

Eyester v Adipietro
2025 NY Slip Op 35565(U)
February 4, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 620254/2018
Judge: Deanna D. Panico
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SHORT FORM ORDER

INDEX No. 620254/2018CAL. No. 202400262MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**PRESENT:**Hon. DEANNA D. PANICO
Justice of the Supreme CourtMOTION DATE 7/11/24ADJ. DATE 10/31/24

Mot. Seq. # 004 MD

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KARL EYESTER and JULIANNE EYESTER,

Plaintiffs,

- against -

FRANK J. ADIPIETRO, JR., M.D., FRANK J.
ADIPIETRO, JR., M.D., P.C., EASTERN LONG
ISLAND HOSPITAL and THE EASTERN
LONG ISLAND HOSPITAL ASSOCIATION,Defendants.
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LEITNER VARUGHESE PLLC

Attorney for Plaintiffs

425 Broadhollow Road, Suite 417

Melville, NY 11747

FUMUSO CHRISTESEN LLP

Attorney for Defendants Eastern Long Island
Hospital and The Eastern Long Island
Hospital Association

110 Marcus Boulevard, Suite 500

Hauppauge, NY 11788

VIGORITO, BARKER, PATTERSON,
NICHOLS & PORTER, LLPAttorney for Defendants Frank J. Adipietro, Jr.,
M.D., and Frank J. Adipietro, Jr., M.D., P.C.

300 Garden City Plaza, Suite 308

Garden City, NY 11530

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants Eastern Long Island Hospital and The Eastern Long Island Hospital Association, filed June 14, 2024; Answering Affidavits and supporting papers by plaintiff, filed September 26, 2024; Replying Affidavits and supporting papers by defendants Eastern Long Island Hospital and The Eastern Long Island Hospital Association, filed October 30, 2024; Other __; it is

ORDERED that the motion by defendants Eastern Long Island Hospital and The Eastern Long Island Hospital Association for summary judgment dismissing the complaint against them is denied.

Plaintiff Karl Eyester commenced this action to recover damages for injuries he allegedly sustained while he was a patient of Frank J. Adipietro, Jr., M.D., and Frank J. Adipietro, J.R., M.D., P.C.

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from March 2015 through May 2, 2016, and while he was receiving care and treatment from Eastern Long Island Hospital (Eastern Hospital) and The Eastern Long Island Hospital Association from March 2015 through December 31, 2016. Plaintiff asserts causes of action sounding in medical malpractice, lack of informed consent, negligence, and gross negligence. It is alleged that defendants were negligent in, among other things, incorrectly performing three left side L5/S2 transforaminal epidural steroid injections, failing to monitor and document plaintiff's condition, failing to order pre-diagnostic testing, performing contraindicated procedures, and failing to refer plaintiff to appropriate specialists. Plaintiff's spouse, Julianne Eyester, asserts a derivative cause of action for loss of services.

The Eastern defendants now move for summary judgment dismissing the complaint against them, arguing that Dr. Adipietro was an independent contractor, that plaintiff was his private patient, and that they are not vicariously liable for any of the care and treatment rendered by Frank J. Adipietro, Jr., M.D. and Frank J. Adipietro, J.R., M.D., P.C. to plaintiff. They further argue that the cause of action premised upon lack of informed consent should be dismissed, and that the duty to obtain a patient's informed consent rests with the physician and does not extend to the hospital. In support of the motion, the Eastern defendants submit the pleadings, transcripts of the deposition testimony of Karl Eyester, Julianne Eyester, Dr. Adipietro, and Nurse Jennifer Nemschick, plaintiff's medical records, a license agreement, and the affidavit of Patricia Pipisa. In opposition, plaintiff argues that the Eastern defendants created the appearance that Dr. Adipietro was their employee and was acting on behalf of the hospital while he was treating plaintiff, and that the Eastern defendants are therefore subject to vicarious liability under a theory of apparent or ostensible agency. In support of his opposition, plaintiff submits his own affirmation and some of his medical records.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Generally, a hospital may not be held vicariously liable for the acts of a physician who is not an employee of the hospital, but is one of a group of independent contractors (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Castro v Durban*, 161 AD3d 939, 77 NYS3d 680 [2d Dept 2018]; *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]). An exception to this rule allows vicarious liability to be imposed for an independent, private physician under a theory of apparent or ostensible agency (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698, 833 NYS2d 638, 640 [2d Dept 2007]; *see Diller v Munzer*, 141 AD3d 628, 34 NYS3d 608 [2d Dept 2016]). To establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, "a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor

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and not a hospital employee and that the exception to the general rule did not apply” (*Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683, 988 NYS2d 628, 630 [2d Dept 2014]; see *Fuessel v Chin*, 179 AD3d 899, 116 NYS3d 395 [2d Dept 2020]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 84 NYS3d 176 [2d Dept 2018]).

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,” and the third party must rely on the appearance of authority based on some conduct by the principal (*Keesler v Small*, 140 AD3d 1021, 1022, 35 NYS3d 356, 358; see *Weiszberger v KCM Therapy*, 189 AD3d 1121, 137 NYS3d 53 [2d Dept 2020]). To establish the reliance element, “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 v Small*, 140 AD3d at 1022, 35 NYS3d at 359).

Here, the Eastern defendants’ submissions are insufficient to establish a prima facie case that Dr. Adipietro was an independent contractor and that an exception to the general rule does not apply (see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 135 NYS3d 127 [2d Dept 2020]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 84 NYS3d 176). Pursuant to the license agreement between Frank J. Adipietro, Jr., M.D., P.C. (the professional corporation) and Eastern Hospital, Dr. Adipietro’s professional corporation was granted the exclusive use of the ambulatory surgery area at the hospital “during the days and time periods set forth on Exhibit B.” Eastern Hospital further agreed to provide the use of two shared clerical staff “who shall be available during their regularly scheduled work hours,” as well as two registered nurses and one nurse anesthetist “during such hours and days provided in Exhibit B.” The agreement provides that such personnel are “deemed to be leased employees of [the professional corporation] while providing services to, or on behalf of, [the professional corporation].” The agreement states that each party is an independent contractor of the other “with respect to the services hereunder.” The court notes that the “exclusive use of the ambulatory surgery area” is said to be indicated in a diagram attached to exhibit A of the agreement; however, the diagram was not submitted with the license agreement. Exhibit B of the license agreement shows that the professional corporation was granted the space, equipment, and leased personnel for one hour per day, from 3:00 to 4:00 p.m., from Monday through Friday. The Eastern defendants failed to establish that the care and treatment plaintiff received by Dr. Adipietro was provided pursuant to the license agreement, as the medical records indicate that plaintiff’s consultations frequently fell outside of the one-hour time period prescribed in the agreement.

Further, Nurse Nemschick testified that she was employed by Eastern Hospital in 2015 and 2016 as a charge nurse, and that she was not formally employed by Dr. Adipietro. She testified that her job duties included following up with patients on the phone, conducting physical assessments of patients before their procedures, and occasionally conducting phone interviews with patients prior to their surgeries. She testified that she followed up with Dr. Adipietro’s patients day one and day seven after their surgeries.

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The Eastern defendants also submitted plaintiff's deposition testimony, wherein he testified that his consultations with Dr. Adipietro took place at Eastern Hospital "in the ambulatory unit behind a curtain while there were nurses coming in and out." Plaintiff testified that a nurse would call him approximately every three weeks to inquire as to his pain scale and would then prescribe medication. When asked whether he signed a consent form prior to his procedure, plaintiff testified that just before going into the operating room, "they give you a clipboard with a bunch of papers and say, sign the papers." The consent forms submitted by the Eastern defendants contain a header with the name Eastern Long Island Hospital. Further, plaintiff's medical records, submitted by the Eastern defendants, are certified by an employee of Eastern Long Island Hospital, and, plaintiff's medical records contain the name Eastern Long Island Hospital at the top thereof. Included therein, Pain Management Discharge Instructions, also with the name Eastern Long Island Hospital at the top, list Frank J. Adipietro, Jr. M.D. as the Chairman of the Department of Anesthesia. Accordingly, the Eastern defendants' own submissions raised a question of fact as to whether they may be liable under a theory of apparent or ostensible agency (see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 135 NYS3d 127). For similar reasons, the Eastern defendants failed to establish their prima facie entitlement to dismissal of plaintiff's cause of action based on lack of informed consent (see *Contu v Albert*, 18 AD3d 692, 795 NYS2d 740 [2d Dept 2005]).

In any event, plaintiff's submissions raised a triable issue of fact as to whether the Eastern defendants may be held vicariously liable under a theory of apparent or ostensible agency (see *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356; *Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]; *Gunther v Staten Island Hosp.*, 226 AD3d 427, 640 NYS2d 601 [2d Dept 1996]). In his affirmation, plaintiff asserts that every visit he had with Dr. Adipietro was at Eastern Hospital and that he believed Dr. Adipietro was employed by the hospital and that he was "seeing him as part of the hospital." He states that a sign on the wall in "the office" read "Frank J. Adipietro, M.D., Eastern Long Island Hospital," that Dr. Adipietro told plaintiff he was the head of the anesthesia department at Eastern Hospital, that all forms he signed bore the heading of Eastern Long Island Hospital, and that he believed all staff members with whom he interacted were employed by the hospital. Finally, he asserts that he treated with Dr. Adipietro in part because he believed he was employed by the hospital and would have more resources available "than someone who just had a private office." Accordingly, plaintiff has presented sufficient evidence to support a conclusion that he reasonably believed Dr. Adipietro was employed by the Eastern defendants or acting on their behalf (see *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698, 833 NYS2d 638; *Sosnoff v Jackman*, 45 AD3d 568, 845 NYS2d 391 [2d Dept 2007]; see generally *Hallock v State*, 64 NY2d 224, 485 NYS2d 510 [1984]).

Accordingly, the motion is denied.

Dated: February 4, 2025
Riverhead, New York


DEANNA D. PANICO, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION