SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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METTIE ALICIA CHAPMAN,

Plaintiff,

-against-

DECISION / ORDER
Index No. 21457/2013E

WINIFRED S. TOVAR, M.D., ST. BARNABAS HOSPITAL, and ST. BARNABAS OB/GYN P.C.,

Defendants.

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The following papers numbered 1 to 5 read on the below motion noticed on May 5, 2017 and duly submitted on the Part IA15 Motion calendar of **August 4, 2017**:

Papers Submitted	Numbered
Def,'s MSJ, Exhibits	1,2
Pls.' Aff. in Opp.	3,4
Def.'s Reply Aff.	5

Upon the foregoing papers, defendant St. Barnabas Hospital ("SBH") moves for summary judgment, dismissing the complaint of the plaintiff Mettie Alicia Chapman ("Plaintiff") and all cross-claims pursuant to CPLR 3212. Plaintiff opposes the motion.

Background

This action arises out of a laparascopic hysterectomy surgery performed by co-defendant Dr. Winifred S. Tovar ("Tovar") on May 6, 2011. Plaintiff alleges that as a result of medical malpractice that occurred during the surgery, she sustained, *inter alia*, an injury to her rectum. Plaintiff thereafter commenced this action against SBH, Tovar, and St. Barnabas OB/GYN, P.C., asserting causes of action predicated upon medical malpractice and lack of informed consent. SBH now moves for summary judgment, seeking dismissal of Plaintiff's complaint and all cross-claims. SBH claims that Plaintiff has not pled independent liability as to SBH, and in any event, SBH was not negligent and bears no direct liability to Plaintiff. SBH also argues that any claims of vicarious liability must fail because Tovar was not an employee of SBH or acting on SBH's behalf at the time of the surgery, and Plaintiff herself elected to proceed with surgery and she

wished for Tovar to perform the surgery. SBH further asserts that it cannot be liable for failure to procure informed consent, because the duty to obtain such consent lies with the surgeon, not the hospital. Moreover, the record demonstrates that Plaintiff was fully informed of the risks and alternatives to surgery, despite her claims to the contrary, and she signed consent forms before the procedure commenced. SBH's expert also notes that some of the injuries alleged in Plaintiff's bill of particulars are unrelated to the May 6, 2011 surgery, but attributable to a prior motor vehicle accident and psychological issues that pre-existed the surgery.

In opposition to the motion, Plaintiff argues that SBH is liable for Tovar's departures from the standard of care under *Mduba v. Benedictine*, 52 A.D.2d 450 (3rd Dept. 1976), even if he was not a SBH employee. Plaintiff had presented to SBH's emergency room on a number of different occasions for complications attributable to her uterine fibroids, the reason for her eventual hysterectomy procedure. She was treated at SBH clinics and ultimately referred by the hospital's internal medicine service to Tovar on or about March 23, 2011. Since she had no input or choice regarding her treating doctor, SBH may be liable for Tovar's alleged malpractice. Plaintiff also argues that issues of fact preclude summary judgment in favor of SBH with respect to her lack of informed consent claim, because the parties' experts disagree as to whether Plaintiff was properly advised of the risks associated with this surgery, and Plaintiff denied that Tovar ever warned her of any such risks.

SBH contends in reply, *inter alia*, that it cannot be vicarious liability for Tovar's medical malpractice under *Mduba* under these facts, and SBH cannot be liable for any alleged failure to procure Plaintiff's informed consent.

Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v.*

Prospect Hosp., 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

Applicable Law and Analysis

A medical malpractice defendant moving for summary judgment meets his initial burden by establishing that either (1) he did not deviate from accepted medical practice, or (2) his alleged deviation was not a proximate cause of the plaintiff's injury or damages (*see Bacani v. Rosenberg*, 74 A.D.3d 500, 501 [1st Dept. 2010], citing *Mattis v. Keen*, 54 A.D.3d 610, 611 [1st Dept. 2008]). Here, SBH's moving papers establish its lack of direct liability to Plaintiff for medical malpractice, as its expert demonstrated that SBH staff did not depart from good and accepted medical practice or do anything to cause Plaintiff's alleged injuries. In opposition, Plaintiff does not address SBH's lack of direct liability for medical malpractice, but focuses on SBH's potential vicarious liability, and liability predicated upon lack of informed consent.

Generally, a hospital is not liable for the acts or omissions of an independent non-employee physician with attending privileges at its facility who is retained by the patient (*see Welch v. Scheinfeld*, 21 A.D.3d 802, 807 [1st Dept. 2005]). However, "'a hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting at the hospital's behest'" (*Malcolm v. Mount Vernon Hosp.*, 309 A.D.2d 704, 705 [1st Dept. 2003], quoting *Sarivola v. Brookdale Hosp. & Med. Ctr.*, 204 A.D.2d 245, 245-46 [1st Dept. 1994];

Soltis v. State of New York, 172 A.D.2d 919 [3rd Dept. 1991]). In such circumstances, a hospital may be vicarious liable for the physician's malpractice even if it did not have "control in fact" over the physician (*see Finnin v. St. Barnabas Hosp.*, 306 A.D.2d 189 [1st Dept. 2003], citing *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72 [1986]). SBH, as the proponent of a motion for summary judgment, "had the burden of proving, as a matter of law, that it is not vicariously liable for the defendant doctor's alleged acts of negligence" (*Malcolm v. Mount Vernon Hosp.*, 309 A.D.2d at 706). "To do this, it must come forward with sufficient evidence to demonstrate the absence of any material issues of fact as to whether or not Dr. [Tovar] was acting as its agent" (*id*).

Here, Plaintiff's verified bill of particulars alleges that Tovar "was directed and assigned to treat plaintiff entirely by defendant St. Barnabas, without any request or input from the plaintiff beforehand. As such, [SBH] is vicariously liable to plaintiff for the injuries inflicted." SBH's moving papers do establish that there was no employer-employee relationship between itself and Tovar at the time of this incident. However, SBH does not eliminate all triable issues of fact as to whether Tovar acted as its apparent agent. Specifically, SBH failed to demonstrate conclusively that Dr. Tovar was not "provided by the hospital or was otherwise acting on the hospital's behest" at the time of his alleged malpractice (*Malcolm, supra* at 706).

The record demonstrates that on December 27, 2010, Plaintiff appeared at SBH's emergency room complaining of asthma exacerbation. Emergency room doctors noted that her hematocrit levels were extremely low and ordered a blood transfusion. The doctors attributed the anemia to chronic bleeding of the uterine fibroid and gave her a follow-up gynecologic appointment upon discharge from the hospital. On January 20, 2011, Plaintiff again appeared at SBH's emergency room and complained of abdominal pain and bleeding, and after more emergency room and clinic presentations, she was first seen by Tovar on March 23, 2011 (SBH Aff. In Support, at Par 13). Tovar testified that Plaintiff came into his care as "a referral from internal medicine. She was referred to the GYN clinic for management of her dysmenorrhea and menometrorrhagia" (Tovar EBT at 15:21-25). Plaintiff testified, "I was seeing a gynecologist regularly. But, however, when I started receiving treatment at St. Barnabas Hospital for my asthma and my anemia and my fatigue in 2011, that's when they recommended me to Dr. Tovar, the doctors at St. Barnabas. And that's when the fibroids was bleeding by itself" (Pl. EBT at 48,

49).

The foregoing evidence raises factual issues as to whether SBH may be held vicariously liable to Plaintiff under a theory of apparent or ostensible agency, even though Tovar was not SBH's employee. "To create an apparent or ostensible agency, the plaintiff must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent" (*see Loaiza v. Lam*, 107 A.D.3d 951, 952 [2nd Dept. 2013]). Here, Plaintiff may have reasonably believed that Tovar was provided by SBH, as he was allegedly referred to her by SBH personnel. Tovar testified that Plaintiff was referred to him by "internal medicine" but he does not state who "internal medicine" worked for. There is no evidence that Plaintiff had a prior relationship with Tovar, and contrary to SBH's contention, there is no evidence that Plaintiff specifically sought him out because of his particular skills. Instead, she was apparently referred to Tovar by SBH personnel after several prior visits to the SBH emergency room due to complications with her uterine fibroids. Under these circumstances, Plaintiff could have reasonably believed that Tovar was "provided by" SBH (*see Loaiza v. Lam*, 107 A.D.3d at 953; *Finnin v. St. Barnabas Hosp.*, 306 A.D.2d 189; *see generally Mduba v. Benedictine Hosp.*, 52 A.D.2d 450, 453 [3rd Dept. 1976]; *see also Santiago v. Brandeis*, 309 A.D.2d 621, 622 [1st Dept. 2003]). Although SBH presents evidence that Plaintiff specifically elected to proceed with surgery as opposed to other less invasive procedures, there is no evidence that Plaintiff specifically chose Dr. Tovar to perform this procedure for any reason other than the fact that he was referred to Plaintiff by SBH personnel. In *Orgovan v. Bloom*, a matter relied upon by SBH, there was no vicarious liability on the part of the hospital for the treating physician's negligence because, among other reasons, the treating physicians were referred to plaintiffs through plaintiffs' own usual pediatrician and neurologist (7 A.D.3d 770, 771 [2nd Dept. 2004]).

SBH failed to carry its initial summary judgment burden regarding specific injuries alleged by Plaintiff – including her alleged inability to ambulate, psychological injuries, and development of an incisional hernia in June 2012. Dr. Cooper, a board-certified obstetric gynecologist, does not explain how he is qualified to render an opinion as to causation with respect to these injuries (*see, e.g., Martinez v. Quintana,* 138 A.D.3d 791, 793 [2nd Dept. 2016]).

That branch of the motion seeking summary judgment with respect to Plaintiff's cause of

action predicated upon a lack of informed consent is granted. As noted in the accompanying Decision and Order disposing of co-defendant's summary judgment motion, Plaintiff failed to raise an issue of fact as to whether the defendants' alleged failure to apprise her of the risks associated with this procedure were a proximate cause of her injuries, and whether a reasonable person, having been appropriately advised of the risks associated with the procedure, would not have elected to go through with the procedure (see *Orphan v. Pilnik*, 66 A.D.3d 543, 544 [1st Dept. 2009], *aff'd*, 15 N.Y.3d 907 [2010]).

Conclusion

Accordingly, it is hereby

ORDERED, that SBH's motion for summary judgment is granted in part, to the extent that any direct claims against SBH are dismissed; Plaintiff's claims against SBH predicated upon a theory of vicarious liability for Tovar's alleged malpractice remain viable and are not dismissed, and it is further,

ORDERED, that SBH's motion for summary judgment seeking dismissal of Plaintiff's claims against it predicated upon a lack of informed consent is granted, and that claim is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 1/30, 2018

Hon. Mary Ann Brigantti, J.S.C.