

SCANNED ON 11/14/2009

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 29

CARIDAD CUEVAS and ROBERT CUEVAS ,
Plaintiffs,

INDEX NO. 107857/06
Motion Sequence No.: 3

-v-

ST. LUKES ROOSEVELT HOSPITAL
CENTER,

Defendant.

The following papers, 1- 22, were read on this motion by defendant St. Lukes Roosevelt Hospital Center for summary judgment dismissing the complaint as asserted against it.

Notice of Motion - Affidavits - Exhibits
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation -

Papers Numbered

1-13

14-21

22

Cross-Motion: Yes No

In March of 2004, Caridad Cuevas was diagnosed with a stone in her salivary gland. On April 20, 2004, Dr. Adam Cohen, performed surgery to remove the stone at St. Lukes Roosevelt Hospital (hereinafter "St. Lukes"). Dr. Cohen was a private attending physician with privileges at St. Lukes. The attending anesthesiologist during the procedure was Dr. Rivas. Dr. Marlina Ezrokhi, a second year anesthesiologist, was also present during the performance of this surgery. During the surgery, general anesthesia was administered via endotracheal intubation.¹ Following the surgery, Mrs. Cuevas began to feel pain upon opening her jaw. She also began to hear a clicking sound when she chewed food, and her jaw started to lock on occasion. Mrs. Cuevas consulted with physicians, who have diagnosed her as having sustained an injury to the temporomandibular joint (TMJ).

Plaintiffs, Caridad Cuevas, and her husband Robert Cuevas, commenced the instant medical malpractice action against the defendant St. Lukes and Dr. Rivas with the filing of a

¹ According to the deposition testimony of Dr. Ezrokhi, it is not clear from the records whether she or Dr. Rivas induced the anesthesia in connection with the subject surgery. However, Dr. Ezrokhi did testify that if it was she that induced the anesthesia, Dr. Rivas would have supervised her.

summons and complaint on or about June 7, 2006.² Plaintiffs allege that St. Lukes, through the acts of Dr. Rivas and/or Dr. Ezrokhi, was negligent in administration of anesthesia to Mrs. Cuevas in connection with her April 20, 2004 surgery. Plaintiffs contend that Dr. Rivas and/or Dr. Ezrokhi were overly aggressive in the manner in which they manipulated her mouth and jaw during anesthesia intubation. The complaint also contains a cause of action for lack of informed consent, as well as a derivative cause of action for loss of services asserted by Mr. Cuevas. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendant St. Lukes presently moves for summary judgment, dismissing the complaint.

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "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." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

St. Lukes argues that this action must be dismissed because it may not be held vicariously responsible for the alleged negligence of Dr. Rivas and/or Dr. Ezrokhi. St. Lukes argues, *inter alia*, that Mrs. Cuevas was admitted to St. Lukes, and operated on, by her private physician, Dr. Cohen, and, thus, it may not be liable for any alleged negligence in connection with the performance of that surgery. St. Lukes argues that under these circumstances the agency principles, which were set forth in Mduba v. Benedictine Hospital, 52 AD2d 450 [3d Dept. 1976] and its progeny, are inapplicable to the instant action. In opposition, plaintiffs contend that defendant St. Lukes is vicariously liable for Dr. Rivas' action under the principle of ostensible agency of Mduba v. Benedictine Hospital, *supra*. Plaintiffs further contend that St. Lukes may be held liable for any negligence attributable to Dr. Ezrokhi because she was a hospital resident at the time of the surgery, for which the hospital is vicariously liable.

The principle of ostensible agency or agency by estoppel has been applied by New York Courts to hold a hospital or other medical treatment facility liable for the malpractice of a medical practitioner providing services at that facility, despite that practitioner's status as an independent contractor, where the treatment was sought by the plaintiff from the facility, as opposed to the particular practitioner (see Hill v. St. Clare's Hospital, 67 NY2d 72 [1986], citing Hannon v. Siegel-Cooper Co., 167 NY 244 [1901]; Malcom v. Mount Vernon Hospital, 309 AD2d 704 [1st Dept. 2003]; Soltis v. State of New York, 172 AD2d 919 [3d Dept. 1991]; Santiago v. Archer, 136 AD2d 690 [2d Dept. 1988]; Lanza v. Parkeast Hospital, 102 AD2d 741 [1st Dept. 1984]; Mduba v. Benedictine Hospital, *supra*). The aforementioned agency principle is applicable where

² Plaintiffs failed to timely serve Dr. Rivas, and the action, as asserted against her, was dismissed, by decision and order of Judge Abdus-Salaam, entered on March 23, 2007.

the plaintiff reasonably believed that the medical practitioner was acting at the facility's behest (see Malcom v. Mount Vernon Hospital, *supra*; Soltis v. State of New York, *supra*).

The evidence submitted in connection with the instant motion indicates that although Mrs. Cuevas sought surgical treatment directly from Dr. Cohen, she did not play any role in selecting the anesthesiologists for her surgery that was performed at St. Lukes. Mrs. Cuevas stated in her affidavit that was submitted in opposition to the instant motion that she believed that the anesthesiologists who treated her during the subject surgery were employees of St. Lukes, and "did not even know anesthesiologists could be employed outside of a hospital." She further stated that she did not specifically request any particular anesthesiologist and assumed the hospital determined who would provide anesthesia. Defendant St. Lukes has not only failed to demonstrate, as a matter of law, that Mrs. Cuevas could not have reasonably believed that Dr. Rivas was acting at the behest of the facility, they did not provide any evidence in support of its motion that shows that the anesthesiologists were not, in fact, employed by St. Lukes.³

The Court acknowledges that Mrs. Cuevas sought surgical treatment directly from Dr. Cohen, and not from St. Lukes. However, plaintiffs are not alleging medical malpractice in connection with the surgery itself, as performed by Dr. Cohen. Plaintiffs' allegations of malpractice herein relate solely to the anesthesiological care, which she believed was being provided by St. Lukes. Based upon the foregoing, the Court finds that a triable issue of fact exists with respect to whether St. Lukes may be vicariously liable on the ground of apparent or ostensible agency for the alleged malpractice of Dr. Rivas. Moreover, the Court finds that triable issues of fact exist with respect to whether St. Lukes may be vicariously liable for any alleged malpractice of Dr. Ezrokhi, a resident at St. Lukes, under the doctrine of *respondeat superior* (see Hill v. St. Clare's Hospital, *supra*).

It is noted that following the submission of the instant motion, defendant St. Lukes, by letter, argued that the issue regarding whether St. Lukes may be liable for the acts of Dr. Rivas was previously decided in its favor in the decision and order of Judge Abdus-Salaam, entered on March 23, 2007, which held that plaintiff failed to timely serve Dr. Rivas. This argument, made *via* letter, following the full submission of the instant motion, was improperly made and should not be considered. Nevertheless, it is clear that the prior decision did not in any way address the issue of whether St. Lukes may be liable for the acts of Dr. Rivas under the principle of ostensible agency. That decision simply stated that Dr. Rivas was improperly served at St. Lukes when she no longer had any connection with the hospital.

St. Lukes further argues that even if St. Lukes could be vicariously liable for the acts of the anesthesiologists, summary judgment is still warranted because plaintiffs cannot establish that Mrs. Cuevas' TMJ injury occurred while she was a patient at its facility. In support of this argument, defendant St. Lukes relies upon, *inter alia*, the expert affidavit of a physician board certified in anesthesiology. St. Lukes' expert opines that the care rendered to Mrs. Cuevas by Dr. Rivas, Dr. Ezrokhi, as well as St. Lukes, was appropriate and proper. This expert further

³ In its reply affirmation, St. Lukes sets forth that, upon information and belief, Dr. Rivas was employed by SLR Medical Anesthesiologists, P.C., at the time of the subject surgery. Such affirmation is not evidence and lacks probative value (see Guzman v. Mike's Pipe Yard, AD3d 266 [1st Dept. 2006]). Moreover, as this information is first presented in St. Lukes' reply papers, it would not be considered even if submitted in proper evidentiary form (see Migdol v. City of New York, 291 AD2d 201 [1st Dept. 2002]). With respect to Dr. Ezrokhi, the evidence clearly establishes that she was a resident at St. Lukes at the time of the subject surgery.

opines that the medical care and treatment of Mrs. Cuevas is not related to the injuries of which the plaintiff claims in this action. According to the expert, any claim that the TMJ injury suffered by Mrs. Cuevas resulted from improper techniques during the administration of anesthesia has no merit. The expert points out that the medical records indicate that the "vocal cords were easily visualized" during the administration of anesthesia, which indicates that Mrs. Cuevas' intubation was not traumatic.

St. Lukes' expert states in his affidavit that because of other health issues, Mrs. Cuevas could have had a predisposition to such a TMJ injury and that there is no evidence to suggest that her TMJ injury was caused by the anesthesia care administered during her surgery of April 20, 2004. It is also stated in this affidavit that in 25 years of practice, the expert physician has never seen a TMJ injury as a result of intubation. Lastly, St. Lukes' expert sets forth that the location of the surgery on the neck made it conceivable that the jaw was manipulated by Dr. Cohen during surgery and that a claim that Mrs. Cuevas injury was caused specifically by a traumatic intubation is without merit.

In opposition to this portion of St. Lukes' motion, plaintiffs also submit an expert affidavit of a physician board certified in anesthesiology. In contrast to the affidavit of St. Lukes' expert, plaintiffs' expert opines that Dr. Rivas and/or Dr. Ezrokhi, departed from good and accepted medical practice in their care and treatment of Ms. Cuevas and that such care and treatment caused injury to Mrs. Cuevas. Plaintiff's expert first opines that Mrs. Cuevas' jaw was over-extended during intubation, resulting in TMJ trauma. Plaintiffs' expert sets forth that there was no question that Ms. Cuevas had a normal functioning jaw prior to her surgery, and notes that as part of the pre-anesthesia assessment Mrs. Cuevas was found to have "normal temporomandibular joints bilaterally." According to plaintiffs' expert:

"[d]uring intubation, the mouth should not be opened beyond three finger breadth's, it is clear that standard was violated. This is evident by the patient's symptom development subsequent to surgery. During the process of oral intubation, the mouth is opened, the larynx and vocal cords are visualized, and using a laryngoscope an endo-tracheal tube is inserted. The patient is paralyzed during intubation and her facial muscles are relaxed and can be over-extended causing trauma to the jaw, including the TMJ. While unconscious, the patient's facial muscles cannot restrict the mouth from being forced beyond its normal anatomical range of motion. Consequently, there is no counter balance of tension from the facial muscles to prevent injury. Hence, the patient is helpless."

Additionally, plaintiffs' expert states that there is nothing in Mrs. Cuevas' medical history that suggests she had a predisposition for this type of injury. Plaintiff's expert also states that during his or her 25 years of practicing medicine, he or she has heard of cases of overly aggressive intubation that have resulted in TMJ trauma, and adds that this problem has been reported in medical literature. In the opinion of plaintiff's expert, the surgery performed by Dr. Cohen did not cause injury to the TMJ. The expert sets forth that Dr. Cohen operated on the salivary gland and did not enter Mrs. Cuevas' oral cavity. Therefore, according to plaintiffs' expert, the contention that Dr. Cohen caused the injury is without merit. Plaintiff's expert concludes that the departure on the part of Dr. Rivas and/or Dr. Ezrokhi, caused the development of TMJ syndrome in Mrs. Cuevas.

Based upon the conflicting expert affidavits submitted by the parties, issues of fact and credibility exist in connection with whether Dr. Rivas and/or Dr. Ezrokhi, departed from good and accepted medical practice by over-extending Mrs. Cuevas' jaw during intubation, and whether such departure was a substantial factor in causing injury to Mrs. Cuevas. Such issues cannot

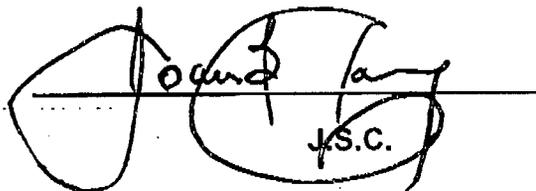
be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). As a result, St. Lukes' motion for summary judgment is denied. Notwithstanding, plaintiffs' informed consent cause of action is dismissed. Although St. Lukes' established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Mrs. Cuevas signed an informed consent form relating to the administration of anesthesia, plaintiffs' failed to submit any medical evidence, through the affidavit of their expert, to refute this *prima facie* showing (see Ericson v. Palleschi, 23 AD3d 608 [2d Dept. 2005]).

Based on the foregoing, It is hereby

ORDERED that this motion by defendant St. Lukes Roosevelt Hospital Center for summary judgment dismissing the complaint is granted only to the extent that the cause of action for lack of informed consent is dismissed; and it is further

ORDERED that counsel for all remaining parties are to appear before the court on September 10, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 8/11/2009

 J.S.C.

Check one: FINAL DISPOSITION NON- FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
AUG 14 2009
COUNTY CLERK'S OFFICE
NEW YORK