Ross v DiBlasio
2020 NY Slip Op 35245(U)
October 8, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 621153/2016
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 621153/2016
CAL. No. 201902370MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 7/15/20
ADJ. DATE ________
Mot. Seq. # 001 MOT D

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JONATHAN ROSS and PATRICIA ROSS,

Plaintiffs,

- against -

FRED DIBLASIO JR., M.D. a/k/a FERDINAND DIBLASIO, M.D., HUNTINGTON HOSPITAL and NORTHWELL HEALTH, INC.,

Defendants.

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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by the defendants dated May 20, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by the plaintiff, dated July 8, 2020; Replying Affidavits and supporting papers by the defendants, dated July 14, 2020 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Ferdinand DiBlasio, M.D., s/h/a Fred DiBliaso Jr., Huntington Hospital, and Northwell Health, Inc. for summary judgment in their favor is determined as follows.

The plaintiff Jonathan Ross commenced this action to recover damages for the alleged medical malpractice of defendants Dr. Fredinand DiBlasio Jr., Huntington Hospital, and Northwell Health, Inc. ("Northwell"). The plaintiff presented at Huntington Hospital on December 4, 2014, with complaints of vomiting and abdominal pain. A CT scan was performed and the plaintiff was diagnosed with acute pancreatitis. Due to various complications, the plaintiff remained at Huntington Hospital until January 10, 2015, and was subsequently transferred to Mount Sinai Hospital where he remained until April 2, 2015. The plaintiff alleges that Dr. DiBlasio and the staff at Huntington Hospital departed from accepted standards of care in their placement of an orogastric tube ("OG tube") into his stomach, and in their failure to timely diagnose the complications that stemmed therefrom. He asserts that the

defendants' acts caused him to have, among other things, a prolonged hospital stay. Additionally, the plaintiff alleges causes of action for lack of informed consent and negligent hiring.

The defendants now move for summary judgment dismissing the complaint on the ground that they did not depart from accepted standards of care during their treatment of the plaintiff. With regard to Northwell, the defendants argue that Northwell is merely the corporate parent of Huntington Hospital and did not have a physician-patient relationship with the plaintiff; thus, it cannot be held liable for the plaintiff's alleged injuries.

The record reveals that the plaintiff presented to the emergency department at Huntington Hospital on December 4, 2014 for complaints of vomiting and abdominal pain. A CT scan of his abdomen and pelvis was performed, and the plaintiff was diagnosed with acute pancreatitis. As a result, he was admitted to the hospital and was treated with antibiotics and fluids, and Dr. DiBlasio was assigned as his attending physician. On December 6, the plaintiff developed shortness of breath and he was transferred to the intensive care unit (ICU). The plaintiff's condition worsened, and on December 9, he was intubated at approximately 8:30 a.m. Some hours after he was intubated, an OG tube was placed so that staff could provide medication and nutrition. A chest x-ray revealed that the tube was properly positioned. At approximately 10:59 a.m., Dr. DiBlasio noted that although his pancreatitis condition was improving, the plaintiff had poor urine output and mild hypotension. The plaintiff's temperature was 102.9 degrees and he had sinus tachycardia. On December 10, an abdominal/pelvic CT scan showed pockets of paraesophageal and perigastric free air, which prompted Dr. DiBlasio to request an evaluation by a surgeon. An esophagram confirmed leakage of contrast along the lesser curvature of the plaintiff's stomach consistent with a perforation at the gastroesophageal junction. A chest x-ray showed no change in the positioning of the OG tube. At approximately 8:55 p.m., surgeons performed an exploratory laparotomy on the plaintiff. The surgeon, Dr. Sobral, observed that the OG tube perforated the plaintiff's stomach at the posterior gastric wall. Dr. Sobral performed a wash out, repair of the gastric perforation, gastrostomy tube placement and jejunostomy tube placement. The perforation was repaired with silk sutures. After the surgery, the plaintiff remained febrile, and Dr. DeBlasio ordered additional CT scans.

On December 15, one CT scan showed persistent leakage of contrast and a small to moderate right pleural effusion. On December 16, a surgeon performed a video assisted thoracoscopic exploration and drained the right pleural effusion. The surgeon placed a new right chest tube and performed a tracheostomy. On December 20, the plaintiff required a laparoscopic cholecystectomy, which found that the plaintiff's gallbladder contained small stones and thick sludge. On January 8, 2015, imaging showed a persistent gastroesophageal junction leak, right-sided central pulmonary emboli, small bilateral pleural effusions, and pancreatic necrosis. On January 10, the plaintiff was transferred to Mount Sinai Hospital with diagnoses that included gastric perforation, necrotizing pancreatitis, sepsis, peritonitis, and acute renal failure. The plaintiff was treated at Mount Sinai Hospital until April 2, 2015, when he was discharged.

To establish liability on a claim for medical malpractice, a plaintiff must prove that the medical provider deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (***Bowe v Brooklyn United Methodist Church Home***,

150 AD3d 1067). On a motion for summary judgment, a defendant has the initial burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, 157 AD3d 773; ***Stucchio v Bikvan***, 155 AD3d 666; ***Mackauer v Parikh***, 148 AD3d 873). To satisfy this burden, a defendant must address and rebut the allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Mackauer v Parikh***, *supra*; ***Wall v Flushing Hosp. Med. Ctr***., 78 AD3d 1043). Once this burden is satisfied, the burden shifts to the plaintiff to raise a triable issue of fact as to whether a departure from good and accepted practice occurred and whether this departure was a proximate cause of his or her injuries (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320); ***Dien v Seltzer***, 116 AD3d 910).

Through the affidavit of Dr. Andrew Boyarsky, the defendants have established their prima facie entitlement to judgment as a matter of law with regard to the plaintiff's medical malpractice claim. Dr. Boyarsky opined that within a reasonable degree of medical certainty the defendants did not depart from good and accepted medical practice in treating the plaintiff. Dr. Boyarsky, who is a practicing surgeon, states that he has placed OG tubes in over one thousand patients and he has treated patients who suffered from acute pancreatitis. According to Dr. Boyarsky, the defendants timely recognized the plaintiff's condition and admitted him to the hospital with an appropriate treatment plan, which included antibiotics and fluid hydration. However, due to the severity of the plaintiff's pancreatitis, he developed multiple complications, and in response to those complications, he was appropriately intubated. Inasmuch as the plaintiff required medication and nutrition, an OG tube was placed. The process of placing an OG tube is a routine procedure in a hospital setting, and it may be performed by a qualified physician or nurse. Physician supervision is not required if the tube is placed by a nurse, and because it is routine practice, informed consent is generally not required from the patient.

According to Dr. Boyarsky, although the record shows that the OG tube caused perforation of the plaintiff's stomach, such perforation was not a result of the defendants' negligence. Dr. Boyarsky states that on January 13, 2015, while he was admitted to Mount Sinai Hospital, it was discovered that the plaintiff had a gastric diverticulum or an "outpouching of the stomach," a rare condition found in approximately 0.01 to 0.11 percent of patients who undergo endoscopy or upper GI series. He opined that it was because of the plaintiff's gastric condition that the OG tube perforated his stomach. It is not the standard to care to perform imaging prior to placement of an OG tube; therefore, there was no reason for the hospital staff to consider that the plaintiff had a gastric diverticulum at the time that the tube was placed. Additionally, the signs of a stomach perforation are nearly identical to pancreatitis; thus, there was no reason for the defendants to become suspicious that there was a perforation when the plaintiff's condition worsened. The defendants timely diagnosed the perforation and surgery was performed on the same day to repair it. The procedures that the plaintiff underwent after the perforation was repaired addressed his pancreatitis, and were not a result of injuries that he sustained due to the OG tube placement.

The affidavit of Dr. Boyarsky is sufficient to demonstrate that the defendants did not commit medical malpractice. The burden shifts to the plaintiff to raise a triable issue of fact as to whether a departure from good and accepted practice occurred and whether this departure was a proximate cause of his injuries (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320).

In opposition, the plaintiff contends that the defendants failed to use the proper technique to place the OG tube, which resulted in the perforation of his stomach. The plaintiff submits the affidavit of his expert, a board certified surgeon, in support of his position. According to the expert, the standard of care requires that a medical professional who places an OG tube do so gently and with extreme caution to avoid serious injury, and to perforate the stomach when placing such a tube requires "an inappropriate amount of force." The doctor opined that perforation of the stomach is not a known or accepted risk of an OG tube placement procedure, and that the hospital staff used excessive force when placing the plaintiff's OG tube. Furthermore, the doctor opined that although the plaintiff had a gastric diverticulum, such a condition did not modify the standard of care required for placement of the OG tube. When placing the OG tube, the medical provider should experience no "resistence," and if there is resistence, the provider should remove the tube and start the process over. Additionally, the doctor opined that the defendants' delay in diagnosing the plaintiff's perforated stomach led to a worsening of his overall condition, including the spread of infection and sepsis.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see* ***Henry v Sunrise Manor Center for Nursing and Rehab***., 147 AD3d 739; ***Fink v DeAngelis***, 117 AD3d 894; ***Feinberg v Feit***, 23 AD3d 517; ***Dandrea v Hertz***, 23 AD3d 332; ***Shields v Baktidy***, 11 AD3d 671). Such credibility issues can only be resolved by a jury (*see* ***Loaiza v Lam***, 107 AD3d 951; ***Fink v DeAngelis***, *supra*; ***Feinberg v Feit***, *supra;* ***Dandrea v Hertz***, *supra)*. In this case, the conflicting opinions of the parties' experts raise triable issues of fact as to whether the defendants deviated from good and accepted practice in their treatment of the plaintiff. Accordingly, the branch of the motion for summary judgment dismissing the plaintiff's medical malpractice claim is denied.

The defendants also move for summary judgment with respect to the plaintiff's causes of action for lack of informed consent and negligent hiring. To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (***Godel v Goldstein***, 155 AD3d 939). Here, the defendants made a prima facie showing of their entitlement to summary judgment on the claim for lack of informed consent and the plaintiff failed to raise an issue of fact in opposition.

Additionally, the defendants have established their entitlement to judgment as a matter of law with regard to the plaintiff's claim for negligent hiring. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*see* ***Talavera v Arbit***, 18 AD3d 738). The defendants herein were acting within the scope of their employment. The plaintiff has failed to raise any issue of fact in opposition. Accordingly, the causes of action for lack of informed consent and negligent hiring are dismissed.

With respect to Northwell, the defendants have established that Northwell is merely the corporate parent of Huntington Hospital, and that it did not have a physician-patient relationship with the plaintiff (*see* ***Potash v Port Auth. of New York and New Jersey***, 279 AD2d 562). Accordingly, the claims against Northwell are dismissed.

Dated: October 8, 2020

HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION