

**Raynor v Carryl**

2023 NY Slip Op 32597(U)

July 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 518012/2021

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  
KENDRA A. RAYNOR

Plaintiff(s),

-against-

**SHORT FORM ORDER**

Index No.: 518012/2021

Mo. Seq.: 2 & 3

STEPHEN S. CARYL, M.D. and THE BROOKLYN  
HOSPITAL CENTER,

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: 37-52; 74-78, 80, 86.

Defendant STEPHEN S. CARYL, M.D., moves this court for an Order pursuant to CPLR § 3212 granting defendant Stephen S. Carryl, M.D. summary judgment and dismissing plaintiff’s claims in their entirety with prejudice against defendant Stephen S. Carryl, M.D.; defendant THE BROOKLYN HOSPITAL CENTER moves this court for an Order pursuant to CPLR § 3212 granting summary judgment in favor of defendant, The Brooklyn Hospital Center, on the grounds that there are no genuine, material issues of fact which would warrant a trial of this matter.

Plaintiff alleges that Dr. Carryl, in his capacity as a general surgeon negligently performed a laparoscopic ventral umbilical hernia repair on December 11, 2020 at the Brooklyn Hospital Center which she alleges caused her to sustain a “botched” navel, disfigurement, pain, swelling, scarring and tenderness. In addition, plaintiff is alleging that Dr. Carryl failed to perform proper studies and failed to properly examine the plaintiff. Post-operatively, Plaintiff complained about skin adjacent to her umbilicus and that she was not comfortable with the appearance of her navel and having a "dent" in her stomach. Plaintiff underwent revision of the hernia repair,

“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 Stephen S. Carryl, M.D.'s expert, Michael D. Grieco, M.D., F.A.C.S., a physician board certified in general surgery and colorectal surgery established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Defendant The Brooklyn Hospital Center's expert, CRAIG J. COLLINS, M.D., a physician board certified in

Surgery and Colon and Rectal Surgery, also established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Plaintiff's expert, David A. Mayer, M.D., D.A.B.S., F.I.C.S., a physician board certified in Surgery by the American Board of Surgery and the National Board of Physicians and Surgeons established that he is qualified to opine as to the care the plaintiff received in this case.

As a preliminary matter, in this motion the court will only entertain and decide claims asserted in Plaintiff's Bill of Particulars dated October 28, 2021. An Amended Bill of Particulars was filed after this motion was filed and is not considered herein.

While Defendant, Dr. Carryl, establishes *prima facie* showing of entitlement to summary judgment, the court finds that through their detailed and non-speculative affirmation, Plaintiff's expert raises issues of fact as to the care, treatment, and surgery conducted by Dr. Carryl in this case. Plaintiff's expert states that "Dr. Carryl departed from standard of care by closing the fascia primarily, under tension, through an open invasive surgical approach, rather than a tension-free laparoscopic mesh onlay, as described above. Although he eventually converted to laparoscopy and placed a mesh over the hernia site, said mesh was merely a reinforcement of his primary fascial repair which was under tension and had an unreasonable risk of hernia recurrence. Primary fascial repairs of ventral hernias no longer comport with standard of care because tension on the repair is the most common cause of ventral hernia recurrence. Not only did Dr. Carryl do an unnecessary invasive open incision prior to laparoscopy, but also did a contraindicated primary fascial closure of the hernia defect which makes it more likely than not that Ms. Raynor's ventral hernia will recur in the future and need additional surgery." As Plaintiff's expert raises an issue of fact as to the surgical procedure which is the subject of this case, summary judgment cannot be granted.

Accordingly, summary judgment is denied as to all claims of medical malpractice relating to Stephen S. Carryl, M.D. See *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

As to defendant The Brooklyn Hospital Center, the court finds that Defendant has met its *prima facie* burden for summary judgment, and Plaintiff fails to raise an issue of fact in opposition. The law in New York is clear that a hospital will not be held liable for medical malpractice where the treatment is provided by the patient's own private attending physician. *Hill v. St. Clare's Hospital*, 67 N.Y.2d 72 [1986]. Here, defendant The Brooklyn Hospital Center is not liable for the claims against Dr. Carryl, a private attending. Additionally, Plaintiff does not oppose that portion of Defendant's motion seeking dismissal of claims relating to the alleged negligent care rendered by the hospital staff at The Brooklyn Hospital Center. Therefore, summary judgment is granted as to all claims of medical malpractice relating to The Brooklyn Hospital Center and such claims are dismissed.

As to the Plaintiff's claim of Negligent Hiring relating to defendant The Brooklyn Hospital Center, the court finds that Defendant has met its *prima facie* burden on this issue, with the submission of Dr. Carryl's credentials, annexed to the moving papers as Exhibit K, but Plaintiff does not raise an issue of fact in opposition. A medical center's hiring and supervision of attending physicians is not negligent where the physician's credentials were adequate for hiring purposes, and there was no evidence that the hospital knew or should have known that employee had displayed propensity for the conduct that allegedly caused the patient's claimed injuries. See *Flanagan v. Catskill Regional Medical Center*, 65 A.D.3d 563, 566 [2d Dept. 2009]. Here, The Brooklyn Hospital submitted evidence that Dr. Carryl's credentials were adequate for hiring purposes.

As the Second Department has held, “[g]enerally, 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]. Here, there is no evidence to support that the staff of the hospital was not acting within the scope of their employment and Dr. Carryl is not an employee of The Brooklyn Hospital Center.

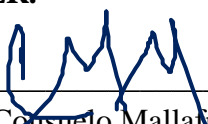
Accordingly, summary judgment is granted as to the claim of Negligent Hiring relating to The Brooklyn Hospital Center’s hiring of Stephen S. Carryl, M.D. and its staff. Thus, such claim is dismissed

In conclusion, summary judgment is DENIED as to all claims against to Stephen S. Carryl, M.D.; summary judgment is GRANTED as to all claims against The Brooklyn Hospital Center. The Clerk is directed to enter judgment accordingly as to The Brooklyn Hospital Center.

This constitutes the decision and order of the Court

Dated: July 26, 2023

**ENTER.**

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