

Sammut v Southside Hospital

2012 NY Slip Op 31161(U)

April 27, 2012

Sup Ct, Suffolk County

Docket Number: 06-21437

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-22-11 (#009)
MOTION DATE 12-15-11 (#010)
ADJ. DATE 2-21-12
Mot. Seq. # 009 - MG; CASEDISP
010 - MG

-----X
NORMAN A. SAMMUT, Executor of the Estate :
of CHRISTINE DOOLEY, deceased, :
 :
Plaintiff, :
 :
 :
-against- :
 :
 :
SOUTHSIDE HOSPITAL, DATA LONGJOHN, :
M.D., TERRY PALATT, M.D. and ALEXANDER :
A. SHUKIS, M.D., :
 :
Defendants. :
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Terry Palatt, M.D., dated October 21, 2011, and supporting papers 1-10); (2) Notice of Cross Motion by the defendant Data Longjohn, M.D., dated November 23, 2011, supporting papers 11-26; (3) Affirmation in Opposition by the plaintiff, dated January 12, 2012, and supporting papers 27-29; (4) Reply Affirmation by the defendant Data Longjohn, M.D., dated February 22, 2012, and supporting papers 30-32; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (009) by the defendant, Terry Palatt, M.D., pursuant to CPLR 3217(b) for the Court to “so order” the stipulation of discontinuance and for dismissal of the complaint, is granted, to the extent that the complaint is dismissed as asserted against him, and it is further

ORDERED that motion (010) by the defendant, Data Longjohn, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted, and the complaint is dismissed with prejudice as asserted against Data Longjohn, M.D.

In this action for medical malpractice, the plaintiff, Norman A. Sammut as executor of the estate of Christine Dooley seeks to recover for the personal injuries suffered by Ms. Dooley as a result of the negligence of all the defendants. A second cause of action for the decedent’s wrongful death has been asserted against defendant Data Longjohn, M.D. It is claimed that the defendants failed to timely diagnose and properly treat the decedent for laryngeal cancer, causing the cancer to metastasize, causing her to sustain loss of speech, and to suffer a tracheotomy and multiple hospitalizations, and proximately causing her pain and suffering and wrongful death on April 9, 2007.

In motion (009), defendant Terry Palatt, M.D. seeks an order granting dismissal of the action as asserted against him on the basis that the plaintiff has discontinued the action with prejudice as asserted against him. The stipulation of discontinuance, dated May 18, 2011, is signed by counsel for the plaintiff, and on behalf of defendants Terry Palatt, M.D. and Alexander A. Shukis, M.D. The stipulation of discontinuance has not been signed by defendants Southside Hospital or Data Longjohn, M.D., although they were served with a copy of the stipulation and a letter requesting that the stipulation of discontinuance be signed. Counsel affirms that stipulations of discontinuance were given by the plaintiff to Dr. Terry Palatt and Dr. Alexander Shukis. It is noted that the complaint of this action was previously dismissed as asserted against defendant Southside Hospital.

No party has opposed this application pursuant to CPLR 3217 (b) to have the stipulation of discontinuance with prejudice “so ordered” by this court. It is noted in reviewing the answers served by the defendants, that no party has asserted a cross claim in their respective answers. It is further noted that no party, except Data Longjohn, M.D. has opposed the motion (010) for summary judgment, however, defendant Longjohn has not opposed the instant application. There has been no showing of prejudice to a substantial right to any party, special circumstances, or improper consequences to the granting of a voluntary discontinuance (*see Perraguire v 27th Street Holding, LLC*, [2d Dept 2007]; *Eugnia VI Venture Holdings, Ltd. v mapleWood Equity Partners, L.P.*, 38 AD3d 264, 832 NYS2d 155 [1st Dept 2007]).

Accordingly, motion (009) is granted to the extent that the action is discontinued with prejudice as asserted against Terry Palatt, M.D.

In motion (010), the defendant, Data Longjohn, M.D. seeks summary judgment dismissing the complaint on the bases that there was no delay in diagnosing and treating the decedent’s condition in that she did not display the constellation of symptoms associated with laryngeal cancer so as to warrant a work up for cancer; and thus that Dr. Longjohn did not proximately cause the injuries and death of the decedent as alleged.

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 eliminate any material issues of fact

from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this application, Dr. Longjohn has submitted, inter alia, an attorney’s affirmation; the expert affirmation of Lori Ann Attivissimo, M.D. dated November 23, 2011; copies of the summons and complaints for the consolidated actions, amended and further amended complaint; defendants’ respective answers, and plaintiff’s verified bill of particulars; copies of Dr. Longjohn’s office records, records concerning the plaintiff’s decedent’s various admissions to Southside Hospital; the unsigned and uncertified transcripts of the examinations before trial of decedent Christine Dooley dated February 23, 2007, Data Longjohn, M.D. dated September 30, 2009, the unsigned but certified transcripts of the examinations before trial of non-party Theresa Hall dated May 9, 2008 and continued February 9, 2009, Michael Dooley dated December 17, 2008, Norman Sammut dated April 14, 2009, Gary Levitt dated August 19, 2010, and Terry Palatt, M.D. dated December 15, 2010.

The unsigned but certified transcripts of the examinations before trial of Norman Sammut is considered as unopposed by the plaintiff (*Rodriquez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). The unsigned and certified deposition transcripts of the non-party witnesses, Theresa Hall and Michael Dooley, and the unsigned and uncertified transcript of decedent, Christine Dooley, are not in admissible form (see *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and are not considered on this motion. While the unsigned and uncertified deposition transcript of Data Longjohn is unsigned¹, it is considered by this court as adopted as accurate by the moving defendant (see *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420[1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [2d Dept 1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the

¹ A signed and certified copy of the transcript of the examination before trial of Dr. Longjohn has been submitted with the reply.

ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3d Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 (2d Dept 1998), *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In reviewing the admissible evidentiary submissions, along with the affirmation of defendant's expert physician, Lori Ann Attivissimo, M.D., it is determined that Dr. Longjohn has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

Dr. Longjohn testified to the extent that she is not certified in any area of medicine, and in 2005, she was licensed to practice medicine in New York, was affiliated with Southside Hospital as an attending physician, and had a private office to treat patients. She first treated Christine Dooley on October 20, 2005 in the emergency room at Southside Hospital and again on November 8, 2005. She was also the admitting physician for the decedent's hospitalization at Southside Hospital from April 14, 2006 to June 24, 2006. She saw the decedent in her office on December 6, 2005 and February 28, 2006. She set forth her care and treatment of the decedent, including signs and symptoms, findings upon testing, and consultations she requested on behalf of the decedent. The decedent reported a history of smoking, ETOH consumption and drug abuse. The admission to Southside Hospital from April 14, 2006 through June 24, 2006, was for cancer of the larynx. Dr. Longjohn had no opinion within a reasonable degree of medical certainty as to whether, when she saw the decedent in October 2005, she had cancer of the throat. She believed that, in April 2006, the decedent had stage 3 or 4 cancer, which was metastatic.

Dr. Terry Palatt testified to the extent that he is board certified in general and thoracic surgery and is licensed to practice medicine in New York. He was an attending physician on staff at Southside in 2005 as a private surgeon who takes calls in the emergency room and sees patients on consult. On October 26, 2005, having been requested by Dr. Longjohn to see the decedent, he performed a video-assisted thoracic surgery for empyema of the decedent's right chest, performed decortication, and took multiple biopsies of the pleura which revealed she had an infection in her chest. He does not treat laryngeal cancer, and does not stage cancer. He did not see the decedent after her discharge from the hospital.

Dr. Alexander Shukis, M.D. testified to the extent that he is a physician who is board certified in anesthesiology, is a partner in South Bay Anesthesia Associates, and was a private attending at Southside Hospital in 2005. He was the anesthesiologist for the procedure conducted by Dr. Terry Palatt on October 26, 2005. He utilized a laryngoscope to intubate the decedent, and in so doing, exposed the opening of the glottis, the opening into the patient's trachea. The larynx is not visualized, but the entry point to the larynx can be observed. There was no further questioning of Dr. Shukis.

Stacey Weber testified to the extent that she was employed by Southside Hospital as an emergency room physician at Southside Hospital on February 16, 2006. She is licensed to practice medicine in New York, and is board certified in emergency medicine and pediatric emergency medicine, and has a lapsed certification in pediatrics. When the decedent presented to the emergency department, she complained of pharyngitis (sore throat) and cough with an onset of one month, she had a temperature of 100.4. She was examined, given a prescription for an antibiotic, and was discharged with instructions. At the time of that visit, the decedent did not have drooling, dysphonia, dysphagia, or

shortness of breath. She also stated that the decedent stated that her throat pain was burning, and that she had some blood-tinged sputum. She described the examination she performed and her findings. She did not refer the decedent to a specialist.

Dr. Attivissimo affirms that she is a physician licensed to practice medicine in New York, and is board certified in internal medicine with sub-specialty certifications in hematology, medical oncology, and hospice and palliative medicine. She has set forth the various deposition transcripts, pleadings, and medical records she reviewed, and set forth an opinion with a reasonable degree of medical certainty that Data Longjohn, M.D. did not depart from good and accepted standards of medical practice in failing to diagnose the signs and symptoms of laryngeal carcinoma leading to delay in treatment, and did not proximately cause the injuries and death of the plaintiff's decedent.

Dr. Attivissimo set forth that the date of defendant Longjohn's alleged departures were from October 20, 2005 to November 8, 2005, and December 6, 2005, and February 28, 2006. She stated that the plaintiff's decedent was a 50 year old female with no significant past medical history and was ultimately diagnosed with advanced infiltrating moderately well differentiated squamous cell carcinoma of the larynx in April 2006. She had a history of tobacco and alcohol use. She first presented to Southside Hospital emergency room on October 20, 2005 with complaints of a productive cough, shortness of breath, fever and chills of a gradual onset, and was admitted with a diagnosis of right lower lobe pneumonia. She was started on antibiotics by Dr. Longjohn. During her admission, her chest x-ray demonstrated worsening pleural effusion, so Dr. Longjohn called for a pulmonary consult. A right pleural chest tube was inserted by interventional radiology. The pleural fluid was negative for malignant cells and showed a few inflammatory cells. After an infectious disease consult, antibiotics were changed. Upon cardiothoracic surgery consult, it was determined that she had empyema (accumulation of pus in the lung) which needed decortication, so on October 26, 2005, Dr. Terry Palatt performed a bronchoscopy and right thoracoscopy. No significant airway abnormalities were seen. She was weaned off the respirator, continued to improve, and was discharged.

On December 6, 2005, Dr. Longjohn saw the plaintiff's decedent in his office at which time she complained of a sore throat and difficulty swallowing for one week, but indicated that it resolved. On February 16, 2006, the decedent presented to Southside Hospital emergency department with complaints of a sore throat, voice changes, and hoarseness for a month. Her pharynx was slightly red, and there was thick/yellow pink sputum. She had no respiratory distress. She was not seen by Dr. Longjohn, but was seen by Dr. Stacey Weber, and discharged on antibiotics. On February 17, 2006, she returned to the emergency room at Southside Hospital, but was not seen by Dr. Longjohn. It was thought that she was reacting to the antibiotic, so the antibiotic was changed. An exam of her ears, nose, mouth, and pharynx was normal to inspection. Dr. Longjohn saw her on February 28, 2006 for cough for one week, slight blood tinged sputum, fever for a few days, and right ear pain. A chest x-ray was taken, and she was diagnosed with bronchitis/pharyngitis.

The plaintiff's decedent returned to Southside Hospital from April 14, 2006 to June 24, 2006, as she was coughing up blood. She had a constant sore throat. She had hoarseness, and a change in her voice and breathing, with audible upper airway noises. She admitted to extensive cocaine and marijuana use, but had not ingested cocaine for three days prior. She was under the care of Dr. Longjohn, but as Dr. Longjohn was going on vacation, the hospitalist, Dr. Weber, assumed the decedent's care and treatment. On April 19, 2006, a direct laryngoscopy revealed a tumor extending into the right lateral and posterior pharyngeal wall, completely consuming the right pyriform sinus, the esophageal introitus, the

right arytenoid and the false vocal cord, and the true vocal cord. Biopsies revealed well-differentiated squamous cell carcinoma. Chemotherapy was commenced with concurrent radiation for Stage T4a laryngocarcinoma. She was discharged from the hospital on June 24, 2006, and died on April 9, 2007.

Dr. Attivissimo opines that Dr. Longjohn did not depart from accepted standard of care, and did not proximately cause the plaintiff's injuries and death. She continues that by the time the decedent first saw Dr. Longjohn on October 20, 2005, the treatment options and outcome of the laryngeal cancer were unfortunately going to be the same, regardless of the timing of the diagnosis from that point forward. Dr. Attivissimo affirms that Dr. Longjohn performed the appropriate work up and evaluation, including consults, when the decedent was admitted to Southside in October 2005. She set forth the treatment provided by Dr. Longjohn. She continued that the decedent did not present with the typical signs and symptoms of laryngocarcinoma, such as odynophagia (pain on swallowing), mass sensation, referred ear pain, or hoarseness, and that it was not in the standard of care for Dr. Longjohn to have diagnosed laryngeal carcinoma. She set forth the bases for that opinion.

Dr. Attivissimo continued that on December 6, 2005, the decedent had a sore throat and difficulty swallowing for one week. She did not present signs or symptoms suggestive of laryngocarcinoma, and that it was not in the standard of care for Dr. Longjohn to have diagnosed laryngeal carcinoma at that time. She set forth the bases for that opinion. With regard to the issue of proximate cause, Dr. Attivissimo opined that on the visit of February 28, 2006, any diagnosis of laryngocarcinoma from October 20, 2005 to February 28, 2006, would not have changed the treatment options or eventual outcome for the decedent. Although the decedent was diagnosed with Stage IVA (T4a, Nx, MO) laryngeal cancer in April 2006, the stage, treatment, and prognosis would not have changed significantly, even if she had been diagnosed on October 20, 2005. With a high degree of medical probability, Dr. Attivissimo opined that on October 20, 2005, the decedent, at best, would have been a Stage III with a T3, NX, Mo lesion, based upon the growth characteristics of the type of moderately well-differentiated tumor with which she was diagnosed, which had an average growth rate. She continued that the treatment for Stage III and Stage IV disease is the same, and treatment for a supraglottic Stage IV lesion includes total laryngectomy with postoperative radiation and concurrent chemotherapy.

Based upon the foregoing, Data Longjohn, M.D. has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see *Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). In the instant action, the plaintiff's expert has failed to raise a triable issue of fact to preclude summary judgment from being granted to the moving defendant.

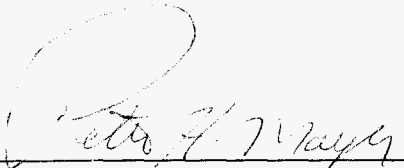
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The plaintiff's expert, Barry J. Benjamin, M.D., avers that he is licensed to practice medicine in Massachusetts and is a board certified otolaryngologist. He set forth the records and materials which he reviewed, and opined within a reasonable degree of medical certainty that based upon history and symptomatology, Dr. Longjohn should have referred Christine Dooley for otolaryngologic evaluation in a timely manner, and that the departure negatively affected her survival period, the possibility of a cure, and contributed to her death.

Based upon the bare and conclusory averments in Dr. Benjamin's affidavit, it is determined that plaintiff has not raised a factual issue to preclude summary judgment. In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a summary judgment motion (*see Alvarez v Prospect Hospital*, supra [1986]; *Garbowski v Hudson Valley Hospital Center*, 85 AD3d 724, 924 NYS2d 567 [2d Dept 2011]; *Simmons v Brooklyn Hospital Center*, 74 AD3d 1174, 903 NYS2d 521 [2d Dept 2010]). Here, Dr. Benjamin did not opine as to the standard of care, or when Dr. Longjohn should have referred the decedent to an otolaryngologist. He does not set forth the symptomatology, or history upon which he based his opinions. He has not supplied a basis for his opinion that the departure affected the decedent's survival period, possibility of a cure and contribution to her death.

Dated: _____

4/27/12



PETER H. MAYER, J.S.C.