

Avvocato v Tress

2024 NY Slip Op 33600(U)

September 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 507585/2020

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 9th day of September 2024.

P R E S E N T :

Hon. Genine D. Edwards, Justice

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ROY A. AVVOCATO,

Plaintiff,

Index No. 507585/2020

-against-

VLADMIR TRESS M.D. and
NEW YORK UNIVERSITY LANGONE HOSPITAL,
Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion, Affirmation, and Exhibits.....	75-100, 108
Affirmation in Opposition and Exhibits.....	104-106
Affirmation in Reply	107

In this action for medical malpractice and lack of informed consent, defendants Vladimir Tress M.D. (“Dr. Tress”) and New York University Langone Hospital (“NYU Langone”) moved pursuant to CPLR §3212, seeking an extension of time to move for summary judgment, and upon granting of the extension, dismissing plaintiff’s claims.¹ Defendants assert that Dr. Tress did not deviate from the standard of care and that NYU Langone cannot be held vicariously liable for Dr. Tress, a private physician employed by NYU Grossman School of Medicine. Pursuant to CPLR

¹ Plaintiff did not oppose the procedural history as described in defendants’ motion papers. After a review of the relevant procedural history, including the two-attorney stipulation seeking to extend the time to file a summary judgment motion, the Court deems defendants’ motion timely.

§3024 (b), defendants also seek to strike certain language contained in plaintiff's Bill of Particulars. Roy A. Avvocato ("plaintiff") opposed defendants' motion.

FACTS

On August 17, 2018, plaintiff presented to Dr. Tress for evaluation of severe right knee pain. Upon examination, plaintiff was diagnosed with tri-compartmental osteoarthritis, and Dr. Tress recommended a total right knee replacement. Dr. Tress noted plaintiff had a history of narcotic dependence, alcohol abuse, depression, anxiety, and nicotine use, among other things. Dr. Tress testified that he observed plaintiff's right knee was in the varus alignment, also known as bow leggedness. Dr. Tress admitted that he did not document the measurement of the varus deformity.

On September 18, 2018, Dr. Tress admitted plaintiff to NYU Langone and performed a right total knee replacement. Dr. Tress testified that during the operation, some portion of the femur was resected, and that in patients with bow leggedness, an accommodation is made in the angulation of the femur resection. Per Dr. Tress, there are two types of approaches to address this accommodation, an anatomical approach and kinematic approach. Under the anatomical approach, a 90-degree resection is performed, while under a kinematic approach, a resection less than 90 degrees is made. Dr. Tress opined that plaintiff would be best treated with the kinematic approach and thus performed a resection close to 87 degrees, which he also did not document. Plaintiff was discharged from the hospital on September 19, 2018. The first post-operative visit with Dr. Tress took place on October 5, 2018. Plaintiff complained of knee pain and had limited range of motion. Dr. Tress recommended physical therapy. Upon further exams with Dr. Tress, between October 5, 2018 and January 25, 2019, plaintiff continued to complain of pain.

On February 1, 2019, plaintiff presented to non-party orthopedic surgeon Ran Schwarzkopf M.D. (“Dr. Schwarzkopf”), who documented that plaintiff continued to experience pain in his right knee. On March 8, 2019, plaintiff returned to Dr. Schwarzkopf, who recommended a revision right total knee replacement. On May 16, 2019, Dr. Schwarzkopf M.D. performed the revision. Post-operation, plaintiff showed improvement but had limited range of motion.

LAW

The elements of a medical malpractice claim are a deviation or departure from accepted practice and evidence that such a departure was the proximate cause of injury or damage. *McHale v. Sweet*, 217 A.D.3d 666, 190 N.Y.S.3d 438 (2d Dept. 2023). A defendant’s negligence is the proximate cause when it is a substantial factor in producing the injury. *Templeton v. Papatomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022).

Negligence can be inferred under the doctrine of *res ipsa loquitor* when an event is so unusual that the event must be the product of negligence. *Smith v. Sommer*, 189 A.D.3d 906, 137 N.Y.S.3d 99 (2d Dept. 2020). It requires that the event not occur in the absence of negligence, “second, that the injury was caused by an agent or instrumentality within the exclusive control of defendant and, third, that no act or negligence on the plaintiff’s part contributed to the happening of the event.” *Id.*

Generally, “a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee.” *Khutoryanskaya v. Laser & MicroSurgery, P.C.*, 222 A.D.3d 633, 201 N.Y.S.2d 177 (2d Dept. 2023). Vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel. *Id.*; *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 833 N.Y.S.2d 638 (2d. Dept. 2007); *see also Keesler v. Small*, 140 A.D.3d 1021, 35 N.Y.S.3d 356 (2d Dept.

2016); *Sampson v. Contillo*, 55 A.D.3d 588, 865 N.Y.S.2d 634 (2d Dept. 2008). To establish vicarious liability under this theory, “[t]he third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent.” *Keesler*, 140 A.D.3d 1021, quoting *Dragotta*, 39 A.D.3d 697; see also *Sampson*, 55 A.D.3d 588. “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.” *Dragotta*, 39 A.D.3d 697; see also *Keesler*, 140 A.D.3d 1021; *Sampson*, 55 A.D.3d 588. “In the context of a medical malpractice action, the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital’s behalf.” *Keesler*, 140 A.D.3d 1021, 35 N.Y.S.3d 356; see also *Sampson*, 55 A.D.3d 588, 865 N.Y.S.2d 634; *Dragotta*, 39 A.D.3d 697, 833 N.Y.S.2d 638.

A defendant establishes entitlement to summary judgment for a claim of lack of informed consent by demonstrating that the plaintiff gave consent after being fully apprised of the benefits, alternatives and foreseeable risks; that a reasonably prudent person in the plaintiff’s position would not have declined to undergo the surgery; and that the actual procedure performed was not a proximate cause of the injury. *Pirri-Logan v. Pearl*, 192 A.D.3d 1149, 145 N.Y.S.3d 545 (2d Dept. 2021).

Summary judgment is warranted where the movant can demonstrate the absence of any relevant material issue of fact, and therefore is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). “When moving for summary judgment, a defendant...must establish the absence of any departure from good and accepted medical practice or that...plaintiff was not injured thereby.” *Barnaman v. Bishop Hucles Episcopal Nursing Home*,

213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). To sustain this burden, a defendant “must address and rebut any specific allegations of malpractice set forth in plaintiff’s bill of particulars.” *D.S. v. Poliseno*, 189 A.D.3d 1102, 133 N.Y.S.3d 831 (2d Dept. 2020). In opposition, the plaintiff must “raise a triable issue of fact regarding the element or elements on which defendant has made its prima facie showing.” *G.M.C. v. O’Sullivan*, 197 A.D.3d 1230, 153 N.Y.S.3d 565 (2d Dept. 2021). To do so, plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice and stating the physician’s opinion that the alleged departure was a competent producing cause of plaintiff’s injuries. *Larcy v. Kamler*, 185 A.D.3d 564, 127 N.Y.S.3d 122 (2d Dept. 2020).

ANALYSIS

Here, the defendants established their prima facie entitlement to judgment as a matter of law via submission of, inter alia, the affirmation of Calin S. Moucha, M.D. (“Dr. Moucha”), who opined that, based on review of the medical records, the deposition testimony, and the pleadings, defendants did not depart from good and accepted medical practice in the care and treatment of the plaintiff, and that no alleged act or omission on defendants’ part caused or contributed to the alleged injuries. Dr. Moucha examined plaintiff on August 30, 2023, finding that while the post-operative radiographs from Dr. Tress’ surgery showed a slight degree of varus placement of the tibial component, it is certainly within commonly acceptable parameters and does not by any means explain plaintiff’s pain after the initial surgery.

In opposition, plaintiff proffered the affirmation of a physician whose opinions conflicts with Dr. Moucha’s opinions. Plaintiff raised triable issues of fact regarding, inter alia, the failure to measure the varus alignment prior to performing the knee replacement surgery, implanting a prosthesis not properly matched to plaintiff’s requirements, failure to correct plaintiff’s varus

deformity, and failure to recommend revision surgery. “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147 (2d Dept. 2021); *see also Gupta v. Lescale*, 224 AD3d 668, 204 N.Y.S.3d 554 (2d Dept. 2024). Defendants’ argument regarding *res ipsa loquitur* is also denied as questions of fact exist as to whether plaintiff’s alleged harm occurred in the absence of negligence.

Turning to plaintiff’s vicarious liability claim, the Court finds defendants’ contentions unavailing. In support of their motion, defendants annexed the affirmation of Michael Browdy, Director of Insurance at NYU Langone, who affirmed that Dr. Tress is not currently an employee of NYU Langone and was not an employee of NYU Langone during the time of the alleged malpractice. He also stated that Dr. Tress was employed by the NYU Grossman School of Medicine, a separate entity from NYU Langone. Defendants did not indicate, however, that Dr. Tress’ independent employment was made known to plaintiff, just that plaintiff was referred to Dr. Tress, and not to NYU Langone. Defendants indicated that plaintiff met with Dr. Tress on August 17, 2018, prior to his surgery, but did not state where that meeting took place. Plaintiff’s next visit with Dr. Tress occurred on September 18, 2018, at NYU Langone. While defendants claimed that plaintiff was referred to Dr. Tress by plaintiff’s Addiction Medicine specialist Dr. Anthony Accurso, plaintiff testified that he thought Dr. Tress may have referred him to Dr. Accurso, and he thought he saw Dr. Accurso after he saw Dr. Tress. Plaintiff further testified that he stopped treating with Dr. Accurso because Dr. Accurso “left NYU,” but he did not distinguish between whether Dr. Accurso was affiliated with NYU Grossman School of Medicine or NYU Langone. In deciding “whether a doctor is the apparent agent of a hospital, a court should consider all attendant circumstances to determine whether the patient could properly have believed that the physician

was provided by the hospital.” *Valerio v. Liberty Behavioral Management Corp.*, 188 A.D.3d 948, 135 N.Y.S.3d 127 (2nd Dept. 2020). Even if plaintiff was made aware of Dr. Tress’ employment status; plaintiff could reasonably have believed that NYU Grossman School of Medicine and NYU Langone were affiliated given the similarity in name and both doctors’ association with NYU.

Similarly, genuine issues of fact exist regarding plaintiff’s lack of informed consent claim. While Dr. Moucha established that a “reasonable person in plaintiff’s shoes, who had chronic severe pain that did not respond to conservative therapy, would agree to proceed with this surgery,” plaintiff testified that while he recognized his signature on the consent forms, he could not recall conversations with Dr. Tress before or after his surgery. Plaintiff further testified he did not recall undergoing a medical clearance or receiving any kind of information about knee replacement surgery prior to the procedure. A plaintiff’s signature on consent forms, standing alone, does not support a defendant’s entitlement to judgment as a matter of law. *Guinn v. New York Methodist Hosp.*, 212 A.D.3d 787, 183 N.Y.S.3d 431 (2d Dept. 2023).

Defendants’ motion to strike the word “carelessness” from plaintiff’s pleadings, pursuant to CPLR §3024 (b), is meritless. CPLR §3024 (b) allows a party to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. The word “carelessness” is not prejudicial nor scandalous. *Irving v Four Seasons Nursing and Rehabilitation Ctr.*, 121 A.D.3d 1046, 995 N.Y.S.2d 184 (2d Dept. 2014).

Accordingly, it is

ORDERED that the defendants’ motion for summary judgment is denied, and it is further

ORDERED that the defendants’ motion to strike is denied, and it is further

ORDERED that plaintiff’s counsel is directed to electronically serve a copy of this decision/order with notice of entry on the defendants’ respective counsel and to electronically file

an affidavit of service with the Kings County Clerk, and it is further

ORDERED that the parties shall appear for an Alternative Dispute Resolution conference on December 10, 2024, at 11:30AM.

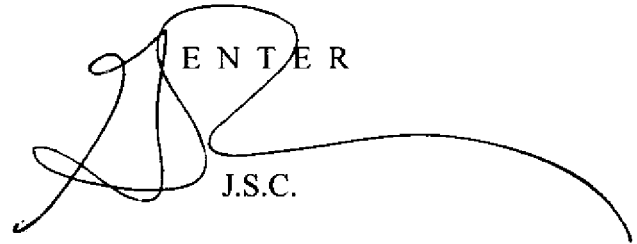
This constitutes the Decision and Order of this Court.

For Clerks use only

MG__

MD__

Motion Seq.#: 4

 E N T E R
J.S.C.