Clark v Rachfal
2021 NY Slip Op 34343(U)
February 1, 2021
Supreme Court, Onondaga County
Docket Number: Index No. 005516/2018
Judge: Gerard J. Neri

At a Motion Term of the Supreme Court of the State of New York held in and for the County of Onondaga at the Onondaga County Courthouse, Syracuse, New York, on the 28th day of January, 2021.

PRESENT: HON. GERARD J. NERI, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

GERALDINE CLARK and MOSES CLARK,

Plaintiffs,

-against-

STEPHAN J. RACHFAL, M.D., JOHN CUCINOTTA, M.D., CROUSE HOSPITAL EMERGENCY MEDICINE DEPARTMENT, CROUSE RADIOLOGY ASSOCIATES, L.L.P., CROUSE HEALTH HOSPITAL, INC. and KRISTA J. KANDEL, M.D

Defendants.

DECSION and ORDER

Index No. 005516/2018

The following motions are pending before the Court: Defendant Stephan J. Rachfal, M.D.'s motion for summary judgment ("Motion #2", NYSCEF Doc. No. 69); Defendants John Cucinotta, M.D. and Crouse Radiology Associates, LLP's motion for summary judgment ("Motion #3", NYSCEF Doc. No. 102); Defendant Krista J. Kandel, M.D.'s motion for summary judgment ("Motion #4", NYSCEF Doc. No. 81; and Defendants Crouse Health Hospital, Inc. and Crouse Hospital Emergency Medicine Department's motion for summary judgment ("Motion #5", NYSCEF Doc. No. 130). By letter dated October 27, 2020, Plaintiff's counsel advised they would be discontinuing the action as against Dr. Rachfall and not otherwise opposing Dr. Rachfall's motion for summary judgment (NYSCEF Doc. No. 148). The Stipulation of Partial Discontinuance in favor of Rachfal was filed on December 8, 2020 (NYSCEF Doc. No. 153).

On June 5th, 2018, Plaintiffs filed a complaint alleging that on October 28, 2017, Plaintiff Geraldine Clark awoke and complained of dizziness, general weakness, trouble walking, weakness in her extremities, elevated blood sugar, and elevated blood pressure (*see* Complaint,

NYSCEF Doc. No. 3, para. 14). Geraldine Clark was then transported to Defendant Crouse Hospital Emergency Medicine Department ("CHEMD"), arriving at 4:13 pm and triaged at 5:09 pm (*see* Complaint, NYSCEF Doc. No. 3, para. 15). Plaintiffs assert that Geraldine Clark was not neurologically evaluated by a physician until 9:46 pm, nearly six hours after her arrival at CHEMD (*see* Complaint, NYSCEF Doc. No. 3, para. 17). Geraldine Clark was discharged at 10:52 pm at her request and advised to see her primary care physician later that week (*see* Complaint, NYSCEF Doc. No. 3, para. 20). Plaintiff alleges that none of the Defendants were advised that Geraldine Clark was taking Lisinopril 5 mgs and that her blood pressure had never been as high as it was that day (*see* Complaint, NYSCEF Doc. No. 3, para. 21). Geraldine Clark was advised that no one was available at that time to read and interpret the MRI which had been performed earlier at 5:59 pm (*see* Complaint, NYSCEF Doc. No. 3, para. 24).

Plaintiff further alleges that the next day, October 30, 2017, at 9:13 am, Nurse Practitioner Peter J. Caluwe called Geraldine Clark and advised her to immediately return to CHEMD (*see* Complaint, NYSCEF Doc. No. 3, para. 25). Plaintiffs allege Defendant Cucinotta transcribed the images findings of the mild chronic microvascular white matter, ischemic disease, and an acute left lateral brain stem lacunar infarction (a stroke) at approximately 8:40 to 9:00 am on October 30, 2017 (*see* Complaint, NYSCEF Doc. No. 3, para. 28). Plaintiffs further allege that Geraldine Clark, as a result of Defendant's negligence, now suffers hemiparesis requiring the use of a walker, dysmetria of the right extremity which affects here daily activities, strength of her right hand, ability to write, and fine motor dexterity coordination (*see* Complaint, NYSCEF Doc. No. 3, para. 29). Plaintiffs allege the Defendants' negligence was not timely diagnosing and treating her condition, among other things (*see* Complaint, NYSCEF Doc. No. 3, para. 34).

Motion #3

Defendants Dr. Cucinotta and Crouse Radiology Associates, LLP ("CRA") move for summary judgment arguing that due to the extended time between original onset of symptoms, 3:00 am on October 29, 2017, and initial presentation at CHEMD at 4:13 pm, some twelve hours later, that Cucinotta's preliminary interpretation of the CT scan did not contribute to Geraldine Clark's outcome. "The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage" (Deutsch v Chaglassian, 71 AD3d 718,

719 [2d Dept 2010]). Defendants note that "window of opportunity for the use of tPA (tissue plasminogen activator) for treatment of a thromboembolic (ischemic) stroke is limited" and can only be administered within the first few hours of symptom onset (Attorney Affirmation, NYSCE Doc. No. 103, para. 7). As Defendants allege that the stroke occurred some twelve hours prior to Cucinotta's preliminary review, nothing he did could have changed the patient's outcome. As Cucinotta's actions did not contribute to Plaintiff's injuries, Defendants argue summary judgment is appropriate.

Plaintiffs argue that Defendant Cucinotta's preliminary report and Dr. D'Ambrosio's final report were based on the same set of images, however, D'Ambrosio found an acute brain stem stroke. Dr. D'Ambrosio reviewed the images on the morning of October 30, 2017, not Dr. Cucinotta as originally asserted in the Complaint. When discharged on the 29th, Geraldine Clark showed no symptoms of a stroke, yet the next day when she returned to CHEMD Geraldine Clark was scored a three on the stroke scale (*see* Attorney Affirmation, NYSCEF Doc. No. 157, p. 11). Plaintiff's expert opines: "within a reasonable degree of medical certainty that as a radiologist [Cucinotta] was fully trained and able to identify this brainstem stroke, and was required to do so by the duties of an attending radiologist at a hospital which also happens to be a certified stroke center" (*see* Expert Opinion, NYSCEF Doc. No. 162, para. 8). Plaintiff's expert concludes: "within a reasonable degree of medical certainty that the Defendants' negligence cause Geraldine Clark to be deprived of a substantial chance of treatment and cure" (*ibid* at para. 14).

In reply, Defendants argue that Plaintiffs' expert provides no factual basis or support for the claims that Geraldine Clark had a transient ischemic attack ("TIA") and not a stroke before she arrived at CHEMD. To rebut Defendants' expert opinions, Plaintiffs' experts must be based on more than mere speculation (*see* Davenport v. County of Nassau, 279 A.D.2d 497, 498 [Second Dept. 2001]). Defendants state: "There is simply ***no competent evidence*** before this Court – based on the undisputed medical record and the brain MRI that as performed at 7:43 pm on October 29, 2017, and thereafter reviewed by Dr. Cucinotta after 11:00 pm on October 29, 2017 that the 'stroke symptoms' which she first reported experiencing at 3:00 am that morning and which were later observed upon her return to the hospital on October 30, 2017, were related to ***anything other than*** the stroke/acute lacunar infarct revealed on that brain MRI on October 29, 2017" (Attorney Reply Affirmation, NYSCEF Doc. No. 166, para. 14, ***emphasis in original***,

citing Knapp Affidavit, NYSCEF Doc. No. 127, paras. 15 & 32). Defendants argue they have met their burden and Plaintiffs have failed to rebut with competent evidence.

Discussion:

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 [2012] *citing* Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335, 339 [2011]). "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then 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'" (Vega at 504 *citing* Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Defendants met their burden by demonstrating that Cucinotta's actions did not result in the Plaintiffs' injuries, and the burden shifted to Plaintiffs. Plaintiffs met their burden.

When viewing the facts in the light most favorable to Plaintiffs, summary judgment in favor of Defendants is not appropriate. Plaintiffs' expert raised triable issues of fact. Cucinotta and D'Ambrosio reviewed the same set of images and came to two drastically different conclusions. As Plaintiffs' expert states: "If Defendant Cucinotta had identified and reported this acute stroke as he was required to do Geraldine Clark would have been admitted to the hospital and under close observation. Then when her stroke symptoms started, including right-sided weakness and facial droop, the time window for intervention with tPA would have began to run and the Plaintiff would have been present to receive treatment" (*see* Plaintiff's Expert Opinion, NYSCEF Doc. No. 162, para. 13). Plaintiff's expert based his/her opinion upon a review of the record (*ibid* at para. 2). As Plaintiffs have raised a triable issue of fact, summary judgment is not appropriate. Defendant's motion is denied.

Motion #4

Defendant Krista J. Kandel, M.D. moves for summary judgment alleging she complied with the applicable standard of care. For Defendant to be successful in her motion for summary judgment, Defendant must establish she either complied with the accepted standard of care or did not cause any injury to the patient (*see generally* Dickinson v. Bassett Healthcare, 173 A.D.3d 1696, 1696 [Fourth Dept. 2019]). Defendant notes that her involvement with Geraldine Clark began at approximately 9:46 pm, some five hours after Clark first arrived at CHEMD (*see*

Attorney Affirmation, NYSCEF Doc. No. 82, para. 17). Kandel conducted her own examination of Geraldine Clark and found "no neurological deficits, normal speech, normal sensation, and equal strength in all extremities" (*ibid*). Defendant further states that she urged Plaintiff to remain at CHEMD, but that Clark was insistent on leaving (*ibid*). Approximately an hour later, Kandel stated Plaintiff wanted to leave CHEMD, Kandel advised the results of the MRI and MRA were not yet available and Plaintiff should remain (*ibid* at para. 18). Despite this, Plaintiff insisted on leaving (*ibid*). Kandel agreed to call Clark when the MRI and MRA results came back if Clark insisted on leaving (*ibid*). Subsequent to Clark's discharge, the MRI and MRA results came back and "[b]ecause these studies did not show any acute strokes or other concerns, Dr. Kandel did not call Plaintiff at 1:00 am to alert her of the results" (*ibid* at para. 19). Defendant's expert opined that: "Even if Dr. Kandel had waited until receiving these results prior to developing a discharge plan, the plan would have been no different. Based on the lack of any physical signs of stroke and negative imaging, Dr. Kandel would still have discharged Plaintiff with instructions to follow-up with her primary care doctor" (*see* Bartfield Affirmation, NYSCEF Doc. No. 94, para. 29). Defendant concludes as she complied with the standard of care and did not cause Plaintiff's injuries, she is entitled to summary judgment.

Plaintiffs oppose Defendant's motion. Plaintiff's expert opines that the standard of care in this instance required Kandel not to discharge Geraldine Clark in light of Clark's medical history (*see* Expert Affidavit, NYSCEF Doc. No. 160, para. 11). Plaintiffs' expert further states Geraldine Clark "was incorrectly discharged by Defendant Kandel that night prior to getting the results of the MRI" (*ibid* at para. 19). Plaintiffs' expert concludes that the improper discharge deprived Geraldine Clark of her last best chance for appropriate treatment and improved outcome (*ibid* at para. 20). Plaintiffs argue that Defendant failed to meet her burden for summary judgment, and even if she had, the Plaintiffs have raised a question of fact.

Defendant replied and argues that Plaintiff's expert opinion was "made solely for the purpose of attempting to defeat this motion" (*see* Reply Affirmation, NYSCEF Doc. No. 164, para. 6). Defendant states: "Plaintiffs' expert admitted that Plaintiff was well at the time of discharge. Yet the expert claimed Mrs. Clark had significant risk factors for a future stroke that required she be admitted for observation and possible intervention *if* she showed new symptoms of stroke. The expert did not state how long this observation period should be for, and the expert's affidavit appears to indicate that Mrs. Clark should have been admitted and observed

until she showed symptoms, whether that be hours, days, or weeks later" (*ibid*, *emphasis in original*). Defendant further argues that Plaintiffs' expert has failed to explain how keeping Plaintiff the extra twenty minutes until the preliminary radiology report would have changed Plaintiff's outcome (*see generally* Martingano v. Hall, 2020 N.Y. App. Div. LEXIS 6813 [Fourth Dept. 2020]). Defendant requests the Court grant the motion for summary judgment.

Discussion:

Defendant's motion for summary judgment is granted. Defendant has demonstrated that Kandel did not deviate from the standard of care, or alternatively, that her actions did not lead to Plaintiff's injuries. Plaintiffs' expert concedes that at the time Kandel examined and subsequently discharged Mrs. Clark, she exhibited no signs of a stroke. Further, had Kandel retained Clark for the extra twenty minutes to review the preliminary report, Kandel would not have changed her position as evidenced by her decision to call Clark with the results the next day instead of at 1:00 am, October 30, 2017, because the reported studies by Radiologist Dr. Cucinatta did not show any acute strokes or other concerns. Plaintiffs' expert, as Defendant notes, would hold the standard to the illogical conclusion that based on the Clark's medical history she be retained for observation until Clark demonstrated stroke symptoms, be it hours, days, or even possibly weeks. Kandel based her actions on the best evidence available at the time and her actions did not lead to Plaintiff's injuries. Summary judgment in favor of Defendant Kandel is granted.

Motion #5

Defendants Crouse Health Hospital and CHEMD (collectively as "Crouse") move for summary judgment. Crouse states that its liability in this action is based on respondeat superior. Crouse acknowledges that it can be held liable for the actions of its employees, in this instance Dr. Rachfal and Dr. Kandel. Crouse argues that if the actions are dismissed against those individuals, there is no basis for liability against Crouse. Crouse further states that Dr. Cucinotta is not an employee of Crouse and therefore Crouse cannot be held liable for his actions.

Plaintiffs merely respond that there is a question whether Crouse is vicariously liable for the Defendants in this action (*see* Memorandum of Law in Opposition, NYSCEF Doc. No. 163, p. 6).

Defendant Crouse replied and reiterated its arguments.

Discussion:

The Court having granted Rachfal and Kandel's motions for summary judgment, there is no basis for vicarious liability against Crouse. Crouse's motion for summary judgment is therefore granted.

NOW, THEREFORE, based upon the documents filed in these motions, Motion #3, Motion #4, and Motion #5, and based upon oral arguments held on January 28, 2021, it is hereby

ORDERED, that the motion for summary judgment made by Defendants Cuccinotta and Crouse Radiology Associates, LLP is DENIED; and it is further

ORDERED, that the motion for summary judgment made by Defendant Kandel is GRANTED; and it is further

ORDERED, that the motion for summary judgment made by Defendants Crouse Hospital Emergency Medicine Department and Crouse Health Hospital, Inc. is GRANTED.

Dated: February 1, 2021

HON. GERARD J. NERI, J.S.C.

ENTER.