

Estate of Parson v Elstrom

2019 NY Slip Op 30731(U)

March 12, 2019

Supreme Court, New York County

Docket Number: 805194/14

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X

ESTATE OF DANIEL PARSON, deceased by
DEBORAH PARSON, Administrator,

INDEX NO. 805194/14

Plaintiff,

-against-

STEVEN ELSTROM, M.D. d/b/a STEVEN
JORDAN ELSTROM, M.D., BRUCE GINGOLD, M.D.,
MANHATTAN COLORECTAL SURGEONS, LLC,
AQUISTA AND MATTOO MEDICAL ASSOCIATES
PLLC d/b/a COMPREHENSIVE ANESTHESIA
SPECIALISTS, ACQUISTA MEDICAL SERVICES, PLLC,
and ELLSTROM ANESTHESIA, P.C.,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this action for medical malpractice and for wrongful death, defendants Aquista and Mattoo Medical Associates, PLLC d/b/a Comprehensive Anesthesia Specialists (Comprehensive) and Aquista Medical Services PLLC (Aquista)(together “the Comprehensive defendants”) move for summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposes the motion and cross moves for an order granting summary judgment finding that defendant Steven Ellstrom, M.D. (Dr. Ellstrom) is an employee of the Comprehensive defendants, and the Comprehensive defendants oppose the cross motion.

Background

Plaintiff alleges that as a result of the negligence and malpractice of defendant Dr. Elstrom and defendant Bruce Gingold, M.D. (Dr. Gingold), plaintiff’s decedent Daniel Parson (“Mr. Parson” or “the decedent”), went into cardiac arrest during a fistulotomy performed by Dr. Gingold, a licensed physician, on July 23, 2012, at defendant Manhattan Colorectal Surgeons,

PLLC (“MCS”).¹ Anesthesia for the surgery was administered by Dr. Ellstrom, a board certified anesthesiologist, whose services were provided to MSC under an Anesthesia Services Agreement between MCS and Comprehensive dated February 1, 2010 (“Anesthesia Services Agreement” or “ASA”)(Comprehensive Defendants’ Motion, Exhibit L). Mr. Parson died on August 4, 2012.

On this motion, the Comprehensive defendants argue that there was no physician-patient relationship between them and Mr. Parson as they did not provide anesthesia services for the subject surgery and that such services were provided by Dr. Ellstrom. Moreover, they argue that they cannot be held liable for the acts of Dr. Ellstrom as he was an independent contractor of Comprehensive pursuant to Professional Services Agreement between Comprehensive and Dr. Ellstrom dated June 4, 2011 (hereinafter “the Professional Services Agreement” or “PSA”)(Comprehensive defendants’ motion, Exhibit M). Specifically, they rely on Section 5 of the PSA Agreement under which the parties agreed that:

the Physician (i.e. Dr. Ellstrom) will act as an independent contractor in the performance of duties under this Contract. Accordingly, the Physician shall be responsible for the payment of all taxes, including Federal, State and local taxes arising out of the Consultant’s activities in accordance with this contract including ...Federal and State income tax, Social Security tax, Unemployment Insurance taxes, and any other taxes or business license fees as required.

The Comprehensive defendants also note that under section 6 of the PSA, Dr. Ellstrom was responsible for procuring his own professional liability (malpractice) insurance coverage.

In further support of their motion, the Comprehensive defendants rely on the deposition testimony and affidavit of Angelo Acquista, MD, a physician licensed to practice medicine and a

¹ Dr. Gingold is the owner of MCS.

principal of Comprehensive, the affidavit of Comprehensive's business manager, Richard Harris, and Dr. Ellstrom's deposition testimony.

At his deposition, Dr. Aquista testified that Comprehensive "was created to hire independent contractors to allow those independent contractors anesthesiologists to provide anesthesia services for certain doctors in their office practice that couldn't afford to have one anesthesiologist there all the time by themselves" (Aquista EBT at 12). He also testified that "Comprehensive did not provide anesthesia services. The independent contractor provided the anesthesia services" [and that]... the anesthesiologistswould receive compensation on a monthly basis for the amount of time that they spent working for Comprehensive Anesthesia" (Id at 12, 22).

As for equipment and supplies, Mr. Aquista testified that "the anesthesiologist would bring... whatever anesthesiologist needed" Id at 26. However, Dr. Acquista also testified that Comprehensive provided leased medical monitoring equipment or anesthesia equipment to various gastroenterologist practices, although he was not sure if such equipment was provided to MCS at the time of the incident (Id 36-37). He further testified that Comprehensive provided its anesthesiologists with forms used to monitor patients which contained the preprinted name of "Comprehensive Anesthesia Specialists" on it (Id at 37-38). He could not recall if Comprehensive provided the anesthesia agents or medication for the anesthesiologists under contract with Comprehensive (Id at 38).

In his affidavit, Dr. Aquista, who states that he had "no medical duties" at Comprehensive, avers that Comprehensive "was as a corporation created to retain anesthesiologists for provision of anesthesia services. The corporation itself did not provide

anesthesia services. Dr. Ellstrom was an independent contractor“(Aquista Aff. Id. ¶’s 2, 4). According to Dr. Aquista, Comprehensive had “no physician-patient relationship with Mr. Parson, exercised no control over the provision of anesthesiology services provided to Mr. Parson ...no input as to the means or methods by which anesthesiology services were provided to Mr. Parson... [no] involve[ment] in procurement of informed consent from Mr. Parson...with clearance of Mr. Parson for surgery ...or deciding and approving the location of the surgery” (Aquista Aff. Id ¶’s 8, 9). As for Acquista Medical Services, PLLC, Dr. Aquista states that it did not exist on the date of the surgery and was formed only after Aquista and Mattoo Medical Associates, PLLC was disbanded on November 16, 2012 (Id ¶ 10).

In his affidavit, Mr. Harris, whose duties at Comprehensive include managing the company, setting up accounts, and making assignments of anesthesiologists to medical facilities, states that Comprehensive “assigned anesthesiologists by facility, and not by particular patients or cases. The assigned anesthesiologist worked out the hours and conditions of work with the retaining medical facility once the anesthesiologist arrived at the assigned facility [and that] Comprehensive...assigned Dr. Ellstrom to render care at the office of co-defendant [Dr] Gingold on July 23, 2012, through a rotation by facility²” (Harris Aff. ¶’s 3, 4). In addition, according to Mr. Harris, Dr. Ellstrom “did not have an exclusive relationship with Comprehensive ... [and] was not obliged to accept all assignments from Comprehensive... which did not withhold taxes, social security, or unemployment insurance from Dr. Ellstrom’s compensation..[nor did it]

²He also states that Comprehensive “did not make any payment to Dr. Ellstrom or Dr. Ellstrom’s professional corporation regarding the care of [Mr. Parson]...[and] did not bill anyone for the care rendered by Dr. Ellstrom to [Mr.] Parson” (Id ¶ 2). However, he does not deny that Comprehensive generally paid Dr. Ellstrom for his assignments.

provide any medical or health benefits to Dr. Ellstrom” (Id ¶’s 5, 6). He also states that “the anesthesiologists provided their own necessary anesthetic equipment, supplies, instruments, and any uniform [and] Comprehensive ...did not control the scope of the anesthesiologist's work ... [and] did not have any authority to discharge an anesthesiologist from an assigned position [and] ...[a]ssigned anesthesiologists did not discuss technical procedures or problems of anesthesia with Comprehensive...” (Id ¶’s 7-9).

As for Aquista’ predecessor-in-interest Aquista and Mattoo Medical Associates, PLLC, Mr. Harris states that this entity was “merely the landlord ... [and] was not in the business of providing medical services and never did provide medical services” (Id ¶ 10).

The Comprehensive defendants also submit Dr. Ellstrom’s deposition testimony. Dr. Ellstrom testified that he had his own professional corporation, Ellstrom Anesthesia P.C., and that he has been board-certified in anesthesiology since 1998 (Id. at 8, 18). According to Dr. Ellstrom, his relationship with Comprehensive began in July 2011 after he “applied, was interviewed and was offered the job” (Id at 12). Once he was hired, he “was provided with places to work if a wanted to and got paid.” (Id) He worked for Comprehensive at various locations about twenty days a month” (Id at 12, 13). He also testified that he worked at Dr. Gringold’s office (i.e. at MSC) on the date of the incident pursuant to his agreement with Comprehensive (Id at 10, 15). Dr. Ellstrom described the MCS’s office as “one of the offices ... that Comprehensive Anesthesia Specialist group staffed,” and when asked what he meant by “group,” he testified “[t]here were several independent contractors like myself” which consisted of “eight or nine doctors” (Id at 14, 16). According to Dr. Ellstrom, the equipment used during the subject surgery was provided by Comprehensive (Id at 59).

Plaintiff opposes the motion and cross moves for an order granting summary judgment to the extent of finding that Dr. Ellstrom is an employee of Comprehensive defendants. In support of its opposition and cross motion, plaintiff cites to various provisions of the Professional Services Agreement and a second agreement, the Anesthesia Services Agreement.

As for the Anesthesia Service Agreement, plaintiff notes that the agreement obligates Comprehensive, as Contractor, to “provide all phases of in-office anesthesiology services to [MSC’s] patients...which services shall be provided in strict conformance with currently approved practices and methods of the community; ...[to] ...provide qualified contractor physicians who shall provide anesthesiology services.. to employ or contract with, supervise and... determine whether to hire, engage, discipline, dismiss or terminate all Contractor Physicians (such as Dr. Ellstrom);... [to] [p]rovide appropriate clinical and administrative supervision of Anesthesiology Services rendered by Contractor Physicians” ...[and] [to] supply all anesthesia related drugs, equipment and supplies” (ASA, ¶ 2(a)(i),(ii), (iii), (vi)).

Plaintiff also points to provisions in the agreement which require Comprehensive to ensure that the “Contractor Physicians” like Dr. Ellstrom have certain qualifications, including that they are Board Certified, they maintain professional liability coverage, and comply with all applicable federal, state, other laws, rules and regulations. In addition, plaintiff points to a non-solicitation clause in the ASA prohibiting MCS from soliciting that Contractor Physicians or other of Comprehensive’s “employees, independent contractors, or agents...until at least 18 months following the termination of this Agreement” (ASA, ¶ 3(c)). Furthermore, plaintiff cites provisions in the ASA under which Comprehensive ensured that the Contractor Physicians have professional liability insurance (Id ¶ 7); assumed the sole and exclusive right to code, collect, and

bill for the Contractor Physician's services (Id ¶ 5(a)); and agreed to withhold on the Contractor Physician's behalf any income tax, unemployment, workers compensation, social security or other withholding related to the Contractor Physician (Id ¶ 5(b)).

As for Comprehensive's Professional Services Agreement with Dr. Ellstrom, plaintiff argues that its provisions demonstrate that Dr. Ellstrom was Comprehensive's employee, including a section entitled Scope of Engagement, under which the parties agreed that while acting on behalf of Comprehensive, Dr. Ellstrom "shall provide anesthesiology services exclusively to clients and patients of [Comprehensive]" (PSA, § 1)(emphasis provided). Plaintiff also asserts that the section of the PSA regarding Dr. Ellstrom's compensation establishes his employee status as he was paid at an annual rate, provided with 30 days for vacation and sick leave, and \$3,000 for education related courses.³ In addition, plaintiff cites to a Covenant Not to Compete clause which provides, *inter alia*, that Dr. Ellstrom "during the period of employment and for the eighteen (18) month period after termination, shall not, as a corporation, partner, employee, shareholder, principal, agent, consultant, manager, advisor, director, officer, independent contractor, control person, operator or in any other capacity or manner whatsoever, directly or indirectly" (Id § 8).

Plaintiff also relies on Dr. Acquista's testimony that Comprehensive paid Dr. Ellstrom on a monthly basis, leased medical monitoring and anesthesia equipment to medical offices that did

³Specifically, the PSA provides that Dr. Ellstrom will be paid "based on the rate of \$360,000 per year for full time service, hereby defined as working five days per week, performed in accordance with this agreement, and prorated for less than full time as appropriate"(Id § 5). It also allowed Dr. Ellstrom "30 days paid time off per year of physicians leave, prorated for less than full time engagement, which includes time off for vacation, sick leave, personal days, meetings, speaking engagements" (Id). Comprehensive also agreed to reimburse Dr. Ellstrom "up to \$3,000 for education related courses and seminars" (Id).

not have their own, and provided forms to the anesthesiologists with their name of Comprehensive on it.

In reply, the Comprehensive defendants argue that the contractual provisions relied on by plaintiff are insufficient to raise an issue of fact in light of evidence that they exercised no control over the means and methods of Dr. Ellstrom's services.⁴ The Comprehensive defendants also argue plaintiff has failed to show that Aquista's predecessors-in-interest, Aquista and Mattoo Medical Associates, employed Dr. Ellstrom or was in the business of providing medical services, or that Aquista was in existence at the time of the underlying incident.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

⁴In support of their position that Dr. Ellstrom is an independent contractor, the Comprehensive defendants cite a provision in the Anesthesia Service Agreement which provides that "[n]one of the provisions of this Agreement is intended to create, nor shall any be designated or construed to create, any relationship between Contractor (i.e. Comprehensive) and/or Contractor Physicians, on the one hand, and [MCS] on the other hand, other than that of independent entities contracting with each other solely for effecting the provisions of this agreement." (ASA, ¶ 2(e)). However, this provision, which speaks to the nature of MCS's relationship with Comprehensive and its Contractor Physicians is irrelevant to whether Dr. Ellstrom is an employee or independent contractor of Comprehensive.

As a preliminary matter, the Comprehensive defendants have made a prima facie showing, which is not controverted by plaintiff, that they did not provide medical services to Mr. Parson such as to give rise to a physician patient relationship. See generally Lee v. City of New York, 162 AD2d 34, 36 (2d Dept 1990) appeal denied, 78 NY2d 863 (1991)(noting that “[t]he physician-patient relationship is a consensual one ...[which] is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment). In addition, the Comprehensive defendants have provided uncontroverted evidence that Aquista, and its predecessor-in-interest Aquista and Mattoo Medical Associates, had no role providing in the medical services at issue, including in contracting with Dr. Ellstrom to provide such services. See Hylton v. Flushing Hosp and Medical Center, 218 AD2d 604 (1st Dept 1995) lv denied 87 NY2d 807 (1996)(defendant corporation that owned premises and leased it to defendant physician providing medical care could not be held vicariously liable for any negligence or malpractice of defendant physician in the absence of evidence that it held itself out as a provider of medical services). Accordingly, the Comprehensive defendants’ motion is granted to the extent of dismissing the complaint against Aquista.

The remaining issue concerns whether the record raises a triable issue of fact as to whether Dr. Ellstrom is Comprehensive’s employee, as opposed to an independent contractor, such that Comprehensive may be held vicariously liable for any negligence and/or malpractice of Dr. Ellstrom.

“As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors, as

opposed to employees of the principal, perform their work.” Goodwin v. Comcast Corp, 42 AD3d 322, 322 (1st Dept 2007)(internal citation omitted); see also Kleeman v. Rheingold, 81 NY2d 270, 273 (1993). “Factors relevant to assessing control include whether a worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule” Hernandez v. Chefs Diet Delivery, LLC, 81 AD3d 596, 598 (2d Dept 2011)(internal citation and quotations omitted). Others factors considered are the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work. Fitzpatrick v Holimont Inc., 247 AD2d 715, 715 (3d Dept), lv dismissed 92 NY2d 888 (1998); Weingarten v XYZ Two Way Radio Serv., Inc., 183 AD2d 964 (3d Dept), lv dismissed, 80 NY2d 924 (1992). In addition, “the mere retention of general supervisory powers over an independent contractor cannot form the basis for liability against the principal.” Santella v. Andrews, 266 AD2d 62 (1st Dept 1999), lv denied 94 NY2d 762 (2000).

Furthermore, “[t]he fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive.” Hernandez v. Chefs Diet Delivery, LLC, 81 AD3d at 599 (internal citations and quotation omitted); see also Vasquez v. Sirkin Realty Corp, 107 AD3d 410, 411 (1st Dept 2013). “Whether an individual is an independent contractor or employee must be determined on an ad hoc basis...and typically involves questions of fact as to who controls the methods and means by which the work is done.” Stevens v. Spec. Inc., 224 AD2d 811 (3d Dept 1996); see also Carrion v. Orbit Messenger, Inc., 192 AD2d 366 (1st Dept), appeal dismissed 82 NY2d 742 (1993). On the other hand, “where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of

law.” Goodwin v. Comcast Corp, 42 AD3d at 323. Based on the conflicting evidence described below, issues of fact exist as to whether Dr. Ellstrom is an employee of Comprehensive.

Comprehensive has submitted evidence which it contends demonstrates that Dr. Ellstrom is an independent contractor, including the Professional Services Agreement which identifies him as an independent contractor, Dr. Ellstrom’s testimony that he considered himself an independent contractor, and that he got paid if he performed work, the statements in the affidavits of Dr. Aquista and Mr. Harris that Dr. Ellstrom was an independent contractor who provided his own liability insurance, did not work exclusively for Comprehensive, and controlled the means or methods of his own work. In addition, Comprehensive submits evidence that it did not withhold taxes, social security, or unemployment insurance from Dr. Ellstrom’s compensation.⁵

However, plaintiff relies on the same Professional Services Agreement and points to, *inter alia*, provisions that Comprehensive paid Dr. Ellstrom for his monthly work based on an annual salary rate, provided paid leave, and reimbursed him for certain educational costs. Plaintiff also points out that under this agreement Dr. Ellstrom was required to provide anesthesiology services “exclusively to clients and patients of [Comprehensive]” and not to compete with Comprehensive during his period of “employment” and for 18 months following his termination. Moreover, plaintiff notes that under the Anesthesiology Services Agreement, Comprehensive agreed to “determine whether to hire, engage, discipline, dismiss or terminate” physicians such as Dr. Ellstrom, and to provide these physicians with “appropriate clinical and

⁵Notably, this evidence conflicts with the Anesthesiology Services Agreement under which the Comprehensive agreed to withhold on the Contractor Physician’s behalf any income tax, unemployment, workers compensation, social security or other withholding related to the Contractor Physician.

administrative supervision of Anesthesiology Services ...[and] [to] supply all anesthesia related drugs, equipment and supplies.⁶”

In view of the conflicting evidence as to whether Dr. Ellstrom was an employee of Comprehensive, the Comprehensive defendants’ motion, as well as plaintiff’s cross motion, for summary judgment must be denied. See Anikushina v. Moodie, 58 AD3d 501 (1st Dept), ly dismissed 12 NY3d 905 (2009)(record raised triable issues of fact as to whether defendant exercised sufficient control over driver’s work to be considered an employee of defendant driver who performed delivery services only for defendant and used defendant’s forms, and defendant made the driver’s schedule and had regular contact with him); Malamood v. Kiamesha Concord, Inc., 210 AD2d 26, 26 (1st Dept 1994)(denying summary judgment on the issue of whether plaintiff’s decedent was an independent contractor of employee of defendant based on an affidavit submitted by plaintiff raising issues of fact as to the degree of control defendant had over the decedent); Carrion v. Orbit Messenger, Inc., 192 AD2d at 367-368 (finding factual issues as to whether defendant driver, who was identified as an independent contractor in his contract with the defendant company, was an employee of the company where there was evidence, *inter alia*, that driver worked exclusively for the company (even though he was free to work for other companies), was paid by the company on a weekly basis, was required to use company’s name on all forms, and was prohibited from soliciting any of the company’s customers for six months following his termination).

Conclusion

In view of the above, it is

⁶While the Anesthesiology Services Agreement is with MSC and not Dr. Ellstrom, its provisions implicate that nature of Comprehensive relationship with Dr. Ellstrom.

ORDERED that the Comprehensive defendants' motion is granted only to the extent of dismissing the complaint and all cross claims against defendant Acquista Medical Services, PLLC, and is otherwise denied; and it is further

ORDERED that the caption is amended so as to delete these defendants from the caption and the amended caption which shall read as follows:

-----X

ESTATE OF DANIEL C. PARSON, deceased,
BY DEBORAH PARSON, Administrator

INDEX NO. 805194/14

Plaintiff,

- v -

STEVEN ELLSTROM, MD a/k/a STEVEN JORDAN
ELLSTROM, MD, BRUCE GINGOLD MD, MANHATTAN
COLORECTAL SURGEONS, LLC, MANHATTAN COLORECTAL
SURGICAL UNIT LLC, ACQUISTA AND MATTOO MEDICAL
ASSOCIATES PLLC, d/b/a COMPREHENSIVE ANESTHESIA
SPECIALISTS, and ELLSTROM ANESTHESIA, P.C.,

Defendants

-----X

and it is further

ORDERED, that Comprehensive shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119) and the County Clerk (room 141B), who are directed to mark the court records to reflect the removal of Aquista Medical Services, PLLC from the caption; and it is further

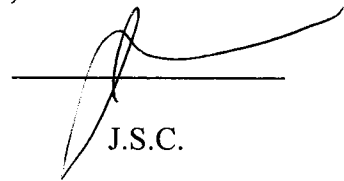
ORDERED that such service upon the General Clerk's Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/suptmanh)); and it is further.

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on April 11, 2019 at

11:30 am in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: March 12, 2019



J.S.C.

HON. JOAN A. MADDEN

J.S.C.