IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STANLEY JOHNSON,	:	
	:	1:19-CV-1877
Plaintiff,	:	
	:	Hon. John E. Jones III
	:	
v.	:	
	:	
JEFFREY LUTTON, M.D., *et al*.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

June 10, 2020

Presently pending before the Court is Defendant Summit Physician Services d/b/a Summit Orthopedic Group's Motion to Dismiss and Strike Portions of Plaintiff's Complaint ("the Motion"). (Doc. 22). The Motion has been briefed, (Docs. 23, 25), and the time for filing a Reply has passed. Accordingly, the matter is ripe for disposition. For the reasons that follow, the Motion shall be denied.

I. BACKGROUND

In accordance with the standard of review applicable to a motion to dismiss, the following facts are derived from Plaintiff's complaint and viewed in the light most favorable to him.

Between January 18, 2017 and October 25, 2018, Defendant Dr. Jeffrey Lutton ("Dr. Lutton") performed a right hip replacement surgery, a left hip

replacement surgery, and a surgical excision of heterotopic ossification on Plaintiff Stanley Johnson ("Plaintiff") at Wellspan Chambersburg Hospital ("Chambersburg Hospital"), a hospital with a history of higher-than-normal Methicillin-Resistant Staphylococcus Aureus ("MRSA") infection rates. (Doc. 1 at ¶¶ 15, 17, 19, 22, 30). Following the heterotopic ossification surgery, Plaintiff developed a MRSA infection which resulted in a series of life-threatening medical issues. (*Id*. at ¶ 16). According to Plaintiff, Dr. Lutton and his staff were responsible for the injurious consequences of his infection because they recommended a surgery that was contraindicated for an immunocompromised patient like Plaintiff, (*id*. at ¶ 25), they failed to conduct proper pre-surgery screens for MRSA, (*id*. at ¶ 31), they failed to appropriately inform him of the risks associated with removal of the heterotopic ossification, (*id*. at ¶ 36–41), they failed to install a drainage line during surgery, (*id*. at ¶ 43), and then they failed to appropriately follow-up during post-operative visits. (*Id*. at ¶¶ 49, 60, 61, 73, 92–99).

On October 29, 2019, Plaintiff filed a three-Count Complaint in this Court. (Doc. 1). In Count I, Plaintiff asserts a negligence claim against all Defendants including Dr. Lutton, Chambersburg Hospital, Dr. Lutton's practice group—Defendant Summit Physician Services d/b/a Summit Orthopedic Group ("Summit Orthopedic Group")—and Defendant Wellspan Summit Health. In Count II, Plaintiff asserts a corporate negligence claim against Chambersburg Hospital,

Summit Orthopedic Group, and Wellspan Summit Health, alleging that they breached their non-delegable duty to enforce appropriate policies and procedures to ensure patient safety by failing to provide sterile environments for surgeries, by failing to maintain a facility free of MRSA, by failing to require physicians to perform pre-surgery MRSA screenings, by failing to properly credential physicians like Dr. Lutton, by failing to require physicians to personally examine patients post-operation, and by failing to have proper informed consent procedures in place. In Count III, Plaintiff alleges that Dr. Lutton failed to disclose to him the facts and risks of performing the heterotopic ossification removal and, had he been appropriately informed of the same and/or potential alternative treatments, he would not have undergone the procedure which ultimately resulted in his injuries.

On February 18, 2020, Dr. Lutton and Summit Orthopedic Group filed a motion dismiss and strike Count II as against Summit Orthopedic Group. (Doc. 22). For the reasons that follow, the Motion shall be denied.

II. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d

361, 374 n.7 (3d Cir. 2002)). In resolving a motion to dismiss pursuant to Rule 12(b)(6), a court generally should consider only the allegations in the complaint, as well as "documents that are attached to or submitted with the complaint . . . and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirement of Federal Rules of Civil Procedure 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that "raise a right to relief above the speculative level . . . ." *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). The complaint must indicate that defendant's liability is more than "a sheer possibility." *Iqbal*, 556 U.S. at 678.

III. DISCUSSION

In the only issue raised in its motion and accompanying brief, Summit Orthopedic Group contends that corporate negligence claims against a physician practice group are "inconsistent with" Pennsylvania law and that the corporate negligence claim outlined in Count II must be dismissed as against Summit Orthopedic Group, Dr. Lutton's physician practice group. According to Summit Orthopedic Group, Pennsylvania courts have "steadfastly refused" to apply corporate negligence claims against physician practice groups that have "not assumed the role of a 'comprehensive health center.'" (Doc. 23 at 5 (citing *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55 (Pa. Super. 2004)). Here, Summit Orthopedic Group reasons, "the lack of any substantive facts pleaded which support the notion that" it assumed the role of a comprehensive health center undermines the application of a corporate negligence claim against it and Count II as against Summit Orthopedic Group must be dismissed. (*Id.*). We disagree.

In *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991), the Pennsylvania Supreme Court concluded that a hospital owed an independent non-delegable duty to its patients to use reasonable care in maintaining its facilities and equipment, in selecting and overseeing its staff, and in creating and enforcing its policies which bear on patient care. *Id*. at 708. Looking to Section 323 of the Restatement (Second) of Torts, the Court took "a step beyond the hospital's duty of care

delineated [in earlier precedent] in full recognition of the corporate hospital's role in the total health care of its patients" and adopted, "as a theory of hospital liability[,] the doctrine of corporate negligence or corporate liability under which the hospital is liable if it fails to uphold the proper standard of care owed its patient." *Id*. (citing RESTATEMENT (SECOND) OF TORTS 2d § 323 (1965)).

Over the next ten years, courts in Pennsylvania struggled to determine whether this non-delegable duty applied to entities that could not fairly be characterized as "hospitals." *Shannon v. McNulty*, 718 A.2d 828, 835 (Pa. Super. 1998) (discussing the application of *Thompson* to HMO's); *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55 (Pa. Super. 2004) (discussing the application of *Thompson* to a physician's office); *Hyrcza v. W. Penn Allegheny Health Sys., Inc*., 978 A.2d 961, 981 (Pa. Super. 2009) (discussing the application of *Thompson* to a physiatrist). Relevant here, because *Thompson* cryptically acknowledged a "corporate hospital's role in the total health care of its patients," some Pennsylvania courts focused their analysis upon whether the medical corporation at issue assumed the role of a "comprehensive health center" in order to determine whether that entity owed the non-delegable duty outlined in *Thompson*. *See Sutherland*, 856 A.2d at 55.

In 2012, the Pennsylvania Supreme Court issued its decision in *Scampone v. Highland Park Care Center, LLC*, 57 A.3d 582 (Pa. 2012). In *Scampone*, the

Pennsylvania Supreme Court rejected the appellant hospital's efforts to limit the duty owed by a medical corporation under *Thompson* to just hospitals that coordinate the total healthcare of its patients. Rather, the *Scampone* Court held that whether a duty of care is owed by a medical corporation to a patient is a function of the specific relationship between the entity and the patient at issue and that such a duty is not a function of the breadth of the role the hospital assumes in a patient's care more generally. *Id*. at 600–605 (citing *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000)). In so concluding, the *Scampone* Court criticized the Superior Court's analysis in *Sutherland* which "focus[ed] on distinctions in types and quantity of services provided." *Id*. at 606. Instead, the *Scampone* Court recommended, lower courts should evaluate whether the facts of the case before them establish that a duty of care exists between the healthcare entity and the patient "by application of Section 323 of the Restatement or by application of the *Althouse* factors." *Id*. Because no intervening decision has supplanted *Scampone*, as it stands, the "key" to the test for corporate liability in the medical context "is the relationship between the plaintiff-patient and the corporate defendant" as outlined in Section 323 of the Restatement and the *Althaus* factors. *McClure v. Parvis*, 294 F. Supp. 3d 318, 328 (E.D. Pa. 2018). A hospital, therefore, may owe a non-delegable duty of care to its patient even if the hospital does not serve as a "comprehensive health center." *Id.*

In the instant case, Summit Orthopedic Group addresses neither Section 323 of the Restatement nor the *Althaus* factors. Rather, relying upon *Sutherland*—a case whose analysis has been rejected by the Pennsylvania Supreme Court—it emphasizes that claims against physician practice groups are "inconsistent with" Pennsylvania law where the plaintiff does not adequately allege that the defendant medical corporation assumed the role of a comprehensive health center. However, in finding that the reasoning of the case upon which Summit Orthopedic Group relies has been rejected by the Pennsylvania Supreme Court, *see Scampone*, 57 A.3d at 606; *McClure*, 294 F.Supp.3d at 328, we are compelled to deny Summit Orthopedic Group's motion premised thereon.

Perhaps had Summit Orthopedic Group referenced Section 323 of the Restatement or the *Althouse* factors in its brief, we would have been drawn to review whether Plaintiff's corporate negligence claim as against Summit Orthopedic Group was sufficient to survive a motion to dismiss. However, because Summit Orthopedic Group's argument in that vein remains entirely undeveloped, we are not compelled to make arguments on its behalf and find the matter waived. *Conroy v. Leone*, 316 F. App'x 140, 144 n.5 (3d Cir. 2009); *Clay v. Holy Cross Hosp*., 253 F.3d 1000, 1002 n.1 (7th Cir. 2001) (holding that perfunctory and undeveloped arguments, and arguments unsupported by pertinent authority, are waived).

IV. CONCLUSION

For the foregoing reasons, Defendant Summit Physician Services d/b/a Summit Orthopedic Group's Motion to Dismiss and Strike Portions of Plaintiff's Complaint, (Doc. 22), shall be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant Summit Physician Services d/b/a Summit Orthopedic Group's Motion to Dismiss and Strike Portions of Plaintiff's Complaint, (Doc. 22), is **DENIED**.

/s/ John E. Jones III
John E. Jones III, Chief Judge
United States District Court
Middle District of Pennsylvania