

<b>Ciceron v Gulmatico</b>
2021 NY Slip Op 30022(U)
January 4, 2021
Supreme Court, Kings County
Docket Number: 2635/2013
Judge: Genine D. Edwards
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 4th day of January 2021.

PRESENT:

Hon. Genine D. Edwards  
Justice, Supreme Court

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BRUNON CICERON and MARIE CICERON,

Plaintiffs,

Index No. 2635/2013

-against-

DECISION/ORDER

CONSTANTINO V. GULMATICO, M.D., SAMANTHI RAJU, M.D., BETH ISRAEL MEDICAL CENTER, and THE BROOKLYN HOSPITAL CENTER,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notices of Motion and Affirmations in Support.....	1-4
Memo of Law in Support.....	5
Affirmation in Opposition.....	6
Memo of Law in Opposition.....	7
Affirmations in Reply.....	8-11

In this medical malpractice action, the defendants separately move for summary judgment pursuant to CPLR 3212. Plaintiffs oppose.

This matter focuses primarily on two operations performed in 2011. First, defendant Constantino V. Gulmatico, M.D. (“Dr. Gulmatico”) performed plaintiff Brunon Ciceron’s (“Mr. Ciceron”) hernia procedure at defendant Beth Israel Medical Center (“BIMC”) on March 28, 2011. Thereafter, defendant Samantha Raju, M.D. (“Dr. Raju”)

performed Mr. Ciceron's radical prostatectomy at defendant The Brooklyn Hospital Center ("TBHC") on September 27, 2011.

**Constantino V. Gulmatico, M.D.**

Plaintiffs contend that Dr. Gulmatico failed to properly perform the hernia procedure that caused Mr. Ciceron further injuries and complications, including an intraoperative termination of the radical prostatectomy.

The submissions in support of Dr. Gulmatico's motion created factual issues that bar summary judgment, including the expert affidavit of Michael G. Persico, M.D. ("Dr. Persico") and Mr. Ciceron's medical records. Dr. Persico opined that the mesh did not move or migrate after Dr. Gulmatico placed it into Mr. Ciceron during the hernia procedure. Conversely, the medical records contain a letter by co-defendant Dr. Raju, in which she states that the mesh migrated after the hernia procedure. Consequently, Dr. Gulmatico did not shoulder his prima facie burden of demonstrating entitlement to summary judgment. *See Kleinman v. North Shore University Hosp.*, 148 A.D.3d 693, 48 N.Y.S.3d 455 (2d Dept. 2017); *Thomas v. Hermoso*, 110 A.D.3d 984, 973 N.Y.S.2d 344 (2d Dept. 2013).

Moreover, Dr. Gulmatico's assertion that plaintiffs raised novel theories in opposition to his summary judgment motion is unpersuasive. Plaintiffs alluded to the mesh migration theory in their bill of particulars and during Dr. Gulmatico's deposition. Further, although failure to timely diagnose or properly treat Mr. Ciceron's cancer was not in their bill of particulars, plaintiffs' counsel intimated same during Dr. Gulmatico's deposition. *See Larcy v. Kamler*, 127 N.Y.S.3d 122, 185 A.D.3d 564 (2d Dept. 2020); *Osipova v.*

*Silverberg*, 152 A.D.3d 614, 58 N.Y.S.3d 522 (2d Dept. 2017); *Valenti v. Camins*, 95 A.D.3d 519, 943 N.Y.S.2d 504 (1st Dept. 2012).

**Beth Israel Medical Center**

Mr. Ciceron presented to BIMC's emergency room on three occasions. First, on January 6, 2011, Mr. Ciceron presented with complaints of abdominal pain. He was diagnosed with a hernia and discharged with instructions to follow up with Dr. Gulmatico. Then, on March 17, 2011, Mr. Ciceron returned to BIMC's emergency room with complaints of abdominal pain. On this occasion he was discharged with instructions to contact non-party Dr. Satsman. On March 28, 2011, Mr. Ciceron presented to BIMC for hernia surgery performed by Dr. Gulmatico.

In moving for summary judgment, BIMC contends that it cannot be held vicariously liable for Dr. Gulmatico's actions because he was a private attending physician. Generally, a hospital is not vicariously liable for the malpractice of a private attending physician who is not an employee. *See Pinnock v. Mercy Medical Center*, 180 A.D.3d 1088, 119 N.Y.S.3d 559 (2d Dept. 2020); *Galluccio v. Grossman*, 161 A.D.3d 1049, 78 N.Y.S.3d 196 (2d Dept. 2018). "However, a hospital may be held vicariously liable for the acts of independent physicians where a patient enters the hospital through the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing." *Pinnock*, 180 A.D.3d 1088; *See Galluccio*, 161 A.D.3d 1049. Thus, in order to defeat a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor, and not a hospital employee, and that the exception to the general rule did not apply. *See Pinnock*, 180 A.D.3d 1088; *Muslim v. Horizon Med. Group, P.C.*,

118 A.D.3d 681, 988 N.Y.S.2d 628 (2d Dept. 2014); *Rizzo v. Staten Is. Univ. Hosp.*, 29 A.D.3d 668, 815 N.Y.S.2d 162 (2d Dept. 2006).

Here, BIMC established, through deposition testimony and Dr. Gulmatico's affidavit, that he was an independent contractor with privileges at BIMC. *See Galluccio*, 161 A.D.3d 1049; *Sampson v. Contillo*, 55 A.D.3d 588, 865 N.Y.S.2d 634 (2d Dept. 2008). However, BIMC failed to establish that the exception to the general rule did not apply. Specifically, considering that, on January 6, 2011, BIMC referred Mr. Ciceron to Dr. Gulmatico after Mr. Ciceron entered BIMC through its emergency room, BIMC failed to demonstrate that Mr. Ciceron did not reasonably believe that Dr. Gulmatico was provided by the hospital and was ostensibly acting as its agent in providing care to Mr. Ciceron during the hernia surgery on March 28, 2011. *See Fuessel v. Chin*, 179 A.D.3d 899, 116 N.Y.S.3d 395 (2d Dept. 2020); *Pinnock*, 180 A.D.3d 1088; *Muslim*, 118 A.D.3d 681; *Rizzo*, 29 A.D.3d 668.

BIMC further avers that plaintiffs raised new theories in opposition to the summary judgment motion. BIMC contends that plaintiffs did not previously plead causes of actions related to the emergency room visits on January 6<sup>th</sup> and March 17<sup>th</sup> of 2011 nor any act or omission that occurred on those visits. This Court concurs. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars." *Anonymous v. Gleason*, 175 A.D.3d 614, 106 N.Y.S.3d 353 (2d Dept. 2019); *See Larcy v. Kamler*, 185 A.D.3d 564, 127 N.Y.S.3d 122 (2d Dept. 2020).

Finally, regarding plaintiffs' cause of action alleging lack of informed consent, BIMC established that it did not maintain a duty to obtain Mr. Ciceron's informed consent since Dr. Gulmatico dictated his treatment course. See Public Health Law 2805-d. Plaintiffs failed to address or specifically oppose that branch of BIMC's motion. See *Spiegel v. Beth Israel Medical Center-Kings Highway Div.*, 149 A.D.3d 1127, 53 N.Y.S.3d 166 (2d Dept. 2017).

**Samanthi Raju, M.D.**

Plaintiffs contend that Dr. Raju deviated from the accepted standard of medical care by not being aware of the mesh's presence within Mr. Ciceron prior to the performing the radical prostatectomy on September 27, 2011.

Dr. Raju established her prima facie entitlement to judgment as a matter of law by demonstrating that there were no departures from good and accepted medical practice and that, in any event, any departure was not a proximate cause of the alleged injuries. See *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). Jonathan Vapnek, M.D. ("Dr. Vapnek"), a board-certified urologist, and Dr. Raju's expert, opined that there were no tests available, including an MRI or CT scan, which would identify the exact location of the mesh placed by Dr. Gulmatico. See *DiLorenzo v. Zaso*, 148 A.D.3d 1111, 50 N.Y.S.3d 503 (2d Dept. 2017); *Swanson v. Raju*, 95 A.D.3d 1105, 945 N.Y.S.2d 101 (2d Dept. 2012); *Germaine v. Yu*, 49 A.D.3d 685, 854 N.Y.S.2d 730 (2d Dept. 2008). Plaintiffs' expert urologist, Ralph E. Duncan, M.D. ("Dr. Duncan"), failed to raise a triable issue of fact in opposition. Dr. Duncan did not address Dr. Vapnek's assertion that the hernia mesh would not appear on a CT scan, as indicated by Mr. Ciceron's 2014 and 2016 CT scans, which did not reveal the presence of mesh or adhesions. See *Gilmore*

*v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504 (2d Dept. 2019); *Jacob v. Franklin Hospital Medical Center*, — N.Y.S.3d —, 188 A.D.3d 838 (2d Dept. 2020); *Lyakhovich v. Vernov*, 185 A.D.3d 566, 126 N.Y.S.3d 711 (2d Dept. 2020); *Wagner v. Parker*, 172 A.D.3d 954, 100 N.Y.S.3d 280 (2d Dept. 2019).

Dr. Raju submitted deposition testimony, Mr. Ciceron's medical records as well as Dr. Vapnek's expert opinion to support her argument that she properly informed Mr. Ciceron of the prostate biopsy. But plaintiffs alleged that Dr. Raju insufficiently informed them regarding the radical prostatectomy. *See Zapata v. Buitriago*, 107 A.D.3d 977, 969 N.Y.S.2d 79 (2d Dept. 2013); *See Johnson v. Staten Is. Med. Group*, 82 A.D.3d 708, 918 N.Y.S.2d 132 (2d Dept. 2011). Further, the fact that Mr. Ciceron signed a consent form does not, in itself, establish Dr. Raju's entitlement to judgment as a matter of law. *Kadanoff v. Whitlow*, 2020 WL 7759453, \_\_ N.Y.S.3d \_\_ (2d Dept. 2020); *Walker v. Saint Vincent Catholic Medical Centers*, 114 A.D.3d 669, 979 N.Y.S.2d 697 (2d Dept. 2014); *Kozłowski v. Oana*, 102 A.D.3d 751, 959 N.Y.S.2d 500 (2d Dept. 2013). Moreover, Dr. Vapnek's opinion did not establish whether a reasonably prudent person in Mr. Ciceron's position would not have declined to undergo the radical prostatectomy if he were fully informed. *See Walker*, 114 A.D.3d 669; *Muniz v. Katlowitz*, 49 A.D.3d 511, 856 N.Y.S.2d 120 (2d Dept. 2008).

#### **The Brooklyn Hospital Center**

Plaintiffs concede that their liability claims as to TBHC are vicarious as to Dr. Raju. TBHC argues that plaintiffs' claim of lack of informed consent must be dismissed as against TBHC because it had no reason to know or suspect that Dr. Raju, who was not

its employee at the time of Mr. Ciceron's treatment, had not properly obtained Mr. Ciceron's informed consent.

"Where a private physician attends his or her patient at a hospital, it is the physician's duty to obtain the patient's informed consent. A hospital may only be liable where it knew or should have known that the physician was acting or would act without the patient's informed consent." *Tomeo v. Beccia*, 127 A.D.3d 1071, 7 N.Y.S.3d 472 (2d Dept. 2015); *See Salandy v. Bryk*, 55 A.D.3d 147, 864 N.Y.S.2d 46 (2d Dept. 2008). Here, TBHC established through Dr. Raju's affidavit that he was not its employee and that no exception applied. *See Fuessel*, 179 A.D.3d 899; *Pinnock*, 180 A.D.3d 1088; *Muslim*, 118 A.D.3d 681; *Rizzo*, 29 A.D.3d 668. Additionally, the medical records evidence that it had no reason to know or believe that Dr. Raju performed the radical prostatectomy without first obtaining Mr. Ciceron's consent. *See Cynamon v. Mount Sinai Hospital*, 163 A.D.3d 923, 81 N.Y.S.3d 520 (2d Dept. 2018); *Doria v. Benisch*, 130 A.D.3d 777, 14 N.Y.S.3d 95 (2d Dept. 2015); *Tomeo*, 127 A.D.3d 1071; *Salandy*, 55 A.D.3d 147.

Accordingly,

Dr. Gulmatico's motion is denied in its entirety;

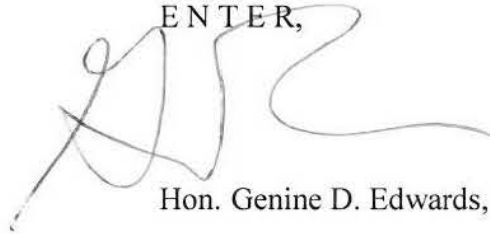
Beth Israel Medical Center's motion is granted in part, plaintiffs' claims regarding January 6<sup>th</sup>, March 17<sup>th</sup> and informed consent are dismissed;

Dr. Raju's motion is granted with respect to plaintiffs' claim of medical malpractice only; and

The Brooklyn Hospital Center's motion is granted.

This constitutes the Decision of this Court.

ENTER,

A handwritten signature in black ink, appearing to be 'G. Edwards', written over the word 'ENTER,'.

Hon. Genine D. Edwards, J.S.C