

**Orlov v City of New York**

2023 NY Slip Op 32535(U)

July 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 511643/2020

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
PYOTR ORLOV, as Administrator of the estate of SARRA  
NEDUVA, Deceased, and PYOTR ORLOV, Individually,  
Plaintiff(s),

-against-

**SHORT FORM ORDER**  
Index No.: 511643/2020  
Motion Sequence: 003

THE CITY OF NEW YORK, THE NEW YORK CITY  
HEALTH AND HOSPITALS CORPORATION,  
PREMIER PARATRANSIT LLC, and  
ASSIST PARATRANSIT LLC,  
Defendants,

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 43-61; 63-66; 67-69.

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION moves this court for an Order pursuant to CPLR § 3212, granting defendant New York City Health and Hospitals Corporation (“NYCHHC”) summary judgment. Plaintiff submits opposition to this motion.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation

from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. ““When experts offer conflicting opinions, a credibility question is presented requiring a jury’s resolution.”” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant’s expert ERICA DUSSELDORP, R.N., a licensed registered nurse board certified in Basic Life Support and as a Certified Emergency Nurse, established that she is qualified to opine as to the care and treatment rendered to the plaintiff in this case.

Defendant’s expert opines that it is the standard of care for ambulette employees to take custody and control of discharged patients after receiving a report from a nurse at the discharging hospital, which was done in this case. Once the ambulette employees initiated transfer of the patient, the staff at Coney Island Hospital had no duty to monitor or assist in the transfer. It is not the standard of care for nurses to supervise ambulette employees while transporting discharged patients, even if the patient is still in the hospital. It is not the standard of care for nurses to assist ambulette employees or to position discharged patients on the ambulette company’s stretcher; the ambulette company has custody and control of discharged patients once its employees receive the handoff report from a hospital nurse, and nurses are not required to do anything further with respect to the patient. The expert opines there was no departure from accepted standards of

practice by the Coney Island Hospital staff and that NYCHHC met the standard of care in the monitoring of the decedent during her transfer by outside ambulance employees. The expert opines that the decedent's claimed injuries were not caused by any negligent acts or omissions by NYCHHC.

Defendant, through its submissions, which includes evidence that the patient was discharged from the hospital before her fall, and its expert, establishes its *prima facie* burden for summary judgment in their favor. Plaintiff, however, does not raise an issue of fact as they do not submit an expert affirmation attesting to the standard of care and opining as to the claimed departures. Expert testimony is necessary to establish liability and causation when the allegations and damages asserted depend upon "professional or scientific knowledge or skill not within the range of ordinary training or intelligence," such as medical malpractice. *Shi Pei Fang v. Heng Sang Realty Corp.*, 38 A.D.3d 520 [2d Dept. 2007] [internal citations omitted]. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." *McAlwee v. Westchester Health Assoc., PLLC*, 163 A.D.3d 549, 551 [2d Dept. 2018], quoting *Burns v. Goyal*, 145 A.D.3d 952, 954 [2d Dept. 2016].

To the extent this case sounds in Negligence, the defendant also established their *prima facie* establishment for summary judgment.

There is no evidence that NYC Health + Hospitals' employee, Lincy Kurian, R.N., supervised the actions of Assist Paratransit in any way. Rather, the only evidence put forth by plaintiff is that Nurse Kurian witnessed the incident. Additionally, Plaintiff does not submit any evidence of malpractice or negligence on the part of any other staff of the defendant hospital.

Plaintiff claims that Assist Paratransit was contracted by the defendant hospital to transport the patient back to the nursing facility, however no evidence is submitted to support

this claim. Likewise, Plaintiff's reliance on *Langner v Primary Home Care Services, Inc.*, is misplaced; indeed, the case supports the movants' position that they are not responsible for the actions of the ambulette company. In that case the Second Department held that:

As a general rule, “a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts'” (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008], quoting *Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; see *Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 778 [2009]). Whether an actor is an independent contractor or an employee for the purposes of tort liability is usually a factual issue for the jury. However, where “there is no conflict in the evidence, the question may properly be determined as a matter of law” (*Schiffer v Sunrise Removal, Inc.*, 62 AD3d at 779; see *Concord Vil. Owners, Inc. v Trinity Communications Corp.*, 61 AD3d 410, 411 [2009]). *Langner v Primary Home Care Services, Inc.*, 83 AD3d 1007 [2d Dept 2011].

Likewise, *Carrion v Orbit Messenger, Inc.*, 82 NY2d 742 [1993], a case plaintiff cites as support for their position, is inapposite in that in this case no evidence was proffered that Assist Paratransit, LLC, a private entity, was an independent contractor solicited by the defendant New York City Health and Hospitals Corporation. Therefore, as a matter of law, *respondeat superior* and vicarious liability does not apply as to the moving defendant as no relationship has been established.

Therefore, summary judgment is GRANTED as to all claims for medical malpractice and negligence related to New York City Health and Hospitals Corporation.

Plaintiff's claims for Negligent Hiring must also be dismissed. “Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and no claim may proceed against the employer for negligent hiring, retention, supervision or training [internal citations omitted].” *S.W. v. Catskill Regional Med. Ctr.*, 211 AD3d 890, 891 [2d Dept. 2022]. Where an employee is acting outside the scope of their employment, and “the hospital was aware of, or reasonably

should have foreseen, the employee's propensity to commit such an act," the hospital may be found liable on a negligent hiring and retention claim. *Seiden v. Sonstein*, 127 AD3d 1158, 1161 [2d Dept. 2015]. Furthermore, a hospital may be liable for negligent hiring only when "its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act." *Id.* at 1160-1161. There is no evidence that Coney Island Hospital staff members were acting outside of their employment at the time of the decedent's fall. In sum, NYCHHC has demonstrated that all actions by Coney Island Hospital staff at the time of the patient's fall were within the standards of accepted practice.

Accordingly, summary judgment is GRANTED.

IT IS ORDERED that and the action against New York City Health and Hospitals Corporation is dismissed in its entirety, with prejudice and the Clerk of the Court is directed to enter judgment in their favor; and it is further

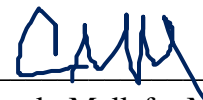
ORDERED that the action is severed and the caption amended to reflect the dismissal of New York City Health and Hospitals Corporation and the prior settlement and discontinuance of defendant Assist Paratransit, LLC; it is further

ORDERED that the action shall be transferred to a City Part.

This constitutes the decision and order of the Court.

Dated: July 20, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,  
J.S.C.