

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JOHN GIOUVALAKIS and KATHERINE
GIOUVALAKIS,

Plaintiff(s),

INDEX No. 14069/04

-against-

MOTION DATE: 3/29/07

ERIC DONNENFELD, M.D., and
TLC LASER EYE CENTERS, INC.,

Defendant(s).

MOTION SEQ. No. 9-MOD

The following papers read on this motion:

TLC Notice of Motion/Affirmation/Exhibits
Affirmation in Opposition/Exhibits
Reply

Defendant THE LASER CENTER (NORTHEAST), INC. d/b/a TLC LASER EYE CENTERS-GARDEN CITY CENTER s/h/a TLC LASER EYE CENTERS, INC. ("TLC") seeks an Order dismissing the plaintiff's claims against it pursuant to CPLR § 3212. Plaintiff opposes.

In this action plaintiff seeks damages for injuries allegedly sustained due to the medical malpractice and a lack of informed consent by the defendants. He brings this action against Dr. ERIC DONNENFELD and his private medical practice, Ophthalmic Consultants of Long Island, and against TLC.

The plaintiff alleges that as a result of laser surgery performed, he experiences night vision disturbances despite good uncorrected visual acuity following a laser correction procedure, performed on May 20, 2000, known as "laser assisted in situ keratomileusis" or, as more commonly referred to as "LASIK". This surgery was performed by DONNENFELD at the TLC surgical facility located in Garden City, New York.

Giouvalakis v. Donnenfeld, et al.

In his Amended Complaint, the plaintiff alleges three separate causes of action against each defendant. The first cause of action alleged medical malpractice, the second cause of action alleges lack of informed consent, and the third cause of action asserts a derivative claim on behalf of the plaintiff's wife, KATHERINE GIOUVALAKIS. Plaintiff alleges that the defendants were negligent in qualifying him as a candidate for LASIK surgery, in selecting the VISX excimer laser to perform the surgery, and in failing to obtain his informed consent for the surgery. He also seeks to hold TLC vicariously responsible for the alleged malpractice of DONNENFELD.

Counsel for TLC argues that TLC has no direct liability to the plaintiff. She also argues that defendant DONNENFELD was not an employee or agent of TLC, but only an independent contractor, and therefore TLC cannot be held vicariously liable for any malpractice or negligence by DONNENFELD or his employees.

The plaintiff claims that the defendants were negligent in measuring his pupil size, in qualifying him for the LASIK surgery based on his pupil size. He claims they were negligent in selecting the VISX excimer laser to perform the surgery, based on his pupil size, and in failing to secure informed consent. (Motion, Exh. C, D) The plaintiff concedes that he achieved good uncorrected visual acuity as a result of the LASIK surgery, but claims night vision disturbances. (Exhibits C, D).

TLC claims that night disturbances are well known and well recognized risks of LASIK surgery.

The plaintiff testified at his deposition that he first became a patient of the private practice of DONNENFELD in February 2002. He testified that at that time he went to DONNENFELD's offices in Rockville Centre, as he wanted to be evaluated to determine if he would be a good candidate for laser vision correction surgery. The plaintiff testified that he had worn eyeglasses or contact lenses since childhood. Dr. DONNENFELD testified that the plaintiff had low to moderate myope, or nearsightedness.

DONNENFELD is a Board Certified ophthalmologist who specializes in corneal disease and refractive eye surgery. TLC provides a medical facility, testing equipment, laser equipment, technical staff and administrative staff for use by licensed ophthalmologists to perform laser vision correction surgery on their patients. TLC claims that it is a management company that manages the business aspects of the medical center, and that it is not a medical service or care provider. It argues that TLC does not direct the manner in which ophthalmologists evaluate their patients, treat their patients or perform surgery. TLC argues that the ophthalmologists, as surgeons, are given complete discretion and control over patient selection, procedure selection, laser selection and peri-operative management. It claims that DONNENFELD's affiliation with

Giouvalakis v. Donnenfeld, et al.

TLC allowed him to use the facility, equipment and staff so that he could perform laser surgery on his patients.

Lori Landrio is a licensed optometrist who served as Clinical Director of the TLC facility in Garden City. DONNENFELD is the Medical Director of the TLC facility in Garden City.

TLC argues that DONNENFELD's contract with TLC specifically excludes him from practicing medicine for TLC. He was not to examine or treat any of TLC's patients. (Motion, Exh. N, par. 2.1)

Pursuant to the same contractual paragraph, DONNENFELD was, however, to provide medical advice and training to TLC, including implementing protocol, credentialing procedures, and advising on administrative procedures relating to medical practice management. He was also contracted to provide other advice needed in connection with managing ophthalmic practices for doctors. (Motion, Exh. N, para. 2.2)

Plaintiff claims that on his initial visit to DONNENFELD's office on February 27, 2002, he was examined by a medical technician and optometrist, Ray Mariani, as well as by Dr. DONNENFELD. He completed a medical history on a form bearing the heading "Ophthalmic Consultants of Long Island". Both DONNENFELD and Dr. Mariani testified that the plaintiff's mesopic and scotopic pupil size were measured by both Mariani and DONNENFELD using two methods: (1) a pupil card with direct visualization of the pupil and (2) a Colvard pupillometer.

The plaintiff alleges that his pupil size was measured by Dr. Mariani to equal 8 mm and by Dr. DONNENFELD to equal 7 mm. DONNENFELD explained that the 1 mm discrepancy was within the accepted range and was not clinically significant. (DONNENFELD EBT, pp. 67-69). TLC notes that this measurement took place at the February 27, 2002 evaluation at DONNENFELD's office, not at the TLC facility.

Dr. DONNENFELD testified that based on this examination plaintiff was considered to be a good candidate for Lasik surgery, and that his pupil size was not an indicator of a poor visual outcome. (DONNENFELD, pp. 26,34-39) DONNENFELD testified that TLC did not play a role in this determination (DONNENFELD, p. 171). Plaintiff and DONNENFELD both testified DONNENFELD discussed the cost of the surgery with the plaintiff, as well as risks involved in the surgery and that the plaintiff read and executed an Informed Consent Form. (Plaintiff, pp. 49, 19-41).

Giouvalakis v. Donnenfeld, et al.

Plaintiff was thereafter scheduled to undergo LASIK surgery at the TLC facility in Garden City on May 20, 2002. Plaintiff conceded at his deposition that he was unaware of the entity TLC until after his surgery was so scheduled. (Plaintiff, pp. 131-135, 156)

On the date of the surgery plaintiff met with the TLC patient consultant who collected the \$5,500.00 fee and executed an Informed Consent Form from the plaintiff. Plaintiff's eyes were reexamined by DONNENFELD and a corneal topography test was performed by a TLC technician. (DONNENFELD, pp. 112, 92-93) TLC notes that no one from TLC conducted a clinical examination of the plaintiff. All of DONNENFELD's findings from the earlier evaluation were transferred onto the TLC Pre-Procedure Planning Form without any additional evaluations. No one from TLC states that they further examined the plaintiff or reviewed the risks of surgery with him. (Plaintiff, pp. 49-50, 135-136)

Plaintiff underwent bilateral LASIK surgery performed by DONNENFELD on May 20, 2002. He was assisted by a TLC laser technician who programmed the laser. Following the surgery plaintiff states that he experienced discomfort in his left eye secondary to slight displacement of the corneal flap. DONNENFELD managed the flap displacement which healed without further incident. Plaintiff appeared at the TLC center the next day for his first post-operative visit. He was examined by Dr. David Leibstein. The examination revealed good initial uncorrected visual acuity in response to LASIK. (Plaintiff, pp. 74-75)

Plaintiff testified that he had further post surgical visits at DONNENFELD's Rockville Centre office. (Plaintiff, pp. 80-88; DONNENFELD, pp. 142, 148-149) The plaintiff complained of visual disturbances including halos, starbursts, and poor night vision. DONNENFELD and Dr. Hatsis, plaintiff's subsequent treating doctor, recommended that he undergo a customize ablation enhancement procedure, but the plaintiff elected against it. (Plaintiff, pp. 90, 107; DONNENFELD, p. 152) Plaintiff wears glasses which he testified greatly reduce these disturbances. (Plaintiff, pp. 114-115)

Counsel for TLC argues that her client is entitled to summary judgment in that there is no evidence that TLC was negligent in its care of the plaintiff. She argues that there is no viable claim of lack of informed consent against TLC. Counsel also argues that the plaintiff cannot establish a direct claim of malpractice against TLC, and that the plaintiff cannot demonstrate that DONNENFELD was an employee or agent of TLC, any claim of vicarious liability against it must also be dismissed.

As to the plaintiff's claims of direct liability, counsel for the plaintiff argues that the unique and significant contractual and factual relationship between DONNENFELD and TLC, which includes

Giouvalakis v. Donnenfeld, et al.

DONNENFELD's position as not only the Medical Director of TLC, but also its Connecticut center, and his position as a significant stockholder in the TLC Vision Corporation, the intermingling of the employees of TLC and DONNENFELD in their offices and practices, all create issues of fact concerning an actual agency and joint venture.

The plaintiffs argue that a finder of fact could conclude that TLC was negligent in allowing a procedure to be performed in its facility using a laser which it should have known would create an ablation or correction zone that was smaller than the plaintiff's scopic pupils, thus allowing a significant risk of post-Lasik night vision complaints. Also plaintiff argues that if there is evidence supporting a conclusion that TLC was negligent in failing to insure that the plaintiff had been adequately informed of the unique risk of Lasik surgery to him because of his large pupil size, degree of myopia and the degree of correction which would be required.

Counsel also notes TLC's active promotion of its commitment to its patients and its representation that it would stand behind the care provided at its center by "Its surgeons". She argues that the ostensible agency between TLC and DONNENFELD which they both promoted, was relied upon by the plaintiff.

An Agency is a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. *Smirlock Realty Corp v. Title Guar Co.*, 70 AD2d 455 (2nd Dept. 1979); *Deep Blue Ventures Inc. v. Manfra, Tordella & Brookes, Inc.*, 6 Misc3d 727 (2004). An agency relationship can be established by conduct or written or oral contract. *F. Hoysradt v. Nilles Ford-Mercury Inc.*, 168 AD2d 824 (3rd Dept. 1990). When an agency relationship is established by conduct, it may create an agency by apparent authority. Such an agency may be established where the principal's word or conduct gives rise to a reasonable belief by a third party that the agent has the authority to enter into a transaction on behalf of the principal, even if unintended.

A review of all of the documents presented reveals evidence of writings and conduct which could give rise to the appearance of an agency relationship between TLC and DONNENFELD. A review of the promotion material, deposition transcripts and affidavits provided reveal statements and actions by not only TLC but also DONNENFELD and other health care providers performing services at the TLC Garden City facility and DONNENFELD's Rockville Centre Office which could reasonably be relied upon by plaintiff or other patients to believe that DONNENFELD, as Medical Director of the TLC facility, was employed by TLC and had the authority to act on its behalf.

Giouvalakis v. Donnenfeld, et al.

There is no evidence that DONNENFELD or any employee of TLC made it clear to the plaintiff that DONNENFELD was an independent contractor only and not an agent or employee of TLC. Further, while a careful review of the statements and testimony reveals no evidence or testimony that DONNENFELD ever told the plaintiff that he was acting without the authority of TLC. Thus there is not only a question of whether contractual agency has been established, but also whether apparent authority has been established.

Based on the proof presented, the motion of TLC for summary judgment is Denied in its entirety. An employer may be liable for the acts of an employee, whether negligent or intentional, if the acts complained of are within the scope of employment. *Joshua S. v. Casey*, 206 AD2d 839 (4th Dept. 1994).

As to the theory of liability of respondent superior, it is a fundamental principal of agency law that an employer may only be liable for the torts of an employee if the acts complained of are in furtherance of the employer's business. *Joshua S. v. Casey, supra*. An employer may be vicariously liable for the torts of its employee even when the employees actions are intentional, if the actions were taken while the employee was acting within the scope of his employment. There is no vicarious liability on the part of an employer for torts committed by the employee solely for personal motives unrelated to the furtherance of employment. *Oliva v. City of New York*, 2002 NY App Div LEXIS 8920 (2nd Dept. 2002); *N.X. v. Cabrini Medical Center*, 280 AD2d 34 (1st Dept. 2001).

Plaintiff provides evidence that upon his consultation visit with DONNENFELD in February, 2002, he was provided publications identifying DONNENFELD as the Medical Director of the TLC Garden City Center. (Opposition, Exh. D) He provides evidence that he paid TLC directly for the surgery in question. Plaintiff also provides evidence that DONNENFELD is the Chairman and CEO of the "20/20 Laser Vision Correction Associates" which has the same principal office as TLC Vision Corporation. Counsel also provides a stock exchange agreement between TLC The Laser Center and DONNENFELD wherein DONNENFELD agreed to exchange his shares of 20/20 for shares of TLC Vision, and as part of this exchange DONNENFELD agreed to provide services to the TLC Vision Center.

Counsel also provides a copy of the Team Surgeon Agreement that DONNENFELD entered into with 20/20. Pursuant to this agreement the surgeon, DONNENFELD was required to establish a professional corporation ("pc") to own and operate his practice, and was to establish one or more practice sites in his State. The Agreement also provided that he could contract with TLC and the PC in one of three ways: (1) as a team

Giouvalakis v. Donnenfeld, et al.

ophthalmologist who did not perform Lasik surgery, but provided pre and post op care; (2) as a Team Surgeon who performed Lasik on not only his own patients but also those of other professionals associated with TLC; or (3) as an affiliate surgeon who contracted on an “as available” basis to provide Lasik surgery and pre and post op care to their own patients. Under the agreement, TLC agreed to establish medical practice sites and organize a team of eye care specialists to furnish professional services. It was obliged to supply the laser, training and management services, including collection of fees and management of the site staff, marketing and professional and patient education.

Pursuant to the agreement within 120 days of signing, the doctor was required to participate in a training session regarding pre and post op procedures and care. He was also required to attend a surgical training and select a Laser Vision Correction Specialist to advise the company and attend marketing training.

The plaintiff notes that DONNENFELD was required to have a complete patient database so that the patient’s consent could be provided to the company and other third parties. TLC provided the consent form. If DONNENFELD did not complete the proper patient progress reports, he was not paid. DONNENFELD was compensated directly by TLC pursuant to a fee schedule for pretreatment evaluations, corneal topography and surgery. There is no indication that he was not compensated by TLC for these services even when performed in his Rockville Centre office. In addition, the agreement reveals that TLC provided all billing and collection services, and the funds paid to TLC and TLC’s payments to DONNENFELD were the only compensation he received from these patients. DONNENFELD expressly waived any rights to collect the fees himself. (Agreement, para. 5.1)

Again, as noted by plaintiff’s counsel, although DONNENFELD had the right to terminate his relationship with the PC, the Company, at its sole option had the right to delay that termination up to one year. In addition, DONNENFELD acknowledged that the company and the PC disclosed trade secrets and proprietary information and materials to him which were critical to the success of the business of the company and P.C. There was exclusivity and non-competition provision.

While the agreement also clearly identified DONNENFELD as an independent contractor, the language in that paragraph contradicts other language of the agreement. The plaintiff also identified other promotional and informational material which identified DONNENFELD as having a substantial relationship with TLC, including its public promotional web-site. (Opposition, Exh. K)

Giouvalakis v. Donnenfeld, et al.

Finally, plaintiff provides a copy of the TLC booklet provided by DONNENFELD to plaintiff prior to his surgery, which was apparently authored and distributed by TLC. In this booklet, TLC promises to stand behind the surgical results of “our surgeons” and tells the patient to return to his “TLC eye doctor”, and again praises “our doctors and staff in our centers.” (Opposition, Exh. M) There is absolutely nothing in the promotional information provided to the patient which informs him or her that the TLC surgeon is only an independent contractor. (Opposition, Exh. M)

Plaintiff also identifies common employees of both DONNENFELD and TLC, including David Skalky and Ray Mariani, both of whom provided services to the plaintiff. (Opposition, Exh. N, O) Finally, copies of TLC’s policies and procedures demonstrate that TLC maintained a degree of control and management over patient care and treatment which could be found to be substantial or significant. (Opposition, Exh. P) As part of TLC’s Guidelines, with respect to counseling candidates, patients with the greatest risk of high glare are those with “large pupils and moderate to severe refractive error.” (Opposition, Exh. P) The plaintiff testified that he was never informed of this risk. (Opposition, Exh. A) Finally plaintiff provides a post operative prescription written by Dr. Liebstein at TLC which identified DONNENFELD as a Co-managing doctor (Opposition., Exh. S)

Counsel for plaintiff argues that all of the promotional information and corporate agreements leave open the question of whether not only was DONNENFELD an employee of TLC as well as whether he was an agent. The Court agrees. *Schwartz v. Speaker*, 35 AD3d 583 (2nd Dept. 2006); *Brown v. Speaker*, 33 AD3d 446 (1st Dept. 2006); *Schiffer v. Speaker*, 36 AD3d 520 (1st Dept. 2007). TLC cannot divest itself of responsibility for DONNENFELD’s actions, as a matter of law by merely naming him an independent contractor. *Felice v. St. Agnes Hospital*, 65 AD2d 388 (2nd Dept. 1978); *Felter v. Mercy Community Hosp.*, 244 AD2d 385 (2nd Dept. 1997).

As to the direct claim of negligence, the plaintiff argues that there is a triable issue of fact in that TLC can be found liable both for the actions of its own employees, agents and servants in addition to vicarious liability for DONNENFELD. Plaintiff notes the TLC records which indicate that the scotopic pupil size was 8 mm, and the laser used, the VISX S3 had a maximum ablation zone of 6.5. (Opposition, Exh. U). Thus, plaintiff claims that the TLC employees should not have permitted the surgery to be performed with this laser, or with proof that the plaintiff was specifically informed of a significant risk of night vision complaints or complications, rather than the standard informed risk information.

Giouvalakis v. Donnenfeld, et al.

Plaintiff again notes that at the February 2002 visit to DONNENFELD the plaintiff inquired whether he was a good candidate because he did not want the surgery if he was not. (Plaintiff, pp. 25-26) Thus, the plaintiff argues that the direct claim of negligence as well as lack of informed consent should stand. Plaintiff provides an expert affirmation wherein the ophthalmologist states that the plaintiff should have been warned of his increased risk of complications by both DONNENFELD and TLC. (Opposition, Exh. X) Plaintiff argues that since TLC held itself out as having a lifetime commitment to its patients, it is distinguishable from a line of cases wherein the hospital is not liable for lack of informed consent by its surgeons. Plaintiff argues that TLC, in its literature and representations to the plaintiff assumed a duty that surgery performed at its facility would be performed without negligence. And thus assumed the duty to provide informed consent. *Wolf v. City of New York*, 39 NY2d (1976); *Florence v. Goldberg*, 44 NY2d 189 (1978).

While the defendant argues that the plaintiff, in opposition this application, has not provided an expert affirmation identifying the corporation's medical malpractice, it merely claims that an affidavit provided by the plaintiff as part of an earlier application should be limited to lack of informed consent.

Summary judgment is a drastic remedy which deprives a party to litigate, and his day in Court, and accordingly it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978). On a motion for summary judgment the moving party must demonstrate, by evidentiary facts, that he is entitled to judgment as a matter of law, whereupon the burden is shifted to the opponent to show that an issue of fact exists. *Piccolo v. De Carlo*, 90 AD2d 609 (3rd Dept. 1982).


A party does not carry its burden of proof in seeking summary judgment dismissing the complaint by merely pointing to gaps in the plaintiff's proof. *Calderone v Town of Cortland*, 15 AD3d 602 [2d Dept, 2005].

Based on the proof presented, the defendant TLC's motion for summary judgment is Denied . CPLR § 3212.

It is, SO ORDERED

Dated:

May 21, 2007


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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MAY 24 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE