Goldin v Kaplan
2021 NY Slip Op 31247(U)
April 1, 2021
Supreme Court, New York County
Docket Number: 805303/2014
Judge: Judith N. McMahon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH REEVES MCMAHON** **PART** **IAS MOTION 30**

Justice

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VITA GOLDIN,

Plaintiff,

- v -

EDMUND KAPLAN, PALAK OZA, DRORIT OR, ELJ OBSTETRICS & GYNECOLOGY GROUP, PLLC

Defendant.

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INDEX NO. 805303/2014

MOTION DATE 03/24/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

Defendants Palak Oza, M.D. ("Dr. Oza") and Droit Or, M.D. ("Dr. Or") and Lenox Hill Hospital ("Lenox Hill Hospital") ("Moving Defendants") move this Court for an Order granting them summary judgment and amending the caption by deleting the names of the Moving Defendants. The Court grants the Motion in part and denies it in part, as detailed below.

This action for medical malpractice surrounds the delivery of the Infant-Plaintiff Vita Goldin ("Infant-Plaintiff") on January 28, 2010 by the co-defendant OB/GYN Edmund S. Kaplan, M.D. ("Dr. Kaplan"). Plaintiff-Mother Yocasta Martinez was a patient of Dr. Kaplan for several years and received prenatal care from Dr. Kaplan prior to the Infant-Plaintiff's birth.[1]

[1] Plaintiff-Mother was a regular patient of Dr. Kaplan for five years prior to the Infant-Plaintiff's birth and began prenatal care with Dr. Kaplan when she learned she was pregnant in 2009. Dr. Kaplan sent Plaintiff-Mother for ultrasounds to determine the Infant-Plaintiff's weight and also calculated the infant's due date, took blood and urine tests and spoke with Plaintiff-Mother regarding gestational diabetes and the plan for delivery. Dr. Kaplan scheduled the delivery for January 27, 2010 at Lenox Hill Hospital and informed Plaintiff-Mother that he wanted to wait until she was at 41-weeks. According to the Plaintiff-Mother's testimony, Dr. Kaplan did not express any concerns that there would be issues with the delivery and that he planned to deliver the Infant-Plaintiff vaginally.

Dr. Kaplan also scheduled the Infant-Plaintiff's birth at Lenox Hill Hospital for January 27, 2010. During her admission at Lenox Hill, Plaintiff was also seen by first-year residents Dr. Oza and Dr. Or. During the Infant-Plaintiff's delivery, Dr. Kaplan encountered a shoulder dystocia that he remedied by performing a sequence of "McRoberts" maneuvers. Infant-Plaintiff was transferred to the NICU, where it was confirmed that she had a fracture of the right clavicle, right brachial plexus injury and right-sided Erb's palsy. On January 30, 2010, Infant-Plaintiff was discharged from the hospital.

In their Complaint, Plaintiffs brings causes of action for (1) medical malpractice against all Defendants, (2) lack of informed consent and (3) hospital and medical facility liability against Lenox Hill Hospital and Defendant ELJ Obstetrics & Gynecology Group, PLLC. The Court notes that Dr. Kaplan never answered or appeared in this Action.

Moving Defendants seek summary judgment dismissal of the Complaint as against them, arguing that they are not liable for Infant-Plaintiff's alleged injuries since her delivery was conducted and overseen by Defendant Dr. Kaplan without any independent medical judgment exercised by Lenox Hill Staff, including Dr. Or and Dr. Oza. Moving Defendants argue that Plaintiffs failed to substantiate any claims regarding negligent hiring or credentialing, including that any persons involved in Plaintiffs' care was unqualified or that Lenox Hill Hospital failed to review any physicians' qualifications or had an inadequate credentialing process.

In support of their Motion, Moving Defendants submit the affidavit of Gary Mucciolo, M.D. ("Dr. Mucciolo"), who opines that the Plaintiffs were treated by attending Dr. Kaplan at all times and that Moving Defendant's treatment was appropriate and did not proximately cause Infant-Plaintiff's alleged injuries. Dr. Mucciolo states that the evidence shows Dr. Kaplan directed and supervised Lenox Hill staff members, including Dr. Or and Dr. Oza who acted

under Dr. Kaplan's direction at all times.[2] According to Dr. Mucciolo, the staff at Lenox Hill Hospital provided appropriate support to Dr. Kaplan and there is no evidence showing that the staff committed independent acts of negligence. Dr. Mucciolo further opines that Dr. Kaplan's treatment, including the use of the McRoberts maneuver and decision to perform an episiotomy, was not contraindicated by normal practice that would require intervention by Lenox Hill Hospital staff members.

Plaintiffs failed to submit an affirmation by a medical expert in opposition and conceded on oral argument that they do not oppose the Motion as to the first and second causes of action as against Moving Defendants. However, Plaintiffs argue that Lenox Hill Hospital is not entitled to summary judgment on the third cause of action for hospital and medical facility liability. The Court notes that it will not consider the affirmation of Plaintiffs' counsel, in which she details a conversation she represents she had with Dr. Kaplan after his release from prison. Such affirmation is inadmissible hearsay and the following alleged chronology is adapted from Plaintiffs' remaining exhibits.

Plaintiffs represent that prior to and on the date of Infant-Plaintiff's birth, Dr. Kaplan was under investigation for three separate allegations of medical malpractice stemming from 2002 through 2007.[3] Plaintiffs represent that in 2007, the Department of Health, Office of Professional Misconduct ("OPM") began investigating Dr. Kaplan for his gynecological and obstetric treatment of three different patients, all of whom were treated by Dr. Kaplan at

[2] According to Dr. Mucciolo, Dr. Kaplan signed off on their notes, which meant "he concurred with their findings", and also authored his own notes "acknowledging that he reviewed treatment rendered by staff members and agreed with their findings/assessments."

[3] Plaintiffs also represent that Dr. Kaplan was sued as a defendant in three separate actions for medical malpractice in New York County, under *Evans v. Kaplan* (Index No. 114948/2004), *Rinder v. Kaplan* (Index No. 112935/2005) and *Brandau v. Kaplan, et al.*, (Index No. 103696/2007). It is not clear if these actions involve the allegations of malpractice contained in the OPM investigation or are separate allegations.

Defendant Lenox Hill Hospital.[4] As detailed in the Statement of Charges filed against Dr. Kaplan by OPM (dated September 21, 2010), OPM made nine charges of professional misconduct against Dr. Kaplan, for gross negligence, professional misconduct, medical incompetence and failure to maintain records.

On November 19, 2010, Dr. Kaplan entered into a Consent Order with OPM, in which he admitted all of the charges asserted against him, and his medical license was significantly restricted.[5] On or about November 29, 2012, Dr. Kaplan was arrested and charged with illegally selling prescription pain medication on the internet. After Dr. Kaplan was convicted of such charges and sentenced to prison, the Commissioner of Health summarily suspended his license to practice medicine on October 24, 2016. Dr. Kaplan's license to practice medicine was permanently revoked on January 12, 2017.

Based upon this alleged chronology, Plaintiffs argue that Defendant Lenox Hill Hospital failed to properly review Dr. Kaplan's qualifications and negligently granted him hospital. According to Plaintiffs, Lenox Hill Hospital had actual knowledge of Dr. Kaplan's gross medical

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[4] "'Patient A' was treated for post-menopausal bleeding from June 2002 through November 2004. OPM charged defendant KAPLAN with, among other things, deviating from accepted medical standards by performing seven diagnostic procedures over a 28-month period for post-menopausal bleeding, in failing to explain potential etiologies of the post-menopausal bleeding to Patient A and in failing to provide her with alternatives to the biopsies and hysteroscopies to evaluate and treat her bleeding.
'Patient B' was treated for gynecological issues from May 2005 through July 2007. OPM charged defendant KAPLAN with, among other things, exposing Patient B to unnecessary risks when performing a hysterectomy with the assistance of an insufficiently trained third year medical student, lacerating Patient B's bladder during the hysterectomy, failing to obtain an intraoperative urology consultation and in failing to manage the bladder injury both intra-operatively and post-operatively causing the development of a fistula.
'Patient C' was treated for a large pelvic mass from October 6, 2006 through October 25, 2006. OPM charged defendant KKAPLAN with, among other things, failing to address concurrent morbidities of an infection and elevated white blood count which may have necessitated in alternative treatment to the planned laparoscopy, in failing to administer appropriate post-operative antibiotics, in failing to appropriately monitor the patient post-operatively and in failing to appropriately manage Patient C's tubo-ovarian abscess." (Plaintiffs' Affirmation in Support, Page 7).

[5] Dr. Kaplan was prevented from practicing surgical gynecology and obstetrics, in addition to providing post-surgical care and follow-up of any patients. Dr. Kaplan was limited to practicing only non-surgical gynecology in the office-setting.

incompetence between 2004 and 2007. Plaintiffs argue that Dr. Kaplan failed to keep medical malpractice insurance prior to, and including on January 28, 2010, and that Lenox Hill Hospital should have automatically suspended Dr. Kaplan's privileges based upon such failure. Plaintiffs contend that due to Dr. Kaplan's failure to maintain insurance, no insurance carrier has stepped in on Dr. Kaplan's behalf or has been assigned to represent him in this Action. Plaintiffs allege that Lenox Hill Hospital had a duty to suspend, restrict or terminate Dr. Kaplan's privileges at the facility "well before 2010" upon learning of his gross medical incompetence based upon an investigation by the NYS Department of Health.

DISCUSSION

It is well settled that on a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party." *Nestenborg v Std. Intl. Mgt. LLC*, 191 AD3d 579 [1st Dept 2021]. The Court of Appeals has held that summary judgment is a "drastic remedy" that should only be granted when a moving party "has tendered sufficient evidence to demonstrate the absence of any material issues of fact." *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Summary judgment should be granted "only if, upon the moving party's meeting of this burden, the non-moving party fails "to establish the existence of material issues of fact which require a trial of the action." *Id.* If the moving party fails to make a prima facie showing of entitlement to summary judgment, the motion must be denied "regardless of the sufficiency of the opposing papers." *Id.*

Under the Public Health Law §2805-j and §2805-k, "a hospital is required to review an independent physician's qualifications before granting or renewing privileges." *Ortiz v Jaber*, 44 AD3d 632, 633 [2d Dept 2007] (upholding the Supreme Court's decision to set aside jury verdict in favor of plaintiff based on lack of evidence showing defendant hospital facility violated its by-

laws and Public Health Law in credentialing Defendant doctor). (*See* Public Health Law 2805-j, 2805-k).[6] In the seminal case of *Raschel v. Rish,* the Appellate Division, Fourth Department held that

> While a hospital is not responsible for the actual treatment of a patient by a private physician with staff privileges, the failure of a hospital to develop and adhere to reasonable procedures for reviewing a physician's qualifications creates a foreseeable risk of harm thus establishing an independent duty to such patients. *Raschel v. Rish,* 110 AD2d 1067, 1068 [4th Dept 1985].

After the hospital represented that it followed reasonable credentials procedures in reviewing defendant Dr. Rish's qualifications, the plaintiff established that Dr. Rish was sued for medical malpractice for surgery and injections performed within five years prior to the alleged malpractice. The Appellate Division, Fourth Department found that whether the hospital negligently failed to restrict Dr. Rish's staff privileges was "a question of fact which should be determined at trial." *Raschel v. Rish,* 110 AD2d 1067, 1068 [4th Dept 1985]. (*See Megrelishvili v. Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 23 [1st Dept 2002]).

In *Megrelishvilli v. Our Lady of Mercy Med. Ctr.,* the Appellate Division, First Department found that Plaintiff's allegation that Defendant OLM was negligent in failing to restrict Defendant Dr. Chiuten's staff privileges since he was no longer covered by malpractice insurance was sufficient to state a cause of action against OLM. The Court further held that

> While the doctor's lack of coverage did not, in itself, cause the alleged physical injuries, had OLM followed its own procedures in seeing that he met its affiliation requirements, the fact that he was unable to obtain coverage would have put OLM on notice that he had lost his privileges at other hospitals and, as the facts, when developed, are likely to show, that he had a history of malpractice claims against him, thus placing those patients of his using OLM's facilities at risk. *Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 23-24 [1st Dept 2002].

[6] *See Condolff v. State*, 18 A.D.3d 797, 798 [2d Dept., 2005]); *Boone v N. Shore Univ. Hosp. at Forest Hills*, 12 AD3d 338, 339 [2d Dept 2004].

In *Sledziewski v. Cioffi*, the Appellate Division, Third Department held that "a hospital may be liable for failing to properly review an independent physician's qualifications before according him use of the hospital's facilities." *Sledziewski . Cioffi,* 137 AD2d 186, 189 [3d Dept., 1998]). The defendant submitted the affidavit of the hospital's director of risk management and quality assurance, who stated he was fully familiar with the hospital's privileges procedure and that the procedures conformed with the standards used by other similarly situated facilities. Such witness specifically reviewed the proceedings by which the defendant doctor was accorded privileges and confirmed that he was properly deemed qualified to hold privileges at the hospital. Based on the plaintiff's failure to submit any evidentiary proof in rebuttal, the Appellate Division, Third Department found that the lower court should have granted the hospital's motion for summary judgment dismissal. (*cf Napolitano v. Huss*, 272 AD2d 308, 309 [2d Dept 2000] (finding that defendant facility met its prima facie burden and plaintiff failed to raise a triable issue of fact regarding the hospital's alleged negligence in failing to supervise or revoke the defendant doctors' privileges).

Here, the Court finds that Lenox Hill Hospital has failed to meet its prima facie burden and tender sufficient evidence to demonstrate the absence of any material issues of fact. Lenox Hill Hospital has failed to submit any affidavits by those familiar with its credentialing procedures or who have reviewed the procedures by which Dr. Kaplan continued to be granted privileges. (*cf. Sledziewski v. Cioffi*, 137 AD2d 186, 189 [3d Dept., 1998]). Lenox Hill Hospital has also failed to submit any such affidavits attesting that Dr. Kaplan properly continued to be granted privileges or that Lenox Hill Hospital ensured that Dr. Kaplan maintained liability insurance. Lenox Hill Hospital has failed to produce any evidence of such insurance and, as Plaintiffs argue, no insurance carrier has stepped in on Dr. Kaplan's behalf in this Action. The

Court finds Lenox Hill Hospital's reliance on Plaintiffs' alleged failure to submit evidence supporting the third cause of action to be unavailing, since a defendant must meet its prima facie burden before the burden shifts to plaintiff to show the existence of a triable issue of fact.

The Court further finds that even if Defendant Lenox Hill Hospital met its prima facie burden as to the third cause of action, Plaintiffs have sufficiently rebutted Lenox Hill Hospital's showing and demonstrated the existence of a triable issue of fact. The lengthy chronology alleged by Plaintiffs regarding the numerous allegations against Dr. Kaplan raise a triable issue of fact as to whether Lenox Hill Hospital knew or should have known about the medical malpractice allegations made against Dr. Kaplan, including those at the center of the OPM investigation. (*See generally Raschel v. Rish*, 110 AD2d 1067, 1068 [4th Dept 1985]; *Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 23-24 [1st Dept 2002]).

Plaintiffs have also sufficiently raised an issue of triable fact as to whether Lenox Hill Hospital ensured that Dr. Kaplan maintained insurance as a condition for privileges at the facility. In its response to Plaintiffs' Notice to Admit and papers underlying this Motion, Lenox Hill Hospital has failed to produce evidence that Dr. Kaplan had insurance on January 28, 2010. If Dr. Kaplan failed to maintain insurance or was not able to obtain such insurance, Lenox Hill Hospital most likely would have been put on notice that Dr. Kaplan was facing malpractice allegations and therefore was putting his patients at Lenox Hill Hospital's facilities "at risk." (*See Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 23-24 [1st Dept 2002]).

The Court notes that the Appellate Division, First Department has ruled that hearsay evidence may be considered in opposition to a summary judgment motion when it is not the only proof submitted. (*See Sumitomo Mitsui Banking Corp. v .Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011]. *See also Bishop v Maurer*, 106 AD3d 622, 622 [1st Dept 2013]). The Court has

considered Lenox Hill Hospital's contention that Plaintiffs' exhibits are "inadmissible" and finds that such hearsay evidence may be considered in opposition since Plaintiffs submitted other evidence, including the affidavit of the Plaintiff-Mother. In the affidavit, the Plaintiff-Mother details how the Lenox Hill Hospital staff assured her during a pre-delivery visit that the facility was extremely diligent in permitting only the best qualified and competent medical personnel, including physicians like Dr. Kaplan, to provide obstetrical care.

Therefore, in viewing the facts in the light most favorable to the nonmoving party, the Court finds that the "drastic remedy" of summary judgment as to Plaintiffs' third cause of action against Lenox Hill Hospital is not warranted.

Accordingly, it is hereby

ORDERED that Moving Defendants' Motion to dismiss Plaintiffs' first cause of action as against them is hereby granted without opposition; it is further

ORDERED that Moving Defendants' Motion to dismiss Plaintiffs' second cause of action as against them is hereby granted without opposition; it is further

ORDERED that Moving Defendants' Motion to dismiss Plaintiffs' third cause of action as against Lenox Hill Hospital is hereby denied; it is further

ORDERED that any and all other requests for relief are hereby denied; and it is

ORDERED that Plaintiffs and Defendant Lenox Hill Hospital are required to virtually appear before this Court for a Microsoft Teams Conference on June 14, 2021 at 3:30 PM.

4/1/2021
DATE

JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE