Downes v Arcoleo
2016 NY Slip Op 31943(U)
July 12, 2016
Supreme Court, Suffolk County
Docket Number: 09-1359
Judge: W. Gerald Asher

[* 1]

SHORT FORM ORDER

INDEX No. 09-1359
CAL. No. 15-00658MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-1-15 (002)
MOTION DATE 10-30-15 (003)
MOTION DATE 11-10-15 (004)
ADJ. DATE 11-10-15
Mot. Seq. #002-MD
#003-MD
#004X-MD

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DENNIS DOWNES and JANE DOWNES,

Plaintiffs,

- against -

CHARLES G. ARCOLEO, M.D., RAJOO C. PATEL, M.D., ROBERT O. LEMP, P.A., ALAN M. GANDOLFI, M.D., 24/7 EMERGENCY CARE, P.C., SOUTHAMPTON HOSPITAL and SOUTHAMPTON HOSPITAL ASSOCIATION,

Defendants.

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Upon the following papers numbered 1 to 118 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 63 ; 64 - 95 ; Notice of Cross Motion and supporting papers 96 - 116 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 117 - 118 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Southampton Hospital and Southampton Hospital Association for summary judgment dismissing the complaint as against them is denied; it further

ORDERED that the motion by defendants Robert O. Lemp, P.A., Alan M. Gandolfi, M.D., and 24/7 Emergency Care, P.C. for summary judgment and dismissing the complaint as against them is denied; it is further

ORDERED that the cross motion by plaintiffs Dennis Downes and Jane Downes for denial of summary judgment in favor of defendants Southampton Hospital and Southampton Hospital Association is denied.

This is a medical malpractice action to recover damages for injuries allegedly sustained by plaintiff Dennis Downes, then 43 years of age, during his admission at defendant Southampton Hospital between October 2 and October 3, 2006. On October 2, at approximately 12:45 p.m., plaintiff was transported to Southampton Hospital via ambulance with complaints of epigastric distress and nausea; he was admitted as a patient around 1:00 p.m. Plaintiff's admission care plan called for simultaneous work-ups of his cardiac and gastrointestinal systems. At around 8:30 p.m., defendant Charles G. Arcoleo, M.D., plaintiff's admitting physician, ordered plaintiff's transfer to the Intensive Care Unit (ICU) to rule out both a myocardial infarction and an abdominal process; this transfer was completed at approximately 9:00 p.m. At 10:52 p.m., defendant Rajoo C. Patel, M.D., the on-call cardiologist in the ICU, diagnosed plaintiff with an acute non-ST segment subendocardial myocardial infarction and ordered his transfer to Stony Brook University Hospital. On October 3, 2006, plaintiff's transfer to Stony Brook University Hospital was complete at approximately 1:30 a.m. and he underwent emergency cardiac catheterization at 2:58 a.m.

Plaintiffs allege that Dennis Downes was injured as a result of defendants' medical malpractice, namely, the failure to timely diagnose and treat an impending myocardial infarction. Plaintiff's spouse, Jane Downes, also sues derivatively for loss of consortium. With respect to Southampton Hospital and Southampton Hospital Association (collectively referred to as the Hospital defendants), by their complaint, as amplified by their verified bill of particulars, plaintiffs allege that Dr. Arcoleo and Dr. Patel were or represented themselves to be agents, servants, and/or employees of the Hospital defendants. Further, plaintiffs allege that the Hospital defendants were negligent in, among other things, failing to properly diagnose an impending myocardial infarction, failing to timely institute appropriate therapy, failing to perform necessary and proper diagnostic tests and procedures, failing to timely administer nitroglycerine or nitropaste, and failing to timely arrange plaintiff's transfer to Stony Brook University Hospital. Plaintiffs allege that, as a result of defendants' malpractice, Mr. Downes suffered a myocardial infarction and reduced global left ventricular systolic functions, requiring that he undergo coronary angiography and placement of stents in the left anterior descending coronary artery and circumflex coronary artery.

The Hospital defendants now move for summary judgment dismissing the complaint against them, arguing that they did not depart from good and accepted medical practice in their treatment of plaintiff. In support of their motion, the Hospital defendants submit copies of plaintiff's medical records during his admission at Southampton Hospital and transcripts of the deposition testimony of plaintiff, defendant Robert Lemp, a physician's assistant who rendered medical treatment to plaintiff in the Hospital's emergency room, Dr. Arcoleo, Southampton Hospital, and nonparty John Manley. The Hospital defendants also submit an affirmation of Andrew Grunwald, M.D., a doctor of internal medicine physician with board certifications in cardiovascular disease and interventional cardiology.

Plaintiffs cross-move for an order denying the Hospital defendants' motion in all respects. Plaintiffs' motion is denied, as it fails to seek any affirmative relief (*see* CPLR 2215). Rather, it simply raises arguments in opposition to the summary judgment motion made by the Hospital defendants. However, the arguments raised therein and the supporting evidence will be considered in opposition to the Hospital defendants' motion for summary judgment. In opposition, plaintiffs argue that the Hospital defendants failed to demonstrate, prima facie, that the emergency medical care rendered to plaintiff conformed with good and accepted medical practice. In addition to relying upon the Hospital defendants' submissions, plaintiffs submit, among other things, an affirmation of a board-certified physician in internal medicine and cardiovascular diseases, plaintiff's ambulance and emergency room admission reports, and transcripts of the deposition testimony of Roberta Griffin, R.N., Mary Ann Knight, R.N., and Dr. Patel.

Defendants Lemp, Alan M. Gandolfi, M.D., an emergency department physician at Southampton Hospital, and 24/7 Emergency Care, P.C., a professional corporation that provides contractual emergency medical services to the Hospital (collectively referred to as the Emergency Care defendants), move separately for summary judgment in their favor, also arguing that they did not depart from good and accepted medical practice in their treatment of plaintiff. The Emergency Care defendants further argue that, because they were no longer directing plaintiff's care as of 7:00 p.m. on October 2, 2006, any alleged deviation or departure from good and accepted medical practice occurred after that time and, therefore, they are not liable to plaintiffs for medical malpractice. In support of their motion, the Emergency Care defendants rely upon the Hospital defendants' submissions and submit the transcript of Dr. Gandolfi's deposition testimony.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d

713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting* ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (*see* ***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). To establish its entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see* ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; ***Faccio v Golub***, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). After making this prima facie showing, the burden shifts to the plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (*see* ***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). However, summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; ***Gressman v Stephen-Johnson***, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; ***Moray v City of Yonkers***, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012].

Although a hospital generally may not be held liable for malpractice committed by a private attending physician not in its employment (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Smolian v Port Auth. of N.Y. & N.J.***, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]; ***Zhuzhingo v Milligan***, 121 AD3d 1103, 995 NYS2d 588 [2d Dept 2014]), an exception exists when a patient presents at an emergency department seeking treatment from the hospital and not from a particular physician of the patient's own choosing (*see* ***Smolian v Port Auth. of N.Y. & N.J.***, *supra*; ***Muslim v Horizon Med. Group, P.C.***, 118 AD3d 681, 988 NYS2d 628 [2d Dept 2014]; ***Giambona v Hines***, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (*see* ***Hill v St. Clare's Hosp.***, *supra*, at 80; ***Muslim v Horizon Med. Group, P.C.***, *supra*; ***Loaiza v Lam***, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). Moreover, a hospital may be held concurrently liable with a private physician if its employees commit independent acts of negligence or fail to inquire about the correctness of a private physician's orders that are contrary to normal practice (*see* ***Doria v Benisch***, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015], *quoting* ***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265 n.3, 292 NYS2d 440 [1968]; ***Aronov v Soukkary***, 104 AD3d 623, 960 NYS2d 462 [2d Dept 2013]; ***Corletta v Fischer***, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]).

Here, the Hospital defendants' submissions have established their entitlement to partial summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment they rendered to plaintiff (*see* ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, *supra*; ***Faccio v Golub***, *supra*). In his affirmation, Dr. Grunwald opines within a reasonable degree of medical certainty that the Hospital's emergency room staff timely and appropriately administered all necessary and appropriate diagnostic tests to differentiate between an ischemic cardiac event and active gastrointestinal process, that all medications

were timely and appropriately administered to plaintiff, that plaintiff did not meet the diagnostic criteria for a myocardial infarction while he was in the emergency department of the Hospital, and that the Hospital's emergency department met the standard of care as it existed in 2006 in its treatment of plaintiff. As Dr. Grunwald bases his conclusions upon plaintiff's certified medical records and the parties' deposition testimony, in addition to his education, knowledge, and medical experience, the Hospital defendants have met their initial burden as to their application for summary judgment on the issue of whether the emergency medical care rendered to plaintiff by their staff departed or deviated from good and accepted medical practice (*see* ***Makinen v Torelli***, *supra*; ***Parrilla v Buccellato***, 95 AD3d 1091, 944 NYS2d 604 [2d Dept 2012]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]).

However, Dr. Grunwald's affirmation specifically states that he has no opinion as to whether Dr. Arcoleo and Dr. Patel departed or deviated from good and accepted medical practice in their treatment of plaintiff. The Hospital defendants' other submissions also fail to address the issue of vicarious liability, even though plaintiff has alleged he presented at the Hospital's emergency department and sought treatment from the Hospital, not from a particular physician of plaintiff's own choosing (*see* ***Hill v St. Clare's Hosp.***, *supra*; ***Smolian v Port Auth. of N.Y. & N.J.***, *supra*; ***Muslim v Horizon Med. Group, P.C.***, *supra*). Therefore, the Hospital defendants fail to establish, prima facie, that they had no apparent or ostensible agency over Dr. Arcoleo and Dr. Patel or that they were independent physicians, precluding an order granting summary judgment as to that issue (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The Hospital defendants having met their initial burden on the motion as to a deviation or departure of good and accepted medical practice by their staff, the burden shifted to plaintiffs to submit admissible evidence raising a triable issue of fact (*see* ***Williams v Bayley Seton Hosp.***, *supra*; ***Makinen v Torelli***, *supra*; ***Stukas v Streiter***, *supra*). In opposition, plaintiffs submit an affirmation of their expert in internal medicine and cardiovascular disease. In his affirmation, plaintiffs' expert opines, within a reasonable degree of medical certainty, that the Hospital defendants' staff departed from the standards of care as they existed in 2006 in their medical treatment of plaintiff in that they had a substantial opportunity for meaningful intervention to prevent plaintiff's progression of cardiac ischemia and non ST myocardial infarction, but failed to do so. The expert identifies several events which he opines, within a reasonable degree of medical certainty, to be departures from good and accepted medical practice on behalf of the Hospital, its staff, Dr. Arcoleo, and Dr. Patel, including: (1) not ordering an immediate EKG of plaintiff after his first documented V Tach run at 7:00 p.m. on October 2, 2006, when physicians are required to do so if there is any change in a patient's clinical condition; (2) a cardiologist not being physically present in the ICU to examine plaintiff when he experienced pain with a recurrence of V Tach at 9:00 p.m. to provide him with medication and/or order his immediate transfer to Stony Brook University Hospital for emergency catheterization; Hospital staff's failure; (3) Nurse Mary Ann Knight's failure to inform a nursing supervisor, ICU director, medical director, or administrative staff that plaintiff was not receiving adequate and timely responses in the ICU and that no cardiologist was physically present in the ICU; (4) Nurse Knight's failure to request for Dr. Patel to immediately come to the ICU to physically examine plaintiff, when she had an obligation to do so; and (5) Nurse Knight's failure to immediately inform Dr. Patel of an anteroseptal infarct on plaintiff's EKG reading at 10:25 p.m., when it is medical custom and practice to do so. Plaintiffs' expert opines, within a reasonable

degree of medical certainty, that these departures were each substantial factors in plaintiff's progression of cardiac ischemia and non ST myocardial infarction and that they were competent in causing irreversible cardiac damage. As plaintiffs' expert describes the applicable standard of care under the circumstances, how the Hospital defendants departed or deviated from such standard, and that these departures were competent causes of plaintiff's injuries, his affirmation is sufficient to raise triable issues of fact (*see* ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; ***Williams v Bayley Seton Hosp.***, *supra*; ***Stukas v Streiter***, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, an order granting summary judgment is not appropriate (*see* ***Leto v Feld***, *supra*; ***Gressman v Stephen-Johnson***, *supra*; ***Moray v City of Yonkers***, *supra*).

Finally, as for the motion by the Emergency care defendants, CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the Court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). The "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy" (***Brill of City of New York***, *supra*, at 652). Here, the Emergency Care defendants allege that, because they are seeking summary judgment on nearly identical grounds as the Hospital defendants, their motion is properly before the Court (*see* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). However, in their motion, the Emergency Care defendants argue that, because they were no longer directing plaintiff's care as of 7:00 p.m. on October 2, 2006, any alleged deviation or departure from good and accepted medical practice occurred after that time, and therefore, they are not liable to plaintiffs for medical malpractice. This differs from the Hospital defendants's contention that there was no deviation or departure at all during plaintiff's admission at the Hospital. As the Emergency Care defendants have not shown "good cause" for their delay in seeking summary judgment, their motion is denied as untimely (*see* CPLR 3212[a]; ***Brill v City of New York***, *supra*; ***Kershaw v Hospital for Special Surgery***, 114 AD3d 75, 86, 978 NYS2d 13, 22 [2d Dept 2013]).

In light of the foregoing, the summary judgment motions by the Hospital defendants, the Emergency Care defendants, and plaintiffs are denied.

Dated: July 12, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**