

Vioni v Montefiore Med. Ctr.
2020 NY Slip Op 31014(U)
March 4, 2020
Supreme Court, Bronx County
Docket Number: 20200/2016E
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A**

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LISA VIONI and ROBERT ARTHURS,

Plaintiffs,

Index No. 20200/2016E
Motion Seq. 003

-v-

DECISION & ORDER

MONTEFIORE MEDICAL CENTER,

Defendants.

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GEORGE J. SILVER, J.S.C.:

Defendant MONTEFIORE MEDICAL CENTER (“Montefiore” or “defendant”) moves for summary judgment on the basis that there is a lack of a physician-patient relationship between Montefiore and plaintiff.¹ Plaintiffs LISA VIONI (“plaintiff”) and ROBERT ARTHURS (“Mr. Arthurs” collectively “plaintiffs”) oppose the motion. For the reasons discussed below, the court denies the motion.

On April 7, 2015, plaintiff, then 46-years-old, called the office of Dr. Nancy Kirshenbaum (“Dr. Kirshenbaum”), an obstetrician/gynecologist, at the Montefiore Women’s Center to request an appointment. Plaintiff was advised that Dr. Kirshenbaum would be contacted, and that someone would advise plaintiff if Dr. Kirshenbaum accepted her as a new patient.

On April 8, 2015, Nurse Clare Keenan (“Nurse Keenan”) returned plaintiff’s phone call, and left a voicemail. Nurse Keenan informed plaintiff that plaintiff could make an appointment with Dr. Kirshenbaum, but because Dr. Kirshenbaum’s next available appointment was in a few weeks, plaintiff should call back to set a specific date. Later that day, plaintiff called Montefiore Women’s Center, and made an appointment for May 18, 2015.

¹ On March 28, 2016, this action was discontinued against defendant CLARE BRIDGET KELLY, NP. The caption herein reflects only the remaining defendant.

On April 14, 2015, plaintiff called Montefiore Women's Center, and advised Nurse Keenan that she was heavily spotting with blood during urination.

On April 16, 2015, plaintiff presented to Lawrence Hospital's Emergency Department with complaints of severe pelvic pain and vaginal bleeding. Plaintiff reported that she had been bleeding on and off for two weeks, and that she experienced severe lower abdominal pain and vaginal bleeding earlier that day. Subsequent testing revealed that plaintiff was pregnant. Plaintiff was then transported to the operating room where she was diagnosed with a ruptured right ectopic pregnancy. Plaintiff underwent a right salpingectomy and an evacuation of a hemoperitoneum. Plaintiff was discharged home two days later on April 18, 2015.²

ARGUMENTS

Defendant argues that there was no physician-patient relationship between Montefiore and plaintiff, and that Montefiore did not owe a duty to plaintiff. Defendant asserts that plaintiff never visited Montefiore Women's Center for medical treatment, plaintiff was never a patient at Montefiore Women's Center, and Montefiore Women's Center never rendered medical services or surgical treatment to plaintiff. Defendant also highlights that Montefiore Women's Center never possessed of any of plaintiff's medical records, and that plaintiff never had any interaction with anyone at Montefiore Women's Center, except for her telephone calls with Nurse Keenan. Instead, defendant contends that plaintiff only had a future appointment with Dr. Kirshenbaum. As such, regard, defendant posits that there was no express or implied contract between plaintiff and defendant.

² Plaintiff concedes the facts as set forth by defendant. However, there may be some discrepancies in the timeline of events based on the recollection of plaintiff and Nurse Keenan, plaintiff's telephone records, and the letters that plaintiff wrote to Dr. Kirshenbaum.

Additionally, defendant argues that plaintiff's telephone conversations with Nurse Keenan do not constitute diagnosis, treatment, instructions, or advice such as to create a physician-patient relationship. Defendant submits that there was no express undertaking by Nurse Keenan to provide care or treatment to plaintiff. Rather, defendant maintains that Nurse Keenan obtained plaintiff's biographical information, and after contacting Dr. Kirshenbaum to inquire as to whether Dr. Kirshenbaum would accept plaintiff as a patient, Nurse Keenan left a voicemail on plaintiff's phone advising plaintiff to make an appointment with the office.

Defendant further reiterates that Nurse Keenan never met plaintiff, never examined plaintiff, and never reviewed plaintiff's medical records. Rather, defendant notes that Nurse Keenan spoke to plaintiff once more via telephone, at which time plaintiff allegedly relayed symptoms of her medical condition to Nurse Keenan. Defendant also highlights that Nurse Keenan, "as was her custom and practice," provided a "common-sense response" to plaintiff to go to the emergency room if her condition worsened. As such, defendant submits that Nurse Keenan merely acted in an administrative role to facilitate an appointment, and offered, at most, an informal opinion as to plaintiff's symptoms.

Finally, defendant argues that if the court denies summary judgment, then Mr. Arthurs' claim for loss of services, consortium, love, and affection should be dismissed as unsubstantiated.

In opposition, plaintiffs argue that there was substantial contact between plaintiff and Nurse Keenan to create a health provider/patient relationship. Plaintiffs contend that defendant owed plaintiff a legal duty based on plaintiff's interactions with Nurse Keenan. Specifically, plaintiffs aver that plaintiff consulted with Nurse Keenan during three separate telephone calls, during which there was substantive discussions about plaintiff's symptoms (post-menstruation spotting/bleeding). Plaintiffs highlight that Nurse Keenan admits that she spoke to plaintiff via

telephone, and that Nurse Keenan considered plaintiff's complaints to be signs of pre-menopause that would be addressed when plaintiff visited Dr. Kirshenbaum. As such, plaintiffs argue that plaintiff relied on Nurse Keenan's advice to her detriment.

Plaintiffs also argue that because Nurse Keenan disputes that plaintiff logged her complaints of significant bleeding, there is a credibility issue that requires a jury resolution.

Lastly, plaintiffs assert that the court should not dismiss Mr. Arthurs' consortium claim since defendant has failed to appreciate that there was a suspension of martial and other relations occasioned by plaintiff's injury. Plaintiffs contend that contrary to defendant's argument, there is no legal requirement that the elements of a consortium claim be permanent since a temporary loss is compensable.

In reply, defendant reiterates that Montefiore Women's Center did not render services to plaintiff, and that plaintiff's communication with Nurse Keenan did not constitute professional services giving rise to a duty regardless of the content of the communication. Defendant also argues that plaintiffs' argument that Nurse Keenan allegedly advised plaintiff to "[not] worry do nothing but wait," does not rise to the level of a "recommended course of treatment" giving rise to a duty on defendant's part. Defendant further posits that if the court allow Mr. Arthurs' loss of consortium claim to survive, the court should limit the timeframe of such claim to two months following plaintiff's discharge from Lawrence Hospital.

DISCUSSION

I. Physician-Patient Relationship

"Liability for medical malpractice may not be imposed in the absence of a physician-patient relationship" (*Thomas v. Hermoso*, 110 A.D.3d 984, 985 [2d Dept. 2013] [citations omitted]). "A physician-patient relationship is created when professional services are rendered and accepted for

purposes of medical or surgical treatment” (*id.*). “An implied physician-patient relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional” (*id.*). “[I]t is not necessary that a [physician] see, examine, take a history of or treat a patient” (*Tom v. Sundaresan*, 107 A.D.3d 479, 479 [1st Dept. 2013]). Rather, “[A] doctor-patient relationship can be established by a telephone call when such a call ‘affirmatively advis[es] a prospective patient as to a course of treatment’ and it is foreseeable that the patient would rely on the advice” (*Cogswell by Cogswell v. Chapman*, 249 A.D.2d 865, 866 [3d Dept. 1998] [citations omitted]).

“Whether a physician’s proffer of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen is ordinarily a question of fact for a jury” (*id.*; *Tom*, 107 A.D.3d at 479, *supra* [“[W]hether a physician-patient relationship exists is generally an issue of fact”]).

Here, there is an issue of fact as to whether plaintiff’s telephone conversations with Nurse Keenan created a physician-patient relationship sufficient to give rise to a duty of care. Contrary to defendant’s assertion, Nurse Keenan’s statements to plaintiff amounted to more than just “common-sense” opinions. Indeed, Nurse Keenan advised plaintiff that she may be premenopausal when plaintiff informed Nurse Keenan that she was spotting. Nurse Keenan also advised plaintiff that she should not worry unless she was bleeding through a pad an hour, and that if plaintiff came in to Montefiore Women’s Center, an ultrasound would be “deferred” per Dr. Kirshenbaum’s decision if plaintiff was still bleeding. As such, although Dr. Kirshenbaum and Nurse Keenan did not “see, take a history of[,] or treat” plaintiff, a physician-patient relationship nonetheless arose between plaintiff and defendant [*Raptis-Smith v. St. Joseph’s Med. Ctr.*, 302

A.D.2d 246, 247 [1st Dept. 2003] [“It is not necessary that a radiologist see, examine, take a history of or treat a patient in rendering medical services.”]).

Significantly, based on plaintiff’s assertion that she relied on Nurse Keenan’s statements to her detriment “by not seeking any intervention,” an issue of fact exists as to whether there was a physician-patient relationship between plaintiff and defendant (*id.* [denying summary judgment where there was an issue of fact as to whether there was a physician-patient relationship between defendant and plaintiff]; *Cogswell by Cogswell*, 249 A.D.2d at 866, *supra*; *Heller v. Peekskill Cmty. Hosp.*, 198 A.D.2d 265, 266 [2d Dept. 1993]; *Bienz v. Cent. Suffolk Hosp.*, 163 A.D.2d 269, 270 [2d Dept. 1990] [An issue of fact exists as to whether a physician-patient relationship had arisen at the time of the alleged malpractice where “it was not entirely clear ‘what was actually said to decedent and his wife, [and] what reliance they could have reasonably placed in [appellant] as the result of their conversations with him’”]). Accordingly, summary judgment must be denied.

Furthermore, the cases that defendant cites are distinguishable from the facts presented here. In *Miller v. Sullivan*, for example, the Third Department held that there was no physician-patient relationship where defendant only advised decedent “to come over and see him right away,” and decedent “did not go right over” to defendant’s office (214 A.D.2d 822, 823 [3d Dept. 1995]). Here, however, Nurse Keenan told plaintiff that she may be peri-menopausal, and not to worry unless she was bleeding through a pad an hour. Moreover, unlike decedent in *Miller*, who “did not rely on the *only* advice allegedly given by defendant over the telephone,” plaintiff here relied on Nurse Keenan’s statements, and did not seek emergency care (*id.* [emphasis added]).

Similarly, *Ingber v. Kandler* is inapplicable (128 A.D.2d 591, 592 [2d Dept. 1987]). Unlike *Ingber*, where there was no showing that defendant “had any contact with the patient, saw any records relating to the case, or even knew the patient’s name,” here, Nurse Keenan spoke to

plaintiff on several occasions over the telephone, and addressed plaintiff's complaints by asking questions, and providing follow-up advice and information (*id.*). Accordingly, because there is an issue of fact as to whether a physician-patient relationship existed between plaintiff and defendant, summary judgment must be denied.

II. Loss of Consortium Claim

Defendant's application to dismiss Mr. Arthurs' claim for loss of consortium is denied. Indeed, defendant has failed to set forth a *prima facie* showing in favor of dismissal based on defendant's reference to limited excerpts of plaintiffs' respective deposition testimony. Moreover, plaintiff's contention that there was a suspension in plaintiffs' marital and other relations occasioned by plaintiff's injury raises a question of fact sufficient to defeat defendant's motion for summary judgment.

Accordingly, based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is DENIED in its entirety; and it is further

ORDERED that defendant's application to dismiss Mr. Arthurs' cause of action for loss of consortium is DENIED; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 1, 2020 at 9:30 a.m. at 851 Grand Concourse (Room 600), Bronx, NY.

This constitutes the decision and order of the court.

Dated: March 4, 2020


HON. GEORGE J. SILVER

HON. GEORGE J. SILVER