

Gibbs v St. Barnabas Hosp.
2018 NY Slip Op 31524(U)
June 11, 2018
Supreme Court, Bronx County
Docket Number: 16364/2005
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A

-----X
MARVIN GIBBS,

Plaintiff,

- against -

INDEX NO: 16364/2005

ST. BARNABAS HOSPITAL, FAUSTO VINCES, M.D., DECISION/ORDER
SCOTT RUSSO, M.D., BERNADETTE BRANDON,
M.D., MONTEFIORE MEDICAL CENTER and
DAVID SHEIN, M.D.,

Defendants.

-----X
-----X
MARVIN GIBBS,

Third-Party Plaintiff,

- against -

INDEX NO: 83952/2008

FRANK WATKINS, M.D.,

Third-Party Defendant.

-----X
HON. LEWIS J. LUBELL

Defendant third-party plaintiff St. Barnabas Hospital (St. Barnabas) moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and all cross claims and counterclaims against it or, in the alternative, limiting any liability of defendant/third-party plaintiff, St. Barnabas Hospital, to vicarious liability for the alleged acts of third party defendant, Frank Watkins, M.D. (Watkins.) Watkins cross-moves for summary judgment dismissing the complaint and all cross claims and counterclaims against him.

This is a medical malpractice action wherein it is alleged that St. Barnabas and its staff failed to properly treat plaintiff's dislocated right hip following a car accident on December 2, 2002. Plaintiff alleges that the hip injury was improperly treated in the emergency room, and that an open reduction and internal fixation should have been performed. It is further claimed that the staff failed to diagnose and treat a right tibial plateau fracture. Watkins, the on-call attending orthopedic surgeon, alleges that a "rogue resident" permitted the plaintiff to bear full weight on the hip on December 3, which was contraindicated so soon after the performance of closed reduction surgery.

Plaintiff presented to the emergency room complaining of right hip pain after a car crash with a metal pillar. Plaintiff was diagnosed as having a dislocated right hip. A closed reduction of plaintiff's right hip was performed in the emergency room by a physician's assistant under conscious sedation, and a hip/knee immobilizer was placed. According to St. Barnabas, post reduction x-rays and CT scan confirmed that the closed reduction was performed successfully. During the hospital stay, plaintiff was instructed on how to use a walker and a cane to ambulate. On December 5, plaintiff was discharged with a right knee immobilizer with instructions to follow-up with the orthopedic clinic in one week, and the trauma clinic in two weeks. However, on December 11, 2002, plaintiff was brought to non-party Montefiore Medical Center, where he was diagnosed with a posterior acetabular wall fracture. On December 15, he underwent open reduction and internal fixation of the right posterior acetabulum.

St. Barnabas argues that it did not deviate from any standard of care and did not proximately cause any of plaintiff's claimed injuries. Moreover, St. Barnabas maintains that the hospital could rely on the decisions of Watkins as the private attending orthopedist, and that nothing occurred during plaintiff's stay at the hospital requiring a member of the staff to contradict Dr. Watkin's decisions. In support of these arguments, St. Barnabas submits the affirmation of Dr. Howard Luks, board certified in orthopedic surgery, who opines that plaintiff received appropriate care at all times from St. Barnabas and its staff. Dr. Luks further opines that it was within the standard of care for the hospital to rely upon the determinations of Dr. Watkins, and that nothing occurred during plaintiff's stay which would require a member of the staff to intervene or challenge Dr. Watkins' decisions. Ostensibly with respect to the alleged "rogue resident" who allowed the plaintiff to place on the hip, Dr. Luks opines that it was appropriate for plaintiff to partially bear weight with an immobilizer based on the location of the fracture. He also opines that whether plaintiff was properly permitted to partially bear weight did not cause or contribute to the eventual re-dislocation that occurred because it occurred while plaintiff was in bed and not walking. Lastly, he asserts that Watkins should have proactively re-assessed the joint for stability prior to the plaintiff's departure from the hospital.

St. Barnabas argues that in the alternative that any liability against it must be limited to vicarious liability for the malpractice of the private attending orthopedist.

In opposition to the motion, plaintiff has provided the court with an expert affirmation from a doctor board certified in orthopedic surgery, who opines that it was a deviation from the standard of care for St. Barnabas' emergency room doctors to fail to order various views of the pelvis, to discover the specific fracture herein and formulate treatment plan for it. In failing to obtain appropriate radiographs prior to treatment, the expert opines that the treatment plan was based on insufficient information as to the extent of the right hip fracture/dislocation. This expert further opines that Mr. Gibbs only underwent a single view hip x-ray post-reduction which was insufficient to determine the congruency of the reduction, the post-reduction stability of the hip and the presence or absence of aggravating factors which was a deviation from the standard of care. The doctor opines that the providers at St. Barnabas deviated from the standard of care in discharging Mr. Gibbs home without performing a surgical reduction and fixation of his posterior acetabular wall fracture. Also, that the orthopedic surgeon should have been aware of what specific fracture and dislocation pattern he was dealing with so that he would know whether it would require early surgical intervention. Instead, plaintiff to a tertiary care center where he could undergo required surgical intervention as this did not happen and instead plaintiff was discharged home with an unstable acetabular fracture that had received no treatment as only the dislocation had been addressed. Furthermore, plaintiff's history of seizures and epilepsy should have added to the urgency of early surgical intervention and St.

Barnabas Hospital failed to correctly consider the increased risks of re-dislocation based on this history.

With respect to the "rogue resident," plaintiff's expert opines that discharging plaintiff with instructions to be full weight bearing placed plaintiff at an increased risk of re-dislocating an already unstable hip, in addition to placing him at risk for articular surface damage. The doctor states that had plaintiff received appropriate pre- and post-reduction care he would not have sustained a re-dislocation of his right hip on December 11, 2002 and subsequent hospitalization and treatment.

Third party defendant Watkins argues that plaintiff's case was discussed between himself and Dr. Koval, and that the plan was for plaintiff to be on bed rest, non-weight bearing, and not out of bed. He testified that the case was discussed with Dr. Koval which means that Dr. Koval would take over the case. Furthermore, he testified that a "rogue" podiatry resident disregarded his order and made plaintiff full weight bearing. Dr. Watkins argues that the rogue resident's order was contrary to his orders, and broke any causal link between his care and treatment of plaintiff and plaintiff's alleged injuries. Watkins argues that as he referred plaintiff to Dr. Koval, the orthopedic specialist, and that as he ordered plaintiff to be on bed rest, non-weight bearing and not out of bed, and that his treatment was proper and within the standard of care.

Analysis

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries. (*Anyie B. v Bronx Lebanon Hosp.*, 128 A.D.3d 1, 2, 5 N.Y.S.3d 92, 93 [1st Dept. 2015].) If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (*Pullman v Silverman*, 125 AD3d 562, 562, 5 NYS3d 38 [1st Dept. 2015], *aff'd* 28 N.Y.3d 1060, 66 N.E.3d 663, 43 N.Y.S.3d 793 [2016].)

Assuming that St. Barnabas established a prima facie case, plaintiff has adduced evidence of numerous departures in failing to properly diagnose plaintiff's hip fracture, and in failing to plan a proper course of treatment. These alleged departures on the part of St. Barnabas' staff, including the actions of the so-called "rogue resident," raise issues of fact requiring a trial. It is, of course, beyond dispute that "[g]enerally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee" (*Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 A.D.3d 1127, 1129, 53 N.Y.S.3d 166

[2d Dept. 2017]) and that " a hospital is normally protected from tort liability if its staff follows the orders' of the patient's private physician" (*Warney v Haddad*, 237 A.D.2d 123, 123, 654 N.Y.S.2d 138 [1st Dept. 1997], quoting *Toth v Community Hosp. at Glen Cove*, 22 N.Y.2d 255, 265, 239 N.E.2d 368, 292 N.Y.S.2d 440 [1968], *rearg denied* 22 N.Y.2d 973, 295 N.Y.S.2d 1033 [1968]), a hospital may be liable for independent acts of negligence of its employees (see *Lorenzo v Kahn*, 74 A.D.3d 1711, 1712-1713, 903 N.Y.S.2d 222 [4th Dept. 2010]). In this regard, issues of fact have been raised as to whether the hospital employees committed malpractice and proximately caused injury to the plaintiff.

Watkins has failed to establish a prima facie case warranting dismissal of the claims against him. Watkins argues that the plaintiff's case was discussed with Dr. Koval, and that accordingly Dr. Koval "took over" the plaintiff's treatment. In this regard, however, Watkins relies only on the note that someone other than himself discussed the case with Dr. Koval, and his own ambiguous testimony that his main concern was "short care" treatment and stabilizing the patient, and that he contemplated that the case would be taken over by more qualified persons, and that future surgery was likely required. However, he Watkins admitted that he never personally spoke with Dr. Koval, and that the PA stated that "in my experience up to that time when we made a call to him, he takes over, he gets involved. I'm going by precedence." (Watson depo. at 68.) Nor has Watkins pointed any evidence that Dr. Koval examined the plaintiff. Watkins also admitted that plaintiff remained under his own care until plaintiff's discharge, at least to the

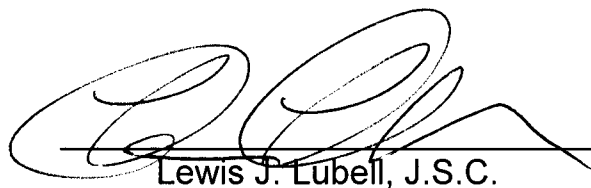
extent that a dislocation could have occurred. Because issues of fact exist as to whether the plaintiff remained under Watkins' care, and whether Dr. Koval "took over" the case, summary judgment in Watkins' favor is not warranted.

In addition, there exist issues of fact as to whether Watson deviated from accepted standards in discharging plaintiff without proactively assessing his hip stability, and without performing surgical reduction.

Accordingly, it is

ORDERED that the motion and cross-motion are denied.

Dated: June 14, 2018



Lewis J. Lubell, J.S.C.