

Yu Hua Hong v Advanced Oncology, P.C.

2023 NY Slip Op 35093(U)

November 7, 2023

Supreme Court, Queens County

Docket Number: Index No. 705729/2020

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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YU HUA HONG, as Administrator of the Estate of
JINZHU CHEN, Deceased, and YU HUA HONG,

Plaintiff,

-against-

ADVANCED ONCOLOGY, P.C., NEW YORK
PRESBYTERIAN HOSPITAL D/B/A NEW YORK
PRESBYTERIAN/QUEENS, NORLAND NG, M.D.,
KIN LAM, M.D., MICHAEL A. COOMARASWAMY,
M.D.,

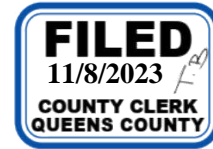
Defendants.
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Index No. 705729/2020

Part MDP

Motion Date: May 10, 2023

Sequence No. 1



The following papers numbered EF-24 through EF-82 read on this motion by defendants KIN LAM, M.D. and ADVANCED ONCOLOGY, P.C. to dismiss plaintiff’s claim for wrongful death pursuant to CPLR §3211(a)(7) and EPTL §5-4.1, and for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF24-EF49
Affirmation in Opposition, Exhibits.....EF72-EF75
Reply Affirmation.....EF81-EF82

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

Defendants Kin Lam, M.D. and Advanced Oncology, P.C.’s motion to dismiss plaintiff’s claim for wrongful death pursuant to CPLR §3211(a)(7) and EPTL §5-4.1 is granted without opposition. Defendants’ motion for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212 is granted as to plaintiff’s claims for lack of informed consent and for negligent hiring and supervision, but denied as to plaintiff’s claim for medical malpractice. (*See Ahrorgulova v. Mann*, 144 A.D.3d 953 [2d Dept. 2016].) Plaintiff commenced this action for medical malpractice, lack of informed consent and wrongful death for failing to diagnose and treat

plaintiff decedent's recurrent small bowel obstructions. Plaintiff filed the Summons and Complaint on May 27, 2020, and issue was joined by defendants on July 14, 2020. It is noted that plaintiff decedent passed away on February 19, 2018 and the death certificate stated the cause of death was complications of small bowel obstruction and internal hernia of mesentery.

Defendants argue that plaintiff's claim for wrongful death is time-barred under EPTL §5-4.1, as it was commenced more than two years after plaintiff decedent's death. They argue that plaintiff decedent passed away on February 18, 2018, and therefore plaintiff needed to commence this action for wrongful death no later than February 18, 2020. Since it is undisputed that plaintiff's Summons and Complaint was filed on May 27, 2020, defendants argue the wrongful death claim must be dismissed.

Defendants also argue that summary judgment is warranted, as plaintiff is seeking to hold them vicariously liable for co-defendant Norland Ng, M.D.'s medical care and treatment of plaintiff decedent, which they argue was appropriate and within the standard of care. They present the pleadings, deposition testimony of the parties, plaintiff decedent's medical records, and the affirmation of Solomon A. David, M.D. in support of their motion. They acknowledge that Dr. Lam is the sole owner of co-defendant Advanced Oncology, P.C., and argue that Dr. Lam is an oncologist who properly treated plaintiff decedent for cancer. Defendants argue that plaintiff's claim for lack of informed consent should be dismissed as a matter of law, as Dr. Lam was not responsible for obtaining informed consent for the chemotherapy. They further argue that plaintiff's claims against defendants under a theory of vicarious liability must be dismissed, as there is no evidence that Dr. Ng or PA Alice Hong departed from good and accepted medical care in treating plaintiff, and no evidence in support of a claim for negligent hiring or supervision.

The medical records and deposition testimony demonstrate that plaintiff decedent presented to defendants' office on December 13, 2016 for treatment of her breast cancer following a breast mastectomy. On December 15, 2016 plaintiff decedent presented to NYU Langone with abdominal pains, and was diagnosed with a small bowel obstruction. Dr. Lam recommended further cancer treatment, and co-defendant Dr. Ng began treating plaintiff decedent, who received her first chemotherapy treatment on January 19, 2017. Dr. Ng's PA Hong saw plaintiff decedent on March 6, 2017, when plaintiff decedent was complaining of abdominal pains, and she later went to the hospital and had an exploratory laparoscopy. Plaintiff decedent continued receiving chemotherapy treatments until October 11, 2017, and her last visit to defendants' office was on February 13, 2018.

Defendants presented Dr. Solomon A. David's expert affirmation in support of their motion. Dr. David is a licensed physician in New York who is board certified in surgery, surgical critical care and colorectal surgery. He reviewed the pleadings, plaintiff decedent's medical records, and the parties' deposition testimony in support of his opinions. Dr. David opined within a reasonable degree of medical certainty that defendants Dr. Lam and Advanced Oncology, P.C. acted at all times within the standard of care and was not the proximate cause of plaintiff decedent's injuries and death. He opined that plaintiff decedent had breast cancer and defendants' treatment with chemotherapy was entirely indicated and within the standard of care. Dr. David opined within a reasonable degree of medical certainty that plaintiff decedent's small bowel obstructions were caused by adhesions from prior abdominal surgeries and were not caused by any of the chemotherapy agents provided by defendants.

Dr. David also opined within a reasonable degree of medical certainty that there is no proximate cause between defendants' care and treatment and the alleged treatment with the first three small bowel obstructions as earlier diagnosis would not have changed plaintiff decedent's outcome. He also opined that defendants are not responsible for plaintiff decedent's fourth and fifth small bowel obstructions, as he argues it is medically impossible for the small bowel obstructions to have existed in the two-and-one-half month period between Dr. Lam's visits with plaintiff decedent and plaintiff decedent's hospitalizations. Dr. David also opined within a reasonable degree of medical certainty that the care and treatment provided by PA Hong was entirely within the standard of care, and there was no proximate cause between PA Hong's care and treatment on March 6, 2017 and plaintiff decedent's alleged injuries of a second small bowel obstruction on March 16, 2017. He also argued that an earlier diagnosis would not have changed plaintiff decedent's outcome. Dr. David also opined that defendants cannot be vicariously liable for Dr. Ng's actions, as Dr. Ng provided medical treatment that was entirely within the standard of care and not the proximate cause of plaintiff decedent's injuries.

Plaintiff opposed defendants' motion, arguing there are triable issues of fact. Plaintiff presented the expert affirmation of Aymen Elfiky, M.D. in support of the opposition. Plaintiff conceded that the claim for wrongful death was untimely pled, but argues that conflicting expert opinions preclude summary judgment as to medical malpractice. Dr. Elfiky affirmed he is a licensed physician in New York who is board certified in Internal Medicine and Medical Oncology. He reviewed the pleadings, deposition testimony and medical records in rendering his opinions. Dr. Elfiky opined within a reasonable degree of medical certainty that defendants departed from the standard of care in failing to consult with plaintiff decedent's other physicians and to review medical records to assess her condition and risk for small bowel obstructions. He

noted that Dr. Ng treated plaintiff decedent as both a primary care internist and oncologist, and the chemotherapy he authorized prevented the small bowel from completely recovering from inflammation and caused plaintiff decedent to develop four small bowel obstructions.

Dr. Elfiky opined within a reasonable degree of medical certainty that defendants departed from accepted medical care by not reviewing plaintiff decedent's medical records that would have alerted them to the prior small bowel obstructions and exploratory laparoscopy. He further opined within a reasonable degree of medical certainty that the continuous administration of chemotherapy to plaintiff decedent caused the sequential small bowel obstructions which ultimately caused plaintiff decedent's injuries and death. Dr. Elfiky also opined within a reasonable degree of medical certainty that defendants departed from accepted standards of care by failing to discuss plaintiff decedent's prognosis with the other doctors and obtaining her medical charts, and the deviation caused plaintiff decedent to suffer worsening small bowel obstructions that led to her injuries and death.

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].)

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' motion to dismiss plaintiff's cause of action for wrongful death is granted without opposition, as the parties agree the claim was not timely pled.

Defendants also established entitlement to dismissal of plaintiff's claim for lack of informed consent, as Dr. Ng was the only doctor required to obtain consent from plaintiff decedent for chemotherapy. As plaintiff presented no evidence in opposition, defendants' motion for summary judgment is granted as to the claim for lack of informed consent. Defendants also established entitlement to summary judgment as to plaintiff's claims for negligent hiring or supervision, as defendant Advanced Oncology, P.C. would be vicariously liable for its employees. As plaintiff did not present evidence to raise an issue of fact as to negligent hiring or supervision, summary judgment is granted as to these claims.

Defendants presented a prima facie entitlement to summary judgment as to Dr. Lam, based upon the pleadings, medical records, the parties' deposition testimony, and Dr. David's affirmation. They demonstrated that Dr. Lam provided appropriate care for plaintiff decedent during his visits and did not provide chemotherapy to her. Defendants also demonstrated through the medical records, deposition testimony, and expert affirmation that Dr. Lam's acts or omissions were not a proximate cause of plaintiff decedent's injuries.

However, plaintiff raised a triable issue of fact in dispute, as there is an issue whether defendant Dr. Lam departed from accepted standard of care in failing to review plaintiff decedent's medical records and consult with her other physicians with regard to her abdominal pain and surgeries, and whether the departure was a proximate cause of plaintiff decedent's injuries. Plaintiff further demonstrated that there are issues of fact whether defendant Dr. Lam departed from good and accepted care in recommending continuous administration of chemotherapy to

plaintiff decedent without having reviewed the medical records or consulting with plaintiff decedent's other physicians, and whether the departure was a proximate cause of plaintiff decedent's injuries. As there are issues of fact in dispute with regard to Dr. Lam's medical care and treatment of plaintiff decedent, Advanced Oncology, P.C. may be vicariously liable for plaintiff decedent's injuries.

Accordingly, defendants' Kin Lam, M.D. and Advanced Oncology, P.C.'s motion to dismiss plaintiff's claim for wrongful death pursuant to CPLR §3211(a)(7) and EPTL §5-4.1 is granted without opposition. Defendants' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted as to plaintiff's claim for lack of informed consent and for negligent hiring and supervision, but denied as to plaintiff's claim for medical malpractice.

This constitutes the decision and Order of the Court.

Dated: November 7, 2023



Tracy Catapano-Fox, J.S.C.

