

**Magarin v Webb**

2021 NY Slip Op 30058(U)

January 8, 2021

Supreme Court, Kings County

Docket Number: 522726/18

Judge: Ellen M. Spodek

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At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8<sup>th</sup> day of January 2021

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

MARIEL MAGARIN, an infant by her mother and natural guardian, YESENIA SANTANA and YESENIA SANTANA, individually,

*Plaintiffs*

**-against-**

Index No. 522726/18

**DECISION/ORDER**  
Hon. Ellen M. Spodek

SHIRLEY WEBB, D.O. and WYCKOFF HEIGHTS MEDICAL CENTER,

*Defendants*

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavit.....	___1___
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits .....	___2-3___
Replying Affidavits .....	___4-5___
Exhibits .....	_____
Memorandum of Law in Support of Motion.....	_____

Upon the foregoing papers, Wyckoff Heights Medical Center (“Wyckoff”) moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing the claims against it in their entirety, and such other and further relief as the Court may deem proper. Both the co-defendant, Shirley Webb, D.O. and the plaintiff Yesenia Santana, as the

mother and natural guardian of Mariel Magarin, and Yesenia Santana individually, opposed the motion.

This case involves allegations of medical malpractice during a cesarean section performed on October 30, 2017. The plaintiff presented to the Emergency Room at Wyckoff via ambulance at 5:48 am, already in labor. Defendant Dr. Webb was assigned as the attending obstetrician when plaintiff was admitted to the labor and delivery floor. Dr. Webb was not an employee of Wyckoff, but was employed, pursuant to a contract, by a separate entity called Stockholm OB/GYN Services, P.C. Dr. Maria Leon, a resident, was assigned by Wyckoff. She dictated the operative report which stated that plaintiff was 39-weeks and five-days with a failed trial of labor after Caesarean-section with non-reassuring fetal heart tracing with recurrent late declarations. Dr. Leon performed the Caesarean section delivery, supervised by Dr. Webb. During the procedure, Dr. Leon made an incision, which resulted in a 2 centimeter laceration on the infant's cheek.

Wyckoff argues that it cannot be held responsible for any alleged malpractice by its resident Dr. Leon, because Dr. Webb was not an employee of Wyckoff at the time of the alleged malpractice, and there cannot be vicarious liability for the actions of a private physician. Wyckoff argues that a hospital cannot be held responsible for the actions of a private attending physician, when its resident did not exercise any independent medical judgment and there were no actions by the attending physician which greatly deviated from the norm that the resident should have intervened. Wyckoff asserts that there are no material issues of fact and summary judgment must be granted.

Defendant Dr. Webb opposed the motion. Dr. Webb asserts that vicarious liability is a material issue of fact, under the apparent/ostensible agency theory, and therefore

summary judgment must be denied. Dr. Webb argues that under the theory of apparent/ostensible agency, Wyckoff is vicariously liable for the actions of Dr. Webb. Dr. Webb contends that the question is whether the plaintiff came to the hospital emergency room seeking treatment from the hospital itself, and not from a private physician directly. Dr. Webb argues that plaintiff came to the Emergency Room at Wyckoff as she was in labor and did not seek treatment from a specific doctor. Dr. Webb contends that even she didn't realize that she was not an employee of Wyckoff at the time, as she was a direct employee of Wyckoff from 2013 to 2017, and she worked at the Wyckoff clinic as well as at Wyckoff. Dr. Webb argued that Wyckoff did not differentiate between particular doctors, whether employed by Wyckoff or the P.C., as to who was on call or who performed deliveries, whoever was on call that day with the resident would perform the delivery. Dr. Webb asserts that in practice, the P.C. which employed her and Wyckoff acted as one entity, so much so, that she believed she was employed by Wyckoff and not the P.C. Dr. Webb contends that she had no autonomy, the billing practices were determined by Wyckoff, she was contractually bound to treat patients at Wyckoff as though they were patients of the PC, and she was contractually required to attend at least 75% of Wyckoff general staff meetings. She argues that the P.C. was completely under the control of defendant Wyckoff, and therefore for all intents and purposes she was an employee of Wyckoff. Dr. Webb contends there are issues of fact regarding vicarious liability and the summary judgment motion must be denied.

Plaintiff opposed the motion, adopting Dr. Webb's arguments in opposition.

### Discussion

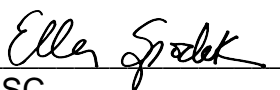
“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). Once the defendant makes a prima facie showing of entitlement to summary judgment, the burden shifts to plaintiff to raise a triable issue of fact. *Id.*

After a review of the papers, the Court finds that there are issues of fact regarding the vicarious liability of Wyckoff for Dr. Webb’s actions. Generally, a hospital cannot be held vicariously liable for the actions of a private attending physician who is not an employee. *See Toth v. Bloshtinsky*, 39 AD3d 848, 850, 835, NYS2d 301 (2d Dept. 2007) However, the exception to this rule states that there is vicarious liability under a theory of apparent or ostensible agency when a patient sought medical care at the hospital “rather than from any particular physician although the physician whose malpractice caused injury to the patient was not an employee of the hospital” *Loaiza v Lam*, 107 A.D.3d 951, 952 (2d Dept. 2013). “To create an apparent or ostensible agency, the plaintiff must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the plaintiff must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not on reliance on the agent’s skill.” *Id.* “In evaluating whether a doctor is the apparent agent of a hospital, a court should consider all attendant circumstances to determine whether the patient could properly have believed that the physician was provided by the hospital” *Id.* at 952-953. In *Loaiza*, the Appellate Division found that there was an issue of fact regarding the vicarious liability of the attending obstetrician when the

plaintiff came to the hospital in labor, she did not have a private physician, she was seeking care from the hospital and not from a particular physician, and the attending physician was assigned to treat the plaintiff by the hospital. This case is directly on point to the matter at hand. Here, the plaintiff did not have a private physician, she came to the Emergency Room at Wyckoff in labor, and was assigned Dr. Webb as her attending physician. The plaintiff testified that she did not know Dr. Webb before coming to Wyckoff. In addition, Dr. Webb testified that for all intents and purposes, the PC. that employed her and Wyckoff were the same entity. All of these circumstances raise issues of fact regarding the vicarious liability of Wyckoff. Therefore, as there are issues of fact, Wyckoff's summary judgment motion must be denied.

This constitutes the decision and order of the Court.

ENTER,

  
JSC