

Rodriguez v Rao

2024 NY Slip Op 34952(U)

August 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 22703/2020E

Judge: Michael A. Frishman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

-----X
CHAVALIN RODRIGUEZ, Individually, and as
Administrator of the Estate of EVELYN CRUZ, deceased,

Index No. 22703/2020E

HON. MICHAEL A. FRISHMAN,
Justice of the Supreme Court

Plaintiffs,

- against -

PRAKASHCHANDRA RAO, M.D., FAREED CHEEMA,
M.D., GINA KIM, M.D., GREATER ROCKLAND
SURGICAL, P.C., TIFFANY HEBERT, M.D., ABEER
ZEESHAN, M.D., MONIQUE ASANTE, P.A., RESHMA
GULANI, M.D., and MONTEFIORE MEDICAL CENTER-
WAKEFIELD CAMPUS,

Defendants.

-----X

The following papers in the NYSCEF System were read on this Motion for Summary Judgment and Protective Order submitted as Motion Seq. No. 003:

Sequence No. 003	NYSCEF Doc. Nos.
Notice of Motion - Exhibits and Affirmations Annexed	97-105
Affirmation in Opposition – Exhibits Annexed	107-108
Affirmation in Reply – Exhibits Annexed	109-111

Upon deliberation of the application duly made by defendants¹ FAREED CHEEMA, M.D., GINA KIM, M.D., TIFFANY HEBERT, M.D., ABEER ZEESHAN, M.D., MONIQUE ASANTE, P.A., RESHMA GULANI, M.D., and MONTEFIORE MEDICAL CENTER (hereinafter “defendants” or “MMC”), by Notice of Motion, and all papers in connection therewith, for an Order granting partial summary judgment on plaintiffs’ fourth cause of action for negligent hiring/credentialing/retention/supervision pursuant to CPLR § 3212 and granting a protective order in favor of defendants against the plaintiffs’ Notice of Deposition dated April 1, 2024 pursuant to CPLR § 3103, is heretofore denied.

Plaintiffs commenced this action for medical malpractice, lack of informed consent, negligent hiring, training and/or supervision, and wrongful death on February 24, 2020 with the filing of a Summons and Complaint, alleging that defendants were negligent in their failure to

¹ According to plaintiffs’ papers submitted in opposition, Dr. Rao settled his portion of plaintiffs’ claims at mediation. Additionally, this Court acknowledges that Dr. Rao was not represented by movants’ firm.

timely communicate decedent's cancerous pathology results for a period of approximately seven months thereby resulting in a delay in cancer treatment and causing decedent's death.

At the outset, that portion of defendants' motion seeking a protective order of plaintiffs' discovery demands, to wit, Notice of Deposition dated April 1, 2024, is denied without prejudice for failure to follow the Part 34 Rules and Procedures regarding discovery motions. Consequently, any arguments pertaining to a protective order will not be discussed.

Defendants seek summary judgment dismissing plaintiffs' fourth cause of action against them arguing, *inter alia*, that since plaintiffs have failed to assert that defendants acted outside the scope of his or her employment in the treatment provided to decedent, but rather alleges that MMC is vicariously liable for these named doctors pursuant to the doctrine of respondent superior, precedent requires dismissal of any claims for negligent hiring/credentialing/retention/supervision. Their motion is supported, among other things, by the affirmations of Dr. Preolo, Senior Director of Credentialing and provider information at MMC; Dr. Melvin, Vice Chairman for Clinical Surgery and the Division Chief of General Surgery at MMC; and Dr. Kajita, Program Director of the Internal Medicine-Wakefield Residency Program at MMC.

In opposition, plaintiffs assert, generally, that their fourth cause of action should not be dismissed because it is currently unknown whether MMC, as the employer of the named doctors, knew of their doctors' potential harmful propensities.² Plaintiffs' opposition is supported by reference to a different and disposed case filed in 2019 with seemingly similar allegations against Dr. Rao, as well as the Bill of Particulars in that separate action attached as an exhibit. Plaintiffs further argue that the affirmations submitted by defendants are insufficient to establish defendants' burden for summary judgment; and that without the deposition of a witness from the corporate hospital, as requested in their demand, this information cannot be established.

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In a medical malpractice action, a defendant establishes *prima facie* entitlement to summary judgment by showing either (i) that in treating the plaintiff there was no departure from good and accepted medical practice, or (ii) that any departure was not the proximate cause of the injuries alleged (*Bahnyuk v Reed*, 174 AD3d 481, 482 [1st Dept 2019]). "Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish *prima facie* entitlement to summary judgment as a matter of law" (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Once a defendant meets his or her burden, the plaintiff must rebut defendant's *prima facie* showing (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). "A plaintiff is only required to raise a triable issue of fact as to causation where the defendant makes a *prima facie* showing

² It is undisputed by the parties that based upon precedent, the correct legal standard is that an employer may be held liable for the actions of an employee for negligent supervision if the employer knew of its employee's harmful propensities and failed to take action.

that a claimed departure was not a proximate cause of the plaintiff's injuries" (*see Barry v Lee*, 180 AD3d 103, 106 [1st Dept 2019], *affd*, 35 NY3d 1050 [2020]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]). "Summary judgment is not authorized in a medical malpractice action where the parties adduce conflicting opinions of medical experts" (*Severino v Weller*, 148 AD3d 272, 273 [1st Dept 2017]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

The Court acknowledges defendants' argument in reply that plaintiffs' opposition was untimely and should not be considered by this Court. However, defendants' have failed to show any prejudice by plaintiffs' two-day delay, and the Court will exercise its discretion in considering plaintiffs' papers (*see e.g. Prato v Arzt*, 79 AD3d 622, 623 [1st Dept 2010] [defendant has not shown prejudice suffered by court's acceptance of plaintiff's late opposition papers] [internal citation omitted]).

The Court recognizes defendants' argument that defendant doctors all treated plaintiff in their capacities as MMC employees and therefore plaintiffs' fourth cause of action is inappropriate. However, the Court finds defendants' motion premature as discovery is ongoing and it cannot be known as a matter of law based on the instant record, whether the employer hospital knew of any potential harmful propensities of the named doctors³ (*see Groves v Land's End Housing Co., Inc.*, 175 AD2d 733 [1st Dept 1991], *citing* CPLR 3212[f]; *Pastoriza v State*, 108 AD2d 605 [1st Dept 1985] [motion for summary judgment was premature in light of outstanding discovery and the opportunity to depose eyewitnesses and other witnesses]). Consequently, defendants' motion for partial summary judgment as to plaintiffs' fourth cause of action must be denied at this time.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED, that the portion of defendants' motion seeking partial summary judgment as to plaintiffs' fourth cause of action for negligent hiring/credentialing/retention/supervision is denied without prejudice; And it is further

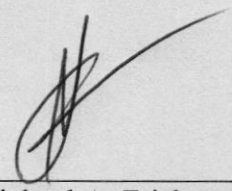
³ To the extent plaintiff argues that another matter involving similar allegations as against Dr. Rao renders plaintiffs' allegations in the current matter appropriate has not been considered by this Court.

ORDERED that the portion of defendants' motion seeking a protective order is denied without prejudice; And it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: 8/8/2024



Hon. Michael A. Frishman, J.S.C.

-
- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER