

Susman v Wong

2022 NY Slip Op 31086(U)

March 31, 2022

Supreme Court, New York County

Docket Number: Index No. 805300/2018

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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INDEX NO. 805300/2018

LINDA SUSMAN, as Executor of the Estate of WARREN
SUSMAN, deceased, and LINDA SUSMAN, individually

MOTION DATE 09/08/2021

Plaintiffs,

MOTION SEQ. NO. 001

- v -

JOYCE WONG, CICI ZHANG, LENOX HILL HOSPITAL, and
NORTHWELL HEALTH, INC.

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants Defendants Cici Zhang’s (“Dr. Zhang”), Lenox Hill Hospital’s (“Lenox Hill”), and Northwell Health, Inc.’s (“Northwell”) (collectively, “Defendants”) unopposed motion for summary judgment dismissal of Plaintiffs Linda Susman’s, as Executor of the Estate of Warren Susman, deceased, and Linda Susman, individually’s (“Plaintiffs”) complaint.

Defendants move for summary judgment on numerous grounds. Specifically, Defendants argue in substance that Defendant Northwell is not liable because it neither administers medical care, nor employs medical professionals. Defendants also argue in substance that Mr. Susman was a private patient who was under the exclusive care and supervision of co-defendant Joyce Wong (“Dr. Wong”), a private attending physician. Additionally, Defendants argue in substance that the claim that Defendants failed to timely diagnose and treat Mr. Susman for a perforated bowel and failed to timely order and assess ct scans must be dismissed because Mr. Susman developed a delayed thermal injury after his pancreatectomy and splenectomy surgeries performed by co-defendant Dr. Wong. Defendants contend that delayed thermal burns are a known risk of Mr. Susman’s procedures. Additionally, Defendants contend that Mr. Susman’s post-surgery radiology films did not reveal a perforated bowel.

Moreover, Defendants argue in substance summary judgment is warranted because at the time of Mr. Susman's surgeries, Defendant Dr. Zhang did not independently provide care for Mr. Susman. Defendant Dr. Zhang was a resident who operated under the direction and supervision of co-defendant Dr. Wong and co-defendant Dr. Wong's care and treatment of Mr. Susman did not deviate from normal practice. Additionally, Defendants argue in substance that Plaintiffs' allegation that the delay in the commencement of chemotherapy was a result of Defendants' misinterpretation of Mr. Susman's pathology results is misguided as it was Mr. Susman's other medical conditions which led to the delay in chemotherapy.

Lastly, Defendants argue in substance that the claim for lack of consent should be dismissed as they were not responsible for informing and obtaining consent from Mr. Susman about his surgeries and medical treatment. Co-defendant Dr. Wong was solely responsible for advising Mr. Susman about what his procedures entailed and obtaining his consent.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or

personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such *prima facie* showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Furthermore, in assessing medical malpractice cases, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself (see e.g. *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79, 490 N.E.2d 823). Thus, "a hospital may not be held liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits independent acts of negligence or the attending physician's orders are contraindicated by normal practice" (*Fink v DeAngelis*, 117 AD3d 894, 896 [2d Dept 2014] [internal quotation marks omitted]; *see Zhuzhingo v Milligan*, 121 AD3d 1103, 1106 [2d Dept 2014]).

The court finds that based on Defendant Dr. Wong's deposition testimony, Mr. Susman was her private patient and she was solely responsible for obtaining his informed consent for his surgeries. Additionally, the court finds that as a resident, Defendant Dr. Zhang operated under the supervision of Defendant Dr. Wong and did not independently treat or provide care for Mr. Susman. Additionally, the court finds that based on Defendants' expert affidavit from Daniel M. Labow, M.D., Defendants demonstrated that Defendant Dr. Wong did not deviate from accepted medical practice in her performance of Mr. Susman's pancreatectomy and splenectomy and his post-surgical care.

Here, the court finds that Defendants met their burden of demonstrating a *prima facie* showing of their entitlement to judgment in their favor as a matter of law through admissible evidence and by demonstrating the absence of any material issues of fact to be determined by the trier of fact. As such, the burden shifted to Plaintiffs to establish the existence of a disputed factual issue and Plaintiffs failed to do so or even oppose Defendants' motion.

Therefore, the court grants Defendants' unopposed motion for summary judgment and dismisses Plaintiffs' complaint as against Defendants Dr. Zhang, Lenox Hill and Northwell only.

To the extent not expressly addressed herein, the court considered all arguments put forth and Plaintiffs' complaint is nonetheless dismissed against the moving Defendants.

As such, it is hereby

ORDERED that the court grants Defendants Cici Zhang's, Lenox Hill Hospital's, and Northwell Health, Inc.'s motion for summary judgment dismissal of Plaintiffs Linda Susman's, as Executor of the Estate of Warren Susman, deceased, and Linda Susman, individually's complaint and dismisses of the complaint as against Defendants Cici Zhang, Lenox Hill Hospital and Northwell Health, Inc. and the remainder of the action is severed and continued.; and it is further

ORDERED that the court directs judgement in favor of against Defendants Cici Zhang, Lenox Hill Hospital and Northwell Health, Inc. as against Plaintiffs Linda Susman, as Executor of the Estate of Warren Susman, deceased, and Linda Susman, individually, without costs to any party

This constitutes the and order of the court.

3/31/2022

DATE



ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE