

Henry v Huo
2019 NY Slip Op 31736(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 154403/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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HULDA HENRY,

INDEX NO. 154403/12

Plaintiff,

-against-

JERRY HUO, M.D., NEW YORK HOTEL TRADES
COUNCIL AND HOTEL ASSOCIATION OF NEW
YORK CITY HEALTH CENTER, INC.,
NY OTOLARYNGOLOGY PLLC, SUBROTO PAUL,
M.D. and SANJAY TEWARI, M.D.,

Defendants.

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JOAN A. MADDEN, J.S.C.:

In this action for medical malpractice and lack of informed consent, defendants New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. (“NYHTC”) (motion seq. no. 004) and Subroto Paul, M.D. (motion seq. no. 005) move for summary judgment. The motions are consolidated for determination herein.

Plaintiff alleges defendants failed to treat her properly for an enlarged goiter and hypothyroidism, and as a result she suffered a complete paralysis of her left vocal cord. On April 7, 2010, defendant Dr. Jerry Huo, an employee of NYHTC, performed a “total thyroidectomy.” which involved the removal of the entire thyroid gland. Plaintiff subsequently presented with complaints of shortness of breath and dysphagia. In December 2010, Dr. Huo advised that she had “residual thyroid (goiter mass) tissue on the left side, which was causing tracheal deviation” and recommended a “completion thyroidectomy with possible sternal split.” In June 2011, plaintiff saw defendant Dr. Paul, and on July 1, 2011, Dr. Paul performed a “partial sternotomy

with resection of substernal goiter after dissection of trachea and esophagus,” and a “bronchoscopy and esophagogastroduodenoscopy.” Non-party Dr. Sanjay Tewari ¹ was the anesthesiologist for the surgery and the record indicates that there was some difficulty intubating plaintiff. Specifically, Dr. Paul’s operative report states that “intubation was not possible using standard techniques and the patient was subsequently intubated by myself with Q#6tube, using a fiber optic bronchoscope.” In August 2011, plaintiff saw Dr. Paul and complained of pain around the incision and occasional hoarseness, but her voice was “normal.” In November 2011, Dr. Paul noted she was doing well but was “clearly hoarse.” Plaintiff advised Dr. Paul that she had seen an ENT who found her left vocal cord “completely paralyzed.” Dr. Paul recommended that she follow-up with the ENT and suggested “medialization” of her vocal cord. He also recommended a follow-up CT scan in six months. That was the last time plaintiff saw Dr. Paul.

In July 2012, plaintiff commenced the instant action, asserting claims against all defendants for medical malpractice, negligent hiring/supervision, and lack of informed consent. Plaintiff essentially alleges that Dr. Huo, as an employee of NYHTC, departed from the standard of care by not removing the entirety of the goiter during the first surgery, and that Dr. Paul departed from the standard of care during the second surgery by not properly intubating plaintiff, which resulted in damaging and paralyzing her vocal chord. ²

¹On April 6, 2016, Justice Alice Schlesinger issued an order dismissing the complaint as against Dr. Tewari, so he is no longer a party to this action.

²The Supplemental Bill of Particulars alleges that NYHTC and its employees departed from the standard of care by: negligently managing plaintiff’s hypothyroidism; failing to obtain an informed consent and advise plaintiff of the risks, benefits, alternatives and complications of the treatment; failing to order adequate x-rays, MRIs or CT scans; failing to diagnose plaintiff’s “true condition”; failing to properly note the size, contours and location of the goiter; using an “inappropriate technique” to perform a thyroidectomy; performing an “incomplete”

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that “in treating the plaintiff, there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, defendant must present expert opinion testimony that

thyroidectomy which left “remnant” thyroid tissue or mass; not properly attending to the remnant mass; causing plaintiff to suffer complications and sustain additional injuries; causing a second complex surgery to be required; failing to complete an accurate operative report; failing to render adequate follow-up care; failing to prescribe appropriate hormone and other drug therapy; failing to order appropriate laboratory testing; negligently ignoring symptoms of the “remnant mass” and causing the mass to “proliferate”; failing to arrange for completion of the thyroidectomy procedure; wrongfully causing a sternal split; and delaying necessary consultations and treatment.

With respect to Dr. Paul, the Supplemental Bill of Particulars alleges most of the same departures as alleged against NYHTC, and includes these additional departures: negligently performing a partial sternotomy, esophagogastroduodenoscopy, bronchoscopy and thyroidectomy; injuring the laryngeal nerve; using an “inappropriate technique” in performance of the surgery; failing properly to monitor the laryngeal nerve; failing to identify or assess plaintiff’s laryngeal/esophageal anatomy; failing to obtain timely and appropriate laryngeal electromyography and laryngeal videostroboscopy examinations; failing to utilize appropriate nerve integrity monitors; failing properly to note the size, contours and location of the remnant goiter; causing and permitting errant tracheal tube placement; failing to use appropriate instruments in the course of the tracheal intubation; failing to properly grade the difficulty in intubating plaintiff prior to intubation; permitting a “forceful and improper intubation”; failing to use appropriate tracheal tub sizing; negligently causing a paralysis to the laryngeal nerve; failing to use appropriate laryngoscope in the visualization of plaintiff’s anatomical structures; failing to provide for the narrowing of the tracheal space; failing properly to insert the tube into the trachea; failing to conduct appropriate testing and assessment of glottic airway factors; failing to examine or check for breath sounds, chest movements or auscultation of epigastric sounds following attempted placement of the endotracheal tube; failing properly to utilize electronic end-tidal carbon dioxide detector; failing to visualize the endotracheal tubes pass through the vocal chords; failing to verify tube placement; failing to timely utilize pulse oxymetry to determine the patient’s saturation level; failing to timely and properly utilize capnography; failing to use imaging studies to determine proper placement of the endotracheal tube; failing to evaluate, assess and treat plaintiff post-operatively; failing to advise plaintiff of the injuries suffered during surgery; and failing to render appropriate follow-up care.

is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id.; see Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

"[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries." Roques v. Nobel, supra at 207. To meet this burden, "plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." Id. Where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

First, as clarified in its reply papers, NYHTC "seeks dismissal of any and all claims of direct liability," and is not moving with respect to any claims for vicarious liability based on the negligence of its employee, Dr. Huo. NYHTC has established prima facie entitlement to partial summary judgment dismissing all claims for direct liability, by submitting the expert affirmation of Dr. Michael Setzine, who is board certified in otolaryngology. Dr. Setzine reviewed the bills of particulars, the pertinent medical records and diagnostic studies, and the deposition testimony,

noting that NYHTC was not deposed. Dr. Setzine adequately addresses the departures alleged in the bills of particulars relating to NYHTC's direct liability and establishes prima facie that no basis exists to impose any direct liability on NYHTC for plaintiff's injuries.

Plaintiff fails to raise an issue of fact as to NYHTC's direct liability. Plaintiff does not submit an expert affirmation, and her attorney simply argues that based on the Notice to Admit, NYHTC admits it employed Dr. Huo, and as his employer, NYHTC is vicariously liable for any negligence on the part of Dr. Huo.

Thus, in view of Dr. Setzine's expert affirmation and the absence of an expert affirmation from plaintiff, NYHTC is entitled to partial summary judgment dismissing all claims against it for direct liability. The claims against NYHTC for the imposition of vicarious liability based on Dr. Huo's negligence, survive.

Dr. Paul likewise establishes prima facie entitlement to judgment as a matter of law based on the expert affirmation of Dr. Zervos, a board certified surgeon specializing in thoracic surgery, who reviewed the bills of particulars, plaintiff's medical records and the deposition testimony. Dr. Zervos opines that Dr. Paul employed "standard surgical techniques" in the removal of plaintiff's tumor, successfully removed the entirety of the tumor and "achieved the goal of the procedure to remove the residual goiter found in the chest cavity." He further opines that the injury to plaintiff's vocal cord causing a "paretic vocal cord," as alleged, was a well-known risk of the procedure that was specifically disclosed to plaintiff prior to the July 1, 2011 procedure, and after that disclosure, plaintiff "signed and executed" an informed consent agreeing to the procedure, and was "therefore willing to accept the risk of this potential complication."

Dr. Zervos opines that it was a “valid exercise” of Dr. Paul’s judgment to not employ “laryngeal nerve monitoring” and to not extend the surgery into the neck, due both to “the possibility of increasing the risks of the procedures and further damage to a scarred in area.” With respect to the issue of plaintiff’s intubation, Dr. Zervos avers that Dr. Paul “only obtained an airway emergently through a fiberoptic means after it was absolutely required,” and that Dr. Paul performed the fiberoptic intubation with a “small 6-0 endotracheal tube under direct visualization, and therefore the vocal chords would have been visualized and avoided during Dr. Paul’s establishment and creation of an airway.”

Plaintiff’s opposition is insufficient to defeat Dr. Paul’s motion. While plaintiff argues that Dr. Paul fails to make a prima facie showing, she does not submit an affidavit or affirmation from her own medical expert to counter the opinions of Dr. Zervos. Rather, plaintiff relies solely on an attorney’s affirmation, Dr. Paul’s operative report, the operating room report and Dr. Paul’s deposition. Contrary to plaintiff’s assertion, Dr. Zervos adequately addresses the allegations in the bills of particulars, including the allegations relating to Dr. Paul’s intubation of plaintiff. Moreover, while Dr. Paul’s operative report shows that he intubated plaintiff, plaintiff has not produced any competent medical evidence identifying the specific nature of Dr. Paul’s alleged departure from the standard of care in the performance of the intubation. See Denis v. Manhattanville Rehabilitation & Health Care Center, LLC, 111 AD3d 406 (1st Dept 2013), lv app den 22 NY3d 863 (2014); Roques v. Nobel, supra at 207. Dr. Paul, therefore, is entitled to judgment as a matter of law dismissing the complaint as against him.

Accordingly, it is

ORDERED that the motion by defendant New York Hotel Trades Council and Hotel

Association of New York City Health Center, Inc (motion seq. no. 004) for partial summary judgment is granted only to the extent of severing and dismissing all claims seeking to impose direct liability on such defendant , and the claims against said defendant for vicarious liability shall continue ; and it is further

ORDERED that the motion by defendant Dr. Subroto Paul, M.D., for summary judgment (motion seq. No. 005) is granted, and the complaint in its entirety is dismissed as against such defendant, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties shall appear for the pre-trial conference previously scheduled for July 18, 2019 at 11: 00 am, in Part 11, Room 351, 60 Centre Street.

DATED: June 18, 2019

ENTER:



J.S.C.

STON. JOHN A. MADDEN
J.S.C.