

Ellswick v Bay Terrace Med., PLLC
2022 NY Slip Op 35261(U)
September 12, 2022
Supreme Court, Queens County
Docket Number: Index No. 703115/2018
Judge: Peter J. O'Donoghue
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Peter J. O'Donoghue IA Part MD
Justice

SAMANTHA ELLSWICK, AS EXECUTOR OF THE
ESTATE OF RITA ELLSWICK GOLDMAN, AND
SAMANTHA ELLSWICK, INDIVIDUALLY,



Plaintiffs

Index

Number 703115/2018

-against-

Motion

Date April 13, 2022

BAY TERRACE MEDICAL, PLLC, BARRY
BELLOVIN, M.D., NORTHWELL HEALTH, INC.,
NORTHWELL HEALTH PARTNERS, LLC., RAM L.
JADONATH, M.D. and K. PETER RENTROP, M.D.,

Defendants

Motion Seq. No. 5 & 7

The following numbered papers read on these motions: (1) the motion by the defendant Barry Bellovin, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against him, and (2) the motion by the defendant Bay Terrace Medical, PLLC, pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against it.

Papers
Numbered

Seq #5

Notice of Motion - Affidavits - Exhibits..... EF 168-190
Answering Affidavits - Exhibits..... EF 254-261
Reply Affidavits..... EF 273

Seq #7

Notice of Motion - Affidavits - Exhibits..... EF 208-215
Answering Affidavits - Exhibits..... EF 262-269
Reply Affidavits..... EF 270-271

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

This medical malpractice action is based on the defendants' purported failure to properly diagnose and treat symptoms of cardiomyopathy, which allegedly resulted in the death of the decedent. In December 1992, the defendant Barry Bellovin, M.D. diagnosed the decedent with cardiomyopathy. Bellovin, a cardiologist, operated his medical practice in conjunction with the defendant Bay Terrace Medical, PLLC (Bay Terrace). Bellovin's subsequent treatment of the decedent's symptoms, which spanned from December 1992 through February 2016, included physical exams, blood tests, prescribing medication, and monitoring the decedent's low ejection fraction. As is relevant here, however, Bellovin referred the decedent for a nuclear stress test in December 2015. The nuclear stress test, which was conducted in January 2016, revealed that the decedent's ejection fraction had decreased to 31%. This development prompted Bellovin to refer the decedent to an electrophysiologist to determine whether a defibrillator should be placed. However, while the initial consultation with the electrophysiologist occurred on February 29, 2016, the decedent died two days later.

The plaintiff, in both her individual capacity and as executor of the decedent's estate, subsequently commenced this medical malpractice action against, among others, Bellovin and Bay Terrace. The plaintiff alleged that Bellovin and Bay Terrace were negligent in, among other things, failing to diagnose nonischemic cardiomyopathy, failing to appreciate the findings of a Holter Report which demonstrated frequent premature atrial contractions and premature ventricular contractions, failing to recognize that the decedent required urgent implantation of an internal cardiac defibrillator, and failing to recognize the decedent's risk of sudden death. Discovery now having been completed, Bellovin and Bay Terrace separately move for summary judgment dismissing the complaint insofar as asserted against each of them.

Motion Seq. #5

"[T]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Raucci v Shinbrot*, 127 AD3d 839, 841 [2d Dept 2015]; see *Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). "[A] defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; see *Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth

in the plaintiff's bill of particulars" (*Mackauer v Parikh*, 148 AD3d 873, 876 [2d Dept 2017]; see *Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). However, where a defendant's expert merely recounts the treatment rendered and provides a conclusory opinion that this treatment did not represent a departure from good and accepted medical practice, a defendant has failed to meet its prima facie burden (see *Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 794, 784 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194, 198 [2d Dept 2002]). A defendant's failure to meet their prima facie burden requires denial of their motion for summary judgment, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In support of his motion, Bellovin submits, among other things, the pleadings, the transcripts from the depositions of the parties, the decedent's medical records, and an affirmation from his expert cardiologist, Malcolm Phillips, M.D. Phillips is board certified in internal medicine, cardiovascular diseases, and adult echocardiography, and is a senior attending cardiologist at St. Barnabas Hospital. After reviewing the decedent's treatment with Bellovin, Phillips opined, within a reasonable degree of medical certainty, that the care and treatment provided by Bellovin did not depart from the standard of care, and in any event, Bellovin's treatment of the decedent was not the proximate cause of the decedent's injuries or death. Phillips noted that Bellovin had diagnosed the decedent's cardiomyopathy during her first visit, that Bellovin was specifically treating the decedent for cardiomyopathy, and that Bellovin's role was limited to referring the decedent to an electrophysiologist to consider an ICD when it became necessary. Phillips also asserted that while the decedent had a consistently low ejection fraction for several years prior to her death, it remained unchanged during the course of Bellovin's treatment. In light of the decedent's lack of other symptoms such as shortness of breath, Phillips asserted that there was no urgent need for the decedent to consider an ICD, and thus, Bellovin's treatment did not depart from the standard of care.

Bellovin failed to establish prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against him. In his expert affirmation, Phillips failed to set forth the standard of care for cardiologists when treating patients with cardiomyopathy or specifically describe how Bellovin's treatment of the decedent comported with the standard of care. (see *Ojeda v Barabe*, 202 AD3d 808, 810 [2d Dept 2022]). Moreover, while Phillips acknowledged that Bellovin was aware of the decedent's frequent premature ventricular contractions as early as 1992, he did not address the plaintiff's allegation that Bellovin failed to appropriately appreciate and treat these symptoms (see *Oliver v New*

York City Health & Hosps. Corp., 178 AD3d 1057, 1058-1059 [2d Dept 2019]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]). Moreover, Phillips merely offered speculative opinions on proximate cause, which are insufficient to meet Bellovin's prima facie burden (see *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 926-927 [2d Dept 2019]). Thus, Bellovin's motion for summary judgment dismissing the complaint insofar as asserted against him is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

Motion Seq. #7

In support of its position, Bay Terrace submits the pleadings and the transcript from the deposition of Bay Terrace's principal, Andre Spindler, M.D. Based on these submissions, Bay Terrace contends that it is entitled to summary judgment dismissing the complaint insofar as asserted against it because Bellovin was the only physician who treated the decedent, and under the circumstances, Bay Terrace cannot be held vicariously liable for Bellovin's negligence. Bay Terrace argues that Bellovin was not an employee, but an independent contractor, since Bellovin set his own working hours, provided his own medical malpractice insurance, and was in sole control of the medical care and treatment of his patients.

"Though 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" (*Weiszberger v KCM Therapy*, 189 AD3d 1121, 1122 [2d Dept 2020]; see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]). As is relevant here, however, "vicarious liability for the medical malpractice of an independent physician may be imposed under a theory of apparent or ostensible agency" (*Kessler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]; see *Hill*, 67 NY2d at 79-80). "In 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" (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]). "The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent" (*Dragotta*, 39 AD3d at 698). "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" (*id.*).

Thus, to establish prima facie entitlement to summary judgment dismissing a vicarious liability claim, a moving defendant must establish, prima facie, that the treatment at issue was rendered by an independent contractor and that the aforementioned exception does not apply (see *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014]). In determining whether a doctor is the apparent agent of a medical facility, a court should consider all attendant circumstances to determine whether the patient could properly have believed that the physician was provided by the medical facility (see *Loaiza v Lam*, 107 AD3d 951, 952-953 [2d Dept 2013]).

Here, the only evidence offered by Bay Terrace which addresses this issue is the deposition testimony of Spindler. Spindler testified that Bellovin was brought in as an independent contractor and received a 1099 for tax purposes. Spindler further testified that he never met the decedent, had no control over Bellovin's practice, and did not advise Bellovin as to the medical care that he should provide. Spindler further testified that Bellovin had no control over Bay Terrace's office manager and other staff. While this testimony is sufficient to establish, prima facie, that Bellovin was an independent contractor, Spindler's testimony nevertheless raised an issue of fact as to whether the ostensible agency exception applies (see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 950 [2d Dept 2020]; *Keitel v Kurtz*, 54 AD3d 387, 390-391 [2d Dept 2008]). In particular, Spindler testified that Bay Terrace handled all of Bellovin's billing and that Bay Terrace received most of the co-pays for Bellovin's services.

Finally, Bay Terrace relies on Bellovin's submissions in support of his own summary judgment motion to assert that vicarious liability claims cannot survive in the absence of negligence. However, as set forth previously, Bellovin failed to meet his prima facie burden to be entitled to summary judgment dismissing the medical malpractice claims asserted against him. It therefore follows that Bay Terrace is not entitled to summary judgment dismissing the plaintiff's vicarious liability claims on this basis. Thus, Bay Terrace's motion for summary judgment dismissing the complaint insofar as asserted against it is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

Accordingly, it is

ORDERED that Bellovin's motion for summary judgment dismissing the complaint insofar as asserted against him is denied; and it is further,

ORDERED that Bay Terrace's motion for summary judgment dismissing the complaint insofar as asserted against it is denied.

Dated: September 12, 2022



PETER J. O'DONOGHUE, J.S.C.

