Perdja v AMB Med. Servs., P.C.
2022 NY Slip Op 34604(U)
February 28, 2022
Supreme Court, Queens County
Docket Number: Index No. 714880/2018
Judge: Peter J. O'Donoghue
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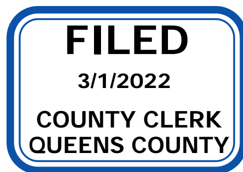
NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

ISHAK PERDJA



Plaintiff
-agianst-

AMB MEDICAL SERVICES, P.C., et. al.,

Defendants

Index Number 714880 2018

Motion Date October 13, 2021

Motion Seq. Nos. 3 and 4

The following papers read on this motion by defendants AMB Medical Services. P.C. (AMB) Nilofar Hava, M.D. for an order dismissing the complaint and all cross claims with prejudice, and directing that summary judgment be entered in favor of said defendants. Defendant Danielle Vilsaint-Antoine sued herein as Danielle V. Antoine a/k/a Danielle Vilsaint Antoine separately moves for an order granting summary judgment dismissing all claims against her.

	Papers Numbered
Motion Sequence Number 3	
Notice of Motion-Affirmations-Statement of Material Facts-Exhibits.	EF101-118
Opposing Affirmations-Affidavits-Exhibits-Statement of Material Facts-Affidavit of Service	EF 158-161
Other Affirmation-Affidavits-Exhibits	EF 141-150
Reply Affirmation- Amended Reply Affirmation	EF 170-171
Motion Sequence Number 4	
Notice of Motion-Statement of Material Facts-Affirmation-Affidavit-Exhibits-Amended Statement of Material Facts-Affirmation of Service.	EF119- 139
Opposing Affirmation-Statement of Material Facts-Affidavit of Service.	EF 162-165
Reply Affirmation-Affidavit of Service	EF 167

Upon the foregoing papers these motion are consolidated for the purposes of a single decision and are determined as follows:

On December 26, 2017, plaintiff Ishak Perdja commenced the within action for negligence/medical malpractice under Index Number 717840 2017, against AMB Medical

Services PC (AMB), Nilofar Hava, M.D. and Barry S. Maizel, M.D. Defendant AMB served an answer and interposed nine affirmative defenses. Defendant Hava served an answer and interposed nine affirmative defenses. Defendant Maizel served an answer and interposed seven affirmative defenses.

On September 7, 2018, plaintiff commenced an action for negligence/medical malpractice against Danielle V. Antoine also known as Danielle Vilsaint Antoine, under Index Number 713777/2018. Ms. Vilsaint Antoine is alleged to be a registered nurse or nurse practitioner, employed by AMB. She served an answer and interposed eight affirmative defenses.

On September 28, 2018, plaintiff commenced an action for negligence/medical malpractice against Olga Slotsky N.P., under Index Number 714880/2018. Olga Slootsky, incorrectly named herein as Olga Slotsky, is alleged to be a registered nurse or nurse practitioner employed by AMB. Defendant Slootsky served an answer and interposed thirteen affirmative defenses.

This Court in an order dated January 25, 2019, granted plaintiff's motion to consolidate all three actions. In an order dated February 13, 2019 and entered on February 21, 2019, this Court, among other things sua sponte modified its order of January 25, 2019, and consolidated all three actions for all purposes under Index Number 714880/2018, amended the caption accordingly, and ordered that the pleadings in each action shall stand as the pleadings in the consolidated action. This court notes that there are no cross claims asserted against any of the co-defendants.

Plaintiff alleges that defendant AMB does business under the name Doc Care at a facility located in Ridgewood, New York. As to all defendants plaintiff alleges that they improperly prescribed Theoretic, an anti-hypertensive medication, and failed to properly monitor him while he was taking said medication, causing him to suffer an electrolyte imbalance resulting in atrial fibrillation, hospitalization and the need to be on anticoagulation therapy.

With respect to Dr. Hava, plaintiff in his bill of particulars alleges that the negligence and malpractice occurred on and after his medication was changed from Atenolol 100 mg. and Hydrochlorothiazide 12.5 mgs. to Tenoretic 100mg/25 mg. on April 15, 2016 through March 14, 2017; that she improperly prescribed medication to and for the plaintiff without appropriate consideration for his medical history and were not appropriately monitoring same; that she improperly prescribed and continued to prescribe Tenoretic 100/25 mg for the plaintiff; that she failed to timely and appropriately "take blood" and monitor plaintiff's electrolytes, including sodium at appropriate intervals after prescribing Tenoretic for the

plaintiff; that she failed to monitor plaintiff's blood chemistries and electrolytes at appropriate and short intervals (less than six month intervals) after prescribing Tenoretic, particularly in the face of plaintiff's medical history and a drop in plaintiff's sodium level below normal after the administration of the said Tenoretic; that she continued and failed to alter the medication (Tenoretic); that she caused, permitted and allowed plaintiff's sodium levels to be, become and remain at low and abnormal levels; that she failed to take new comprehensive metabolic panels when defendants knew same were needed; that plaintiff had an electrolyte imbalance; and that she continued to prescribe Tenoretic in the face of such electrolyte imbalance. It is alleged that as a result of the alleged negligence and malpractice plaintiff suffered from an electrolyte imbalance, hyponatremia and atrial fibrillation; fatigue; was required to be on anticoagulation therapy; dietary restrictions; reduced life expectancy; high risk for stroke or heart attack; high risk from complications due to anticoagulation therapy such as hemorrhage or organ damage; and pain and suffering.

Plaintiff alleges in his bill of particulars that Dr. Marc Sherman, Dr. Nilofar Hava, Dr. Barry Maizel, Dr. Alan Bigman, Nurse Practitioner Danielle Vilsaint Antoine and Nurse Practitioner Olga Slootsky committed negligent acts or acts of malpractice that are attributable to AMB. The remainder of the alleged acts of negligence and medical malpractice are identical to the allegations asserted against defendant Hava as stated above.

With respect to defendant Danielle Vilsaint Antoine, plaintiff alleges in his bill of particulars that the acts of malpractice occurred on April 5, April 28, and November 3, 2016, and on May 28, 2016, June 28, 2016, August 24, 2016, October 3, 2016, October 29, 2016, November 25, 2016, December 21, 2016, January 19, 2017 and February 15, 2017, when she prescribed or authorized renewals of the medication Tenorectic. The remainder of the alleged acts of negligence and medical malpractice are identical to the allegations asserted against Dr. Hava as stated above.

A defendant moving for summary judgment in a medical malpractice must make a prima facie showing either that there was no departure from accepted community standards of medical practice, or that any departure was not a proximate cause of the plaintiff's injuries (*see Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677 [2d Dept 2021]*; Schwartz v Partridge*, 179 AD3d 963, 964 [2d Dept 2020]; *DiLorenzo v Zaso*, 148 AD3d 1111, 1112, [2d Dept 2017]). Where a defendant meets its prima facie burden as to both the departure element and the proximate cause element, "the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element" (*Stukas v Streiter*, 83 AD3d 18, 25 [2d Dept 2011]; *see Simpson v Edghill*, 169 AD3d 737, 738 [2d Dept 2019]; *Swanson v Raju*, 95 AD3d 1105, 1107 [2d Dept 2012]). "[W]here the moving defendant addressed the elements of both departure and proximate cause, the plaintiff [is] required to raise a triable issue of fact as to both of those

elements" in order to avoid dismissal (*Stukas v Streiter*, 83 AD3d at 26; *see Spilbor v Styles*, 191 AD3d 772 [2d Dept 2021]; *DiMitri v Monsouri*, 302 AD2d 420, 421[2d Dept 2003]). In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on "specifically cited evidence in the record" *(Tsitrin v New York Community Hosp*., 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *see Brinkley v Nassau Health Care Corp*., 120 AD3d 1287, 1290 [2d Dept 2014]).

Although a medical facility can be held liable for the negligence or malpractice of its employees, it is not generally held liable when the treatment is provided by an independent contractor, even if the facility affiliates itself with that independent contractor (*see Hill v. St. Clare's Hosp*., 67 NY2d 72, 79 [1986]). However, the facility may be held vicariously liable under a theory of apparent or ostensible agency by estoppel (*see* id. at 79; *Dragotta v Southampton Hosp*., 39 AD3d 697, 698 [2d Dept 2007]).

<u>Defendant Vilsaint's motion for summary judgment (motion sequence no. 4)</u>

Nurse Practitioner Valsaint Antoine (Valsaint) testified at her deposition that she saw the plaintiff on November 10, 2015, at which time she ordered lab work which was received on November 12, 2015; that she saw him on November 19, 2015 for a flu vaccine; and that the last time she saw the plaintiff was on April 5, 2016, at which time she ordered lab work and told him to follow up in a month. Plaintiff's prescription for Tenoretic authorized by Valsaint, was filled by CVS Pharmacy April 26, 2016, at which time he had not yet gone for the lab work. Plaintiff went for lab work on April 28, 2106, and the lab report was received by Doc Care on April 29, 2016. Valsaint stated that she reviewed said lab work, which showed a low level of sodium and chloride; that on May 3, 2016, she told the medical assistant to call the plaintiff; that the medical assistant called the plaintiff and left a voice mail; that a letter was sent to the plaintiff on May 18; and that plaintiff did not return to Doc Care for a follow up visit in May 2016. Vilsaint stated that she did not discuss the plaintiff's with either Dr. Maizel or Dr. Sherman.

CVS' Pharmacy's records show that Vilsaint's name is listed in connection with prescriptions for Tenorectic (or its generic equivalent) that were filled on August 24, 2016, October 3, 2016, October 29, 2016, November 15, 2016, December 21, 2016 and January 19, 2017. Vilsaint stated that on at least one of these dates she was not in Doc Care's office; that other medical providers at Doc Care saw the plaintiff after April 5, 2016; and that the patient or family could call to renew or refill a prescription and that the clerical staff at Doc Care would go over the patient's chart and medication and electronically send a refill or renewal to the pharmacy without having consulted her.

Defendant Vilsaint has established her prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting among other things, an expert affirmation from Joy B. Alvarez, a nurse practitioner licensed in the State of New York. Ms. Alvarez states that based upon her years of practice as a nurse practitioner, she is fully familiar and knowledgeable of the customs, practices and procedures utilized in the New York City Metropolitan area with regard to the examination of patients by nurse practitioners and the prescriptions of medications by such nurse practitioners, and that she is also familiar with dealing with the results of any blood work ordered by nurse practitioners in follow-up.

Ms. Alverez states that at the April 5, 2016 visit Vilsaint a performed an appropriate physical exam of the plaintiff, and recorded her findings; that Vilsaint assessed that the plaintiff's follow-up visit was for prescription refills and that he had pre-existing hypertension and gastroesophageal reflux disease; that her plan was to prescribe Prevacid and Tenorectic and request a comprehensive metabolic panel; and directed plaintiff to return in a month. The plaintiff dod not go for the blood work until April 28, 2016, and the report was received on April 29, 2016, showing a blood sodium level of 131, with the lab having a normal range of 135-148. Alvarez states that per the protocol of AMB, Vilsaint told the medical assistant to call the patient to advise him of the blood test results and for the patient to follow up; that the records indicate that the call was made on May 3, 2016, and that when there was no response to the call, a letter was sent on May 18, 2016, per AMB's protocol. She states that records of CVS seem to indicate that there may have been a prescription for Tenoretic renewed, under the name of Nurse Practitioner Vilsaint on April 26, 2016 two days before plaintiff actually went to the lab for his work up; that this was appropriate under the circumstances; and that subsequent lab work done in November 2016 at the direction of another nurse practitioner showed the same sodium level on the same medication.

Ms. Alvarez states that the follow-up lab work Vilsaint sought was finally performed in October-November 2016; that the patient saw another nurse practitioner and two different physicians; that Dr. Sherman renewed the Tenorectic prescription in February 2017; and that the plaintiff did not have the event complained of until March 2017. Ms. Alvarez opines that Nurse Practitioner Vilsaint treated the plaintiff with appropriate and accepted practice with regard to her examination of April 5, 2016, the medications that were ordered and the follow-up that was requested. She further states that the notes Vilsaint wrote in the patient's chart were appropriate, careful and fully documented her care and treatment of the plaintiff so that any subsequent physician/health care provider would be aware of what transpired during this visit.

Plaintiff has submitted a single affirmation from his expert in opposition to separate motions for summary judgment by all of the defendants. It is noted that many of the assertions set forth in said affirmation do not apply to Ms. Vilsaint' care and treatment of the

plaintiff, who she saw on a total of three occasions. Plaintiff's expert a name redacted physician licensed to practice in the State of New York, is board certified in internal medicine and pulmonology. Said affirmation lacks probative value as it fails to specify how said physician became familiar with the applicable standards of care for nurse practitioners (*see Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677 [2d Dept 2021]; *Korszun v Winthrop Univ. Hosp*., 172 AD3d at 1345; *DiLorenzo v Zaso*, 148 AD3d at 1112). Rather, said doctor sets forth his or her experience in internal medicine and pulmonology, and offers a general standard of care for a patient who is prescribed a diuretic. In addition, plaintiff's expert affirmation is conclusory and speculative as regards defendant Vilsaint and therefore is insufficient to raise a triable issue of fact.

Plaintiff's expert's focuses on plaintiff's office visit with Vilsaint on April 5, 2016, the lab work performed on April 28, 2016 and October 29, 2016, and the records of CVS Pharmacy which list her name in connection with prescriptions for Tenoretoc on nine occasions between April 26, 2016 and January 19, 2017. As regards the April 26, 2016 prescription, plaintiff's expert ignores the evidence in the record which establishes that although Vilsaint ordered a complete metabolic panel (CMP) on April 5, 2016, plaintiff did not go to the lab until April 28, 2016. The lab report received on April 29, 2016, showed a sodium level of 131 (with a reference range of 135-148) and a chloride level of 92 (with a reference range of 98-109). Plaintiff did not return for a follow-up visit as directed by Vilsaint within a month of his April 5, 2016 visit. It is undisputed that plaintiff traveled to Albania on May 11, 2015 and returned on October 25, 2016.

Plaintiff's expert asserts that the renewal of prescription for Tenorectic (or its generic equivalent) listed in CVS's Pharmacy's records as prescribed by Vilsaint on May 28, June 28,August 24, October 3, 2016, without further lab tests or a further follow-up in light of an electrolyte imbalance was a deviation from good and accepted practice. Plaintiff's expert, however, ignores the evidence in the record that plaintiff was in Albania on said dates, and there is no evidence in the record that plaintiff received these refills while he was in Albania or that he was taking medication prescribed by Vilsaint at that time. Plaintiff's expert's claims in this regard therefore are speculative and conclusory and are insufficient to raise an issue of fact.

Plaintiff presented to Doc Care on October 28, 2016, and was seen by Nurse Practitioner Slootsky, who ordered a CMP. The blood was drawn at a lab on October 29, 2016 and the lab report received by Doc Care on November 3, 2016, showed that the sodium level remained unchanged at 131, and that the chloride level was 90. He was thereafter seen by Dr. Sherman and Dr. Maizel who made no changes in his medications.

Plaintiff in his bill of particulars alleges that Vilsaint was negligent for failing to

monitor his blood chemistries and electrolytes at intervals of less than 6 months. The evidence in the record establishes that plaintiff saw Vilsaint on April 5, 2016 at which time she ordered blood work. It is undisputed that such blood work is neither drawn nor performed at Doc Care, and that plaintiff did not go to a lab for said blood work until April 28, 2016. Although Vilsaint directed plaintiff to return for a follow-up visit within a month of April 5, 2016, he did not do so. It is undisputed that plaintiff traveled to Albania on May 11, 2016, returned on October 25, 2016, and did not return to Doc Care until October 28, 2016. There is no evidence that Vilsaint was aware of plaintiff's plan to travel to Albania when she saw him on April 5, 2016, and plaintiff does not claim that Vilsaint was required to monitor him while he was in Albania.

It is undisputed that plaintiff's sodium and chloride levels as documented in his April 28 and October 29, 2016 lab reports showed that there had been no change in the sodium level and a two point decrease in the chloride level dropped by two points during this time period. Plaintiff's expert's statement that "the chloride dropped on each occasion" signifying a "persistent decline in sodium and chloride levels" therefore is not supported by the record, as there had been no change in his sodium level. Further, plaintiff's expert's states that the "persistent decline in sodium and chloride levels could have and should have been detected and corrected before the sodium reached the critically low level of 100 and the chloride reached the level of 56" without offering anything more than speculation that a CMP, if Valsaint ordered prior to January 19, 2017, when her name was last listed by CVS as the ordering provider, would have demonstrated any decline in sodium and chloride levels, or a quantitative decline substantially different from the two point drop in plaintiff's chloride level that occurred over a six month period. Plaintiff's expert's affirmation in this regard therefore is insufficient to raise a triable issue of fact.

Defendants Hava and AMB's motion for summary judgment (motion sequence no.3)

Dr. Hava testified at her deposition that she is employed by AMB; that she does not have any ownership interest in AMB; and that she last saw the plaintiff in May 2014. It is undisputed that Dr. Hava did not change plaintiff's medication to Tenoretic either prior to or after May 2104, and did not authorize any refills of said medication. Plaintiff testified at his deposition that he had been treated by Dr. Hava, a family care physician at Doc Care; that he never talked to Hava about Tenoretic, and that Hava never prescribed any blood pressure medication.

Dr. Alan Bigman, a non-party, testified at his deposition that he is AMB's CEO and senior physician; that he has a 100 percent ownership interest in AMB; and that he is employed by AMB. He stated that his duties as CEO and senior surgeon are to oversee Michael Garcia, the chief financial officer and chief operations officer, and to see patients. Dr. Bigman stated that AMB has collaborative agreements with its nurse practitioners which

provide for collaborative counseling in the event said nurse practitioner needed to his assistance with decision making on a patient, or interpretation of diagnostics or a treatment plan.

Dr. Bigman saw the plaintiff for the first time on March 14, 2017, at which time he referred him to Long Island Jewish Medical Center (LIJ) to rule out a potential TIA, CVA or any other cardiac related problem. Plaintiff went to the emergency room of LIJ the same day and was he admitted to the hospital. He was discharged to his home on March 21, 2017 and did not thereafter return to Doc Care.

Defendant Hava has established her prima facie entitlement to judgment as a matter of law dismissing the complaint with prejudice by submitting among other things,, an expert affirmation from Umesh K. Gidwani, a physician licensed in the State of New York and board certified in pulmonary disease, critical care medicine and palliative care. Dr. Gidwani states that he specializes in treating critically ill patients with a variety of cardiac and pulmonary conditions, and that based upon his education and experience he has the requisite knowledge regarding, among other things, the management of patients with anti-hypertensive therapy and electrolyte abnormalities.

As regards Dr. Hava, Dr. Gidwani states that his review of the medical records and deposition testimony reveals that the patient's last visit with Dr. Hava was on May 5, 2014, which was over a year and a half before the patient was prescribed Tenoretic. He states that said review also revealed that Dr. Hava never prescribed or directed anyone to prescribe Tenoretic to the patient. Dr. Gidwant therefore states that none of the alleged departures regarding the prescription of Tenoretic and the management of same can be attributed to Dr. Hava and the plaintiff's allegations against Dr. Hava are without merit. He further opines with a reasonable degree of medical certainty that even assuming the period of alleged negligence included treatment by Dr. Hava, that Dr. Hava's care and treatment of the patient at Doc Care was at all times appropriate and in accordance with the applicable standard of care.

Plaintiff in opposition submits an affirmation from a name redacted physician who is licensed to practice in the State of New York and is board certified in internal medicine and pulmonology. Said expert specifically excepts Dr. Hava from having deviated from the good and accepted standards of care. Plaintiff, thus, does not oppose that branch of the motion which seeks to dismiss the complaint with prejudice as to Dr. Hava. It is noted that no cross claims have been asserted against Dr. Hava.

Plaintiff, in his bill of particulars, seeks to hold AMB vicariously liable for the alleged negligence and malpractice of Dr. Hava, Dr. Maizel, Dr. Bigman, Dr. Sherman, Nurse

Practitioner Slootsky and Nurse Practitioner Vilsaint. As the complaint against Dr. Maizel and Nurse Practitioner Slootsky has been dismissed pursuant to orders dated February 28, 2022 and February 28, 2022 (motion sequence numbers 1 and 2), plaintiff's claims against AMB based upon the alleged negligence of Maizel and Slootsky must be dismissed. In addition AMB cannot be held vicariously liable with respect to either Vilsaint or Hava, as the claims against these defendants are dismissed for the reasons stated abovc.

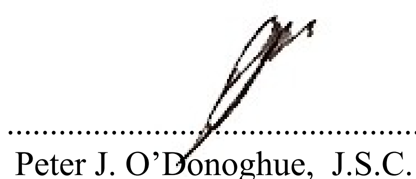
Plaintiff does not allege that Bigman's assessment of his condition on March 14, 2017 or that his instruction that plaintiff go to the hospital constituted negligence or malpractice. It is undisputed that Dr. Bigman did not treat the plaintiff prior to March 14, 2017, and that he did not prescribe or renew any of the plaintiff's medications. In addition, plaintiff does not allege that Dr. Bigman on behalf of AMB exercised control or supervision over Dr. Hava, Dr. Sherman, Dr. Maizel or Nurse Practitioners Slootsky and Valsaint Antoine. Therefore, plaintiff's claim against AMB for vicarious liability based upon the allegations with respect to Bigman must also be dismissed.

Finally, with respect to Dr. Sherman, AMB has established its established its prima facie entitlement to judgment as a matter of law by the submission of its contractual agreement and amendments thereto with Sherman. Said agreement provides that Sherman is an independent contractor and beginning in July 2008 agreed to provide cardiology services to AMB every Wednesday at the office located at 68-23 Fresh Pond Road, and every other Saturday at the office located at 66-55 Fresh Pond Road. There is no evidence that Sherman is an employee of AMB. Plaintiff in opposition had failed to raise a triable issue of fact as to whether AMB may be vicariously liable for Sherman's alleged malpractice and negligence under a theory of apparent or ostensible agency (*see Weiszberger v KCM Therapy*, 189 AD3d 1121, 1122-23 [2d Dept 2020]).

In view of the foregoing, defendants Hava and AMB's motion for summary judgment dismissing the complaint with prejudice is granted. That branch of the motion which seeks to dismiss all cross claims is denied as moot, as there are no cross claims against these defendants. Defendant Vilsaint's motion for summary judgment dismissing the complaint is granted.

The case is now dismissed in its entirety.

Dated: February 28 , 2022



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