Loccisano v Ascher

2022 NY Slip Op 34701(U)

May 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 504883/2015

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of May, 2022.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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ROCCO LOCCISANO,

Plaintiff,

-against-

ENRICO ASCHER, M.D.,
LUTHERAN MEDICAL CENTER,
ANIL HINGORANI, M.D.,
TOTAL VASCULAR CARE, PLLC and
VASCULAR INSTITUTE OF NEW YORK,

Defendants.

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DECISION AND ORDER ON REMITTAL

Index No. 504883/15

Mot. Seq. No. 5

The following e-filed papers read herein:	NYSCEF Doc. No.:
Notice of Motion, Affirmations, and Exhibits Annexed	72-81
Affirmations in Opposition and Exhibits Annexed	90-95
Reply Affirmation and Exhibits Annexed	96-97
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In this action to recover damages for medical malpractice, defendant Lutheran Medical Center ("LMC") moved in Seq. No. 5 for summary judgment dismissing, as relevant herein, the medical malpractice claim as against it. By decision and order, dated January 30, 2019 (the "prior order"), this Court, as relevant herein, granted the branch of LMC's motion which was for summary judgment dismissing the medical malpractice claim as against it. On appeal by plaintiff Rocco Loccisano ("plaintiff"), the Second Judicial

Department, by decision and order, dated June 2, 2021, modified the prior order, by among other things, vacating the portion of the order which granted the branch of LMC's motion which was for summary judgment on the medical malpractice claim and, upon vacatur, remitted the matter to this Court for a new determination of that branch of LMC's motion (*see Loccisano v Ascher*, 195 AD3d 610, 611, *rearg denied* 2022 NY Slip Op 61073[U] [Jan. 31, 2022]). The remaining defendants, Enrico Ascher, M.D. ("Dr. Ascher"), his associate Anil Hingorani, M.D. ("Dr. Hingorani"), and his practice, Total Vascular Care, PLLC, doing business as Vascular Institute of New York (collectively, "Total Vascular"), took no position on LMC's motion.

Background

The principal events giving rise to this matter took place between Sunday afternoon, August 24, 2014, and Wednesday morning, September 3, 2014.[1] On Sunday afternoon, August 24th, plaintiff – then an already established patient of Dr. Ascher and the latter's practice, Total Vascular – underwent a wall-stent implant in his left mid-common iliac vein (*i.e.*, in his left groin) at Total Vascular (Total Vascular's records at 000009 [NYSCEF Doc. No. 92]). On his return to Total Vascular four days later, on Thursday, August 28th, Dr. Ascher diagnosed plaintiff with deep vein thrombosis ("DVT") in his "left common femoral and left iliac veins" and directed him to present immediately to LMC where Dr. Asher and his associate, Dr. Hingorani, were the Chief and Assistant Chief of Vascular

[1] Unless otherwise indicated, all subsequent references are to year 2014.

Surgery, respectively. Neither Dr. Ascher nor Dr. Hingorani was an employee of LMC. *See* Affidavit of Deborah Hackshaw, dated July 19, 2018, ¶¶ 1-2

In the late afternoon/evening of Thursday, August 28th, plaintiff, at Dr. Ascher's referral, presented to LMC's emergency room and was admitted to Dr. Ascher's vascular service as his (Dr. Ascher's) patient (LMC's records at 03582-03583).[2] On the following morning, Friday, August 29th, Dr. Ascher performed, at LMC, a surgical procedure on plaintiff consisting of a thrombectomy (surgical removal of blood clots) and a thrombolysis (a one-time, 4 mg injection of Alteplase which is a tissue-plasminogen activator, commonly known as a "clot buster") (LMC's records at LMC002006-LMC002007). Following this procedure (which is referred to herein as the "first clot-busting session"), plaintiff remained at LMC while he was receiving intravenous Heparin (an anticoagulant) as a prophylaxis against the formation of new blood clots.

It appears, however, that Dr. Ascher was unable to remove all (or at least some) of the blood clots during the first clot-busting session. In an implicit acknowledgement of the importance of being thorough, Dr. Ascher's associate, Dr. Hingorani, returned plaintiff to the operating table on the morning of Tuesday, September 2nd, for what is referred to herein as the "second clot-busting session." During the second session, Dr. Hingorani placed an infusion catheter of an additional (2 mg/hour at the rate of 50 cc/hour) dose of Alteplase in plaintiff's left iliac vein (LMC's records at LMC002004, LMC002773, LMC004537-

[2] Portions of LMC's records were e-filed under NYSCEF Doc. Nos. 70, 80, and 93. LMC's records employed two different types of Bate-stamping: one with "LMC" as the prefix; the other without the "LMC" prefix.

LMC004538). At the conclusion of the second clot-busting session, plaintiff was restarted on intravenous Heparin (LMC's records at LMC002005).

At approximately 6:30 a.m. the following morning, Wednesday, September 3rd, plaintiff – then 51 years of age with the medical history that was significant for headaches – suffered an acute brain hemorrhage. He became paralyzed on his left side, despite a quick discontinuation of Heparin (as well as of Alteplase), a prompt reversal of anticoagulation by the administration of blood-clotting products, and the speedy undertaking of other interventions by the LMC stroke and critical care teams (LMC's records at LMC002773, LMC001485-LMC001486, LMC001507).

On October 15th, plaintiff was transferred from LMC to its affiliated rehabilitation facility from which he was discharged home approximately one month later. The subsequent course of medico-surgical treatment of his permanent left-sided paralysis is outside the scope of the matter at hand.

On April 23, 2015, plaintiff commenced the instant action against LMC (among others). In the course of discovery, plaintiff did not depose anyone from LMC, although he deposed Dr. Ascher and Dr. Hingorani (collectively, the "defendant doctors").

Plaintiff's medical malpractice claim as against LMC rests on two principal grounds. First, plaintiff's presenting condition to LMC on Thursday, August 28th (*i.e.*, the DVT in his iliac vein), did not warrant the clot-buster administration, either in a single session or, as was the instance with him, in two consecutive sessions. Second and independently of his presenting condition to LMC on August 28th, plaintiff was not an appropriate candidate for clot-buster administration because of: (1) a previously

undetected aneurysm or arteriovenous malformation ("AVM") in his brain; and (2) his pre-stroke medical history of headaches. According to plaintiff's expert (in ¶ 98 of his/her affirmation), LMC should have performed (or should have required the defendant doctors to have performed) a medical assessment of plaintiff, together with a neurological and diagnostical work-up, to rule out the existence of a brain aneurysm or AVM *before* it permitted the defendant doctors to subject plaintiff to the clot-busting sessions in its operating rooms.

At this point in discussing the history of this matter, it is crucial to correct one aspect of plaintiff's expert's interpretation of LMC's radiologic records. It is true that the STAT (non-contrast) CT scan of plaintiff's cranium, as was orally reported at 7:06 a.m. on Wednesday, September 3rd, "suggest[ed]" – rather than "demonstrated" as plaintiff's expert misdescribed it in ¶ 11 of his/her affirmation – "a ruptured aneurysm or AVM" (LMC004703). It is also true that a critical care progress note timed at 7:32 a.m. recast the initial CT scan's "suggestion" into the affirmative "showing" of an "AVM vs. Aneurysm" in plaintiff's brain (LMC001485). Significantly, however, plaintiff's expert failed to mention – let alone address – that the repeat (and then contrast-enhanced) CT scan of plaintiff's cranium, as was performed and interpreted approximately two hours later on the same morning of Wednesday, September 3rd, found "no evidence of aneurysm or vascular malformation" (LMC004699). The negative "finding" on the repeat CT scan conclusively disproved the initial radiological "suggestion" of the presence of a brain aneurysm or AVM in plaintiff's brain.

To return to the history of this matter, the Court notes that its prior order, as relevant herein, granted the branch of LMC's motion which was for summary judgment dismissing the medical malpractice claim as against it. The Court's determination in that regard was predicated on its concurrent ruling on the defendant doctors' separate summary judgment motion for dismissal of plaintiff's medical malpractice claim as against them.[3] As stated, the Second Judicial Department modified the prior order to hold that plaintiff *did* raise a triable issue of fact as to the defendant doctors' potential liability in medical malpractice. With the Court's ruling regarding the defendant doctors' potential liability in medical malpractice having been modified on appeal, the Second Judicial Department remitted the matter to the Court to determine anew LMC's potential liability in medical malpractice.

Discussion

"In general, a hospital cannot be held vicariously liable for the negligence of a private attending physician" (*Martinez v La Porta*, 50 AD3d 976, 977 [2d Dept 2008]). Courts have carved out three principal exceptions to the aforementioned general rule. First, a hospital may be held liable to a private patient under the theory of ostensible or apparent agency (*see Schultz v Shreedhar*, 66 AD3d 666, 667 [2d Dept 2009]). Second, liability on a hospital can be imposed for its own independent acts of negligence (*see Corletta v Fischer*, 101 AD3d 929, 930 [2d Dept 2012]). Third and finally, a hospital (or its staff)

[3] *See* Prior Order at 32, wherein the Court held that:

> "Having granted summary judgment to Dr. Ascher and Dr. Hingorani, the Court finds that [LMC] is also entitled to summary judgment dismissing plaintiff's medical malpractice claim. Accordingly, the court need not reach the issue whether the [defendant] Doctors were (or were not) [LMC]'s employees."

owes a duty to intervene when it "knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders" (*Toth v Community Hosp.*, 22 NY2d 255, 265 n 3 [1968], *rearg denied* 22 NY2d 973 [1968]).

As a threshold matter, LMC established prima facie that the defendant doctors were *not its employees, and that plaintiff who was admitted to Dr. Ascher's vascular service as* his private patient (rather than as a general emergency room patient) on August 28th and who underwent the first and second clot-busting sessions on August 29th and September 3rd by Dr. Ascher and his associate, Dr. Hingorani, respectively, sought (and received) vascular treatment only from the defendant doctors, rather than from LMC's staff (*see Giambona v Hines*, 104 AD3d 807, 811 [2d Dept 2013]). Contrary to plaintiff's contention, the defendant doctors' administrative positions at (and their affiliation with) LMC did not, ipso facto, establish ostensible or apparent agency sufficient to impute liability to LMC, particularly where, as here, there was no evidence that plaintiff relied on the defendant doctors' positions at (and/or affiliation with) LMC while he was seeking (and receiving) treatment from the defendant doctors (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, *80 [1986]* ["Nor *is affiliation of a doctor with a hospital or other medical facility, not* amounting to employment, alone sufficient to impute the doctor's negligent conduct to the hospital or facility."]; *Thurman v United Health Servs. Hosps., Inc.*, 39 AD3d 934, 936 [3d Dept 2007] ["plaintiff's reference to the content of defendant's Web site is unavailing in the absence of even an allegation that plaintiff or decedent accessed it or relied upon it"], *lv denied* 9 NY3d 807 [2007]).

Further, LMC demonstrated, prima facie (by way of its vascular surgeon's expert affirmation), that its staff did not commit any independent acts of negligence, and that no orders given by either of the defendant doctors were contraindicated by normal practice (*see Corletta*, 101 AD3d at 930; *Schultz*, 66 AD3d at 667).

In opposition, plaintiff's expert failed to raise a triable issue of fact. Plaintiff's expert's contention that LMC's staff should have obtained a neurological consult pre-operatively, as well as performed a CT/MRI scan to rule out any abnormal brain pathology, was contradicted by the record. Neither of the recommended preoperative interventions was necessary because, as highlighted above, the repeat (contrast-enhanced) CT scan affirmatively ruled out the existence of any vascular abnormality in plaintiff's brain. Further, plaintiff failed to raise a triable issue of fact as to whether LMC was on any actual or constructive notice of plaintiff's pre-stroke history of headaches because that history was documented in Total Vascular's (rather than in LMC's) records. Nor was LMC required, as plaintiff's expert asserted, to intervene in (or overrule) the defendant doctors' administration of the clot buster to plaintiff. Plaintiff's expert's assertion in that regard was conclusory, inasmuch as he/she failed to substantiate his/her claim that LMC's staff was clearly required to intervene before plaintiff suffered an acute hemorrhagic stroke (for example, plaintiff's expert pointed to no evidence in LMC's chart that plaintiff's activated partial thromboplastin time or aPTT – a measure of the level of anticoagulation during intravenous Heparin administration – had been, before his stroke, outside the expected range for patients receiving intravenous Heparin).

Conclusion

Accordingly, it is

ORDERED that the branch of LMC's motion in Seq. No. 5 for summary judgment dismissing the medical malpractice claim as against it is granted, and the remainder of the complaint as against LMC, to the extent not already dismissed by the prior order, is dismissed without costs and disbursements; and it is further

ORDERED that the action is severed and continued as against the remaining defendants Enrico Ascher, M.D., Anil Hingorani, M.D., Total Vascular Care, PLLC, and Vascular Institute of New York on plaintiff's medical malpractice claims as against them; *and it is further*

ORDERED that to reflect the dismissal of LMC from this action, the caption is amended to read in its entirety as follows:

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ROCCO LOCCISANO,

Plaintiff,

-against- *Index No. 504883/15*

ENRICO ASCHER, M.D.,
ANIL HINGORANI, M.D.,
TOTAL VASCULAR CARE, PLLC and
VASCULAR INSTITUTE OF NEW YORK,

Defendants.
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; and it is further

ORDERED that LMC's counsel is directed to electronically serve a copy of this *decision and order on remittal with notice of entry* on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Court's decision and order on remittal from the Second Judicial Department in accordance with the latter's decision and order, dated June 2, 2021, *reargdenied* January 31, 2022.

ENTER,

J. S. C.
HON. ELLEN M. SPODEK

KINGS COUNTY CLERK
FILED
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