

Bussie v Good Samaritan Hosp.
2020 NY Slip Op 30504(U)
February 19, 2020
Supreme Court, Suffolk County
Docket Number: 00044/2019
Judge: William B. Rebolini
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Christopher A. Bussie, Sr.,

Index No.: 00044/2019

Plaintiff,

Motion Sequence No.: 001; MD

Motion Date: 8/29/19

Submitted: 11/27/19

-against-

Good Samaritan Hospital
and Kukadia Ashok, M.D.,

Motion Sequence No.: 002; MD

Motion Date: 11/27/19

Submitted: 11/27/19

Defendants.

Plaintiff Pro Se:

Attorney for Defendant
Good Samaritan Hospital Medical Center
s/h/a Good Samaritan Hospital:

Christopher Bussie
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Amityville, NY 11701

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Attorney for Defendants:

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Clerk of the Court

Upon the following papers read on the applications by defendants for an order dismissing the complaint as against them pursuant to CPLR 3211 [a][7] and CPLR 3212; Notice of Motion and supporting affirmation dated July 26, 2019, supporting affirmation dated July 10, 2019, together with exhibits 1 and 2 and A and B annexed thereto; Notice of Motion and supporting affirmation dated October 30, 2019 and exhibits A through E annexed thereto; opposition papers dated December 16, 2019; it is

ORDERED that the motions by defendants are consolidated for purposes of a determination herein; and it is further

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ORDERED that the defendants' motions to dismiss the complaint are denied.

Plaintiff *pro se* commenced this medical malpractice action by the filing of a summons and complaint dated January 3, 2019 and an amended summons and complaint on May 31, 2019. Issue was joined by defendant Ashok N. Kukadia, M.D. ("Dr. Kukadia") and by defendant Good Samaritan Hospital ("Good Sam Hospital") by answer dated July 17, 2019. Plaintiff alleges that on July 4, 2016, Dr. Kukadia performed a surgery upon plaintiff at defendant Good Sam Hospital relative to a left scrotal hematoma. Plaintiff alleges that a mesh plug ring implanted during an inguinal hernia surgery fell or migrated and became lodged in plaintiff's left scrotal region tearing tissue, causing an infection, internal bleeding and left spermatic cord damage. Plaintiff alleges that Dr. Kukadia did not remove the mesh or the infected area caused by the mesh. Plaintiff alleges that another surgery was performed on May 31, 2018 to remove the infected tissue and a "micro surgical denervation" of his left spermatic cord, which was performed by Dr. Peter Stahl at "Columbia Doctors Columbia University." Plaintiff alleges that as a result of the failure of Dr. Kukadia to identify the mesh and properly remove it and the infected tissue during the surgery, plaintiff had spermatic cord damage and associated pain and swelling, which necessitated a further surgery on May 31, 2018. Plaintiff also alleges a lack of informed consent with regard to the surgery performed by Dr. Kukadia at Good Sam Hospital on July 4, 2016. There is no assertion that discovery has commenced in this action or that a preliminary conference has been held. Defendant Dr. Kukadia now moves pursuant to CPLR 3211 [a][7] to dismiss the complaint and defendant Good Sam Hospital moves pursuant to CPLR 3212 to dismiss the complaint as against it. Defendants submit attorney affirmations, a copy of the pleadings and certain medical records, and defendant Dr. Kukadia submits an affirmation, which states that he treated plaintiff on July 4, 2016 and that on that date, he performed a "scrotal exploration, evacuation of hematoma and debridement of scrotal wall" on plaintiff. Dr. Kukadia attaches the chart he maintained in regards to his treatment of plaintiff on July 4, 2016. Dr. Kukadia avers that he has not treated plaintiff since July 4, 2016.

It is well established that on a motion to dismiss a complaint pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]; *Rosenblum v. Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v. Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v. Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). "The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments'" (*Hampshire Prop. v. BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v. Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; see also (*JPMorgan Chase v. J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v. Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]; CPLR 3013). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v. Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept

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2010)). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v. Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see *DiMauro v. Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v. Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v. Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). “Dismissal of the complaint is warranted if they plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-42, 53 NYS3d 598 [2017]).

Here, by way of attorney affirmation, defendant Dr. Kukadia acknowledges that certain of plaintiff’s damages and injuries are predicated upon “migrated mesh lodging in his left scrotum.” Defendant claims that these allegations are contradicted by the documentary evidence, mainly an ultrasound of plaintiff’s left scrotum which was performed by Dr. Asaph Zimmerman prior to plaintiff’s surgery on July 4, 2016. Defendant Dr. Kukadia alleges that the complaint is based upon a “false factual predicate” in that the medical records do not indicate the presence of any “migrated mesh” lodged in the left scrotum. Defendant Kukadia further alleges that there was no duty to report to plaintiff the presence of mesh, as there is no duty to report what does not exist. These assertions, however, are contained within an attorney affirmation and thus, have no probative value. Dr. Kukaida has not submitted an expert medical affidavit explaining how the ultrasound report and other medical records utterly refute plaintiff’s allegations (see *Sobel v. Ansanelli*, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; *Harris v. Barbera*, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]). In addition, the medical reports are not the type of documentary evidence that would suffice on a motion to dismiss pursuant to CPLR 3211 in the absence of an expert affidavit (see *Mehrhof v. Monroe-Woodbury Central School Dist.*, 168 AD3d 713, 91 NYS3d 503 [2d Dept. 2019]).

Regarding the motion by defendant Good Sam Hospital, it is firmly established that a party moving for summary judgment “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” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O’Brien v. Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see *Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment and a breach of this duty constitutes medical malpractice (*see Dupree v. Giugliano*, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; *Scott v. Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989] *Tracy v. Vassar Bros. Hosp.*, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff must prove both that the healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused plaintiff's injuries (*see Gross v. Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v. Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Stukas v. Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see Keane v. Dayani*, 178 AD3d 797 [2d Dept 2019]; *Stucchio v. Bikvan*, 155 AD3d 666, 667, 63 NYS3d 498 [2d Dept 2017], quoting *Matos v. Khan*, 119 AD3d 909, 910, 991 NYS2d 83 [2d Dept 2014]; *Bongiovanni v. Cavagnuolo*, *supra*; *Mitchell v. Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v. Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). A moving defendant "is required to address the factual allegations set forth in the [plaintiff's] bill of particulars with reference to the moving defendant's alleged acts of negligence and the injuries suffered with competent medical proof" (*DiLorenzo v. Zaso*, *supra* at 1112, quoting *Cham v. St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 1005, 901 NYS2d 65 [2d Dept 2010]; *Wall v. Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *LaVecchia v. Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Grant v. Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v. Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]). If defendant produces the requisite evidence, then a plaintiff "must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden" (*Gullo v. Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 AD3d 773, 774, 69 NYS3d 108 [2d Dept 2018]).

"As a general matter, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient" (*Cynamon v. Mount Sinai Hosp.*, 163 AD3d 923, 924, 81 NYS3d 520 [2d Dept 2018] [internal quotations omitted]). Further, "so long as the resident physicians and nurses employed by the hospital have merely carried out that private attending physician's orders, a hospital may not be held vicariously liable for resulting injuries," with three exceptions. Those exceptions are: (1) "when the private physician's orders so greatly deviate from normal medical practice that the hospital's employees should be held liable for failing to intervene"; (2) when a hospital's employees "have committed independent acts of negligence"; and (3) "on a theory of ostensible or apparent agency" (*Doria v. Benisch*, 130 AD3d 777, 777-778, 14 NYS3d 95 [2d Dept 2015] [internal citations and quotations omitted]). In addition, "where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent" (*Salandy v. Bryk*, 55 AD3d 147, 152, 864 NYS2d 46 [2d Dept 2008]).

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Here, defendant Good Sam Hospital has not established its prima facie entitlement to summary judgment through its submission of an attorney affirmation and medical records (*see Post v. County of Suffolk*, 80 AD3d 682, 915 NYS2d 124 [2d Dept. 2011]; *Fotiou v. Goodman*, 74 AD3d 1140, 905 NYS2d 626 [2d Dept. 2010]). Being that defendant has not established its prima facie case, the court need not address the sufficiency of the plaintiff's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Accordingly, the motion by defendant Ashok N. Kukadia, M.D. to dismiss the complaint is denied and the motion by defendant Good Samaritan Hospital for summary judgment pursuant to CPLR 3212 is denied, without prejudice.

Dated: 2/19/2020


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION