Figueroa v Jamaica Hosp. Med. Ctr.
2021 NY Slip Op 33089(U)
November 9, 2021
Supreme Court, Queens County
Docket Number: Index No. 702855 2019
Judge: Peter J. O'Donoghue

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

VIDAL FIGUEROA,

Plaintiff

-against-

JAMAICA HOSPITAL MEDICAL CENTER, et. al.,

Index Number 702855 2019

Motion Date July 14, 2021

Motion Seq. No. 4

The following papers read on this motion by defendant Jamaica Hospital Medical Center (JHMC) dismissing all claims of direct liability and limiting all claims to ones sounding in vicarious liability only as to said defendant; granting summary judgment on its cross-claim against New York Institute of Technology College of Osteopathic Medicine for common law indemnification; and dismissing co-defendant New York Institute of Technology College of Osteopathic Medicine's cross claim for full indemnity either by common law, contract or for contribution.

	Papers Numbered
Notice of Motion-Affirmations-Exhibits-Affirmation of Service	EF 64-86
Opposing Affirmations- Exhibits-Statement of Material Facts	EF 87-89
Opposing Affirmation-Affirmation of Service.....	EF 91-92
Reply Affirmation.....	EF 93

Upon the foregoing papers the motion is determined as follows:

Plaintiff Vidal Figueroa sought medical treatment at JHMC's emergency room on February 11, 2019, for diarrhea, nausea and vomiting. He was examined by Dr. David Mallin, an attending emergency department physician employed by said hospital, who ordered a CT scan and blood work. Nafisa Wadud, a medical student at co-defendant New York Institute of Technology of Osteopathic Medicine (NYIT) was shadowing Mallin that day; was present when Mallin examined the plaintiff; and was aware of Mallin's blood work order. It is undisputed that outside of Mallin's presence, Wadud attempted to draw the plaintiff's blood and/or start an IV line at which time a piece of the rubber tourniquet she was tying or tied around the plaintiff's right arm broke off. Plaintiff alleges that the broken piece of the tourniquet hit him in the right eye, causing his injuries. Plaintiff underwent surgery on his right eye on February 11, 2019.

Plaintiff in his amended verified complaint alleges that JHMC, Jane Doe #1 NYIT and Jane Doe # 2, their agents, servants and/or employees negligently and carelessly departed from accepted medical practices and procedures rendered to or on behalf of the plaintiff, and alleges professional and ordinary negligence with respect to all defendants. With respect to JHMC, plaintiff in his verified bill of particulars asserts that "defendant hospital is vicariously liable for the negligent acts and/or omissions of its agents, servants and/or employees. Defendant hospital, by its agents, servants and/or employees were careless and negligent in causing injury to patient's eye; in causing the patient to suffer; in improperly performing intravenous line insertion; and in failing to place intravenous line insertion in a careful, skillful and proper manner. " It is alleged that Jane Doe # 1, a servant, agent and/or employee of JHMC "recklessly and negligently performed intravenous line insertion on plaintiff on February 11, 2019."

Defendant JHMC served an answer and interposed 7 affirmative defenses and separately cross claimed against NYIT for common law indemnification and to provide a defense pursuant to an agreement to provide insurance. Defendant NYIT served an answer and interposed 8 affirmative defenses and a cross claim against JHMC for common law or contractual indemnification and for contribution. Defendants have each served a reply to the respective cross claims.

Defendant JHMC acknowledges that it can be found vicariously liable for the acts or omissions of its employees. Defendant hospital now seeks summary judgment dismissing any claims for direct negligence on the grounds that plaintiff's injury was wholly caused by the NYIT medical student Wadud's application of the tourniquet; that Wadud was not directed to apply the tourniquet and draw the patient's blood; that her actions were unknown to anyone at JHMC; and that she acted on her own accord, although she was not permitted to draw blood unless directed and supervised by an attending physician. It is asserted that plaintiff has not alleged a cause of action for negligent supervision and that any such claim is not sustainable here. It is further asserted that the claims of direct liability against the hospital must be dismissed as no specific acts of direct negligence are asserted against this defendant. Defendant also seeks summary judgment on its cross claim against NYIT for common law indemnification and summary judgment dismissing NYIT's cross claims.

In support of its motion JHMC submits, among other things, copies of the pleadings, plaintiff's hospital records, the hospital's occurrence report, the hospital's emergency department's policy regarding medical students, and copies of the deposition testimony of the plaintiff, his son Rosendo Figueroa, Dr. David Mallin, Sheela Sebastian R.N. and Nafisa Wadud.

Plaintiff in opposition submits an affirmation from his counsel who asserts that a

triable issue of fact exists as to JHMC, based upon the hospital's written policy regarding the supervision of medical students, and Mallin's alleged failure to properly supervise Wadud. Plaintiff argues that JHMC had a duty of care with respect to the plaintiff and that the hospital through its ED attending Mallin directly or indirectly-but independently- breached that duty, resulting in the injury to the plaintiff's right eye. Plaintiff's counsel also argues that according to Wadud's testimony Mallin ordered and instructed the blood draw, and that Mallin failed to directly supervise said medical student, in violation of hospital policy.

Co-defendant NYIT in opposition submits an affirmation from its counsel and an affirmation from its expert, Robert H. Meyer, M.D., a physician licensed to practice medicine in the State of New York, and Board Certified in Emergency Medicine. NYIT's counsel asserts that the hospital's motion must be denied on the grounds that it failed to submit an affirmation from an expert regarding the attending physician's supervision of the medical student. Counsel further argues that JHMC was independently negligent in failing to properly supervise Wadud, and that JHMC's request for common law indemnification must be denied.

In his affirmation, Dr. Meyer opines with a reasonable degree of medical certainty that although he is " not commenting on how this blood draw was conducted and whether it really could have caused the injury to plaintiff that he is alleging; my opinion is that the attending physician, Dr. David M. Mallin failed to supervise Nafisa Wadud, including failing to properly instruct her and failing to be present while she was drawing blood. This was a departure from standard of care for an Emergency Medicine Attending and Jamaica Hospital Medical Center employee".

Defendant JHMC in its reply asserts that plaintiff and NYIT do not dispute that Wadud was the only person who was actively involved in the incident giving rise to plaintiff's injury. It is asserted that plaintiff and NYIT's opposition is based upon a misreading of Wadud's and Mallin's respective deposition testimony. JHMC further asserts that the plaintiff never raised a negligent supervision theory in his prior pleadings and therefore cannot raise additional theories of liability in opposition to the within motion. Finally JHMC's counsel asserts that as the plaintiff entered the hospital through its emergency room, JMHC will be vicariously liable for the actions of Wadud, but cannot also be held liable under a theory that it failed to supervise Wadud.

This Court finds that JMHC has established prima facie its entitlement to summary judgment dismissing the non-specific claims against it of direct negligence, as plaintiff in his amended verified complaint and bill of particulars failed to allege a direct cause of action against JHMC based upon Mallin's alleged failure to instruct and supervise the medical student, Wadud. In addition, the complaint and bill of particulars do not allege a direct

claim against JHMC based upon the actions of Wadud. Therefore under the circumstances presented herein, JMHC is not required to submit an affirmation from a medical expert in order to obtain summary judgment dismissing any non-specific direct claims against it.

To the extent that plaintiff now alleges that Mallin failed to properly instruct and supervise Wadud, it is well settled that "[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 AD3d 614, 616-17 [2d Dept 2019], quoting *Palka v Village of Ossining*, 120 AD3d 641, 643, [2d Dept 2004]; *see Samer v Desai*, 179 AD3d 860, 861-64 [2d Dept 2020]; *Hanson v Sewanhaka Cent. High Sch. Dist.*, 155 AD3d 702, 703[2d Dept 2017]; *Shaw v City of New York*, 139 A.D.3d 698, 699–700 [2d Dept 2016]; *Garcia v Richer*, 132 AD3d 809, 810 [2d Dept 2015]; *Ostrov v Rozbruch,* 91 AD3d 147, 154 [1st Dept 2012]).

Here, plaintiff's bill of particulars clearly states that the claim against JHMC is based upon vicarious liability. "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" (*Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]; *see Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 741-42 [2d Dept 2017]; *Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; *see also Weinberg v Guttman Breast & Diagnostic Inst*., 254 AD2d 213, 213 ([1st Dept 1998]). Both plaintiff and co-defendant NYIT in opposition to JHMC's facie showing that its employee Mallin was acting within the scope of his employment, have failed to raise a triable issue of fact. While an exception exists to the above general principle where the plaintiff seeks punitive damages from the employer "based on alleged gross negligence in the hiring or retention of the employee" (*Talavera v Arbit,* 18 AD3d at 738), that exception is inapplicable here, as plaintiff does not seek to recover punitive damages. Therefore, contrary to plaintiff and NYIT's assertions, plaintiff may not now raise a claim against JHMC based upon Mallin's alleged failure to supervise Wadud.

Finally, this Court notes that while an employer may be liable for a claim of negligent hiring, training or supervision if an employee commits an "independent act of negligence outside the scope of employment" and the employer "was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (*Seiden v Sonstein*, 127 AD3d 1158, 1160-1161 [2d Dept 2015]), plaintiff has failed to allege such a claim (*see Lamb v Baker*, 152 AD3d 1230, 1231 [4th Dept 2017]).

With respect to the parties' cross claims, "a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any

negligence ... on its own part" (*McCarthy v. Turner Const., Inc*., 17 NY3d 369, 377-378 [2011]; *see Bermejo v. New York City Health & Hospitals Corp*., 119 AD3d 500 [2d Dept 2014]). Here, although JHMC can only be found vicariously liable for the plaintiff's injuries, no determination of negligence has yet been made. Therefore, JHMC's request for summary judgment on its cross claim against NYIT for common law indemnification, is denied, as premature.

That branch of defendant's motion which seeks to dismiss NYIT cross claim to the extent that it alleges a claim for common law indemnification is granted. Inasmuch as JHMC can only be found vicariously liable for the plaintiff's injuries, common law indemnification is not available to NYIT.

That branch of defendant's motion which seeks summary judgment dismissing NYIT cross claim to the extent that it alleges a claim for contractual indemnification is denied. The movant has failed to establish prima facie that it did not have a contractual relationship with NYIT, or that any such contractual agreement did not include an indemnification provision or that any such provision is inapplicable here.

A claim for contribution may be established, among other ways, where the party from whom contribution is sought owed a duty to the injured plaintiff, and a breach of this duty contributed to the plaintiff's alleged injury (*see Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018]). An "essential requirement" for contribution is "that the parties must have contributed to the same injury" (*Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp*., 71 NY2d 599, 603 [1988]). "[C]ontribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks omitted]). Therefore, that branch of JHMC's motion which seeks to dismiss NYIT's cross claim for common law contribution is denied, as the movant has failed to establish prima facie that the co-defendant may not maintain this cross claim.

Accordingly, that branch of defendant JHMC's motion which seeks summary judgment dismissing plaintiff's non-specific claims for direct negligence is granted. That branch of the motion which seeks summary judgment on JHMC's cross claim against NYIT for common law indemnification is denied as premature. That branch of the JHMC's motion which seeks to dismiss NYIT's cross claims is granted as to the cross claim for common law indemnification and is denied in all other respects.

Dated: November 9, 2021

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Hon. Peter J. O'Donoghue, J.S.C.

5