

**Forrest v Tierney**

2010 NY Slip Op 33966(U)

November 5, 2010

Supreme Court, Nassau County

Docket Number: 11372/05

Judge: Anthony L. Parga

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA, J.S.C.

Part 9

-----X  
WILLIAM FORREST and GABRIELLE FORREST,

Plaintiffs,

INDEX NO. 11372/05

- against -

MOTION DATE: 9/9/10  
SEQUENCE NO. 09,10,11

SEAN TIERNEY, D.O. SOUTH NASSAU  
COMMUNITIES HOSPITAL, MERCY MEDICAL  
CENTER, CATHOLIC HEALTH SYSTEM OF  
LONG ISLAND, INC., ISLAND MEDICAL  
PHYSICIANS, P.C., DANIEL AG. MURPHY,  
M.D., CHRISTOPHER EDELSTEIN, P.C.  
and LONG ISLAND EMERGENCY CARE, P.C.,

Defendants.

-----X

Notices of Motion, Affs. & Exs.....	<u>1-2</u>
Order to Show Cause.....	<u>3</u>
Affirmation In Opposition & Exs.....	<u>4</u>
Reply Affirmation.....	<u>5-6</u>

Motion (Seq.09) by defendant Mercy Medical Center for an order granting summary judgement is granted.

Motion (Seq. 10) by defendants Daniel G. Murphy, M.D., Christopher Edelstein, P.A., and Long Island Emergency Care, P.C. for an order granting summary judgement is granted.

Motion (Seq.11) by defendant South Nassau Communities Hospital for the issuance of a "So Ordered" partially executed Stipulation of Discontinuance is granted as unopposed.

In this action, plaintiffs seek to recover damages for injuries suffered as a result of defendants' alleged negligence and medical malpractice as to the events of December 26-31, 2004. Plaintiff, Gabrielle Forrest's claim is derivative, however, Gabrielle Forrest did not appear for deposition and is precluded from

testifying at trial pursuant to a Stipulation dated October 22, 2008. The action has been discontinued as to defendant Catholic Health System of Long Island.

By decision dated 7/16/09 this action is dismissed against Sean Tierney, D.O., Island Medical Physicians, P.C. and South Nassau Communities Hospital.

"The essential elements of a medical malpractice claim are a departure from good and accepted medical practice and evidence that such departure was a proximate cause of the plaintiff's injury (*see, DiMitri v. Monsouri*, 302 AD2d 420, 421). Therefore, on a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851)". *Williams v. Sahay*, 12 AD3d 366, (2nd Dept.,2004).

Defendant's Mercy Medical Center, Daniel G. Murphy, M.D., Christopher Edelstein, P.A. and Long Island Emergency Care, P.C. made a *prima facie* showing through the affidavit of medical expert Richard Blum, deposition testimony and medical records, that defendant's Mercy Medical Center, Daniel G. Murphy, M.D., Christopher Edelstein, P.A. and Long Island Emergency Care, P.C. actions and judgments were in accordance with good medical practice and were not a proximate cause of plaintiff's injuries (*see, Alvarez v. Prospect Hosp.*, 68 NY2d 320; *Williams v. Sahay, supra*).

Specifically, Defendants Mercy Medical Center, Daniel G. Murphy, M.D., Christopher Edelstein, P.A., and Long Island Emergency Care, P.C. submitted the affirmation of Richard Blum who reviewed plaintiff's medical records, pleadings and witness depositions and concluded:

"Mr. Forrest was correctly diagnosed with pneumonia based on radiographic findings. Based on evaluation and diagnostic testing, there was no evidence of empyema. He had no medical indication for hospitalization as he was not running high fevers, coughing blood, having low blood oxygen or demonstrating shortness of breath..... It is my opinion with a reasonable degree of medical certainty that the care and treatment provided to the plaintiff by defendants Murphy, Edelstein and Long Island Emergency Care, P.C., at Mercy Medical Center on December 31, 2004, was at all times appropriate and in accordance with accepted standards of care ..... It is further my opinion with a reasonable degree of medical certainty that there were no departures or deviations from

accepted standards of care by Dr. Murphy, P.A. Edelstein or Long Island Emergency Care, P.C. which caused or contributed to any of the injuries claimed by the plaintiff in this case"


The burden shifted to the plaintiffs to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure by defendant's Mercy Medical Center, Daniel G. Murphy, M.D., Christopher Edelstein, P.A. and Long Island Emergency Care, P.C. from accepted medical practice and that their acts or omissions were a competent producing cause of injuries to plaintiff(see, *Dellacona v. Dorf*, 5 AD3d 625 (2<sup>nd</sup> Dept, 2004).

In opposition to both motions, plaintiff submits the affirmation of emergency medicine physician David Barlas who reviewed plaintiff's medical records and depositions of Daniel G. Murphy, M.D., Sean Tierney, D.O. and Richard Blum. Dr. Barlas concluded that:

"with a reasonable degree of medical certainty, that Daniel Murphy, M.D. and P.A. Christopher Edelstein did not appreciate the seriousness of the plaintiff's medical condition and departed from the prevailing standard of care in their treatment of him, which resulted in worsening of his medical condition..... It is my opinion that it was a departure from the standard of care for Dr. Murphy and P.A. Edelstein to have failed to determine the extent of deterioration of Mr. Forrest's condition and to appreciate it's significance..... It is also my opinion that the standard of care also dictated that a patient such as Mr. Forrest who evaluation revealed 1) a history of diabetes mellitus, a condition predisposing to impaired ability of fight infections, 2) a worsening illness as evidenced by progressive symptomatology including severe (7 out of 10) pain, and 3) a pulmonary infiltrate and pericardial fluid accumulation on radiographic imaging, be deemed at higher risk for a poor outcome than if these conditions did not exist. .... It is my opinion that Dr. Murphy and P.A. Edelstein departed from this standard of care by instructing Mr. Forrest to make an appointment with another physician, Dr. Adul Majeed, rather than his own private physician, Dr. Robert Purvin, upon discharge from the Mercy Medical Center Emergency Department".

Plaintiff's expert affidavit was insufficient since it failed to address any specific medical departure, and merely states in conclusory terms *inter alia* that there were departures. Defendants note that plaintiff in sworn testimony admitted to have not follow up with Dr. Majeed as directed on 12/31/04.

Dated: November 5, 2010

  
Anthony L. Parga, J.S.C.

cc: Scott O. Frycek, Esq.  
90 Merrick Avenue  
East Meadow, NY 11554

Herman M. Goldberg & Associates, LLC  
675 Third Avenue, Suite 3005  
New York, NY 10017

Montfort, Healy, McGuire & Salley  
1140 Franklin Avenue  
Garden City, NY 11530

**ENTERED**  
NOV 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE