

Lynch v Kaiser

2017 NY Slip Op 31775(U)

August 21, 2017

Supreme Court, New York County

Docket Number: 805410/13

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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PENNY LYNCH,

Index No. 805410/13

Plaintiff,

DECISION

-against-

MICHAEL G. KAISER, M.D., NEUROSURGICAL ASSOCIATES, P.C., CHRISTOPHER S. AHMAD, M.D., SPENCER ORTHOPEDICS PLLC, NEW YORK ORTHOPAEDIC HOSPITAL ASSOCIATES, P.C., FARAH HAMEED, M.D., COLUMBIA DOCTORS, NEW YORK AND PRESBYTERIAN HOSPITAL, and NEW YORK-PRESBYTERIAN, THE UNIVERSITY HOSPITAL OF COLUMBIA AND CORNELL,

Defendants.

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MICHAEL G. KAISER, M.D., NEUROSURGICAL ASSOCIATES, P.C., CHRISTOPHER AHMAD, M.D., NEW YORK ORTHOPAEDIC HOSPITAL ASSOCIATES, P.C., FARAH HAMEED, M.D., COLUMBIA DOCTORS, NEW YORK AND PRESBYTERIAN HOSPITAL, and NEW YORK-PRESBYTERIAN, THE UNIVERSITY HOSPITAL OF COLUMBIA AND CORNELL,

Third-Party Index No.
595443/16

Defendants-Third Party Plaintiffs,

-against-

AMERICAN MEDICAL ALERT CORP. d/b/a H-LINK ONCALL,

Third-Party Defendant.

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Martin Shulman, J.

In this medical malpractice action, defendants-third party plaintiffs Michael G. Kaiser, M.D. (Dr. Kaiser), Neurosurgical Associates, P.C., New York Orthopaedic Hospital Associates, P.C., Farah Hameed, M.D. (Dr. Hameed), the Trustees of

Columbia University in the City of New York s/h/a Columbia Doctors (Trustees) and the New York Presbyterian Hospital s/h/a New York-Presbyterian, the University Hospital of Columbia and Cornell (NYPH) (collectively defendants)¹ move pursuant to CPLR 3212 for summary judgment on their third party complaint against American Medical Alert Corp. d/b/a H-Link Oncall (H-Link)² seeking common law indemnification, contractual indemnification and contribution. The motion also seeks summary judgment on the issue of H-Link's alleged liability. H-Link opposes the motion and plaintiff Penny Lynch (Lynch or plaintiff) partially opposes it.

BACKGROUND

The main action arises from plaintiff's October 31, 2012 minimally invasive discectomy which Dr. Kaiser performed at Columbia Presbyterian Hospital. Following the surgery, Lynch reported pain in her right upper extremity. She was discharged on November 2, 2012 and remained in frequent contact with Dr. Kaiser's office with respect to her pain status. Dr. Kaiser referred Lynch to an orthopaedic surgeon, who in turn referred plaintiff to co-defendant Dr. Hameed, a rehabilitation specialist. A November 7, 2012 cervical MRI revealed a collection causing cord displacement and compression. Plaintiff's pain continued and Dr. Hameed administered trigger point injections which gave her some pain relief.

¹ The foregoing are the defendants-third-party plaintiffs named in the motion papers as movants. Despite the fact that plaintiff discontinued the main action as to Christopher Ahmad, M.D., he is named as defendant-third party plaintiff in the third party action.

² H-Link and the Trustees entered into a contract on December 12, 2015 (the contract) whereby H-Link provided after hours answering services to the Trustees and its employees, including Dr. Kaiser.

On the evening of November 21, 2012, plaintiff began to experience weakness and numbness in her right arm and leg. This was the first instance of lower extremity pain or weakness. Plaintiff called Dr. Kaiser but reached his answering service, H-Link.³ She continued to deteriorate to the point that, on the next morning, Thanksgiving Day, she could not get out of bed without assistance. She again attempted to contact Dr. Kaiser, reached H-Link and reported changes in feeling in her right arm and leg. The next morning, November 23, 2012, plaintiff made a third call and left a message describing worsening symptoms.

Later that day Lynch presented to radiologist Dr. Joseph Racanelli for an MRI of her shoulder and cervical spine, which ultimately revealed fluid collection and spinal cord compression. Dr. Racanelli attempted to contact Dr. Kaiser twice that afternoon to relay the MRI findings and also left messages with H-Link. That evening, approximately 48 hours after Lynch's symptoms began to worsen, Dr. Kaiser received a text from H-Link asking him to call Clinton Brown, plaintiff's then boyfriend, who had left another message with H-Link on her behalf. This was the first and only message from H-Link that Dr. Kaiser received.

Upon reaching Mr. Brown, Dr. Kaiser learned that plaintiff was in the emergency room at NYPH and was experiencing right side paralysis. He arrived at the emergency room within 35 minutes of being contacted and learned from Lynch's family that she had been trying to reach him for days. Plaintiff was immediately taken for surgery to evacuate a fluid collection which a cervical MRI revealed had enlarged since her

³ H-Link has no record of Lynch's first phone call but her telephone records confirm that she made the call.

November 7, 2012 MRI, causing spinal cord compression. This surgery revealed a tissue mass that was adherent to the dura. Pathology of the tissue demonstrated marked acute and chronic inflammation.

Subsequently, Dr. Kaiser contacted H-Link to ascertain why he had not received Lynch's numerous messages. He learned that he did not receive the messages because H-Link contacted an outdated pager number, rather than his cell phone, contrary to instructions he had given H-Link in January 2012. In a November 24, 2012 e-mail to Dr. Kaiser, an H-Link representative apologized for the errors made and understood that such errors "caused a serious delay in Ms. Lynch receiving the patient care she needed." Motion at Exh. W.

Plaintiff alleges that her injuries include "paralysis causing spasticity in both legs (right significantly worse than left), deltoid weakness in both arms, FDI and dorsal interosseous muscle weakness, constant pain, neurogenic bladder causing urinary incontinence, urgency, frequency, and multiple urinary tract infections, pelvic pain, decreased sensation in her pelvis, loss of sensation of the peroneal and vaginal areas, loss of sexual sensation, and atrophy, causing severe sexual dysfunction." *Coscia Aff.* in Partial Supp. and in Partial Opp., fn 2.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material

issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be drawn from the evidence. See *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad, supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc., supra*.

Liability

As set forth in *Mortensen v Memorial Hosp.*, 105 AD2d 151, 158 (1st Dept 1984):

In a medical malpractice action, as in any negligence action, the plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant's negligence, in this case the departure from good and accepted medical practice, proximately caused the injury claimed. If such negligence is a substantial factor in producing the injury, it is a proximate cause of the injury. (Citations omitted).

A finding that the defendant's negligence proximately caused a patient's injury may be predicated on the theory that the defendant's action or omission diminished the patient's

chance for a better outcome. *Clune v Moore*, 142 AD3d 1330, 1331 (4th Dept 2016); *Flaherty v Fromberg*, 46 AD3d 743, 745 (2d Dept 2007).

In support of their motion for summary judgment defendants submit an expert affidavit from Roger A. Bonomo, M.D. (Dr. Bonomo), a physician who is Board Certified in Psychiatry and Neurology (Neurology), Psychiatry and Neurology (Vascular) and Internal Medicine, who opines that:

- based upon the progression and worsening of plaintiff's symptoms, the delay from the time of plaintiff's first message on November 21, 2012 until November 23, 2012 when Dr. Kaiser ultimately received notification of her calls was a substantial factor in causing the permanent deficits plaintiff claims herein;
- H-Link violated the standard of care applicable to after-hours answering services by failing to: update Dr. Kaiser's contact information as he had instructed; timely relay plaintiff's messages; document plaintiff's first phone call in its call log; and attempt a different contact method after receiving plaintiff's second and third emergent messages;
- in order to give Lynch the optimal chance of preventing any neurological deficits from becoming irreversible, timely intervention was required when, on November 21, 2012, she developed new, continuing symptoms in her lower right extremity;⁴ and
- Lynch was neurologically stable prior to November 21, 2012 and H-Link's foregoing failures were a substantial factor in allowing her symptoms to progress and cause the deficits alleged herein.

Based upon the foregoing, defendants argue that they have established their prima facie case entitling them to summary judgment against H-Link as to liability, contribution and/or indemnity with respect to any alleged injuries Lynch sustained as a result of the delay in treatment from November 21, 2012 through November 23, 2012.

⁴ Dr. Bonomo explains that when the spinal cord is compressed, blood circulation is impaired, causing weakness and numbness. If impaired circulation persists for too long, reversible deficits can become permanent. Motion at Exh. A, ¶ 89.

Specifically, defendants contend they have established that H-Link's delay in transmitting plaintiff's messages to Dr. Kaiser was a substantial factor in causing Lynch's alleged neurological deficits, thus the element of proximate cause is established. Defendants also rely upon H-Link's November 24, 2012 e-mail to Dr. Kaiser (Motion at Exh. W) as well as its representations via deposition testimony and the contract itself of *inter alia* its duty to defendants; its understanding that Dr. Kaiser relied on H-Link to effectively communicate with his patients; and its failure to follow its own protocols with respect to emergent messages.

While defendants claim in their reply that H-Link's opposition does not specifically address defendants' claim that summary judgment as to liability is warranted, in fact, H-Link argues that summary judgment is premature and should be denied since a question of fact exists as to whether its alleged negligence was a substantial factor in producing plaintiff's injury. H-Link notes that issues of proximate cause are "best left for the jury to determine," and even though it does not deny that it erred in attempting to reach Dr. Kaiser by using an incorrect contact number, this alone does not establish that its error was a substantial factor, or any factor at all, in causing Lynch's injuries. *Harding v Noble Taxi Corp.*, 182 AD2d 365, 370 (1st Dept 1992).

Responding to Dr. Bonomo's affidavit, H-Link submits an affidavit from Ira Goldstein, M.D. (Dr. Goldstein), a neurosurgeon having 19 years of experience, who opines in relevant part that:

- it is impossible to determine if H-Link's errors were a predominant factor in causing plaintiff's alleged deficits, as it cannot be stated with a reasonable degree of medical certainty that without the delay in contacting Dr. Kaiser Lynch would be neurologically intact today, nor can it be determined to what extent H-Link's error may have contributed to her alleged injuries;

- Dr. Bonomo is unqualified to speak on the standards applicable to after hours answering services, and since he is not a neurosurgeon he is similarly unqualified since has no experience performing the operation at issue; and
- contrary to Dr. Bonomo's characterization of Lynch as neurologically stable prior to November 21, 2012, Dr. Goldstein notes that plaintiff was in uncommonly excruciating pain post-operatively, and during the time period from her October 31, 2012 surgery and the onset of additional symptoms on November 21, 2012, Lynch displayed neurological deficits which should have caused Dr. Kaiser to consider re-operating on her.⁵

Dr. Goldstein concludes that the symptoms Lynch began to experience on November 21, 2012 were sequelae from the October 31, 2012 surgery, and if she had not experienced complications, presumably due to Dr. Kaiser's negligence, she never would have reached out to H-Link to contact Dr. Kaiser.

In reply, and notwithstanding the discussion and analysis of the causation element in defendants' motion, they now correctly emphasize that a finding of negligence requires only a determination that a duty to plaintiff exists and a breach thereof. *Darby v Compagnie Natl Air France*, 96 NY2d 343, 347 (2001) ("A finding of negligence may be based only upon the breach of a duty"). As stated in *Ohdan v City of New York*, 268 AD2d 86, 89 (1st Dept 2000):

The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the negligence determination. A defendant may act negligently without that negligence constituting a proximate cause of the accident (citations omitted).

Here, H-Link owed a duty to Dr. Kaiser by virtue of the contract, acknowledged that duty in its November 24, 2014 e-mail and admitted both the existence of a duty to

⁵ A lesion noted on plaintiff's November 7, 2012 MRI increased in size between then and November 23, 2012, progressively growing during this period.

defendants as well as a breach thereof in its representative's deposition testimony.⁶ Defendants therefore seek summary judgment finding that H-Link acted negligently as a matter of law in failing to relay plaintiff's calls to Dr. Kaiser regarding her deteriorating condition.

Defendants nonetheless continue to claim entitlement to summary judgment as to causation, arguing that Dr. Goldstein's speculative affidavit is insufficient to refute Dr. Bonomo's affidavit. They emphasize that Dr. Goldstein's affidavit uses an incorrect standard of law regarding causation which carries a heavier burden. Specifically, Dr. Goldstein's affidavit uses the term "predominant factor" rather than "substantial factor." While H-Link's memorandum of law employs the correct standard of law, defendants argue that this is irrelevant since it is not an expert opinion.

Putting aside Dr. Goldstein's use of a purportedly incorrect legal standard,⁷ Dr. Bonomo maintains, in a general manner, that if spinal cord compression "persists for too long, deficits that are reversible can become irreversible and permanent." Motion at Exh. A, ¶89. This equivocal statement lacks specificity and Dr. Bonomo seems to merely speculate that, based on plaintiff's worsening symptoms, first arising the evening of November 21, 2012 and intensifying through November 23, 2012, that earlier intervention would have improved her chance for a better outcome. See *Clune v*

⁶ In light of the foregoing finding, it is unnecessary for this court to address H-Link's contention that Dr. Bonomo is unqualified to speak on the standard of care applicable to after hours answering services. In any event, the contract sets forth H-Link's duty to defendants and the function of an after hours answering service is within the knowledge of a layperson.

⁷ Defendants cite no authority for this proposition and in researching the issue this court found no authority for it.

Moore, supra. While this appears logical, the determination that the delay was substantial is wholly conclusory, unsupported and speculative. As H-Link contends, issues of proximate cause are “best left for the jury to determine.” *Harding v Noble Taxi Corp., supra*. For the foregoing reasons, Dr. Bonomo’s affidavit is insufficient to establish defendants’ prima facie entitlement to summary judgment in their favor as to liability and this branch of the motion must be denied.

Contractual Indemnity

The right to contractual indemnification depends upon the contract’s specific language. *Cunha v City of New York*, 45 AD3d 624, 625 (2d Dept 2007), *affd* 12 NY3d 504 (2009). In support of their motion for summary judgment on their contractual indemnification cause of action, defendants rely on the contract’s indemnification clause, which provides in relevant part as follows:

[H-Link] shall . . . be liable to and hold harmless indemnify and defend the University and its trustees, officers, agents and employees, from and against any and all actions, suits, claims, losses, damages, liabilities, penalties, costs and expenses (including actual attorney’s fees) arising out of or relating directly or indirectly to any services rendered hereunder by [H-Link], or its officers, agents or employees, or others under its direction or control, including but not limited to, claims of negligence, gross negligence or intentional misconduct, property damage, bodily injury or death . . .

Motion at Exh. U.

H-Link argues that summary judgment on defendants’ contractual indemnity cause of action is premature, claiming that the contract is clear that the Trustees will only be indemnified for claims arising from or relating to services H-Link provides. Since there has been no finding or even proof that Lynch’s damages arise from or relate to H-Link’s acts and/or omissions, H-Link claims summary judgment is premature.

This court agrees. Since there has been no determination whether plaintiff's injury was caused by any wrongful act or omission on H-Link's part an award of summary judgment on defendants' contractual liability claim is premature.⁸ *Quiroz v Beitia*, 68 AD3d 957, 961 (2d Dept 2009). Accordingly, the branch of defendants' motion seeking summary judgment on their contractual indemnification cause of action is denied.

Common Law Indemnity

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (citation omitted)." *Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d 483, 484 (1st Dept 2010). Defendants argue that they cannot be held liable for any damages to plaintiff for the delay in treatment from November 21, 2012 through November 23, 2012 because H-Link was the sole entity responsible for the delay.⁹ However, like their contractual indemnity claim, summary judgment on defendants' cause of action seeking common law indemnity is also premature since no finding as to responsibility for Lynch's injuries has been made. *Brockman v Cipriani Wall St.*, 96 AD3d 576, 577 (1st Dept 2012). This branch of defendants' motion is also denied.

⁸ Plaintiff supports defendants' position as to their contractual liability claim.

⁹ Claiming that defendants are not free from negligence or without actual fault during the period of November 21, 2012 through November 23, 2012, plaintiff opposes defendants' position regarding common law indemnification.

Contribution

Finally, defendants argue that in the event plaintiff recovers from any or all of them, they are entitled to contribution from H-Link for its proportionate share of the liability.¹⁰ As articulated in *Rosner v Paley*, 65 NY2d 736, 738 (1985), “[i]n determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff’s damages.”

In opposition, H-Link observes that defendants’ motion *inter alia* does not address whether H-Link owed a duty to plaintiff. In reply, defense counsel scoffs at this notion, stating that “[i]nherent in H-Link’s very existence is a duty to a patient to convey his or her messages to his or her physician.” Post Reply Aff. at ¶64. This court declines to comment as the issue of whether or not Lynch is a third-party beneficiary to the contract has not been briefed. As H-Link argues, by omitting this analysis, defendants’ motion on its face fails to establish prima facie entitlement to contribution. Accordingly, the branch of defendants’ motion seeking summary judgment on their claim for contribution must be denied, and it is

ORDERED that defendants-third party plaintiffs’ motion for summary judgment as against third party defendant H-Link is denied in its entirety.

Counsel for the parties shall appear in Part 1, 60 Centre Street, Room 325, New York, New York, on September 5, 2017 at 9:30 a.m. for a settlement conference.

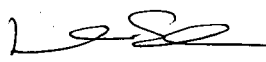
¹⁰ Plaintiff supports defendants’ position as to their contribution cause of action.

NYSCEF DOC. NO. 154

RECEIVED NYSCEF: 08/22/2017

The foregoing is this court's decision and order.

Dated: New York, New York
August 21, 2017



Hon. Martin Shulman, J.S.C.