

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN W. BURKE

Justice

-----X TRIAL/I.A.S. PART 1  
NASSAU COUNTY

MARIA KEELER, as Administratrix of  
the Estate of NICOLA PELLE, Deceased,  
Plaintiff,

INDEX NO.19156/00

-against-

MOTION DATE: 12/5/03

BURT GELBERG, M.D., ANTHONY COLANTONIO,  
M.D., and FRANKLIN HOSPITAL MEDICAL  
CENTER,

MOTION NO.007,008

Defendants.

-----X

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Upon the foregoing papers the motion by the defendant Franklin Hospital Medical Center (Franklin) for summary judgment and the cross-motion by defendant Anthony Colantonio, MD., (Dr. Colantonio) for leave pursuant to CPLR §3025(b) to amend his answer and assert a cross-claim against Franklin, are disposed of as hereinafter provided.

This is a wrongful death action brought by the decedent's estate alleging malpractice against the hospital and the treating physicians. Dr. Colantonio was assigned to the case when plaintiff, age 37, presented himself in the hospital emergency room on May 25, 1999, with complaints of abdominal pains and vomiting blood. The decedent had a history of an ulcer and an "extensive psychiatric history."

Dr. Colantonio performed two operations on the decedent over the following weeks and he died on July 13, 1999, having never left the hospital.

The hospital moves for summary judgment on the grounds that "no acts or failure to act on behalf of the hospital caused or contributed to the plaintiff's claimed injuries. Franklin was merely the site of the events in issue." Franklin argues that it

should not be held vicariously liable for the acts of its employees.

Motion By Franklin

The motion to dismiss is denied. The law is well-settled that a hospital is vicariously liable for the acts of its independent contractors. The leading case of Mduba v Benedictine Hospital, 52 AD2d 450 (1976) held that:

"Patients entering the hospital through the emergency room, could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital. Such patients are not bound by secret limitations as are contained in a private contract between the hospital and the doctor. Defendant held itself out to the public offering and rendering hospital services (see, Hannon v Siegel-Cooper Co., 167 NY 244; Santise v Martins, Inc., 258 App Div 663, 664-665). The Court of Appeals has held that a defendant who employs an independent contractor to perform services that the defendant has undertaken to perform, is liable for the negligence of the independent contractor. ( Miles v R & M Appliance Sales, 26 NY2d 451.) In so holding, the court adopted the applicable rule from the *Restatement of Torts*, which provides: 'One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants' (\*454 *Restatement, Torts* 2d, §429). The rule is applicable if 'the negligence of the contractor consists ... in carelessness in the detail of rendering them' (*Restatement, Torts* 2d, § 429, Comment b).

"It is, therefore, our conclusion that the defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, was under a duty to perform those services and is liable for the negligent

performance of those services by the doctors and staff it hired and furnished to decedent. Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital. This does not mean that a hospital will be liable under principles of *respondeat superior* for the acts or omissions performed on its premises by any and every physician or other medical attendant."

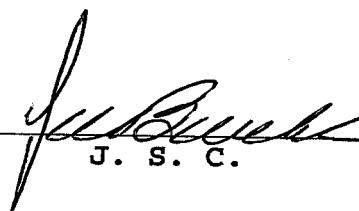
Franklin, in its reply papers, seeks further relief in that it seeks leave to amend its complaint to include cross-claims against Dr. Colantonio. This branch of the motion is granted and the cross-claim included in Franklin's reply papers is deemed served. Defendant Colantonio shall have 30 days from the date of this order to serve an answer to the cross-claims.

Motion by Dr. Colantonio

This motion seeking leave to amend this defendant's answer to assert a cross-claim against Franklin is granted. The cross-claim included in Dr. Colantonio's affirmation in support of the motion is deemed served and Franklin shall have 30 days from the date of this order to serve an answer to the cross-claims.

The plaintiff shall serve a copy of this order upon all other parties within 10 days of the date hereof.

Dated: DEC 17 2003

  
J. S. C.

**ENTERED**

DEC 22 2003

MASSACHUSETTS  
COUNTY CLERK'S OFFICE