Pizzacar v Robinson
2017 NY Slip Op 30412(U)
January 17, 2017
Supreme Court, Suffolk County
Docket Number: 11-7910
Judge: Denise F. Molia

SHORT FORM ORDER

COPY

INDEX No. 11-7910
CAL. No. 15-01150mm

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

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 11-18-15 (002)
MOTION DATE 1-15-16 (003)
ADJ. DATE 2-5-16
Mot. Seq. #002 - MotD
Mot. Seq. #003 - MD

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CAROL PIZZACAR, as Administrator of the Estate of VINCENT PIZZACAR and CAROL PIZZACAR, as Administrator of the Estate of MARY PIZZACAR,

Plaintiffs,

-against-

NEWELL ROBINSON, M.D., RAMESH RAICHOUDHURY, M.D., ST. FRANCIS HOSPITAL, CARDIO THORACIC SURGERY, P.C., and CATHOLIC HEALTH SERVICES OF LONG ISLAND,

Defendants.

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BRUCE G. CLARK & ASSOCS., P.C.
Attorney for Plaintiff
22 South Bayless Avenue
Port Washington, New York 11050

GABRIELE & Marano, LLP.
Attorney for Defendants for Robinson & Cardio
100 Quentin Roosevelt Blvd.
Garden City, New York 11530

BOWER LAW, P.C.
Attorney for Defendants Raichoudhury,
St. Francis & Catholic Health Services
1220 RXR Plaza
Uniondale, New York 11556

Upon the following papers numbered 1 to 66 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers 27 - 34 ; Answering Affidavits and supporting papers 35 - 47; 48 - 57 ; Replying Affidavits and supporting papers 58 - 61; 62 - 63 ; Other Affirmation, 64 - 65; Addendum, 66 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

Now, on the court's own motion, it is

ORDERED that the order of this Court dated October 5, 2016, which denied the motion (# 002) by defendants Ramesh Raichoudhury, M.D., St. Francis Hospital, and Catholic Health Services of Long Island and granted the cross motion (# 003) by defendants Newell Robinson, M.D., and Cardio Thoracic Surgery, P.C., is hereby recalled and vacated and this order is substituted in its stead; and it is further

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ORDERED that the motion by defendant Ramesh Raichoudhury, M.D., St. Francis Hospital, and Catholic Health Services of Long Island for summary judgment dismissing the complaint and all cross claims against them is granted in part but is otherwise denied; and it is further

ORDERED that the cross motion by defendants Newell Robinson, M.D., and Cardio Thoracic Surgery, P.C., for summary judgment, is denied.

Plaintiff Carol Pizzacar, as administratrix of the estate of Vincent Pizzacar and Mary Pizzacar, commenced this action to recover damages for medical malpractice, lack of informed consent, loss of services, wrongful death, and fraud. On November 18, 2009, decedent Vincent Pizzacar, who was 85 years old at the time, first presented to the office of defendant Dr. Newell Robinson due to symptomatic aortic stenosis. On January 14, 2010, decedent underwent redo aortic valve replacement surgery performed by Dr. Robinson with defendant Dr. Ramesh Raichoudhury as first surgical assistant at defendant St. Francis Hospital, which is operated by defendant Catholic Health Services of Long Island.

On January 19, 2010, decedent was transferred from the cardiac critical care unit to a regular room. The next day, on January 20, 2010, he passed away. According to an autopsy of the decedent performed by the medical examiner's office, the official cause of death was hemorrhage due to tear of the aorta near the surgical site of the aortic valve replacement. The complaint alleges that defendants negligently failed to take a proper history, to recognize decedent's symptoms, to perform indicated diagnostic procedure, to perform proper medical and surgical treatments, and to properly monitor decedent following the surgery. As to the cause of action for fraud, the complaint alleges that defendants fraudulently billed Medicare for repair of a blood vessel lesion and "coronary artery bypass/reop" when no such procedures were performed.

Defendants Dr. Raichoudhury, St. Francis Hospital, and Catholic Health Services of Long Island (hereinafter collectively referred to as the Hospital defendants) move for summary judgment dismissing the complaint against them on the grounds that they are not vicariously liable for the malpractice of Dr. Robinson, who was a private attending physician. They also argue that Dr. Raichoudhruy and the hospital staff did not depart from applicable standards of care during their treatment of decedent. Finally, they argue that the cause of action for fraud is time-barred and that plaintiff lacks standing to bring such a claim. Plaintiff opposes the motion by the Hospital defendants, arguing that they failed to meet their burden in establishing that their treatment of Vincent Pizzacar did not depart from accepted standards of care. In opposition, plaintiff submits various medical records regarding decedent's treatment and transcripts of the parties' deposition testimony.

Defendants Dr. Robinson and Cardio Thoracic Surgery, P.C., cross-move for summary judgment dismissing plaintiff's cause of action for fraud, arguing that plaintiff lacks standing to bring such a claim. Plaintiff opposes the motion on the ground that it is untimely.

Dr. Alfred Culliford, a physician licensed to practice medicine in the State of New York and board certified in thoracic surgery, states that his review of the records reveal decedent was treated and admitted to St. Francis Hospital as a private patient of Dr. Robinson, who discussed with decedent the procedure and obtained informed consent. He states Dr. Raichoudhury was Dr. Robinson's surgical assistant during the

surgery and, as such, he was not required to have such discussions with the patient pre-operatively regarding the procedure's risks, benefits, and alternatives. He further states that any potential liability arising from the intraoperative care rendered to decedent during the subject procedure would rest with Dr. Robinson as he was responsible for all intraoperative decisions and care rendered. Dr. Culliford opines that as all of the intraoperative care was done in accordance with the directions and decisions of Dr. Robinson, the Hospital defendants acted appropriately and did not depart from good and accepted medical care. He also states that as Dr. Robinson directed and monitored decedent's post-operative care, the claims against the Hospital defendants should be dismissed. He stated that the hospital staff acted appropriately in following and carrying out the orders and instructions of Dr. Robinson. Specifically, he states that Dr. Robinson was following and monitoring decedent post-operatively and was aware of all findings, including the dysfunction of the unused pacing wires that were subsequently discontinued, monitoring of decedent's small right pneumothorax, presence of subcutaneous air, and the decision to transfer decedent from the cardiac critical care unit to a regular room.

Dr. Culliford further states as the evidence indicates that there was an acute tear in decedent's aorta parallel to the suture line and acute hemorrhage, death was almost immediate and unexpected. He opines that decedent's clinical course throughout the admission is devoid of evidence to suggest an impending aortic rupture and tear. He states that the Hospital defendants did not depart from the applicable standards of care while treating decedent and nothing they did or did not do proximately caused his death.

As to Dr. Raichoudury, Dr. Culliford states he was involved in decedent's care solely as a surgical assistant during the subject procedure, that there was no doctor-patient relationship, and thus no departure from applicable standards of care. He also states that Dr. Raichoudury had no involvement regarding decedent's pre-operative or post-operative care. He states that during the procedure, Dr. Raichoudury worked under the direct supervision of Dr. Robinson, who made all the intraoperative decisions. He states Dr. Raichoudury was never left alone in Dr. Robinson's operative field, and assisted with tasks, such as suctioning and holding retractors. He states Dr. Raichoudhury never used the surgical saw, did not perform the sternotomy, and did not open or crossclamp the aorta. He states Dr. Raichoudhury did not and was not expected to check for leaks or tears during the procedure, did not remove decedent from the vent and did not "close the layers or chest." Dr. Culliford opines that Dr. Raichouldury followed the applicable standards of care during the procedure. He explains that there are limited circumstances when a surgical assistant would be required to exercise his or her own judgment or take over performance of a surgery is if the attending surgeon is physically incapable of completing the surgery or if the attending surgeon intends to or begins to do something that is contraindicated or detrimental to the patient. Dr. Culliford states that the evidence clearly establishes that neither situation arose during the subject procedure. He concludes that Dr. Raichoudhury and the hospital staff did not commit any departures from applicable standards of care during decedent's treatment, and that nothing they did, or did not do, proximately caused decedent's injuries and death.

The Hospital defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law as to medical malpractice, lack of informed consent, loss of services, and wrongful death. Significantly, the expert affirmation Dr. Culliford was conclusory, as he failed to set forth the applicable standard of care, and merely recounted the treatment rendered, and opined, in a conclusory manner, that such treatment did not represent a departure from good and accepted medical

practice (*see* ***Tomeo v Beccia***, 127 AD3d 1071, 7 NYS3d 472 [2d Dept 2015]; ***Barlev v Bethpage Physical Therapy Assoc., P.C.***, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]). The bill of particulars alleges, inter alia, that during his stay at the hospital, decedent's epicardial pacing wires were damaged and the staff negligently failed to fix it; that he was anemic during surgery and the staff negligently failed to treat it; and that he was negligently placed in wrist restraints. It further alleges that the staff negligently failed to treat his low heart rate; that a tube connected to decedent had an air leak which the staff negligently failed to fix; that he was negligently given oxycodone even though he was allergic to codeine; that the staff failed to treat his congestive heart failure, subcutaneous emphysema, diminished breathing, and drooping eyelid; and that he was negligently moved out of the intensive care unit. However, Dr. Culliford's affirmation concludes that as Dr. Robinson was following and monitoring patient post-operatively, and aware of the above findings, including, among other things dysfunction of pacing fires and presence of subcutaneous air, the hospital staff acted appropriately in following and carrying out his orders and instructions. The affirmation failed to explain the duties of the hospital staff, failed to set forth the applicable standard of care, and explain whether that standard was met. Thus, the branch of the motion by the Hospital defendants for summary judgment as to claims for medical malpractice, lack of informed consent, wrongful death, and loss of services is denied.

However, with regard to the portion of the motion for summary judgment as to the cause of action for fraud, the complaint alleges that defendants fraudulently billed Medicare for procedures not performed on decedent. The elements of a fraud cause of action consist of "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011], *quoting* ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 412, 646 NYS2d 76 [1996]). Plaintiff has not alleged and cannot establish the necessary elements of such a claim. Here, the complaint alleges that defendants committed fraud against Medicare, not plaintiff, and plaintiff cannot demonstrate any injury from the alleged fraud. Accordingly, this cause of action is dismissed as to all defendants.

The cross motion by defendants Newell Robinson and Cardiothoracic Surgery, P.C. is denied. 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]). Although the statutory 120-day period for making a summary judgment motion in this case expired on October 24, 2015, defendants Newell Robinson and Cardiothoracic Surgery, P.C. did not make their cross motion for summary judgment until December 23, 2015. As there is no explanation in the cross-moving papers for the delay in seeking summary judgment, the cross motion must be denied as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261; ***Bivona v Bob's Discount Furniture of N.Y., LLC***, 90 AD3d 796, 935 NYS2d 605 [2d Dept 2011]; ***Ofman v Ginsberg***, 89 AD3d 908, 933 NYS2d 103 [2d Dept 2011]; ***Castillo v Valente***, 85 AD3d 1080, 926 NYS2d 304 [2d Dept 2011]; ***Brewi-Bijoux v City of New York***, 73 AD3d 1112, 900 NYS2d 885 [2d Dept 2010]). Moreover, the issues raised on the cross motion were not identical to the issues raised by the Hospital defendants' motion for summary judgment (*see* ***Podlaski v Long Is. Paneling Ctr. of***

Centereach, Inc., 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]; ***Bickelman v Herrill Bowling Corp.***, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]).

Dated: 1-17-17

Hon. Denise F. Molt

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**