

Chiesa v Katz

2019 NY Slip Op 33558(U)

January 17, 2019

Supreme Court, Putnam County

Docket Number: 328/2016

Judge: Victor G. Grossman

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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

-----X
APRIL CHIESA and ANTHONY CHIESA,

Plaintiff,

-against -

JEFFREY B. KATZ, M.D., HANSRAJ K. SHETH, M.D.,
CARL F. CALICA, M.D., MT. KISCO MEDICAL
GROUP, P.C., and PUTNAM HOSPITAL CENTER,

Defendants.

-----X
GROSSMAN, J.S.C.

DECISION & ORDER

Index No. 328/2016

Sequence No. 2
Motion Date: 10/10/18

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PUTNAM COUNTY
CLERK

The following papers, numbered 1 to 23, were considered in connection with Defendant Putnam Hospital Center's Notice of Motion, dated July 12, 2018, seeking an Order, granting summary judgment and dismissing the complaint as against it.

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support/Exhs. A-L	1-14
Affirmation in Opposition/Exhs. 1-7	15-22
Reply Affirmation	23

On March 8, 2016, Plaintiffs April and Anthony Chiesa commenced this medical malpractice action against Defendants Jeffrey B. Katz, M.D., Hansraj K. Sheth, M.D., Carl F. Calica, M.D., Mt. Kisco Medical Group, P.C. ("MKMG"), and Putnam Hospital Center ("Putnam Hospital"). Plaintiff Anthony Chiesa is seeking damages for loss of consortium. The Verified Complaint alleges that on February 7, 2014, Ms. Chiesa underwent an elective hysterectomy at Putnam Hospital performed by Dr. Katz, after which, she developed serious

complications during her stay at Putnam Hospital, forcing her to remain a patient until February 27, 2014, and undergo another surgery, on February 12, 2014, to correct a perforated bowel. She alleges that but for the negligence of the named Defendants, she would not have had these complications.

As to Putnam Hospital, Plaintiffs allege (Notice of Motion, Exh. B):

59. Upon information and belief, defendant, PUTNAM HOSPITAL CENTER, its agents, servants and employees and those under its supervision and/or control were careless and negligent, committed acts and/or omissions and deviated and departed from the standards of medical and/or surgical and/or hospital and/or radiological and/or gynecologic standards and /or other indicated treatment; said defendant was further careless and negligent in supervising and/or controlling its agents, servants and/or employees; carelessly and negligently failing to treat and care for the plaintiff, APRIL CHIESA, in accordance with good and accepted standards of medical and/or surgical and/or radiological and/or gynecological and/or hospital care and treatment and/or working up plaintiff and/or following the plaintiff and addressing findings with respect to said plaintiff's condition and were careless and negligent in failing to heed signs, symptoms and complaints of the plaintiff and in carelessly and negligently failing to obtain necessary and appropriate consultations; carelessly and negligently failing to take into account clinical, radiological and laboratory findings; carelessly and negligent failing to appreciate the significance of objective findings on x-rays and CT Scans and other studies; failing to properly monitor and arrest and reverse the deteriorating condition of the plaintiff; failing to perform urgent surgical intervention upon plaintiff; carelessly and negligently failing to properly diagnose the true condition of the plaintiff; carelessly and negligently delaying necessary surgical intervention to plaintiff; failing to promulgate and implement rules, regulations, protocols, policies and guidelines with respect to the post-operative management of its patients; failing to supervise its agents, servants and employees; and in being otherwise caress [sic] and negligent under the prevailing circumstances;

* * *

61. Defendant, PUTNAM HOSPITAL CENTER, is vicariously liable for the negligent acts and omissions and medical malpractice of defendants JEFFERY B. KATZ, M.D., HANSRAJ K. SHETH, M.D. and CARL

CALICA, M.D., pursuant to the doctrines of *respondeat superior* and ostensible agency by estoppel.

62. As a direct and proximate result of the negligence of the defendants as aforesaid, plaintiff, APRIL CHIESA, was caused to undergo further medical and surgical care and treatment and sustained conscious pain and suffering, was rendered sick, sore and disabled and has been caused to suffer emotional anguish and upset, loss of the ability to enjoy her life and other injuries, damages and losses all to her detriment.

Plaintiffs also allege that Defendants failed to disclose to Ms. Chiesa the risks of undergoing this procedure (Notice of Motion, Exh. B).

Putnam Hospital interposed a Verified Answer, generally denying the allegations and raising two affirmative defenses, including failure to state a cause of action (Notice of Motion, Exh. C).

According to Plaintiffs' Bill of Particulars as they pertain to Putnam Hospital, Plaintiffs assert that it and its employees were careless and deviated from the standards of medical care while she was a patient at the hospital by, *inter alia*: "failing to heed signs, symptoms and complaints of the plaintiff and in carelessly and negligently failing to obtain necessary and appropriate consultation"; failing to perform necessary tests and surgical procedures; failing to promulgate rules and protocols with respect to post-operative management of its patients; failing to supervise its employees, and failing to perform open exploratory abdominal surgery to inspect her bowel to rule out other perforations" (Notice of Motion, Exh. D). Plaintiffs allege that Ms. Chiesa suffered specific injuries and/or disabilities which were caused, or aggravated, by Putnam Hospital's negligence (Notice of Motion, Exh. D).

Putnam Hospital now moves for summary judgment, arguing: (1) vicarious liability may not be imputed to Putnam Hospital because Drs. Katz, Sheth, nor Calica were not employees of

the hospital; (2) Putnam Hospital's staff conformed to the standard of care and did not proximately cause Ms. Chiesa's injuries; and (3) Plaintiffs have not adequately pleaded a cause of action for negligent supervision and training. In support of its motion, Putnam Hospital proffers, inter alia: (1) the pleadings; (2) the expert affirmation of Dr. Danne Lorio; (3) the affidavit of Peter Kelly, Putnam Hospital's President; (4) April Chiesa's deposition transcript; (5) Dr. Sheth's deposition transcript; (6) Dr. Calica's deposition transcript; (7) Dr. Katz's deposition transcript; and (8) Putnam Hospital records.

In opposition, Plaintiffs argue that summary judgment is inappropriate in this case, as there are conflicting expert affidavits before the Court. In support, Plaintiffs proffer, inter alia: (1) April Chiesa's deposition transcript; (2) the expert affidavit from Dr. David Mayer; and (3) Putnam Hospital records.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits. See Millerton Agway Coop. v. Briarcliff Farms, 17 N.Y.2d 57, 61 (1966); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Initially, "the proponent... 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 issue of fact." However, once movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers. Id.; see also Fabbricatore v. Lindenhurst Union Free School Dist., 259

A.D.2d 659 (2d Dept. 1999).

It is well settled that a hospital is liable to a patient for injuries sustained through negligence of its employees acting within the scope of their employment. Bing v. Thunig, 2 N.Y.2d 656 (1957); see Hilsdorf v. Tsioulis, 132 A.D.3d 727 (2d Dept. 2013); Sampson v. Contillo, 55 A.D.3d 588, 589 (2d Dept. 2008). Hospitals may also be liable for the acts of a private attending physician under the theory of apparent or ostensible agency. See Sanchez v. Master, 61 Misc.3d 246, 248 (Sup.Ct. [Bronx] 2018). “Under this theory, vicarious liability exists where a patient, in accepting treatment from the private physician, relies upon the fact that the services being provided by the physician as the hospital’s apparent agent, such as where a patient comes to the emergency room seeking treatment *from the hospital* and not from a particular physician of the patient’s choosing.” Sanchez v. Master, *supra* (emphasis in original), citing Polgano v. Christakos, 104 A.D.3d 501. (1st Dept. 2013); see Sampson v. Contillo, *supra*.

Putnam Hospital has established a prima facie case that it is not vicariously liable or liable under the theory of apparent or ostensible agency, as it relates to the named physicians by proffering an affidavit from Peter Kelly, President of Putnam Hospital, who stated that in February 2014, Drs. Katz, Sheth and Calica: (1) were independent physicians with medical staff privileges to admit and treat their patients at Putnam Hospital; (2) were not employees of Putnam Hospital in February 2014; (3) were not provided offices at Putnam Hospital; (4) did not have schedules set by Putnam Hospital; (5) did not receive compensation from Putnam Hospital for patients treated there; and (6) did not receive W-2s from Putnam Hospital (Notice of Motion, Exh. E). In response, Plaintiffs failed to rebut this proof (see Hilsdorf v. Tsioulis, *supra*), or even address this argument in their opposition papers. As such, the allegation that Putnam

Hospital is liable for the actions, or inactions, of Drs. Katz, Sheth and Calica, under the theories of *respondeat superior*, or apparent or ostensible agency, is dismissed.

Turning to the medical malpractice allegations against Putnam Hospital, “[t]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage.” Hamilton v. Good Samaritan Hosp. of Suffern, N.Y., 73 A.D.3d 697, 698 (2d Dept. 2010). In opposition to the defendant’s motion, a plaintiff “must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.” Alvarez v. Prospect Hosp., *supra* at 324-25. “General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician’s summary judgment motion.” Alvarez v. Prospect Hosp., *supra* at 325. In addition, “[s]ummary judgement is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions’ because ‘[s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury.’” Cummings v. Brooklyn Hosp. Ctr., 147 A.D.3d 902, 904 (2d Dept. 2017), quoting DiGeronimo v. Fuchs, 101 A.D.3d 933, 936 (2d Dept. 2012).

In support of its motion, Putnam Hospital proffered Ms. Chiesa’s medical records and the parties’ deposition transcripts. Putnam Hospital also proffered an expert affirmation from Dr. Danne Lorieo, who opined, “to a reasonable degree of medical certainty that the treatment rendered to plaintiff April Chiesa by Putnam Hospital during the February 7, 2014 admission was appropriate at all times and that her alleged injuries were not the result of any acts or omissions

by” Putnam Hospital (Notice of Motion, Exh. A at ¶3). Dr. Lorieo detailed the care and treatment of Ms. Chiesa and the response to her by the staff during her stay at the hospital (Notice of Motion, Exh. A at ¶¶7-21). Dr. Lorieo opined, inter alia, “to a reasonable degree of medical certainty that the plaintiff’s care by Putnam Hospital employees and staff was appropriate and consistent with the standard of care at all times * * *. Based upon my review of the records and deposition testimony, there was nothing Putnam Hospital staff did or failed to do pre-operatively, intra-operatively, or post-operatively in relation to either the February 7 or February 12 surgeries that deviated from normal practice where any of the hospital staff should have intervened * * *. [T]here were no acts or omissions by the Putnam Hospital staff which deviated from the standard of care. Furthermore, there were no acts or omissions by the Putnam Hospital staff which contributed to the plaintiff’s claimed injuries [and] any alleged treatment of the patient rendered by Putnam Hospital did not proximately cause the patient’s claimed injuries, which in the Bill of Particulars. * * * The bowel perforation [and alleged injuries flowing from it were] in no way causally related to the care and treatment rendered by Putnam Hospital staff. * * **” (Notice of Motion, Exh. A at ¶¶22-27).

In response, Plaintiffs proffered Ms. Chiesa’s deposition transcript, her medical records, and an expert affirmation from Dr. David Mayer. At her deposition, Ms. Chiesa explained that she repeatedly complained to the nursing staff about her extreme pain, nausea, diarrhea, hard abdomen, and racing heart during her post-operative stay at Putnam Hospital. She states that she was told repeatedly by the nursing staff that these complaints would be relayed to her physicians (Opposition, Exh. 3 at 70-76, 80-82, 84-85, 172-73, 178-82, 186-92, 202-05, 207-08, 223-25, 229, 233, 239). Dr. Mayer stated, inter alia, that “[b]etween February 7, and February 12, 2014

April Chiesa presented with continuous symptoms and complaints including pain, both shooting and aching and in the abdomen and the chest, together with elevated temperatures, tachycardia, low pulse ox, high blood pressure, low respiration rate, abdominal hardness, redness, and warmth, nausea and vomiting. The pain assessment records by the PUTNAM HOSPITAL CENTER staff are particularly telling as to the continued deterioration of April Chiesa between February 7 and February 12, 2014 and the failures of the nursing staff to report ominous findings with consistency to appropriate physicians” (Opposition, Exh. 5 at ¶¶5-6). Dr. Mayer, based on his review of her medical records, details, inter alia, the history of her pain increasing over time, while on intense painkillers, noting that “[s]aid pain, especially while under such intensive medications that mask the pain should have been a consistent warning, and the failure of the nurses to consistently report, notify, or refer the patient’s condition to the appropriate physicians were clear deviations and departures from hospital standards of care contributing to pain and/or other conditions” (Opposition, Exh. 5 at ¶6). Dr. Mayer stated that the reports by the nurses “were infrequent and sporadic, contributing to delay,” and the hospital “staff failed to impress upon the physicians the continuity and significance of each datum violating professional standards of care” (Opposition, Exh. 5 at ¶9). Dr. Mayer asserts that there were laboratorial and radiological findings unreported, or underreported, to the treating physicians, and/or negligently interpreted (Opposition, Exh. 5 at ¶¶10-11). According to Dr. Mayer, “[t]he initial underreporting of the test performed on February 9, 2014 contributed to a significant delay and deterioration in April Chiesa’s condition, including pain, as the findings of February 9 were ominous” (Opposition, Exh. 5 at ¶12). Dr. Mayer concluded that “my review of this matter compels the conclusion that there was clear negligence by Putnam Hospital staff in consulting,

notifying, and referring ominous findings to appropriate physicians as set forth herein, as well as a failure by a hospital-employed radiologist to make and report key findings on February 9, 2014 which, according to another hospital employee, Dr. Krakowski on February 11, 2014, were in fact present on February 9, 2014, all of which carelessness, negligence, deviations and departures contributed to the decline of April Chiesa's medical condition" (Opposition, Exh. 5 at ¶14). As such, Plaintiffs have raised a triable issue of fact.

As the parties have proffered conflicting opinions of medical experts, and upon the Court's review of the evidence proffered by both sides, the Court finds that summary judgment is inappropriate. See Cummings v. Brooklyn Hosp. Ctr., *supra*.

To the extent any relief is not directly addressed herein, it is denied and it is hereby ORDERED that Defendant's motion is denied to the extent stated herein; and it is further ORDERED that the allegation that Defendant Putnam Hospital Center is liable for the actions, or inactions, of Defendants Drs. Katz, Sheth and Calica, under the theories of *respondeat superior*, or apparent or ostensible agency, is dismissed; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Thursday, February 7, 2019 at 9:30 a.m. for a pre-trial conference. No per diem counsel will be permitted, and no adjournments will be granted unless for good cause shown.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
January 17, 2019


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