

Carlin v Naidoo

2012 NY Slip Op 32459(U)

September 20, 2012

Supreme Court, Suffolk County

Docket Number: 08-30581

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 8-10-12

ADJ DATE 8-16-12

Mot. Seq. # 007 - MG

-----X
DANIEL CARLIN and JEANNE CARLIN,

Plaintiffs,

- against -

RAJENDRAN NAIDOO, M.D. , BARBARA
ROSE, L.P.N., and HUNTINGTON HOSPITAL
ASSOCIATION,

Defendants.
-----X

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Upon the following papers numbered 1 to 15 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 1-9; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 10-15; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (007) by the plaintiffs, Daniel Carlin and Jeanne Carlin, pursuant to CPLR 2221 (e) for leave to renew their prior motions (004) and (005) which resulted in this court's order dated March 24, 2011, and to consider plaintiffs' opposition papers which were not previously before the court, is granted, and the order dated March 24, 2011 is hereby recalled and vacated; and it is further

ORDERED that upon consideration of the prior motion, cross motion and opposition, the motion by defendant Rajendran Naidoo, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted with prejudice; and it is further

ORDERED that the motion by defendants Huntington Hospital and Barbara Rose pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is denied.

In motion (004), defendant Rajendran Naidoo, M.D. moved pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint. In motion (005), defendant Huntington Hospital s/h/a Huntington Hospital Association, and nurse Barbara Rose, moved for an order granting summary judgment dismissing plaintiff's complaint. Both applications were denied by this court's order dated March 24, 2011. No papers in opposition to defendants' motions were received prior to the issuance of said decision, and the court was unaware that the parties had agreed to an adjournment of the motions until May 5, 2011, after which time the plaintiffs' opposition was received. Thereafter, an appeal was filed of the March 24, 2011 order. The plaintiff moved, inter alia, to hold the appeal in abeyance, to strike the record on appeal as inadequate, and to enlarge their time to serve and file a brief. By decision and order dated May 23, 2012, the Appellate Division denied the motion. It is noted that in the brief submitted to the Appellate Division Second Department by Huntington Hospital and nurse Rose, counsel for the defendants acknowledged that numerous adjournments were granted on consent and that they received the plaintiff's opposition dated May 13, 2011.

The plaintiffs now seek renewal of the prior motions (004) and (005) on the basis that the parties consented to an adjournment of the motions to May 5, 2011, and therefore, their opposition was not considered by this court in its order of March 24, 2011. Defendants Huntington Hospital and Barbara Rose oppose this application on the basis, inter alia, that they would be deprived of the opportunity to serve a reply. However, it is noted that they did not seek to serve a reply after they received the order dated March 24, 2011, or upon receiving the plaintiffs' opposition, and do not seek permission to do so at this time.

Pursuant to CPLR 2221(e)(2), a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR 2221 (e) (3), a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," (*Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor*, 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]). Here, a basis for renewal has been demonstrated by the plaintiffs, as the parties had agreed to an adjournment of the motions, and on the ground that this court rendered a decision without considering the opposition papers submitted by the plaintiff and received by the defendants.

Accordingly, the plaintiff's application for renewal of motions (004) and (005) is granted, and this court's order dated March 24, 2011 is hereby recalled and vacated. Upon consideration of the plaintiffs' opposing papers, it is noted that the plaintiffs did not oppose defendant Rajendran Naidoo's motion (004) for summary judgment, and, in fact, submitted a stipulation of discontinuance dated April

18, 2011, wherein they agreed to discontinue the action against him. This stipulation was signed by counsel for defendant Naidoo and counsel for the plaintiffs. Said stipulation was not signed by counsel for defendants Huntington Hospital and Barbara Rose, as required pursuant to CPLR 3217. However, Huntington Hospital and nurse Rose did not object to such stipulation of discontinuance; they did not assert a cross claim against defendant Naidoo in their answer; and further, they did not submit any evidentiary submissions establishing any liability against defendant Naidoo.

Accordingly, upon consideration of the plaintiffs' opposition papers and the stipulation of discontinuance, that part of the prior order dated March 24, 2011, which denied summary judgment in motion (004) to defendant Naidoo is vacated, and summary judgment dismissing the complaint as asserted against him is granted, with prejudice.

This medical malpractice action is premised upon the alleged negligence of defendants, lack of informed consent, negligent hiring by the defendant Huntington Hospital, and a derivative claim on behalf of the plaintiff's spouse, relating to the care and treatment rendered to the plaintiff, Daniel Carlin, beginning on or about November 17, 2006 through about November 30, 2006. It is claimed that the defendants negligently performed knee surgery, failed to properly treat a hematoma, and otherwise departed from accepted standards of care causing the plaintiff to sustain a dislocation and permanent injury in his left knee after surgery.

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]).

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). 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 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 2d Dept 1996]). Except as to matters within the 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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In motion (005), defendants Huntington Hospital and Barbara Rose sought summary judgment dismissing the complaint on the bases that they bear no liability in this action in that nurse Barbara Rose did not depart from the standard of care in carrying out the verbal order of the physician; that although nurse Rose lifted the plaintiff's leg without the immobilizer in place, it was not a departure from the standard of care and did not cause or contribute to any injury to the plaintiff; that because a private physician managed the plaintiff's care and treatment, the hospital was not responsible for providing informed consent to the plaintiff; that no cause of action is stated with regard to the physical therapist and Ms. Rose for whom the plaintiff claims the hospital is vicariously liable; and that the plaintiff has failed to establish any evidence to support a claim against the hospital with regard to Dr. Naidoo's privileges. In support of said motion (005), Huntington Hospital and Barbara Rose submitted, inter alia, an attorney's affirmation; the moving defendants' answers, plaintiff's verified bill of particulars and supplemental bill of particulars; an uncertified copy of the plaintiff's hospital record; the affidavit of Barbara Rose; and the affirmation of Philip A. Robins, M.D.

Barbara Rose set forth in her supporting affidavit dated September 9, 2010, that she is a certified nursing assistant employed at Huntington Hospital. She stated that on the morning of November 24, 2006, she was asked by the orthopedic resident to place a pillow under Mr. Carlin's left leg, and that she did so by placing her hand under his ankle, gently raising his ankle and positioning a pillow so that Mr. Carlin's heel was resting on the pillow. She further stated that it is common to keep post-operative knee patients positioned in bed with the operative leg elevated on a pillow, as she had done on numerous patients prior to her care of Mr. Carlin.

It is noted, however, that Ms. Rose did not set forth the accepted procedure for raising a patient's knee postoperatively after the knee surgery for the purpose of placing the patient's leg on a pillow, whether or not she followed the proper protocol, and whether she properly supported the joints of the extremity she was lifting, thus creating a factual issue in her affidavit. These factual issues were not resolved by the affirmation of Philip A. Robins, M.D., submitted in further support of motion (005).

Philip A. Robins, M.D. set forth in his affirmation that he is board certified in orthopedic surgery. He set forth his opinions with a reasonable degree of medical certainty, as well as the plaintiff's status during his admission to Huntington Hospital. He noted that on November 19, 2006, an order was placed for an immobilizer which was to be applied to Mr. Carlin's left leg. On November 20, 2006, when the neurology consult was called, the neurologist's impression was that Mr. Carlin had a proximal peroneal palsy with inability to dorsiflex toes 2 to 5. Dr. Robins stated that Dr. Naidoo, noted in a subsequent note that there was an expanding hematoma with possible peroneal nerve compression for which he planned an incision and drainage which was performed later that day at which time a "massive hematoma" was found. Postoperatively, Mr. Carlin was permitted full weight bearing with the immobilizer in place, and he was to have a pillow under his ankle, and ice to his knee.

Dr. Robins stated that on November 22, 2006, a vena cava filter was placed, physical therapy and Heparin were to be held until the next day, and Mr. Carlin's heels were to be kept off the bed. The neurology consultation note indicated "probable left peroneal neuropraxia" with weakness mostly in ankle dorsiflexion. On November 23, 2006, Mr. Carlin was seen by the physical therapist who noted that weight bearing could be resumed as tolerated with the immobilizer, however, it was noted that Mr. Carlin was having "great difficulty" advancing his right lower extremity and maintaining an erect posture. The physician was contacted regarding resuming range of motion and CPM, and on November 23, 2006, Dr. Naidoo saw Mr. Carlin, held the CPM and permitted weight bearing with the immobilizer.

Dr. Robins continued that on November 24, 2006, Dr. Naidoo wrote in his note that Mr. Carlin was complaining of severe pain and reported that a nurse's aide "forcibly manipulated" his knee, resulting in sharp pain and deformity. Dr. Naidoo's initial impression included a rupture of the lateral collateral ligament and dislocation of the tibia or the fibula for which he thereafter performed a closed reduction under anesthesia reducing the dislocation. Post-operatively, he noted that there was extreme instability to posterior stress and also in the posterior capsule. Therefore, stated Dr. Robins, Dr. Naidoo performed a further left total knee revision and used a rotating hinged prosthesis. He stated Dr. Naidoo's operative report indicated extreme instability of the knee in the anteroposterior plane.

Dr. Robins opined that Huntington Hospital and Ms. Rose did not depart from accepted standards of care in that the doctor's orders only required the immobilizer with weight bearing and there was no order requiring that the immobilizer be kept in place at all times. Dr. Robins continued that the orthopedic resident did not deviate from the standard of care in ordering the placement of the pillow under Mr. Carlin's leg, heel or ankle as it is routine practice for patients who have undergone knee surgery. Dr. Robins further stated that Ms. Rose appropriately lifted Mr. Carlin's leg and properly followed the resident's instruction to place the foot on a pillow.

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (*Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]). It is determined that Ms. Rose's alleged actions were performed by her as an employee of the defendant hospital, acting within the scope of her employment. Therefore, Huntington Hospital would be liable for the act of its employee, if liability is found.

In turning to the issue of liability, it is determined that Dr. Robins' opinion that Ms. Rose properly lifted Mr. Carlin's leg is conclusory, as he did not set forth the proper procedure or protocol for lifting a leg after knee surgery and providing support to the joints and extremity. Likewise, no hospital procedure or policy has been submitted relative thereto, leaving it to this court to speculate as to the proper procedure to be followed, and the basis for Dr. Robins' opinion. Thus, Dr. Robins' affirmation does not resolve this factual issue. There was also no expert testimony submitted by any of the defendants opining that Ms. Rose's actions did not proximately cause the injury. Nor is there proof as to whether the instability in the knee referred to by Dr. Seideman and by Dr. Naidoo contributed to the dislocation of the plaintiff's knee when Ms. Rose lifted Mr. Carlin's leg to place the pillow.

Accordingly, the movants failed to set forth the cause of the plaintiff's knee dislocation sufficient to establish that the defendant hospital and nurse Rose did not proximately cause the plaintiff's injury. Thus, it is determined that Huntington Hospital and Ms. Rose have not establish prima facie entitlement to summary judgment dismissing the complaint against them, and their motion for summary judgment dismissing the complaint as interposed against them is denied.

If entitlement to summary judgment had been demonstrated by the defendant hospital and Ms. Rose, to rebut the prima facie showing of entitlement to an order granting summary judgment by the defendants, the plaintiffs 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]).

It was noted that Dr. Seideman, Dr. Naidoo's expert, set forth that on November 24, 2006, Dr. Naidoo noted that Mr. Carlin complained of severe pain following forcible manipulation of his knee by a nurse's aide at which time Mr. Carlin felt like something was pulled out from under his leg, there was a snap which he could hear, and then there was a horrifying pain. He stated that consequently, Mr. Carlin was returned to the operating room by Dr. Naidoo for a closed reduction under anesthesia due to a posterior dislocation and internal tibial rotation of his knee status "post a traumatic rupture of the lateral collateral ligament and dislocation of the tibia or femur."

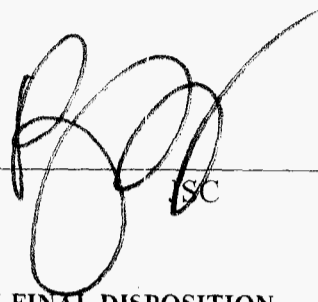
Plaintiffs' expert, a physician is licensed to practice medicine in New York, New Jersey, Pennsylvania and Florida, and is also board certified in orthopedic surgery. He set forth the materials and records reviewed and opined with a reasonable degree of medical certainty. He continued that the affidavit of Barbara Rose indicated that she visited Mr. Carlin on the morning of November 24, 2006 to place a pillow under his ankle, and that Mr. Carlin remembered somebody trying to move his leg, that his leg was "pulled or yanked", and that he immediately heard a snap and felt a sharp pain. It is the plaintiffs' expert's opinion that moving Mr. Carlin's leg without the use of an immobilizer permitted his joint to move as the necessary support was not provided. Such manipulation by Barbara Rose, he stated, was a departure from the standard of care. He continued that a posterior dislocation such as the type experienced by the plaintiff, did not happen spontaneously, and required a force for the knee to dislocate. He further stated that the order requiring the use of a 20 inch knee immobilizer was never discontinued, and as such, it should have never been removed from Mr. Carlin's left knee, especially when his leg was being moved. Failure to have the immobilizer in place when moving the leg permitted the joint to bend without the support from the immobilizer or necessary support. Thus, he concluded, the manipulation by Barbara Rose was a departure from the standard of care. As to proximate cause, the plaintiff's expert stated that the forcible manipulation of Mr. Carlin's leg by Barbara Rose was the cause for the dislocation. Thus, even if defendants Huntington Hospital and Barbara Rose had established prima facie entitlement to summary judgment, factual issues were raised by the plaintiffs precluding summary judgment.

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Based upon the foregoing, it is determined that the defendants Huntington Hospital and Barbara Rose failed to establish prima facie entitlement to summary judgment dismissing the complaint and that the plaintiffs have raised factual issues to preclude summary judgment on both the issue of departure from the standard of care by nurse Rose, and whether such departure from the standard of care was the proximate cause of the injury, dislocation of the plaintiff's knee, and sequella related thereto.

Accordingly, the motion by Huntington Hospital and Barbara Rose for summary judgment dismissing the complaint as asserted against them is denied.

Dated: 9/20/12


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 FINAL DISPOSITION X NON-FINAL DISPOSITION