Troy v Glassman
2024 NY Slip Op 35448(U)
May 2, 2024
Supreme Court, Queens County
Docket Number: Index No. 714552/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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SHEILA TROY and EDDIE TROY,

Plaintiffs,

-against-

LAWRENCE GLASSMAN, M.D., GARY GECELTER, M.D., EUGENE RUBACH, M.D., NEW YORK SURGICAL PARTNERS, HUN LEE, M.D. and LONG ISLAND JEWISH HOSPITAL,

Defendants.

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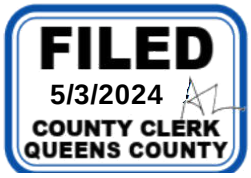
Index No. 714552/2020

Part MDP
Motion Date: April 17, 2024

Calendar No. 19
Sequence No. 1



The following papers numbered EF-29 to EF-89 read on this motion by defendant LONG ISLAND JEWISH MEDICAL CENTER s/h/a LONG ISLAND JEWISH HOSPITAL for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF29-EF51
Affirmation in Opposition, Exhibits……...	EF84-EF85
Reply Affirmation, Exhibits……...	EF88-EF9

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

Defendant Long Island Jewish Medical Center s/h/a Long Island Jewish Hospital's (hereinafter referred to as "LIJMC") motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, as defendant LIJMC demonstrated that it did not depart from good and accepted standards of care and did not proximately cause or contribute to Ms. Troy's injuries and death. (*See generally DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2d Dept. 2017].)

Plaintiffs commenced this action for medical malpractice and lack of informed consent arising out of treatment rendered to plaintiff Sheila Troy by defendants between July 17, 2018 and November 21, 2018. Plaintiffs filed the Summons and Complaint on September 1, 2020 and issue

was joined by the moving defendant via the filing of its Answer on October 5, 2020.

Defendant LIJMC argues that it is entitled to summary judgment and presents the pleadings, deposition testimony, plaintiff Sheila Troy's medical records, and the expert affirmation of Marc J. Shapiro, M.D. in support of its motion. Defendant LIJMC argues that the care and treatment rendered to Ms. Troy was well within the standards of good and acceptable medical and surgical practice and did not proximately cause plaintiffs' injuries. Defendant LIJMC also argues that plaintiffs' claims for lack of informed consent must be dismissed, as defendant LIJMC did not have a legal obligation to obtain plaintiff Sheila Troy's informed consent. Defendant LIJMC argues that plaintiff Sheila Troy's private attending physicians, defendant Dr. Gecelter and Dr. Glassman, were under a duty to obtain her informed consent. Defendant LIJMC also argues that it cannot be held vicariously liable for the acts or omissions of private attending physicians Dr. Rubach and Dr. Gecelter. While Dr. Glassman was also a private attending physician, he was previously discontinued out of the case. Lastly, defendant LIJMC argues that plaintiff Eddie Troy's derivative cause of action sounding in loss of services and consortium must also be dismissed, as the deposition testimony demonstrates that Sheila and Eddie Troy have been separated since July 2018.

Defendant LIJMC presents the affirmation of Dr. Shapiro in support of its motion. Dr. Shapiro affirmed that he is a physician licensed in New York and Board Certified by the American Board of Surgery with a Certification of added Qualifications in Surgical Critical Care. Dr. Shapiro affirmed to reviewing the pleadings, plaintiffs' Bills of Particulars, plaintiff Sheila Troy's medical records, and the deposition testimony in rendering his opinions. Dr. Shapiro opined to a reasonable degree of medical certainty that defendant LIJMC and its staff acted in accordance with good and accepted standards of medical and surgical critical care practice and did not proximately cause or contribute to plaintiff Sheila Troy's injuries.

Dr. Shapiro reviewed plaintiff Sheila Troy's pertinent medical history in rendering his opinions and affirmed the following. Ms. Troy presented to LIJMC on January 15, 2016 and underwent several surgical procedures between January 20, 2016 and March 17, 2016 when she had a PEG tube placed. Ms. Troy became septic and was transferred to the Intensive Care Unit (hereinafter referred to as "ICU") on April 1, 2016. She continued treatment and was determined stable for discharge to a rehabilitation facility on April 27, 2016. On February 2, 2017, Ms. Troy underwent another surgery at North Shore University Hospital performed by non-party Dr. Brinster with the assistance of Dr. Glassman. Ms. Troy followed up with Dr. Glassman later that month and advised that she was interested in pursuing further surgical intervention to restore gastrointestinal continuity and resume eating. Ms. Troy subsequently underwent the laparotomy, lysis of adhesions, gastric mobilization, pullup, incisional hernia repair, neck exploration, esophagogastric anastomosis, and esophageal reconstruction performed by Dr. Glassman and defendant Dr. Gecelter at LIJ on July 17, 2018. Ms. Troy became hypotensive, tachycardic, and

hypothermic overnight, necessitating several rounds of intravenous fluids and vasopressors. She was stabilized in the Cardiothoracic ICU and transferred out on July 19, 2018. Ms. Troy became tachycardic again and went into septic shock on July 20, 2018. She was urgently returned back to the Cardiothoracic ICU and a chest x-ray revealed a new right lower lobe infiltrate which was believed to be the source of the septic shock. Ms. Troy was also diagnosed with Candida glabrata in the blood and pseudomonas aeruginosa and E coli in the pleural fluid. Ms. Troy was started on a broad spectrum of antibiotics and was returned to the Operating Room. During surgery, two serosal injuries were identified and repaired, including a small bowel perforation. Ms. Troy remained in the hospital and underwent several other procedures until her discharge on September 17, 2018. After her discharge, she saw Dr. Glassman at his office on October 10, 2018, underwent an esophagoscopy by Dr. Glassman on October 19, 2018, and underwent multiple balloon dilations by Dr. Glassman on November 16, 2018, January 14, 2019, and April 22, 2019. Ms. Troy subsequently relocated to North Carolina and commenced treatment with Duke Health Care.

Dr. Shapiro opined to a reasonable degree of medical certainty that the care and treatment rendered to Ms. Troy was appropriate in all respects and did not deviate from standards of good and accepted medical care and practice. Dr. Shapiro reasoned that the postoperative management was exemplary, as Ms. Troy was closely monitored and her small bowel perforation was timely recognized, diagnosed, and corrected. Dr. Shapiro further reasoned that LIJMC's staff timely recognized that Ms. Troy became hypotensive, tachycardic, and hypothermic in the immediate postoperative period, she was immediately administered intravenous fluids and vasopressors, and was appropriately transferred to the Cardiothoracic ICU. Dr. Shapiro further reasoned that although she was doing well for one-to-two days, LIJMC staff timely recognized Ms. Troy's decline when she became tachycardic, hypotensive, and went into septic shock. Dr. Shapiro further reasoned that she was timely transferred back to the Cardiothoracic ICU and appropriately underwent a chest x-ray, started on a broad spectrum of antibiotics, and returned to the Operating Room. He opined that a CT scan of Ms. Troy's abdomen was timely and appropriately performed on July 20th to assess for perforation. Dr. Shapiro further reasoned that although the CT scan that did not reveal a perforation, LIJMC staff correctly continued to suspect a possible perforation and closely monitored her until she underwent the subsequent surgery on July 20th, only three days after the prior surgery.

Dr. Shapiro also opined that Ms. Troy's postoperative management was an appropriate multidisciplinary team approach with her abdomen being followed by her surgical team and the ICU staff providing her supportive care. Dr. Shapiro further opined that the ICU staff had a right to rely on the surgical team for input regarding any postoperative concerns, as the surgical team was in the best position to address these issues. Dr. Shapiro reasoned that based upon LIJMC's records, the hospital staff was in direct communication with defendant Dr. Gecelter the entire time Ms. Troy was in the Cardiothoracic ICU.

Dr. Shapiro also opined that there is no basis for Ms. Troy's lack of informed consent claim against defendant LIJMC. Dr. Shapiro reasoned that there is no evidence to suggest that LIJMC knew or should have known that Dr. Glassman and defendant Dr. Gecelter were acting without Ms. Troy's informed consent. Rather, Dr. Shapiro reasoned that the LIJMC records demonstrate that Ms. Troy's informed consent was obtained prior to any invasive procedures. Based upon the foregoing, defendant LIJMC argues that it is entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiffs oppose the motion and argue that defendant LIJMC's motion must be denied because it failed to eliminate all triable issues of fact with respect to whether it departed from accepted standards of care and proximately caused Ms. Troy's injuries. Plaintiffs further argue that LIJMC staff should have recognized and considered a small bowel perforation between the early morning of July 18, 2018 and the morning of July 20, 2018. Plaintiffs further argue that LIJMC is vicariously liable for the acts of defendant Dr. Eugene Rubach, the first assistant surgeon. They argue that defendants failed to present a prima facie case, as their expert failed to present any opinions with respect to Dr. Rubach's surgical care. They further argue that LIJMC failed to eliminate all material issues of fact as to whether Dr. Rubach was acting as the hospital's agent, and failed to demonstrate that plaintiffs could not have reasonably believed that he was acting on behalf of the hospital.

Plaintiffs present the affirmation of a physician licensed to practice in New York and Board Certified by the American Board of Surgery and the National Board of Physicians and Surgeons in opposition to defendant LIJMC's motion. Plaintiffs' expert affirmed to reviewing Ms. Troy's medical records, the deposition testimony, and Dr. Shapiro's affirmation in rendering opinions. Plaintiffs' expert opined within a reasonable degree of medical certainty that defendants Dr. Rubach and Dr. Gecelter deviated from accepted standards of care in performing the surgery on Ms. Troy on July 17, 2018, in that they caused injury to her bowel and failed to timely recognize the injury prior to the conclusion of the procedure. Plaintiffs' expert reasoned that Ms. Troy demonstrated severe hypotension, 7/10 abdominal pain even with medication, nausea, minimal flatus, hot flashes, and tachycardia almost immediately and consistent with a bowel perforation. Plaintiffs' expert opined that the standard of care demands immediate recognition of a bowel injury and operative repair, as early diagnosis and prompt repair offer the best chances for favorable long-term results. The expert further opined that devastating consequences could follow if treatment is delayed as it was here, as the surgeons were unable to complete the bowel repair intraoperatively and Ms. Troy underwent several subsequent operations to remove additional damaged portion of the bowel throughout July and August 2018.

Plaintiffs' expert affirmed that defendant Dr. Rubach inferiorly performed the dissection of the incisional hernia in the periumbilical area to allow extension of the midline laparotomy. Plaintiffs' expert further affirmed that Dr. Rubach testified that he did not have an independent

recollection of examining the bowel following the dissection of the incisional hernia and it is not mentioned in the Operative Report. Plaintiffs' expert further affirmed that the report is silent as to the method employed to exam the bowel prior to closure. Plaintiffs' expert further affirmed that a proper and thorough inspection of the bowel is the standard of care in any abdominal surgery, as the most favorable time to diagnose a perforation is within the intraoperative period, and it must be documented in the Operative Report. Plaintiffs' expert further opined that the delay in diagnoses and repair proximately caused the severe septic abdomen that the surgeons encountered on July 20, 2018. Plaintiffs' expert reasoned and opined that the failure to timely repair the bowel injury allowed the bowel to leak bacteria fluid into the abdomen, resulting in an acute abdomen which required five total surgeries to complete the repair. Plaintiffs' expert opined that had the bowel injury been timely diagnosed and repaired, Ms. Troy would not have been subjected to repeated reoperations. Plaintiffs' expert further opined that as a result of Ms. Troy's acute abdomen and septic condition, she was unable to take anything by mouth for several weeks postoperatively, which resulted in scar tissue in her esophageal anastomosis resulting in multiple endoscopy and dilation procedures.

Plaintiffs' expert further opined to disagreeing with Dr. Shapiro's opinions. The expert argued that there is no documentary evidence that the bowel was properly inspected intraoperatively by Dr. Rubach and Dr. Gecelter on July 17, 2018. Plaintiffs' expert opined that LIJMC staff immediately should have begun an investigation to determine if there was a bowel perforation and infection. Plaintiffs' expert further opined that in light of the surgery plaintiff underwent and the deterioration in her recovery, the first item on the differential diagnosis should have been a bowel perforation. Based upon the foregoing, plaintiffs' expert opined to a reasonable degree of medical certainty that defendants departed from good and accepted practice and proximately caused Sheila Troy's injuries. Therefore, plaintiffs argue that defendant LIJMC's motion should be denied.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party.

(*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolia & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

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].)

To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury." (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948, 949 [2d Dept. 2020].) However, a hospital may not generally be held vicariously liable for the malpractice of a private attending physician who is not an employee, such as an independent contractor. (*Dupree v. Westchester County Health Care Corp.*, 164 A.D.3d 1211, 1213 [2d Dept. 2018].) There is an exception where a facility may be held vicariously liable for the acts of independent contractors under a theory of apparent or ostensible agency by estoppel. (*Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 698 [2d Dept. 2007].) In order to create apparent agency, "there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal…[t]he third party must reasonably rely on the appearance of the authority based on some misleading words or conduct by the principal, [and]

the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal." (*Id.*) In a medical malpractice case, the patient must have reasonably believed that the treating physician was provided by the facility or acting on the facility's behalf. (*Dolan v. Jaeger*, 285 A.D.3d 844, 846 [2d Dept. 2001].) This is commonly broken down into the "holding out" element defined as the misleading words or conduct attributable to the principal and the "reliance" element defined as the third party's acceptance based upon the belief that the agent was an employee of the principal. (*Weiszberger v. KCM Therapy*, 189 A.D.3d 1121, 1123 [2d Dept. 2020].)

Defendant LIJMC established a prima facie entitlement to summary judgment. Defendant LIJMC demonstrated through the documentary evidence presented that it did not depart from accepted standards of care and did not proximately cause or contribute to Ms. Troy's injuries. Defendant LIJMC demonstrated through the deposition testimony and medical records that Ms. Troy's surgeries were performed by private attending physicians including Dr. Glassman, defendant Dr. Gecelter, and defendant Dr. Rubach. Defendant LIJMC further demonstrated that LIJMC staff provided appropriate post-operative care by transferring her to the ICU both times she became hypotensive and tachycardic and by providing appropriate treatment including intravenous lines, vasopressors, an x-ray, a CT scan, antibiotics, and additional procedures. Defendant LIJMC further demonstrated that the perforation was timely diagnosed and appropriately treated through a series of additional procedures. Defendant LIJMC also demonstrated that plaintiffs' claims for lack of informed consent should be dismissed, as plaintiffs' informed consent was obtained for her surgical procedures. Defendant LIJMC also demonstrated that plaintiffs' derivate claims for loss of consortium and services should also be dismissed.

Plaintiffs failed to raise a triable issue of fact with respect to plaintiffs' claims for lack of informed consent and loss of consortium and services, as they failed to sufficiently oppose those portions of defendant LIJMC's motion.

Plaintiffs also failed to raise triable issues of fact with respect to whether defendant LIJMC is vicariously liable for the acts of Dr. Gecelter or Dr. Rubach. Plaintiffs presented no competent, admissible evidence to demonstrate that Dr. Rubach held himself out as an agent of LIJMC or that plaintiffs reasonably believed he was its agent or employee. Further, the evidence showed Dr. Rubach was a partner at CHS Physician Partners with Dr. Gecelter and both were voluntary private attending physicians at LIJMC. Plaintiffs' argument that Dr. Rubach was "called into the case" by co-defendants and did not see Ms. Troy outside of LIJMC is similarly without merit, as it is insufficient to raise triable issues of fact with respect to whether Dr. Rubach held himself out to be an agent of the hospital. Therefore, plaintiffs failed to demonstrate LIJMC is vicariously liable for the acts or omissions of Dr. Gecelter or Dr. Rubach.

Plaintiffs also failed to raise triable issues of fact with respect to whether defendant LIJMC's staff departed from accepted standards of care and proximately caused or contributed to Sheila Troy's injuries. Plaintiffs' expert submission substantively failed to rebut defendant LIJMC's prima facie case and failed to sufficiently refute the arguments and opinions by defendant's expert. Plaintiffs' expert's opinion that LIJMC staff failed to appreciate Ms. Troy's symptoms indicating she had a perforation is vague, conclusory, and unsupported by the record. Defendant LIJMC demonstrated its staff rushed Ms. Troy to the ICU both times she became hypotensive and tachycardic, which plaintiffs' expert failed to refute. LIJMC staff also appropriately treated Ms. Troy in that they administered antibiotics, intravenous lines, and vasopressors, and were in contact with her treating physician, defendant Dr. Gecelter, while she was in the ICU. Based upon the foregoing, plaintiffs failed to raise a triable issue of fact in dispute.

Accordingly, defendant Long Island Jewish Medical Center s/h/a Long Island Jewish Hospital's motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted. Plaintiffs' Complaint is hereby dismissed as to defendant Long Island Jewish Medical Center s/h/a Long Island Jewish Hospital.

This constitutes the decision and Order of the Court.

Dated: May 2, 2024

Tracy Catapano-Fox

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

FILED
5/3/2024
COUNTY CLERK
QUEENS COUNTY