

Depasquale v Staten Is. Univ. Hosp.

2020 NY Slip Op 32862(U)

July 27, 2020

Supreme Court, Richmond County

Docket Number: 151010-2015

Judge: Judith N. McMahon

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

IAS PART 6

ESTELLE DEPASQUALE and NOELLE CARBONE as
Administrator of the Estate of JOSEPH DEPASQUALE,

ORDER

Plaintiffs,

- against -

Index Number: 151010-2015

STATEN ISLAND UNIVERSITY HOSPITAL,
NORTH SHORE LIJ NETWORK, INC., DANIEL MEGNA,
M.D., SOTTILE & MEGNA, M.D., P.C., CORNELIU VULPE,
M.D., SHAILRAJ PARIKH, M.D., JOHN/JANE DOE, M.D.
AND JOHN/JANE DOE, R.N.,

Hon. Justice
Judith N. McMahon

Defendants.

Defendants', Northwell Health, Inc., s/h/a North Shore-LIJ Network, Inc., Staten Island University Hospital ("SIUH"), and Shailraj Parikh, M.D., Motion for Summary Judgment seeking to dismiss the case **is granted** as detailed herein.

Plaintiff alleges that Estelle DePasquale's duodenum was perforated during either an endoscopic retrograde cholangiopancreatography (ERCP) performed by Defendant Gastroenterologist Daniel Megna on December 29, 2014, or during a cholecystectomy performed by Defendant General Surgeon Corneliu Vulpe on December 30, 2014. Plaintiff has not alleged malpractice related to the performance of the ERCP procedure, and consequently Plaintiff has discontinued against Defendant Dr. Megna and his professional practice. Plaintiff's alleged malpractice concerns the post-op care of Estelle DePasquale. Plaintiff alleges, among others, that Defendants failed to properly diagnose sepsis prior to discharging Ms. DePasquale on January 4, 2015.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence

demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage.” *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2nd Dept. 2010). “To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries.” *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2nd Dept. 2018).

Defendants submitted Affirmations from Dr. William Mandell and Dr. Frank G. Gress which demonstrated their prima facie entitlement to judgment as a matter of law. *See Lefkowitz v. Kelly*, 170 A.D.3d 1148, 96 N.Y.S.3d 642 (N.Y.A.D. 2nd Dept. 2019).

In support of Defendants’ motion, Dr. Mandell noted that “the discharge of Ms, DePasquale was not the responsibility of Dr. Parikh or the nursing staff [of SIUH]. The attending physician, Dr. Ferzli, was responsible for discharging the Plaintiff.” It should be noted that Dr. Ferzli was covering attending duties for Dr. Vulpe, as Dr. Vulpe testified that he was out sick during Plaintiff’s post-op treatment. Dr. Mandell opined “that the need for drainage could not have been avoided irrespective of the diagnosis time. The treatment would have been the same if the infection had been appreciated at SIUH on January 4, 2015 or earlier because Ms. DePasquale could not have been treated with antibiotics alone as they would not address the fluid collection.”

In response to Plaintiff's allegations regarding a failure to conduct appropriate diagnostic tests, Dr. Gress stated that, "it is not the role or responsibility of an intern in his first year of residency, such as Dr. Parikh, or any other residents, nurses or hospital staff working at SIUH to order such tests; this responsibility is that of the attending physician/s whom Ms. DePasquale was assigned to, and secondly, diagnostic testing was ordered by attending physician Dr. Vulpe and was performed." Dr. Gress opined "that had duodenal perforation been diagnosed before discharge from SIUH, care and treatment would have been the same as it was at New York Presbyterian Hospital... the alleged delay in diagnosis for four days, did not make any difference to the treatment required or Ms. DePasquale's alleged injuries or outcome."

"Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

In opposition to Defendants' motion, Plaintiff submitted an Affirmation from Dr. Robert A. Aldoroty. Dr. Aldoroty noted that "the Discharge Instructions lists Dr. Parikh as the discharging physician and the Discharge Instructions were signed by Dr. Parikh and Melissa Lord, R.N., an employee of SIUH." Dr. Aldoroty states that, "SIUH, Dr. Parikh, and Dr. Vulpe, were negligent when they discharged Ms. DePasquale while she had exhibited signs and symptoms of a serious infection which included, but were not limited to, an elevated [white blood count], fever, urinary retention, and swelling of her lower extremities." Dr. Aldoroty further opined that, "SIUH, Dr. Parikh, and Dr. Vulpe, were negligent in discharging Plaintiff without investigating and finding the source of Ms. DePasquale's infection. This is particularly true as the patient had an ERCP during the same admission and a duodenal or bile duct

perforation are known risks of the procedure. A perforation should have been on their short list of possible complications following Plaintiff's ERCP."

Dr. Aldoroty concluded "that had Defendants, SIUH, Dr. Vulpe, and Dr. Parikh timely diagnosed and treated the source of Plaintiff's infection, a perforation, Ms. DePasquale's medical and surgical treatment of the peritonitis would have been abbreviated and less complex. Plaintiff would have needed fewer hospitalizations, fewer abdominal drains to drain peritoneal collections and abscesses that were [the] result [of] prolonged peritonitis."

"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. Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders." *Cynamon v. Mount Sinai Hosp.*, 163 A.D.3d 923, 81 N.Y.S.3d 520 (N.Y.A.D. 2nd Dept. 2018).

Dr. Aldoroty's Affirmation attempts to amalgamate the actions of and negligence attributable to Dr. Parikh, SIUH, and Dr. Vulpe. The caselaw makes it clear that this is not a proper basis to oppose the summary judgment motion of a first year resident or the hospital that employs them.

"In opposition, the Plaintiff failed to raise a triable issue of fact by the submission of [their] expert's affidavit since expert opinions which are speculative, conclusory, and unsubstantiated are insufficient to defeat a motion for summary judgment." *Martirosyan v. Antreasyan*, 153 A.D.3d 616, 57 N.Y.S.3d 404 (N.Y.A.D. 2nd Dept. 2017). Dr. Aldoroty's

Affirmation is speculative and conclusory as it fails to set forth an explanation of the reasoning and does not rely on specifically cited evidence in the record. See *Tsitrin v. New York Community Hospital*, 154 A.D.3d 994, 62 N.Y.S.3d 506 (N.Y.A.D. 2nd Dept. 2017).

As such, Defendants' Motion for Summary Judgment must be granted.

It must be noted that in determining the Motion, this Court did not consider the Affirmation of Dr. George Ferzli, submitted for the first time as an exhibit to Defendants' Reply. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion." *Lee v. Law Offices of Kim & Bae, P.C.*, 161 A.D.3d 964, 77 N.Y.S.3d 676 (N.Y.A.D. 2nd Dept. 2018); See also *Allstate Ins. Co. v. Dawkins*, 52 A.D.3d 826, 861 N.Y.S.2d 391 (N.Y.A.D. 2nd Dept. 2008). It should also be noted that this Court has already precluded Dr. Ferzli from testifying in this matter. In an Order dated September 30, 2019, this Court precluded non-parties from testifying unless their EBT was completed on or before December 9, 2019. Dr. Ferzli's Affidavit is dated July 6, 2020.

Accordingly, it is

ORDERED that Defendants' Motion for Summary Judgment seeking dismissal is granted, and it is further

ORDERED that Plaintiff's Complaint is severed and dismissed as to Defendants', Northwell Health, Inc., s/h/a North Shore-LIJ Network, Inc., Staten Island University Hospital, and Shailraj Parikh, M.D., and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 27, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.