Colon v Monroe Pediatric Assoc., P.C.
2010 NY Slip Op 33917(U)
November 16, 2010
Sup Ct, Bronx County
Docket Number: 302732/08
Judge: Howard H. Sherman

FILED Dec 09 2010 Bronx County Clerk

Supreme Court of the State of New York
County of the Bronx

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Alfred Colon , *individually and as administrator of the estate of* Abigail Colon , *deceased*

Plaintiffs

-against -

Index No. 302732/08

Decision/Order

Monroe Pediatric Associates, P.C., Montefiore Medical Center, Jamee Goldstein, D.O., Christine Walsh, M.D., and Stacey Kaplan Rosmarin, M.D.

Howard H. Sherman
Justice

Defendants

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Defendants Monroe Pediatric Associates, P.C. (" Monroe Pediatric ") , and Jamee Goldstein, D.O. (" Dr. Goldstein") move for an order awarding summary judgment dismissing the complaint as against Dr. Goldstein and dismissing plaintiff's first cause of action in vicarious liability against Monroe Pediatric as arising out of the conduct of Dr. Goldstein , on the grounds that Dr. Goldstein rendered no medical treatment to the plaintiff decedent .

Procedural History

This action for personal injury and wrongful death was commenced in April 2008 . An amended complaint was served the following month, and issue was joined with the service of the moving defendants' separate answers dated May 7, 2008. In her answer, Dr. Goldstein denied the specific allegations of the amended complaint with respect to the administration of services , or diagnosis, or treatment of Abigail

Colon during the period 02/16/05 through 06/17/05 [Verified Complaint ¶¶ 42-45].

By verified bill of particulars dated August 9, 2008 it is alleged that Dr. Goldstein's negligent acts /omissions took place in the defendant health care facility commencing on or about 02/16/05 and continuing through 06/17/06,[1] and consisted of *inter alia,* failing to administer the appropriate tests to determine the extent and nature of the infant decedent's illness; failing to diagnose, treat , manage and control symptoms and complaints relative to WPW Syndrome[2], congestive heart failure, and ventricular hyperthrophy while such conditions were still manageable, and in administering and prescribing medications that were contra-indicated and dangerous, all of which acts/omissions resulted in serious injuries and plaintiff's death from cardiac arrest on June 17, 2006 Verified Bill of Particulars ¶ 3-].

To date, no Note of Issue has been filed.

Motions /Contentions of the Parties

Defendant Goldstein moves for an award of summary judgment in her favor dismissing the complaint on the grounds that she had no involvement of any type in the medical care and treatment of Abigail Colon at Monroe, or at any other medical facility. In addition, defendants seek summary dismissal of any claim against Monroe Pediatric predicated on that facility's vicarious liability for the conduct of Dr. Goldstein, then an employee of the facility. The motion is supported by the affidavit of Jamee Goldstein, D.O., a board certified pediatrician , who since July 1, 2004, has been affiliated with

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[1] The plaintiff decedent was treated at the facility on eight occasions during this period.

[2] Wolff-Parkinson-White Syndrome.

Monroe Pediatric [Affidavit of Jamee Goldstein, D.O., ¶ 1]. Dr. Goldstein further attests that in 2006, she was an employee of Monroe Pediatric, but not an officer, director, or a shareholder of the facility, and that during the subject period, she "never saw [Abigail Colon] as a patient, was never consulted by other health care professional concerning her, and made no entries in the office chart maintained by Monroe Pediatric ....." [Id. ¶ 2]. The motion is also supported by a copy of the transcript of defendant Stacey Kaplan Rosmarin's 04/20/10 examination before trial . Dr. Rosmarin conducted the initial Monroe Pediatric examination of Abigail Colon on 02/16/05, as well as subsequent exams on 08/01/05 , and on 06/16/06. Finally, defendants submit copies of the Monroe Pediatric patient records.

In opposition, plaintiffs argue that the motion is premature as significant discovery, including the deposition of the moving physician , remains outstanding. In addition, it is contended that the moving defendants have failed to meet their initial burden on the motion as unaddressed are issues as to whether Dr. Goldstein could have answered the phone call scheduling plaintiff's last visit to Monroe Pediatric , or whether she had "discussions" about plaintiff with any of the Monroe Pediatric physicians .

In reply, defendants argue that the papers in opposition should not be considered as they were untimely served, being served by facsimile transmission without consent thereto, and without the supporting exhibits, on the day before the return date of the motion (see, CPLR 2214(b)). Alternatively , addressing the substantive issues raised, defendants maintain that no further discovery is warranted, noting that plaintiffs have never made any objection to the adequacy of the records

provided by Monroe Pediatric in response to the discovery demands that were made exclusively on co-defendant Rosmarin, and that there are no demands served as to either moving defendant. In addition, defendants maintain that plaintiff has failed to come forward with any probative evidence to rebut defendants' *prima facie* showing that Dr. Goldstein did not render medical services to Abigail Colon.

Applicable Law

Summary Judgment

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 [1980] To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition. Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008] Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'"

(Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003] Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

Medical Malpractice

It is established that "a doctor who actually treats a patient has a duty of care towards that patient." (Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 307, *citing* McNulty v. City of New York, 100 NY2d 227,232 [2003]; see also, Cregan v. Sachs, 65 A.D.3d 101, 110 [1st Dept. 2009]), and thus, the "threshold question in determining, liability is whether the defendant doctor owed the plaintiff a duty of care." (Dallas-Stephenson, op. cit., at 307).

To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury (Elias v Bash, 54 A.D.3d 354, 357, [1st Dept. 2008], *lv denied* 11 N.Y.3d 711, [2008])

When moving for summary judgment in such an action a defendant has the initial burden of showing entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to any alleged departure from accepted standards of medical practice, or that any departure from accepted practice was not the proximate

cause of the injuries alleged (see, Roques v. Noble, 73 A.D.3d 204, 206 [1st Dept. 2010]). This burden cannot be met by defendant's conclusory assertions that there was no deviation from good and accepted medical practice (see, Santiago v. Filstein, 35 A.D.3d 184,186 [1st Dept. 2006]).

Once the initial showing is made, the burden shifts to plaintiff to " produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice'." (Frye v. Montefiore Medical Center, 70 A.D.3d 15, 24 [1st Dept. 2009], quoting Alvarez, v. Prospect Hosp., 68 NY2d 320, at 325 [1986]). As the appellate court also observed .

> In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor (*Murphy v Conner*, 84 NY2d 969,646 N.E.796, 622 N.Y.S. 2d 494 [1994]). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 N.E. 2d 68, 754 N.Y.S. 298 [2002]
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> Frye, at 24

Discussion/Findings

Upon review of the submissions in support of the motion and upon consideration of the applicable law, it is the finding of this court that defendants have presented sufficient proof to demonstrate that there are no material issues of fact that Dr.

Goldstein did not render medical services to Abigail Colon at Monroe Pediatric or elsewhere, or that she entered into an implied physician-patient relationship by giving medical advice concerning the infant's diagnosis or treatment as communicated through another affiliated physician (see, Raptis-Smith v. St. Joseph's Medical Center, 302 A.D.2d 246 [1st Dept. 2003]).

In light of this showing it is incumbent upon plaintiffs to come forward with evidence to raise a triable issue of fact with respect to Dr. Goldstein's participation in the medical services rendered to the decedent.

It is the finding of this court that though untimely, the papers in opposition will be considered on the motion as defendants have had an opportunity to address the substantive issues raised therein.

Upon review of the papers, it is the finding of this court that plaintiffs fail to demonstrate an evidentiary basis to suggest that discovery may lead to relevant evidence with respect to the issue of Dr. Goldstein's showing of lack participation in Abigail Colon's medical care at Monroe Pediatric , or elsewhere. As such, there is no basis to "forestall" summary judgment upon the claim for additional discovery (Steinberg v. Schnapp, 73 A.D.3d 171,177 [1st Dept. 2010]; see also, Bailey v. New York City Tr. Auth., 270 A.D.2d 156 [1st Dept. 2000]).

Finally, upon review of the papers in opposition, it is the finding of this court that plaintiffs fail to come forward with any admissible proof to raise a triable issue of fact with respect to defendants' prima facie showing, surmise and/ or speculation , or conjecture based upon a distinction between the words "consultation and "conversation" being insufficient for said purpose .

Conclusions

For all the reasons above set forth , it is ORDERED that the motion of defendants Jamee Goldstein, D.O. and Monroe Pediatric Associates, P.C., be and hereby is granted and it is further ORDERED that judgment be entered in favor of defendant Goldstein dismissing the complaint and any and all cross-claims asserted against her and it is further ORDERED that judgment be entered in favor of defendant Monroe Pediatrics Associates, P.C., dismissing as against it any and all claims premised upon vicarious liability with respect to the conduct of Dr. Goldstein.

This constitutes the decision and order of this court.

Dated: November 16, 2010

Howard H. Sherman

HOWARD H. SHERMAN