

**Gaudio v AU\_cj JW**

2012 NY Slip Op 33097(U)

December 19, 2012

Supreme Court, Suffolk County

Docket Number: 09-45045

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 9-5-12  
ADJ. DATE 11-15-12  
Mot. Seq. # 001 - MG

**COPY**

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APRIL GAUDIO Individually and as  
administratrix of the estate of DARREN J.  
GAUDIO, Deceased,

Plaintiff,

- against -

CHRISTOPHER S. MATKOVIC, M.D.,  
MITCHELL G. KIRSCH, M.D., SUFFOLK  
NEPHROLOGY CONSULTANTS, P.C.,  
SUFFOLK NEPHROLOGY PLLC, NICOLAE  
SORIN CARAIANI, M.D. and ST. CATHERINE  
OF SIENA MEDICAL CENTER,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 16; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 17-18; 22-23; Replying Affidavits and supporting papers 19-21; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (001) by the defendant, St. Catherine of Siena Medical Center, pursuant to CPLR 3212 for summary judgment is granted, and the complaint and any cross claims asserted against it are dismissed, and the co-defendants are precluded from asserting the limited liability provisions provided by CPLR Articles §§ 14 and 16, and General Obligations Law §15-108.

In this medical malpractice action, the plaintiff, April Gaudio, as Administratrix of the Estate of Darren J. Gaudio, deceased, seeks damages personally and derivatively premised upon the negligent departures from the

accepted standards of medical care and treatment by the defendants; lack of informed consent; for the wrongful death of the plaintiff's decedent; a derivative claim on behalf of the plaintiff; and an additional cause of action as against St. Catherine of Siena Medical Center (St. Catherine) premised upon, inter alia, alleged negligent departures from the standard of care by its staff and employees, and wrongful hiring, supervision, and training of said personnel. It is asserted that the decedent came under the care and treatment of the defendants who failed to timely diagnose and treat the plaintiff's decedent for a myocardial infarction, in failing to timely and appropriately diagnose and treat him for an infection at the catheter site resulting in bacteremia and sepsis, and in diminishing his chances for survival.

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 [1999]). 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*, 224 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

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]).

In support of this application, the defendant St. Catherine has submitted, inter alia, an attorney's affirmation; affirmation of defendant's expert physician, Salvatore Scoma, M.D.; copies of the summons and complaint, its answer with various demands, co-defendants' answers, and plaintiff's verified and supplemental verified bills of

particulars; and copies of the transcripts of the examinations before trial of April McAlister Gaudio dated November 8, 2010, Christopher Matovic, M.D. dated July 12, 2011, Mitchell G. Kirsch dated September 20, 2011, Nicolae Caraiani, M.D. dated December 1, 2011, all of which are in admissible form; and a certified copy of the St. Catherine of Siena Medical Center hospital record.

A review of the hospital record indicates that Darren Gaudio was admitted to defendant St. Catherine's on September 2, 2008, through the emergency department, by his primary care physician Christopher Matkovic, M.D. His admitting diagnosis was severe sepsis. The discharge summary indicates that he was 41 year old male who had been in chronic renal failure, on hemodialysis via a PermCath since June 2008. Dialysis had been administered 24 hours prior to this admission through a maturing fistula in his right arm. On the morning of admission, he awoke at home with a shaking chill, and a temperature of 104. He was noted to have bluish discoloration of his ears and thorax which had been getting worse over the past year, and was positive for alkaptouria which was believed to be responsible for this discoloration. He denied any infectious exposure prior to this admission. He was noted to be alert, responsive, and oriented with a Port-A-Cath located on his right chest, with no inflammatory changes noted at the site of entry. He was felt to have a septic picture possibly secondary to the PermCath and was started on antibiotics, with the plan to continue hemodialysis through the maturing fistula, and to remove the PermCath. He was initially admitted to ICU, monitored, and transferred to the floor. He complained of chest pain and shortness of breath during hemodialysis, was seen by Cardiology on consult, and admitted to CCU. The EKG purportedly revealed no acute changes. On September 7, 2008 he complained of increasing epigastric pain, was seen in consultation by a surgery consult with no acute abdominal process found, however, blood cultures were still positive for Staphylococcus aureus. He complained of increasing shortness of breath. That evening, he experienced increasing difficulty breathing, his EKG revealed acute changes. He went into a witnessed cardiac arrest, but was unable to be resuscitated and was pronounced dead that evening. Postmortem examination preliminary reports suggest the presence of a purulent pericarditis, and indeed Staphylococcus aureus was grown from this space postmortem.

The expert physician for St. Catherine Hospital, Salvatore Scoma, M.D. has set forth that he is licensed to practice medicine in New York and is board eligible (not board certified) in infectious disease and internal medicine. He graduated in 1971 from the Universita De Roma-La Sapienze, Facolta di Medicina e Chirurgia, Roma, Italy. Although he did not set forth where he did his internship and residency or his work history, he stated that he is affiliated with multiple area hospitals and maintains a private practice specializing in internal medicine and infectious disease. He set forth the materials and records which he reviewed and the decedent's presentations and treatment during admission. He stated that a review of the EKGs of September 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> noted no indication of pericarditis. The EKG performed on September 7, 2009 at 4:10 p.m. revealed no ST depression or other indications of pericarditis, however, the EKG done at 11:45 p.m. was distinctly different from the one of earlier that day. Cardiac enzymes drawn at 11:50 p.m. on September 7<sup>th</sup> were suggestive of cardiac injury. His white blood cell count was 62,000. A code was called at 12:05 a.m. and CPR immediately started, he was intubated at 12:16 a.m. medications were given, but the blood pressure, respirations and pulse did not return and his cardiac rhythm remained asystolic. The code was called at 12:45 a.m. and the decedent was pronounced dead.

Dr. Scoma opined within a reasonable degree of medical certainty that the staff and employees at St. Catherine of Siena did not depart from good and accepted standards of care; that they were not responsible for providing informed consent; that the decedent's antibiotics were ordered and monitored by Dr. Matkovic, the decedent's admitting and attending physician; that the nephrology, cardiac, vascular, pulmonary, and infectious disease consults were appropriately called; that Dr. Matkovic and the nephrologists determined when and whether to remove the PermCath as well as whether to culture the PermCath upon its removal. Dr. Scoma further opined



that the staff and employees at St. Catherine obtained a full and adequate medical history of the patient; they timely, properly and adequately communicated to the treating physicians the decedent's clinical findings, including signs, symptoms and complaints. Vital signs were properly monitored and recorded in the chart at all times as ordered. Blood work and test results were timely reported and incorporated within the chart. The doctors, nurses and staff at St. Catherine timely and properly referred the patient for appropriate consultations. Blood cultures, as per the responsibility of the private attending physicians were ordered by them, and were drawn by hospital staff in a timely fashion and reported promptly to the patient's treating physicians and recorded within the hospital chart. The decedent's treating physicians had the responsibility for determining when and whether to removed the PermCath, and to rule in or rule out a catheter infection or determine the source of infection, and not the hospital staff, as was the decision to administer antibiotic therapy while it was in place.

Dr. Scoma continued that the ordering of the antibiotics and medications were the responsibility of the treating physicians, and that such medications were timely and appropriately administered and recorded, as ordered by the decedent's treating physicians. Vancomycin levels were timely performed by the hospital staff and timely and properly reported, and it was up to the decedent's treating physicians to properly interpret those results. Infection, bacteremia and/or sepsis were timely and properly diagnosed upon the decedent's admission to the hospital by Dr. Matkovic, and the signs and symptoms were realized by the hospital staff and Dr. Matkovic. He stated that all the cultures, blood, urine, and other blood work, were timely and properly performed, and the results conveyed to the treating physicians. Ordering of diagnostic studies, such as the MRIs, x-rays, CT scans, ultrasound examinations, echocardiogram and ECG testing were the responsibility of the treating physicians and were timely and carried out, interpreted, and reported. The nursing staff did not improperly utilize the infected PermCath for hemodialysis, and utilization of the AV fistula was ordered by the treating nephrologists. When the decedent experienced a rapid drop in blood pressure during the hemodialysis treatment on September 6<sup>th</sup>, it was promptly noted, and the rapid response team and Dr. Kirsch responded within one minute. Dialysis was discontinued; consultations with pulmonary, cardiology, surgery, and vascular were promptly called and obtained; the decedent was transferred to CCU; a myocardial infarction was ruled out by Dr. Ganguly; and appropriate medications were ordered and timely and properly administered.

Dr. Scoma opined that while prior EKGs were not indicative of pericarditis, the EKG of September 7, 2009 of 11:44 p.m. was indicative of pericarditis, and blood work involving cardiac enzyme marker were suggestive of cardiac injury. A critical finding was also made at that time of a white blood cell count of 62,800. Based upon his review of the rapid response team, he opined that despite the efforts to stabilize the decedent, and calling a code when the decedent progressed to asystole, resuscitative efforts were unsuccessful. Therefore, he stated, allegations that St. Catherine failed to timely and properly prevent a myocardial infarction or infection of the heart is without merit. Dr. Matkovic, Dr. Kirsch and Dr. Caraianni were board certified in their areas of practice, with many years of training and experience. He continued that there is no evidence to support a contention that the nurses or staff at the hospital were unfit, inexperienced, incompetent, improperly skilled or unqualified. There is nothing to support that the staff was not properly trained or supervised. He found no evidence to substantiate the contention that the hospital did not have rules, regulations, bylaws, protocols, and/or guidelines necessary for the care and treatment of the decedent or that such failure was the proximate cause of any of the decedent's injuries. He continued that the decedent and/or his family signed the consents authorizing the various invasive procedures, and it was not the responsibility of the nursing staff or hospital staff to provide the decedent or his family with alternatives to a procedure, or to disclose reasonably foreseeable risks or benefits. Dr. Scoma concluded that it is his further opinion to a reasonable degree of medical certainty that the staff and employees at St. Catherine did not depart from good and accepted standards of medical care and practice, and that the care and treatment rendered by them was not the

proximate cause of the decedent's alleged injuries, including death, cardiac arrest, myocardial toxicity, pericarditis, bacteremia, septicemia, infection, pain and suffering, or the loss of enjoyment of life.

Based upon the foregoing, defendant St. Catherine of Siena has demonstrated prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against it.

Defendants Mitchell G. Kirsch, M.D. Suffolk Nephrology Consultants, P.C., Suffolk Nephrology, PLLC, and Nicolae Sorin Caraiani, M.D. have submitted partial opposition to motion (001) to the extent that they do not take any position as to the summary judgment motion filed on behalf of St. Catherine of Siena and specifically reserve their right to rely upon the provisions of CPLR Article 16 of the General Obligations Law § 15-108 at the trial of this action, and state they do not waive the same by failing to oppose this instant motion. Defendant Christopher Matovic also opposes motion (001), and counsel sets forth that he reserves his right to invoke limits of liability for non-economic loss as set forth in CPLR Article 1601, and asks the court to issue an order reserving his rights. However, none of the opposing co-defendants have cross moved for such relief. Even if they did, it is determined that these opposing defendants have not submitted any expert testimony in opposition to this motion for summary judgment which controverts the expert opinions by Dr. Scoma and raises a factual issue, and thus, as a matter of law, they have waived the provisions of CPLR Articles 14 and 16, and General Obligations Law §15-108 at trial.

New York General Obligations Law §15-108 provides when a release or covenant not to sue or not to enforce a judgment is given to one of two or more persons liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provides, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under CPLR Article 14, whichever is the greatest. Here, no release has been given by Mitchell G. Kirsch, M.D. Suffolk Nephrology Consultants, P.C., Suffolk Nephrology, PLLC, and Nicolae Sorin Caraiani, M.D. By not opposing this motion and submitting an expert affirmation to raise a factual issue, the defendants are not entitled to the benefits of New York General Obligations Law §15-108 and Article 14 or 16 (*Cover et al v Cohen et al*, 113 AD2d 502, 497 NYS2d 382 [2d Dept 1985]; see, *Dembitzer v Broadwall Management Corp*, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]]). Furthermore, no release has been submitted to trigger the provisions of GOL Law §15-108.

As further set forth in *Dembitzer, supra*, "[I]t is hornbook law that common law indemnity can only be had by a party without fault that is being held vicariously liable for the fault of another. 'Where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy' (*Glaser v M. Fortunoff of Westbury Corp*, 71 NY2d 643, 646, 524 NE2d 413, 529 NYS2d 59[1988]; accord, *Kagan v Jacobs*, 260 AD2d 442, 442-43, 687 NYS2d 732 )... In any event, if, at trial, defendants are found to be blameless, they will need neither contribution nor indemnity. If on the other hand, they are found to be partially or wholly to blame, they will only be liable for their comparative share of the damages, rather than be jointly and severally liable for the entire amount of the damages, and they will not be entitled to indemnity (because of their fault) or contribution (because the damage award against them will be limited by operation of law)." Here, the co-defendants were obligated to submit proof on point in admissible form in opposition to St. Catherine's motion for summary judgment and failed to do so. Thus, they have failed to satisfy the evidentiary burden which shifted to them upon the finding that St. Catherine of Siena bears no liability in this action. The opposing defendants have

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thus forfeited their opportunity to limit their liability as to St. Catherine of Siena Medical Center as this motion for summary judgment is the plenary equivalent to a trial. The complaint and any cross claims asserted against St. Catherine of Siena have been dismissed rendering the reservation of rights asserted by Mitchell G. Kirsch, M.D. Suffolk Nephrology Consultants, P.C., Suffolk Nephrology, PLLC, Nicolae Sorin Caraiani, M.D. and Christopher Matovic academic and precluded as a matter of law (*Tapogna v Tan*, 2010 NY Slip Op 31818U [Sup Ct, Suffolk County]).

Accordingly, motion (001) is granted to St. Catherine of Siena, and the complaint and any cross claims asserted against it are dismissed with prejudice, and the co-defendants are precluded from asserting the limited liability provisions provided by CPLR Article 16, and General Obligations Law §15-108.

Dated: December 19, 2012

  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION