

Wertz v Kaham

2023 NY Slip Op 35085(U)

September 29, 2023

Supreme Court, Queens County

Docket Number: Index No. 700802/2021

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ROLAND WERTZ and DONNA WERTZ,

Plaintiffs,

-against-

SAIF KAHAM, M.D., MRIDUL KUMAR, M.D.,
JOSEPH CHIRAYI, M.D., and EBENEZER
ESSUMAN, M.D., NEW YORK CITY FIRE
DEPARTMENT, NEW YORK CITY FIRE
DEPARTMENT EMERGENCY MEDICAL
SERVICES, and "JOHN DOE" and "JANE DOE" 1-10,
Said names being fictitious and presently unknown,
EPISCOPAL HEALTH SERVICES, INC., d/b/a ST.
JOHN'S EPISCOPAL HOSPITAL, and
PROGRESSIVE EMERGENCY PHYSICIANS, PLLC,

Defendants.

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Index No. 700802/2021

Part 6

Motion Date: August 23, 2023

Calendar No. 32

Sequence No. 5



The following papers numbered EF-242 through EF-310 read on this motion by defendants MRIDUL KUMAR, M.D. and PROGRESSIVE EMERGENCY PHYSICIANS, PLLC for summary judgment pursuant to CPLR §3212.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....	EF242-EF265
Affirmation in Opposition, Exhibits.....	EF275-EF278
Reply Affirmation.....	EF309-EF310

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendants Mridul Kumar, M.D. and Progressive Emergency Physicians, PLLC's motion for summary judgment pursuant to CPLR §3212 is granted. Plaintiff commenced this action for medical malpractice occurring from July 18, 2018 through July 19, 2018 due to defendants' alleged delay in diagnosing plaintiff's spinal cord compression and performing spinal surgery. Plaintiff filed a Summons and Complaint on January 13, 2021 and issued was joined on February 27, 2021.

It is noted that this action was consolidated with a related matter under Index No. 716016/2019, by court order dated June 28, 2021.

Defendants argues that summary judgment is warranted, as Dr. Kumar provided appropriate medical care to plaintiff while in the emergency room on July 18, 2018, and defendants were not the proximate cause of plaintiff's alleged injuries. They present the pleadings, parties' deposition transcripts, expert affirmation of Saul Melman, M.D. and plaintiff's medical records in support of their motion. Defendants argue that the medical records and deposition testimony show Dr. Kumar evaluated plaintiff and did not note any complaints of neck pain, numbness or weakness. Dr. Kumar noted that plaintiff presented to co-defendant St. John's Episcopal Hospital on July 18, 2018 with a nasal laceration and in an intoxicated condition. The records show that Dr. Kumar examined plaintiff and found plaintiff's neck was non-tender, with equal bilateral extremity strength and no complaints of pain.

Defendants present Dr. Saul Melman's affirmation in support of their motion. Dr. Melman affirmed he is a licensed physician in New York, and is certified by the American Board of Emergency Medicine. He relied upon his review of the pleadings, deposition testimony, medical records and his experience in rendering his opinion. Dr. Melman opined within a reasonable degree of medical certainty that Dr. Kumar followed the standard of care applicable for emergency medicine in July 2018. He further opined within a reasonable degree of medical certainty that none of the acts or failures to act by Dr. Kumar proximately caused plaintiff's injuries. Dr. Melman opined within a reasonable degree of medical certainty that Dr. Kumar acted appropriately and within the standard of care in treating plaintiff. He opined within a reasonable degree of medical certainty that Dr. Kumar's examination of plaintiff was thorough, appropriate and comprehensive. He noted that Dr. Kumar performed an examination, which was normal, and ordered plaintiff to be under close observation, which was done by the nursing staff. Dr. Melman opined that Dr. Kumar met the standard of care by reevaluating plaintiff three hours after plaintiff presented in the emergency room, during which plaintiff did not make complaints of pain. He further opined that Dr. Kumar acted within the standard of care and did not depart from the standard of care in not ordering a cervical collar or other immobilization care for plaintiff, as plaintiff's presentation did not require immobilization. Dr. Melman also opined within a reasonable degree of medical certainty that plaintiff did not initially present with signs or symptoms suggesting of spinal cord compression, as he did not have weakness in his extremities, neck pain, neck tenderness or sensory abnormalities.

Dr. Melman opined within a reasonable degree of medical certainty that a fall from a

standing position with a nasal fracture is not indicative of central cord syndrome, and therefore the standard of care would not require plaintiff to have a cervical collar if no complaints of pain. He further opined that the transfer of care from Dr. Kumar to Dr. Khan met the standard of care. Dr. Melman noted that the medical records did not show any trauma occurring to plaintiff while in EMS or while in the hospital. Dr. Melman opined within a reasonable degree of medical certainty that without any intervening traumatic events, any injuries plaintiff sustained occurred during his fall and none of Dr. Kumar's acts or failures to act proximately caused plaintiff's injuries.

Plaintiffs did not oppose defendants' motion with regard to plaintiffs' claims of negligent hiring, training or supervision and punitive damages. Plaintiffs also did not oppose defendant's motion to dismiss plaintiff Donna Wertz's loss of services claim. However, plaintiffs oppose defendants' motion with regard to medical malpractice, arguing there are issues of fact that preclude summary judgment. Plaintiffs presents the affirmation of Dr. Michael D'Ambrosio in support of their opposition. Dr. D'Ambrosio affirmed he is a licensed physician in Pennsylvania and New Jersey who is board certified in Neurology, Emergency Medicine and Vascular Neurology. He affirmed he reviewed the pleadings, depositions, medical records and expert affirmation in rendering his opinion. Dr. D'Ambrosio argues that plaintiff sustained a spinal cord injury as a result of his fall while entering the elevator on July 18, 2018. He argues that central cord syndrome most commonly occurs after the type of fall that occurred in this case.

Dr. D'Ambrosio opined within a reasonable degree of medical certainty that the standards of good and accepted EMT and emergency department nursing and physician practice required defendants to consider a cervical spine cord injury in the differential diagnosis. He further opined that restricting cervical spine motion should have been immediately and continuously implemented by use of a cervical collar or other immobilization device, performing a complete neurological exams and cervical spine imaging. Dr. D'Ambrosio opined within a reasonable degree of medical certainty that plaintiff's intoxication prevented him from participating in a reliable neurological examination and therefore Dr. Kumar departed from good and accepted practice by delaying the performance of a cervical spine imaging, resulting in a delay in diagnosis of central cord syndrome and administering necessary treatment, and the departure was the proximate cause of plaintiff's injuries. He argues that the standard of care required Dr. Kumar to order a cervical collar to immobilize plaintiff's cervical spine while in the emergency room. Dr. D'Ambrosio opined within a reasonable degree of medical certainty that Dr. Kumar departed from good and accepted emergency department care by failing to immediately perform a full neurological exam, failing to timely order cervical spine imaging, failing to immediately apply cervical spine

immobilization to plaintiff and failing to timely administer steroids and obtain a neurological consultation leading to surgical spine decompression and proximately causing plaintiff's spinal injuries.

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. (*Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety. (*D'Elia v. Menorah Home*

& *Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 850 [2d Dept. 2008].)

Defendants established a prima facie entitlement to summary judgment. (*See Carradice v. Jamaica Hosp. Med. Ctr.*, 198 A.D.3d 863 [2d Dept. 2021].) They established through the medical records, deposition testimony and Dr. Melman's affirmation that Dr. Kumar did not depart from accepted medical practice in failing to order a neurological consultation, providing cervical spine interventions, or ordering cervical imaging while plaintiff was admitted to co-defendant St. John's Episcopal Hospital. Defendants established that plaintiff was intoxicated when admitted and did not make any complaints of pain when Dr. Kumar performed an examination. They further established that Dr. Kumar performed proper testing and ordering continual monitoring of plaintiff and reexamined plaintiff three hours after his admission to the emergency room. As there is no evidence that Dr. Kumar was aware plaintiff sustained any cervical or neurological impairment upon admission to the emergency room, there is no evidence defendants departed from good and accepted medical care, and no evidence that any acts or omissions were a proximate cause of plaintiff's injuries. Defendants also established entitlement to summary judgment as to punitive damages and negligent hiring, training or supervision, as well as dismissal of the loss of services claim.

Plaintiffs failed to raise a triable issue of fact in dispute. (*See id.* at 865.) Plaintiffs did not oppose defendants' motion for summary judgment as to punitive damages or negligent hiring, training or supervision, nor did they oppose dismissal of the loss of services claim. Plaintiffs failed to raise a triable issue of fact in dispute with regard to medical malpractice, Public Health Law or negligence, as the expert affirmation was conclusory and did not raise an issue of fact as to deviations from good and accepted medical care. (*See Longhi*, 187 A.D.3d at 878 ["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".]) Plaintiff's expert Dr. D'Ambrosio assumed in conclusory fashion that Dr. Kumar knew plaintiff fell in the elevator, while simultaneously arguing that plaintiff was intoxicated and inarticulate during his admission. Dr. D'Ambrosio failed to acknowledge that Dr. Kumar had no information from plaintiff that would warrant ordering cervical imaging, and no evidence of a spinal injury from the examinations. Dr. D'Ambrosio also failed to acknowledge that Dr. Kumar ordered close monitoring of plaintiff by the nurses, and reexamined plaintiff after his admission, during which plaintiff presented no complaints of pain. As plaintiffs' expert affirmation was conclusory, speculative and unsupported by the evidence, they failed to raise a triable issue of fact in dispute. (*See Elstein v. Hammer*, 192 A.D.3d 1075 [2d Dept. 2021].)

Accordingly, defendants Mridul Kumar, M.D. and Progressive Emergency Physicians, PLLC's motion for summary judgment pursuant to CPLR §3212 is granted, and plaintiff's Complaint is dismissed as to defendants Mridul Kumar, M.D. and Progressive Emergency Physicians, PLLC.

Dated: September 29, 2023

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.

