Weisblum v Jackman

2021 NY Slip Op 33560(U)

October 13, 2021

Supreme Court, Westchester County

Docket Number: Index No. 60530/2019

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

---X
MOLLY WEISBLUM,

Plaintiff,

-against-

ALEXIS HOPE JACKMAN, M.D., YOSUKE IMAI, M.D., ENT AND ALLERGY ASSOCIATES, LLP, AND NEW YORK-PRESBYTERIAN LAWRENCE HOSPITAL,

Defendants.
---X

DECISION & ORDER

Index No: 60530/2019

Motion Sequence Nos. 1, 2, 3

The following papers (NYSCEF document nos. 30-92; 97-119) were read on: (1) the motion by the defendant, Yosuke Imai, M.D., for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against him (sequence no. 1); (2) the motion by the defendant, The New York & Presbyterian Hospital sued herein as New York-Presbyterian Lawrence Hospital, for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against it (sequence no. 2); and (3) the motion by the defendants, Alexis Hope Jackman, M.D. and ENT and Allergy Associates, LLP, for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against them (sequence no. 3).

Motion Sequence No. 1
Notice of Motion-Statement of Facts-Affirmation-Exhibits (A-P)
Affirmation in Opposition (by plaintiff)-Exhibits (A-K)-
Expert Affirmations (2)-Memorandum of Law-Plaintiff's Response to Statement of Facts
Reply Affirmation

Motion Sequence No. 2
Notice of Motion-Statement of Facts-Affirmation-Exhibits (A-O)-Memorandum of Law
Affirmation in Opposition (by plaintiff)-Exhibits (A-K)-
Expert Affirmations (2)-Memorandum of Law-Plaintiff's Response to Statement of Facts
Reply Affirmation

Motion Sequence No. 3
Notice of Motion-Statement of Facts-Affirmation-Exhibits (A-U)

Affirmation in Opposition (by plaintiff)-Exhibits (A-K)-
Expert Affirmations (2)-Memorandum of Law-Plaintiff's Response to Statement of Facts
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion by the defendant, Yosuke Imai, M.D., is granted to the extent that the plaintiff's claim alleging failure to obtain informed consent is dismissed, and the motion is otherwise denied as to the plaintiff's claim alleging medical malpractice (sequence no. 1); and it is further

ORDERED the motion by the defendant, The New York & Presbyterian Hospital sued herein as New York-Presbyterian Lawrence Hospital, is granted to the extent that plaintiff's claim alleging vicarious liability for the acts/omissions of Dr. Imai and Dr. Jackman is hereby dismissed, and the motion is otherwise denied as to the plaintiff's claim alleging vicarious liability for the hospital's medical staff (sequence no. 2); and it is further

ORDERED the motion by the defendants, Alexis Hope Jackman, M.D. and ENT and Allergy Associates, LLP, is granted, and so much of the complaint that asserts a cause of action against Alexis Hope Jackman, M.D. and ENT and Allergy Associates, LLP, is severed and dismissed (sequence no. 3); and it is further

ORDERED the parties to the severed action shall appear for a settlement conference in the Settlement Conference Part. The Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues alleging medical malpractice.

On December 18, 2018, plaintiff underwent an otolaryngological procedure (sinus surgery), which was performed by her private treating physician, the defendant, Alexis Hope Jackman, M.D. (Dr. Jackman) at the defendant, The New York & Presbyterian Hospital, sued herein as New York-Presbyterian Lawrence Hospital (Lawrence Hospital). The defendant, Yosuke Imai, M.D. (Dr. Imai) was the attending anesthesiologist. Neither Dr. Jackman nor Dr. Imai were employed by Lawrence Hospital. As the anesthesiologist, Dr. Imai was responsible for positioning the plaintiff before and during the procedure with the assistance of medical staff employed by Lawrence Hospital. At deposition, Dr. Imai testified that during the induction of anesthesia, "both [of plaintiff's] arms were on [an] armboard to her side maybe ten or fifteen degrees abducted…Following the induction after the patient is completely anesthestized we took the armboard off and tucked…both arms to her side padded" (Imai deposition tr at 48). Dr. Imai testified that the induction process took approximately ten to fifteen minutes (*see id.* at 50). After the induction process is complete, he testified that both of plaintiff's arms were tucked at her sides, padded with hollow foam, covered with a blanket, and the armboards were removed (*see id.* at 51). Dr.

Imai was positioned by the plaintiff's head and, as such, he testified that a circulating nurse "may have removed the armboard for him" (*see id.* at 51). Plaintiff remained in a supine position throughout the procedure and plaintiff's face was oriented slightly towards the right about ten to fifteen degrees throughout the procedure to allow Dr. Jackman sufficient space to approach the surgical site (*see id.* at 55-56).

Immediately following the procedure, plaintiff transferred herself from the operating table to the stretcher. In this regard, Dr. Imai testified that plaintiff "was awake enough and she was able to bend her knees and lift her bottom up, so I asked whether she's able to move by herself, and she said yes, so she moved" (Imai deposition tr at 58). As to whether plaintiff received assistance when transferring onto the stretcher, Dr. Imai testified that "[p]robably one or two nurses might have helped moving her legs at the same time. It's possible" (*see id.* at 58). Dr. Imai further testified that the transfer by the plaintiff was not remarkable, that he followed the plaintiff to the recovery room, that the plaintiff was awake and conversant during the transport, and did not make any complaints (*see id.* at 59-60).

While in the recovery room, plaintiff experienced left shoulder pain and decreased mobility of her upper left extremity. Plaintiff was admitted to Lawrence Hospital for further observation. During the admission, she was evaluated by, among others, orthopedics and neurology and underwent various diagnostic testing including, x-rays of the shoulder and elbow which were negative for dislocation and fracture and CT scans of the head and neck which were negative for any acute occlusion. Ultimately, plaintiff was diagnosed by a non-party physician with Parsonage Turner Syndrome (PTS) of the brachial plexus. PTS is an idiopathic condition which arises spontaneously and that can occur absent any malpractice.

This action by plaintiff ensued. As to Dr. Imai, plaintiff alleges, *inter alia*, that he failed to properly position plaintiff during the procedure including, the placement of her left arm. Plaintiff further alleges that Dr. Imai was negligent by allowing plaintiff to transfer herself from the operating table to the stretcher following the procedure. As to Dr. Jackman, plaintiff alleges, *inter alia*, that she was negligent by failing to properly position the plaintiff for surgery, by failing to properly support plaintiff's left arm while she was on the operating table, and by failing to properly transfer plaintiff from the operating table to the stretcher following the procedure. Plaintiff essentially asserts the same set of allegations against Lawrence Hospital for vicarious liability. Plaintiff further alleges that the aforesaid negligent acts or omissions constituted departures from good and accepted medical care and that said acts/omissions were substantial contributing factors to plaintiff's injuries. Plaintiff is proceeding under a theory of res ipsa loquitur.

Following the completion of discovery, Dr. Imai moves for an order granting summary judgment dismissing so much of the complaint as asserts a cause of action against him (sequence no. 1). Lawrence Hospital separately moves for an order granting summary judgment dismissing so much of the complaint as asserts a cause of action against it

(sequence no. 2). Dr. Jackman and ENT and Allergy Associates also move for an order granting summary judgment dismissing so much of the complaint as asserts a cause of action against them (sequence no. 3). Plaintiff opposes all three motions. The motions are consolidated for joint disposition and decided herein as follows.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

A defendant-physician moving for summary judgment dismissing a claim for medical malpractice must demonstrate, prima facie, that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Meade v Yland*, 140 AD3d 931, 932-933 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]). Once the defendant-movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce sufficient evidence to establish the existence of a material issue of fact, but only as to those elements on which the movant met its prima facie burden (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]; *Keane v Dayani*, 178 AD3d 797, 798 [2d Dept 2019]).

Plaintiff relies on the doctrine of res ipsa loquitur in support of her medical malpractice cause of action. Ordinarily, a claim for medical malpractice requires proof that a defendant departed from good and accepted medical practice and that such deviation was a proximate cause of plaintiff's injury (*see Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). Where, however, "the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). "In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor and that rule is particularly appropriate in a medical malpractice case in which the plaintiff has been anesthetized" (*Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2d Dept 2015]

[internal quotation marks, brackets, and ellipses omitted]; *Schmidt v Buffalo Gen Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv. denied* 96 NY2d 710 [2001]).

To establish a prima facie claim of res ipsa loquitur, three elements must be met. "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Kambat*, 89 NY2d at 494). "To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence" (*Kambat*, 89 NY2d at 494 [internal quotation marks omitted]). "Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door" (*Swoboda*, 131 AD3d at 1045).

Motion by the Defendant, Yosuke Imai, M.D.
Sequence No. 1

In support of his motion, Dr. Imai proffers, *inter alia*, an expert affirmation by Anthony R. Brown, M.D., a board certified anesthesiologist who indicates familiarity with the applicable standards of medical care and practice as pertains to anesthesiology during the relevant time frame. Dr. Brown affirms that based upon his education and years of training and experience in the field of anesthesiology, as well as his review of the pleadings, deposition testimony of the parties and non-party witnesses, as well as the relevant medical records from New York Presbyterian Lawrence Hospital and Neurology Associates of Westchester and White Plains Hospital, that the care and treatment provided by Dr. Imai to plaintiff was appropriate and within the applicable standards of good and accepted medical practice. Dr. Brown affirms that Dr. Imai performed a proper pre-anesthesia assessment of plaintiff, appropriately administered general anesthesia to plaintiff for her sinus surgery, and properly monitored plaintiff during the course of the surgery. Dr. Brown further affirms that plaintiff was properly positioned for the induction of anesthesia and that plaintiff was properly positioned during the course of the sinus surgery. Dr. Brown affirms that the manner in which plaintiff was positioned did not cause or contribute to the alleged injuries sustained. Dr. Brown affirms that it is within the standard of care to allow an abled patient, such as plaintiff, to transfer herself from the operating table to a stretcher after surgery and that such movement would not create a risk of compression or stretch injury to the left arm or shoulder.

In opposition, plaintiff proffers the expert affirmations of two name redacted physicians, one who is board certified in anesthesiology and the other who is board certified in neurology. The expert anesthesiologist affirms that based upon a review of the relevant medical records, the deposition testimony of the parties and non-party witnesses, and the

expert affirmations proffered by the defendants, that Dr. Imai departed from the standards of good and accepted medical practice. The anesthesiologist affirms that plaintiff suffered a brachial plexus injury during the course of the procedure which was caused by a stretching of the brachial plexus. The anesthesiologist further affirms that the injury and residual sequelae sustained by plaintiff does not ordinarily occur in the absence of negligence. In this regard, plaintiff's anesthesiologist affirms that plaintiff's positioning during the course of the procedure was under the exclusive control of the defendants and that plaintiff did not cause or contribute to her injuries. Based thereon, this physician affirms that defendants (collectively) departed from good and accepted medical practice in improperly and inadequately positioning plaintiff during the course of the procedure, and specifically her left arm, as well as by improperly allowing plaintiff to self-transfer while still under the effects of anesthesia. Such departures, according to plaintiff's expert anesthesiologist, were a proximate cause of plaintiff's injuries. With respect to the left arm, plaintiff's anesthesiologist opines that the left arm was improperly positioned during the course of the surgical procedure because it was improperly abducted which stretched the brachial plexus causing damage. Plaintiff's anesthesiologist opines that it was a departure from good and accepted medical practice to abduct the left arm to any degree whereby the head was contralaterally turned to the right, which stretches the brachial plexus. As an alternative, plaintiff's anesthesiologist affirms that plaintiff's left arm was improperly over-tucked (i.e., overtightened) at her side. In either event, plaintiff's anesthesiologist opines that it is undisputed that defendants (collectively) caused and/or allowed plaintiff to be improperly positioned during the course of the procedure which resulted in stretching of the brachial plexus and consequential nerve injury. Plaintiff's anesthesiologist also opines that it was a departure from good and accepted medical practice to allow a patient such as the plaintiff, who just underwent a nearly four and a half hour procedure and whom the expert describes as morbidly obese, to self-transfer from the operating table to the stretcher while still under the effects of anesthesia, and that said transfer was a proximate cause of her injuries.

Plaintiff also proffers the expert affirmation of a name redacted neurologist. This neurologist affirms that based upon a review of the relevant medical records, deposition testimony of the parties and non-party witnesses, the expert affirmations of plaintiff's anesthesiologist and defendants' doctors, that plaintiff's injuries were proximately caused by defendants. The neurologist essentially agrees with the opinions proffered by plaintiff's anesthesiologist.

Here, viewing the evidence in a light most favorable to plaintiff, as non-movant, the papers submitted, including the conflicting expert affirmations proffered by Dr. Imai and plaintiff, raise triable issues of material fact as to whether Dr. Imai departed from good and accepted medical practice in improperly/inadequately positioning the anesthetized plaintiff before and during the course of the sinus procedure and in improperly allowing plaintiff to self-transfer from the operating table to the stretcher following the procedure, and whether such departures proximately caused plaintiff's injuries under the doctrine of res ipsa

loquitur (*see Swoboda*, 131 AD3d at 1045). "The jury should be allowed to hear from plaintiff's experts in order to determine whether this injury would normally occur in the absence of negligence. Likewise, defendant must be given an opportunity to rebut the assertion with competent expert evidence to show, for example, that the injury complained of is an inherent risk of the procedure and not totally preventable with the exercise of reasonable care" (*State v Lourdes Hosp.*, 100 NY2d 208, 214 [2003]). Accordingly, the motion by Dr. Imai is denied as to the claim alleging medical malpractice. The motion is granted to the extent that the claim alleging failure to obtain informed consent is dismissed without opposition.

Motion by Lawrence Hospital
Sequence No. 2

The motion by Lawrence Hospital is granted to the extent that any claims alleging vicarious liability for the acts of Dr. Imai and Dr. Jackman are dismissed. The motion is otherwise denied as to vicarious liability for the acts/omissions of its medical staff.

Plaintiff alleges that Lawrence Hospital, by and through its agents, were negligent in its acts and/or omissions from December 18, 2018, through December 21, 2018. Plaintiff identifies the alleged agents of the hospital as the defendants-physicians, Dr. Jackman and Dr. Imai, as well as several non-parties, to wit: Arvin Hiwatig, Christina Roberts, Oliver Mosley, Carl Debrosse, Izetta Scotland, and Al Magnifico.

Vicarious Liability for Dr. Imai and Dr. Jackman

Lawrence Hospital established its *prima facie* entitlement to judgment as a matter of law for summary judgment dismissing the claim that it was vicariously liable for the alleged malpractice of the defendants-physicians, Dr. Imai and Dr. Jackman. Generally, "a hospital may not be held [liable] for the acts of [a physician] who was not an employee of the hospital, but one of a group of independent contractors" (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Although vicarious liability for the medical malpractice of an independent private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel, "[i]n order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal. [Further,] [t]he third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill" (*Weiszberger v KCM Therapy*, 189 AD3d 1121, 1122 [2d Dept 2020] [internal quotation marks and citation omitted]).

In support of this branch of its motion, Lawrence Hospital proffered, *inter alia*, the deposition testimony of Dr. Jackman and Dr. Imai as well as an affidavit from Deborah Alicea, an Associate of Human Resources of Lawrence Hospital. The evidence submitted establishes that Dr. Jackman and Dr. Imai were not employees of Lawrence Hospital during the relevant time period. At deposition, Dr. Imai testified that he was employed by Singular Anesthesia Services (*see* Imai deposition tr at 76). Dr. Jackman was employed by ENT and Allergy Associates, LLP, and it is undisputed that plaintiff had been treating with Dr. Jackman for several years prior to the alleged date of malpractice. Accordingly, the burden of going forward shifted to plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, plaintiff failed to raise a triable issue of material as to whether Lawrence Hospital may be held vicariously liable for the alleged malpractice of Dr. Jackman and/or Dr. Imai under a theory of apparent or ostensible agency (*see Sullivan v Sirop*, 74 AD3d 1326, 1328 [2d Dept 2010]; *cf. Loaiza v Lam*, 107 AD3d 951, 952-953 [2d Dept 2013]). Accordingly, the motion by Lawrence Hospital is granted to this extent.

Vicarious Liability for Medical Staff

The papers submitted raise triable issues of material fact regarding the liability of the medical staff as relates to the positioning of the plaintiff before and during the surgery as well as the transfer of plaintiff from the operating table to the stretcher following the procedure under the doctrine of res ipsa loquitur (*see Swoboda*, 131 AD3d at 1045; *Gaspard v Barkly Coverage Corp.*, 65 AD3d 1188, 1189 [2d Dept 2009]).

Motion by the Defendant, Alexis Hope Jackman, M.D.
Sequence No. 3

In support of her motion, defendants, Dr. Jackman and ENT, proffer the expert affirmation of Seth Lieberman, M.D., a board certified otolaryngologist. Dr. Lieberman affirms that based upon a review of the relevant medical records and the bill of particulars as well as a review of portions of the deposition testimonies of plaintiff, Dr. Jackman and Dr. Imai, and further based upon his education, training, and experience, that the care and treatment rendered by Dr. Jackman and ENT was appropriate and within the applicable standards of good and accepted medical practice and that nothing Dr. Jackman did or failed to do was a proximate cause of the alleged injuries. Specifically, Dr. Lieberman affirms that positioning of the plaintiff-patient is not within the responsibilities of the operating surgeon. It is undisputed that Dr. Jackman did not participate in the intubation of the plaintiff nor is it in dispute that Dr. Jackman did not participate in the positioning of the plaintiff before or during the procedure. It is further undisputed that Dr. Jackman did not participate in the transfer of the patient following the procedure from the operating table to the stretcher. Rather, Dr. Jackman testified at deposition that she was positioned at the plaintiff's right side while performing the procedure (*see* Jackman deposition tr at 28). Dr.

Jackman further testified that she requested that the endotracheal tube be placed at the plaintiff's left side since she was positioned on the plaintiff's right side and that she requested that the plaintiff's right arm be tucked (*see* Jackman deposition tr at 83-84). While Dr. Jackman testified to using various surgical tools during the course of the procedure, she testified that the application of the tools and devices did not cause plaintiff's head or neck to move (*see* Jackman deposition tr at 119). Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Even viewing the evidence in a light most favorable to plaintiff, as non-movant, the evidence demonstrates that Dr. Jackman fulfilled her duty to the plaintiff by performing the sinus procedure and that Dr. Jackman had no duty with respect to positioning of the plaintiff before or during the procedure or in the transfer of the plaintiff following the procedure (*confer Donnelly v Parikh*, 150 AD3d 820, 822 [2d Dept 2017]). Plaintiff's experts, neither of whom are otolaryngologists, fail to lay a proper foundation for their conclusion that Dr. Jackman departed from the standard of care by failing to participate in the positioning of plaintiff before or during the procedure or in failing to participate in the transfer of plaintiff following the procedure which was a proximate cause of the alleged injuries. Accordingly, the motion by Dr. Jackman is granted, and so much of the complaint that asserts a cause of action against her is severed and dismissed.

E N T E R,

Dated: White Plains, New York
October 13, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz, E=jlefkowi@nycourts.gov
Reason: I am the author of this document
Location: your signing location here
Date: 2021.10.13 14:11:37-04'00'
Foxit PhantomPDF Version: 10.1.3

HON. JOAN B. LEFKOWITZ, J.S.C.