passed away in April 2015 at the age of 91 from unrelated causes, and that he testified at a deposition in February 2014. Joseph DelVecchio testified that he presented to the emergency department of Huntington Hospital on August 17, 2011, after a trip and fall incident that occurred in the parking lot of a library. He testified that prior to the fall, he was feeling fine, that he was not dizzy, and that he believed he tripped on a curb. He testified that he had fallen in the past from a seizure condition referred to as drop attacks or syncope, but he does not attribute such condition to the fall that he had at the library. Joseph DelVecchio testified that when he fell, the back of his head struck the curb, and he sustained a bump on his head. He testified that he felt fine, but the librarian phoned emergency services, and an ambulance drove him to Huntington Hospital. He testified that he was treated in the emergency department and subsequently admitted to the hospital, as the doctors who examined him were concerned with his head injury and wanted to conduct a CAT scan. Mr. DelVecchio testified that he was given a robe, tread socks, and a red ID bracelet indicating he was the victim of a fall. He testified that the following day his son, John DelVecchio, came to the hospital, and that he was treated by Dr. Bobby Chandok, among other doctors and nurses. He testified that Dr. Chandok informed him that he did not suffer a concussion and discussed his discharge. Joseph DelVecchio stated Dr. Chandok wanted to ensure he was steady on his feet before he discharged him, so he observed him walk down the hall. He testified that two hospital employees stood on each side of him and they walked approximately 30 feet through the hallway and 30 feet back to his room. Mr. DelVecchio testified that he was able to walk and felt steady because each assistant was holding his arms, but that he would have been unsteady walking without them. He testified that Dr. Chandok observed him ambulating and informed him that he was ready to be discharged. He testified that after Dr. Chandok left the room, he attempted to dress himself but he lost his balance and fell on his left side and fractured his hip. He testified that his son was in the bathroom when he fell and that no one offered to help him get dressed. Joseph DelVecchio testified that he suffered a fractured hip and underwent two surgeries before receiving a total hip replacement in 2012.

John DelVecchio testified his father had a pacemaker, two knee replacement procedures, and was in excellent shape. He testified that his father still drove his car and rode his bicycle, that he "outwalked" him, and that he was still performing home repairs. He testified that his father was independent, lived alone and cooked and cleaned for himself. John testified that a few years prior to the hospital visit, his father suffered from "drop attacks," but does not know the cause of the condition or whether it resolved. He testified that he visited his father at Huntington Hospital on August 18, 2011 after his brother, Patrick DelVecchio, called him and told him that he was there after suffering a fall. He testified that the hospital staff told him that his father did not break any bones and did not suffer a head

injury so he could be discharged after they performed “due diligence.” He testified that two hospital employees walked his father up and down the hallway, one on each side holding his arms and that, after the walk, he was cleared to go home. He testified that the nurse told him that she was going to get the discharge papers and a wheel chair and that his father should get ready to go. John DelVecchio testified that while his father was getting dressed, he went to the bathroom, which was three feet from the bed, to empty a urine bottle that was on the table, and when he returned his father was on the floor.

Dr. Chandok testified that he works for Huntington Hospital as a hospitalist, and that he was assigned to DelVecchio and first met him on August 18, 2011 at 8:53 a.m. He testified that he examined DelVecchio, treated him for a fever, and mild kidney failure, and ordered a chest x-ray and a CAT scan of the head. He testified that he ordered intravenous fluids, which corrected the kidney issue, and that the fever was caused by the trauma of the fall. He testified that the chest x-ray examination indicated Mr. DelVecchio did not have pneumonia, and that the CAT scan did not reveal an abnormality. Dr. Chandok testified that his notes indicate that he assessed Mr. DelVecchio as an “87 year old living independently who sustained a mechanical fall and suffered a scalp hematoma.” He testified that when he examined and evaluated Joseph DelVecchio, he believed he was safe to ambulate, as he did not suffer from dizziness or syncope. He testified further that he observed Joseph DelVecchio walking down the hallway with no assistance, and that he discussed the discharge plan with Mr. DelVecchio and his son, John.

Nurse Susan Kiniron testified that she saw Joseph DelVecchio on August 18, 2011, and that he was wearing a fall prevention bracelet and his bed had an alarm. She testified that patients who are fall risks need assistance getting out of bed and ambulating, and that if a patient tries to get out of bed on his or her own, an alarm alerts the hospital staff. Nurse Kiniron testified that she observed Mr. DelVecchio ambulating in the hallway with a nurse assistant and that he was doing well. She testified that she spoke to Joseph DelVecchio and his son about his discharge and left the room to get the discharge papers when the nursing assistant, Robert Aronov, called for assistance because he had fallen. Nurse Kiniron testified that before she left the room, she told Joseph DelVecchio’s son that Robert would assist his father in getting dressed, but his son said he would assist him and would help him dress. She testified that when she started working at Huntington Hospital in 2009, she was instructed on fall prevention protocol and that a manual is kept at the nurses station. She testified to the risk factors that are reviewed and to a number system when assessing a patient’s risk of falling, and that Mr. DelVecchio was at risk for falling.

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]).

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]).

To establish a prima facie showing of entitlement to summary judgment, a defendant hospital, as well as a defendant physician, 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 (*Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 2017 NY Slip Op 03189 [2d Dept 2017]; *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]).

In support of their motion, defendants submit the affidavit of Dr. Jeffrey Farber, who states that he is board certified in internal medicine and geriatric medicine. However, the affidavit has no probative value, as Dr. Farber does not state what records he relied on to form his opinion. It is well settled that opinion evidence must be based on evidence in the record or upon the expert’s personal knowledge (*Hambusch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195 [1984]; *DeLuca v Ding Ju Liu*, 297 AD2d 307, 746 NYS2d 183 [2d Dept 2002]). Here, Dr. Farber does not indicate that he reviewed the pleadings, the bill of particulars, the transcripts of deposition testimony or the medical records pertaining to Joseph DelVecchio. The affidavit is, thus, insufficient to establish defendants’ prima facie entitlement to judgment as a matter of law.

Furthermore, the conflicting deposition testimony of the parties as to Joseph DelVecchio’s ability to ambulate before the decision to discharge him was made, and the conflicting testimony of John DelVecchio and Nurse Kiniron regarding who would assist plaintiffs’ decedent in getting dressed raises triable issues of fact, rather than eliminating them. Accordingly, defendants’ motion for summary judgment dismissing the malpractice and negligence causes of action is denied.

With respect to the cause of action for lack of informed consent, the hospital and Dr. Chandok have established, prima facie, that they are entitled to summary judgment in their favor on the cause of action alleging lack of informed consent. The requisite elements of such cause of action are “(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably

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prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury” (*Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). For the claim to be actionable, the defendant must have engaged in a “non-emergency treatment, procedure or surgery” or “a diagnostic procedure which involved invasion or disruption of the integrity of the body” (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of the plaintiff’s physical integrity (*Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Here, none of the elements have been fulfilled.

Dated: 5-30-17

Hon. Denise F. Mollen

A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION