UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JANE DOE,

Plaintiff,

12 Civ. 686 (CM)

-against-

MONTEFIORE MEDICAL CENTER, MONTEFIORE MEDICAL GROUP, and MONTEFIORE HEALTH SYSTEM, INC.,

Defendants.

----------x

DECISION AND ORDER

McMahon, J.:

This case involves an unfortunate incident of sexual assault committed by a primary care physician against his patient. The patient, Jane Doe ("Plaintiff"), now seeks to hold the physician's former employer, the above-captioned Montefiore entities ("Defendants"), liable on theories of negligence and breach of fiduciary duty. Defendants have moved for summary judgment.

For the reasons set forth herein, Defendants' motion for summary judgment is GRANTED in part and DENIED in part.

BACKGROUND[1]

I. The Parties

Plaintiff Jane Doe is an adult female citizen and resident of Florida.

[1] The following facts are drawn from the pleadings and the record on Defendants' summary judgment motion. They are undisputed unless otherwise noted.

Defendant Montefiore Medical Center ("MMC") is a citizen of New York. At all relevant times, Defendant MMC was a New York not-for-profit corporation organized and existing pursuant to the laws of the state of New York, providing medical treatment and examinations to patients. Defendant MMC operates more than 20 clinics around Bronx County and Westchester County through its affiliate, Defendant Montefiore Medical Group ("MMG").

Defendant MMG, also apparently organized and existing pursuant to the laws of the state of New York, provides clinical care and healthcare services to Defendant MMC's patients.

Defendant Montefiore Health System, Inc. ("MHS") is a not-for-profit corporation created and existing under the laws of New York, with a principal place of business in the Bronx. Defendant MHS offers healthcare services to residents of Bronx County and Westchester County in conjunction with Defendants MMC and MMG.

II. Jurisdiction and Choice of Law

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332. There is diversity among the parties and the amount in controversy exceeds $75,000.

The parties apparently agree that New York law applies in this case.

III. The Incident

In or around January 2009, the terms of Plaintiff's health insurance coverage changed. She needed to undergo a physical examination and obtain a referral from her primary care physician, Dr. Richard Saulle ("Dr. Saulle"), in order to continue receiving coverage for psychiatric treatment and anti-depressant medication. Plaintiff scheduled an appointment with Dr. Saulle for January 30, 2009 at Defendants' Grand Concourse facility in the Bronx.

At the January 30 appointment, Dr. Saulle told Plaintiff that he needed to perform a "gynecological pelvic examination" as part of her physical examination. Plaintiff and Dr. Saulle

were alone in the examination room, despite Defendants' "spoken," albeit unwritten, policy requiring the presence of a chaperone when a male physician carries out an intimate physical examination of a female patient. (Deposition of Dr. Donald Raum ("Raum Depo.") at 59:24-60:24.) Plaintiff was confused and told Dr. Saulle that she had had a pelvic examination less than two weeks earlier. When Dr. Saulle insisted, Plaintiff complied with his request. Dr. Saulle then allegedly instructed Plaintiff to get on her hands and knees on the examination table, at which point "he proceeded to digitally penetrate [Plaintiff's] vagina and anus multiple times for his own sexual gratification." (Compl. ¶ 9.) Immediately thereafter, Plaintiff reported the incident to Defendants.

Defendants removed Dr. Saulle from duty and launched an investigation into the incident. Dr. Saulle was ultimately terminated because of his failure to participate truthfully in the investigation.

Plaintiff also filed a complaint against Dr. Saulle with the New York State Department of Health State Board for Professional Medical Conduct. Dr. Saulle was charged with seven counts of professional misconduct, all of which were resolved by consent decree. (*See* Rodgers Affirm., Ex. 6.)

IV. Procedural History

Plaintiff filed suit against Defendants on January 26, 2012, alleging negligence and breach of fiduciary duty. An initial conference was held before me on March 22, 2012, at which I made the following rulings: (1) Plaintiff was permitted to proceed under a pseudonym; (2) Plaintiff was given a week to inform Defendants whether her negligence theory was based on negligent hiring or negligent supervision/retention; (3) Defendants were given three weeks to produce material relevant to their summary judgment motion, and to appoint a knowledgeable

30(b)(6) witness for Plaintiff to depose; and (4) Defendants were to make their motion for summary judgment two weeks after these discovery materials were turned over to Plaintiff. (*See* Docket, Mar. 22, 2012 Minute Entry.) No other discovery was authorized.

On March 29, 2012, Plaintiff sent a letter to Defendants, clarifying that her negligence claim was based on a negligent supervision/retention theory. (Rodgers Affirm., Ex. 5.) On May 10, Defendants moved for summary judgment. Defendants' 30(b)(6) witness, Dr. Donald Raum, was deposed on June 15.

DISCUSSION

I. Standard of Review

A party is entitled to summary judgment when there is "no genuine issue as to any material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247–48 (1986). On a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the nonmoving party must present "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson*, 477 U.S. at 248.

To withstand a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmoving party. Summary judgment is designed to flush out those cases that are predestined to result in directed verdict. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997).

II. Dr. Saulle Did Not Have a Known Propensity to Engage in Sexual Misconduct

"To state a claim for negligent supervision or retention under New York law, in addition to the standard elements of negligence, a plaintiff must show: (1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels." *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004) (internal citation and quotation marks omitted). In other words, "A claim for negligent supervision or retention arises when an employer places an employee in a position to cause *foreseeable* harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee." *Vione v. Tewell*, 820 N.Y.S.2d 682, 687 (New York Co. Sup. Ct. 2006) (citing *Sheila C. v. Povich*, 781 N.Y.S.2d 342 (1st Dep't 2004); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791 (2d Dep't 1997)) (emphasis added).

Defendants concede the first and third elements of the *Ehrens* test. (Defs.' Support Memo. at 10 n. 4.) Neither Plaintiff nor Defendants addresses directly the "standard elements of negligence"; however, the parties appear to agree that "a hospital has a duty to protect persons

lawfully present on its premises from the reasonably foreseeable criminal or tortious acts of third persons" and that "A hospital also has a special duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety." *Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 823 N.Y.S.2d 463, 463 (2d Dep't 2006) (internal quotation marks omitted).

Accordingly, Plaintiff's negligent supervision/retention claim comes down to whether Dr. Saulle had a propensity toward sexual misconduct and whether Defendants were or should have been aware of that propensity. *See Murphy v. Metropolitan Transp. Auth.*, 548 F. Supp. 2d 29, 42 (S.D.N.Y. 2008). Put differently, this case comes down to the foreseeability of Dr. Saulle's sexual misconduct, which depends in turn on the parties' competing visions of Dr. Saulle. *See Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255, 261 (S.D.N.Y. 2010) (*citing Vione*, 820 N.Y.S.2d at 687). Both sides have submitted substantial documentation in support of their particular vision, but the dispute is a simple one.

Plaintiff argues that Dr. Saulle was a ticking time bomb, as evidenced by a series of emails, pulled from Dr. Saulle's employment file, and dating from approximately 2004 to 2008. According to Plaintiff, the emails demonstrate that Defendants knew of Dr. Saulle's "aggressiveness, unpredictability[,] . . . delusional paranoia[, and] need of mental health intervention." (Pl.'s Opp'n at 2; *see also* Pl.'s 56.1 Stmt, Add'l Mat'l Facts ¶¶ 1-9.) Defendants' "express awareness" of Dr. Saulle's "repeated bizarre behaviors" made it foreseeable that he "would commit an assault in the workplace." (Pl.'s Opp'n at 2.)

Defendants, for their part, argue that they had no reason to suspect that Dr. Saulle had a propensity toward sexual misconduct, as evidenced by a long and, for the most part, exemplary medical career free of complaints of professional misconduct, let alone complaints of sexual

assault. (*See* Defs.' 56.1 Stmt ¶¶ 7-25.) Defendants also dismiss the incidents described in the emails from Dr. Saulle's personnel file as "episodic and largely administrative and/or interpersonal with respect to his interactions with MMG staff." (*Id.* ¶ 17.)

Having reviewed the emails upon which Plaintiff relies, I agree that they tend to demonstrate Dr. Saulle's aggressiveness, unpredictability, delusional paranoia, and possible need of mental health intervention. What they do not reveal, however, is any propensity toward sexual misconduct, and a reasonable jury could not find otherwise. While Plaintiff is entitled to all reasonable inferences in her favor as the non-movant, *Matsushita*, 475 U.S. at 587, it is simply too much of a leap to infer a known risk of sexual assault from emails that merely demonstrate a man's increasingly erratic and bizarre behavior in the workplace. That some of Dr. Saulle's inappropriate conduct was apparently directed at his female colleagues does not alter this conclusion, because nothing suggests that it was at all sexual in nature.

Instead, this case falls squarely within the negligent supervision/retention cases that Defendants cite. *See, e.g., Jackson v. New York Univ. Downtown Hosp.*, 893 N.Y.S.2d 235 (2d Dep't 2010) ("*Jackson II*"); *Travis v. United Health Services Hospitals, Inc.*, 804 N.Y.S.2d 840 (3d Dep't 2005); *Mataxas v. N. Shore Univ. Hosp.*, 621 N.Y.S.2d 683 (2d Dep't 1995). Each of these cases involved a hospital employee accused of sexual misconduct, and, in each case, summary judgment was granted in favor of the hospital defendant, because, as here, there was no evidence in the record from which a juror could reasonably infer a known propensity toward sexual misconduct. *See Jackson v. New York Univ. Downtown Hosp.*, 856 N.Y.S.2d 24, 24 (Kings Co. Sup. Ct. 2007), *aff'd*, 893 N.Y.S.2d 235 (2d Dep't 2010) ("*Jackson I*"); *Travis*, 804 N.Y.S.2d at 842; *Mataxas*, 621 N.Y.S.2d at 685.

Plaintiff attempts to restyle the dispute by asserting that the emails demonstrate a genuine risk that Dr. Saulle would commit *an assault* – i.e., a violent act, broadly defined to include a sexual assault – in the workplace. The case law on negligent supervision/retention suggests that, to prevail on such a claim, the plaintiff must prove that the employer defendant was or should have been aware of the *specific* conduct at issue. *See, e.g., Kirkman by Kirkman v. Astoria Gen. Hosp.*, 611 N.Y.S.2d 615, 616 (2d Dep't 1994) (employer must have "knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm"); *Rodriguez v. United Transp. Co.*, 677 N.Y.S.2d 130, 132 (1st Dep't 1998) (employee accused of assault and rape, but "plaintiff offered nothing as to [the employee's] background that would have placed [the defendant] on notice of or alerted it to a potential propensity for violence or sexual abuse"). In other words, it would seem that a court faced with a negligent supervision/retention claim should not consider the employee's conduct at the highest level of generality. However, even assuming *arguendo* that I should treat the incident involving Dr. Saulle and Plaintiff as an assault, rather than a sexual assault, I still could not agree with Plaintiff that the emails demonstrate a propensity toward physical violence, and a reasonable jury could not conclude otherwise. While the emails reveal incidents in which Dr. Saulle apparently raised his voice, lost his temper, used (unspecified) "inappropriate body language," and was "absolutely out of control" (*see generally* Pl.'s 56.1 Stmt, Add'l Mat'l Facts ¶¶ 1-9), there is no indication that Dr. Saulle was ever physically violent with anyone.

In sum, then, there is no evidence in the record from which a reasonable juror could infer that Defendants knew or should have known that Dr. Saulle had a "propensity for violence or sexual abuse." *Rodriguez*, 677 N.Y.S.2d at 132. In other words, Dr. Saulle's conduct was not

foreseeable. Accordingly, Defendants' motion for summary judgment on Plaintiff's negligent supervision/retention claim is GRANTED.

III. Defendants' Chaperone Policy

Plaintiff argues that there is an issue of fact as to whether Defendants may be held liable for negligence due to (1) Dr. Saulle's undisputed violation of Defendants' chaperone policy and/or (2) "the failure of [the chaperone] policy to have a procedure or mechanism to assure its enforcement," such as having "a nurse, secretary or other employee in the doctor's office be assigned responsibility to enforce the chaperone policy." (Pl.'s Opp'n at 17.) I agree with Plaintiff's first argument and reserve judgment on her second until trial.

With respect to Plaintiff's first argument, in *Cucalon v. State*, 427 N.Y.S.2d 149, 152 (Ct. Cl. 1980), the New York Court of Claims held that the existence of a chaperone policy, requiring that female psychiatric patients be accompanied by female staff members, made a male hospital employee's rape of a female patient when they were alone in an examination room "completely foreseeable." Indeed, "Its foreseeability undoubtedly was one of the very reasons for the [chaperone policy]." *Id.* Accordingly, the Court of Claims granted summary judgment in favor of the plaintiff on her negligence claim, which was based on the state psychiatric hospital's failure to abide by statute and state and hospital regulations. *Id.* at 152-53.

Similarly, in *Avitia v. United States*, the Ninth Circuit, applying California tort law, noted the following with respect to the chaperone policy at issue:

> The chaperone policy at the clinic at the time the complained-of [sexual] assault took place was put in place in part to ensure patient safety. It is no stretch of imagination that such safety concerns would include the prevention of the kind of inappropriate conduct complained of here. If the policy was put in place to prevent such conduct, the assault was foreseeable and [the doctor's] intentional conduct [(i.e., the alleged sexual assault)] did not supersede the negligent acts of the clinic and [clinic employee (i.e., non-enforcement of the chaperone policy)].

24 F. Appx. 771, 774-75 (9th Cir. 2001).

Here, Defendants' 30(b)(6) witness, Dr. Raum, conceded, at his deposition, that one of the reasons that Defendants have a chaperone policy is to "incidentally discourage [sexual assault] from occurring." (Raum Depo. at 59:3-5.) Thus, Plaintiff's claim falls squarely within the reasoning of *Cucalon* and *Avitia*, and must be submitted to the jury.

With respect to Plaintiff's second argument, Defendants are correct that, ordinarily, expert testimony is required to determine whether a given policy is consistent with customary practice and/or industry standards. *See Diaz v. New York Downtown Hosp.*, 731 N.Y.S.2d 694 (1st Dep't 2001) *aff'd*, 99 N.Y.2d 542 (2002). However, as noted above, I limited discovery in this case, and thus Plaintiff has had no opportunity to retain such an expert. (*See* Docket, Mar. 22, 2012 Minute Entry.)

Dr. Raum testified that it falls to the physicians to abide by Defendants' chaperone rule – i.e., no third party ensures that female patients are given the option of a chaperone when a male physician is to carry out an intimate physical examination: "At the time a chaperone is needed, it is the physician's responsibility to have the chaperone into the room . . . . I can testify about my own practice, which is when I realized there will be such an exam that will require a chaperone and the woman has consented verbally, I then call my front desk and alert my secretary that I will need a chaperone." (*Id.* at 71:2-14.) I cannot decide, on this record, whether Defendants' chaperone policy falls below customary practice and/or industry standards. The issue will be readdressed at trial.

IV. Plaintiff's Breach of Fiduciary Duty Claim is Dismissed

Defendants argue that Plaintiff's breach of fiduciary duty claim should be dismissed as a matter of law, because it is "premised on and supported by the same allegations set forth to support her claim of negligent supervision and retention." (Defs.' Support Memo. at 15.) This is an accurate portrayal of Plaintiff's complaint. *Compare* Compl. ¶¶ 14-20 *to* ¶¶ 21-26.

In support of their argument, Defendants rely on *Padilla v. Verczky-Porter*, in which the Fourth Department dismissed a breach of fiduciary duty claim described as "duplicative of" the plaintiff's medical malpractice and negligent hiring/supervision claims.[2] 885 N.Y.S.2d 843, 843 (4th Dep't 2009). However, Plaintiff is correct in pointing out that the *Padilla* court's dismissal of the breach of fiduciary duty claim appears to have been based on its earlier finding, with respect to the plaintiff's medical malpractice and negligent hiring/supervision claims, that there was no evidence that the hospital defendants "were aware of [the accused doctor's] alleged sexual relationship with plaintiff, or that [the accused doctor's] actions were reasonably foreseeable." *Id.* Because the breach of fiduciary duty claim was "duplicative of" plaintiff's other claims, "the same reasoning applie[d] to that cause of action as well, requiring its dismissal." *Id.* In other words, contrary to the proposition Defendants cite *Padilla* for, the Fourth Department dismissed the breach of fiduciary duty claim on the merits, not because it was based on the same set of operative facts and sought the same relief as the plaintiff's negligent hiring/supervision claim.

---

[2] Defendants also cite to cases that stand for the proposition that a breach of fiduciary claim must be dismissed as duplicative where it is based on the same operative facts and seeks the same relief as a claim for legal malpractice. *See Northwind v. Rowland*, 584 F.3d 420, 432-33 (2d Cir. 2009); *Flycell, Inc. v. Schlossberg LLC*, No. 11 Civ. 915, 2011 WL 5130159, at *8 (S.D.N.Y. Oct. 28, 2011). No malpractice has been alleged here.

I recognize that there is some tension in deciding, on the one hand, that Dr. Saulle's conduct was not foreseeable for the purposes of a negligent supervision/retention claim and, on the other hand, that Defendants' chaperone policy very likely made Dr. Saulle's conduct foreseeable for the purposes of Plaintiff's negligence claim. However, *Padilla* plainly equates the foreseeability requirement of a negligent supervision/retention claim with that of a breach of fiduciary duty claim. Accordingly, because I have already determined that Dr. Saulle's conduct was not sufficiently foreseeable to support a negligent supervision/retention claim, Plaintiff's breach of fiduciary duty claim must also fail. Thus, Defendants' motion for summary judgment on Plaintiff's breach of fiduciary duty claim is GRANTED.

V. Punitive Damages

Defendants argue that Plaintiff is not entitled to punitive damages as a matter of law, and thus Plaintiff's request for such damages should be dismissed. Plaintiff counters that it would be premature to strike her "claim" for punitive damages, because discovery might reveal that Defendants acted in a sufficiently outrageous manner to justify such damages. Both sides seem to be under the misapprehension that punitive damages are a cause of action, when they are in fact a remedy. *See Pyatt v. Raymond*, No. 10 Civ. 8764, 2011 WL 2078531, at *10 (S.D.N.Y. May 19, 2011) *aff'd*, 462 F. Appx. 22 (2d Cir. 2012), *as amended* (Feb. 9, 2012). Nevertheless, I agree with Plaintiff that it is indeed premature to preclude the possibility of punitive damages. I will decide at the conclusion of trial whether to charge the jury on this extraordinary remedy.

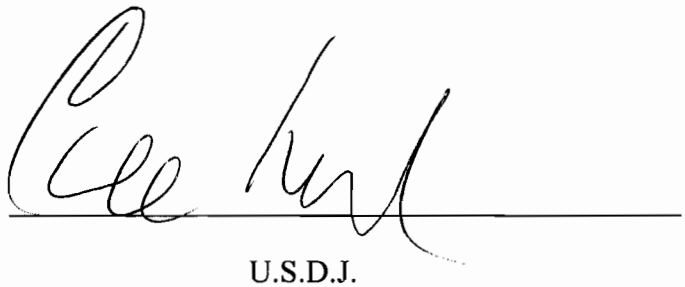
CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment is GRANTED in part and DENIED in part.

The parties must submit a joint pretrial order, in accordance with the Court's individual rules, by March 21, 2013.

The Clerk of the Court is directed to remove the motion at Docket No. 11 from the Court's list of pending motions.

Dated: February 19, 2013



U.S.D.J.

BY ECF TO ALL COUNSEL