

Luciano v Cohen

2011 NY Slip Op 32473(U)

August 16, 2011

Sup Ct, Suffolk County

Docket Number: 06-20552

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-29-10
ADJ. DATE 5-26-11
Mot. Seq. # 003 - MD

-----X	
VIRGINIA LUCIANO, as Administratrix of the	:
Estate of WILLIAM LUCIANO, Deceased and	:
VIRGINIA LUCIANO, Individually,	:
	:
Plaintiff,	:
	:
- against -	:
	:
BRADLEY COHEN, M.D., SALVATORE	:
GIANTINOTO, D.O., GOOD SAMARITAN	:
HOSPITAL, GINA SUSSI, NP, and ISLAND	:
SURGICAL AND VASCULAR GROUP, P.C.,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 22 - 28; Replying Affidavits and supporting papers 29 - 34; Other 35 - 36; it is,

ORDERED that the motion (#003) by defendant Gina Sussi, NP for summary judgment dismissing the complaint is denied.

In this medical malpractice action, plaintiff alleges that defendants departed from accepted medical practice in the care and treatment of her husband William Luciano, deceased, while decedent was a patient at defendant Good Samaritan Hospital (hereinafter "the hospital"). The record reveals that decedent was admitted to the hospital on November 7, 2005 for the surgical removal of a cancerous tumor. The medical record reveals that decedent developed a fever and was found unresponsive by the nursing staff on November 10, 2005. Resuscitation efforts were unsuccessful and decedent died. By way of the bill of particulars, plaintiff alleges that defendant Gina Sussi, RNP departed from accepted medical practice in her failure to assess decedent's risks relative to surgery, anticipate pulmonary complications from surgery, administer antibiotics, steroids, or bronchodilators, perform diagnostic tests, consult with the appropriate specialists, and inform decedent of alternative avenues to treat and care for his condition.

KAK

Defendant Sussi now moves for summary judgment dismissing the complaint.

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The requisite elements of proof in a medical malpractice case are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988], *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). 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 1998]). The practice of a registered nurse practitioner as defined in Education Law § 6902 (3) (a) includes diagnosis of illness and physical conditions and the performance of therapeutic and corrective measures in collaboration with a licensed physician qualified to collaborate in the specialty involved.

In support of her motion, Sussi submits, *inter alia*, the pleadings, the bill of particulars, the supplemental bill of particulars, the deposition testimony of defendant Sussi and Bradley Cohen, M.D., Salvatore Giantinoto, D.O., Don Han, M.D., the affirmation of Vincent Garbitelli, M.D., and the decedent's hospital medical records.

Defendant Cohen testified that he is duly licensed to practice medicine in the State of New York and is board certified in general surgery. He first met decedent on October 18, 2005 in his office after referrals by decedent's primary physician, Salvatore Giantinoto, D.O. Cohen learned that decedent was 49 years of age, a heavy smoker of 2 packs per day, weighed 213 pounds and was 5'11" tall. After reviewing a colonoscopy, he told decedent that surgery was required to remove a cancerous tumor, which was performed on November 7, 2005. Although he noted that decedent's white count was elevated, decedent had a fever, and developed atelectasis in the lung bases, he stated that such signs were

common in patients who had abdominal surgery. Cohen ordered a consult by decedent's family practitioner and a pain medication consult. Cohen stated that he saw decedent on November 8, 2005 and did not notice signs and symptoms of infection. On November 9, 2005, Cohen observed decedent walking in the hallway and decedent looked reasonably well. He did not see decedent after that time. He had no opinion regarding why decedent died.

Salvatore Giantinoto testified that he is duly licensed to practice medicine in the State of New York and is board certified in family practice. He was decedent's family practitioner since September 1, 2005. At his initial appointment on that date, he learned that decedent weighed 213 pounds, had experienced rectal bleeding for the past 9 months, and was a heavy smoker. He performed a pulmonary function test, which revealed mild obstructive pulmonary disease. He stated that he told decedent to stop smoking. He referred decedent for a colonoscopy, which revealed a malignant neoplasm in the sigmoid colon. He also referred him for a CT scan of the abdomen and pelvis which revealed bullae in the right lung, that he stated was of no significance. Once surgery was planned, a chest x-ray was performed which was normal. Giantinoto medically cleared decedent and also wrote that decedent may potentially have problems during surgery with anesthesia due to his history of smoking. He saw decedent in the hospital after his surgery. He read the progress notes in the medical chart. He did not know that decedent had a temperature or that decedent had any difficulty breathing.

Don Han¹ testified that he was the anesthesiologist during surgery. He is duly licensed to practice medicine in the State of New York and is an attending physician at the hospital. He is employed by Long Island Anesthesiologists, PLLC, and is not an employee of the hospital. He stated that he read the medical chart and was aware that decedent was a smoker. He did not see the CT scan showing lung bullae. He stated that he inserted the epidural catheter and injected medication into it during surgery and also administered general anesthesia. He had no problems inserting the epidural catheter or intubating decedent with an endotracheal tube. The surgery was uneventful and at the completion of surgery, he was able to extubate decedent in the operating room, and capped the epidural catheter. After decedent was discharged from the recovery room, he signed off the case and ordered a pain management consultation to monitor the epidural catheter.

Sussi testified that she is a licensed registered nurse practitioner and at the time of decedent's admission she was employed by New York Pain Consultants. Sussi was responsible for the pain management of all post operative patients who had spinal medications, such as PCA and epidural catheters, inserted preoperatively. She was not an employee of the hospital. She stated that she had a collaboration agreement with Dr. Shalmi, who reviewed her charts every three months. Sussi stated that when she first saw decedent on November 8, 2005, she observed that he had an epidural catheter that was capped. She discontinued the epidural catheter and ordered dilaudid 2 mg every three hours intravenously as needed for pain while the decedent was NPO (nothing by mouth). Although she could not recall this patient, she stated that it was her practice to speak with the patient's nurse and find out if there were any problems. After reviewing the medical chart she learned that decedent had some problems with his blood pressure, but upon speaking with him, he was alert, oriented, and having pain.

¹ By order dated March 3, 2011, this Court dismissed the complaint as asserted against Dr. Han.

On November 9, 2005, after she noted that decedent was on a regular diet, she ordered percocet 2 tablets orally every three hours for pain on a scale of 1 through 5 (out of ten), and dilaudid 2 mg intravenously every three hours for severe pain on a scale of 6 through 10 (out of ten). She spoke with decedent who told her that his pain was a 5 out of 10 at rest, and a 10 out of 10 with movement. Later that day, she ordered dilaudid 2 mg intravenously every two hours as needed. She read decedent's medical chart and after speaking with decedent, she noted that he was alert and oriented. She was not aware that an outpatient CT scan showed bullae in the lung. Sussi stated that dilaudid was preferable because it caused fewer side effects than morphine. Each time she visited decedent, she assessed how well the pain medication was working, she did not observe him to be in respiratory distress, or any flu or pneumonia symptoms. As a general practice, she does not look at the laboratory values in a patient's chart and does not order consultations. She signed off the case on November 9, 2005 and did not see decedent again.

Vincent Garbitelli affirms that he is duly licensed to practice medicine in the State of New York and is board certified in internal medicine. Initially, the Court rejects his reliance on an unsubmitted autopsy report. He opines, within a reasonable degree of medical certainty, that no fault exists on the part of Sussi in her care and management of decedent's pain. It is his expert opinion, within a reasonable degree of medical certainty, that Sussi appropriately ordered pain medication for decedent in the proper dosage and frequency in accord with proper and accepted practice. He states that the responsibility of diagnosing post operative sepsis, post operative fever and post operative pneumonia was within the province of the doctors who were treating decedent. Dr. Garbitelli states that the interpretation and assessment of decedent's post operative symptoms, including the monitoring of fluid intake and output, oxygen saturation, fever and testing were within the province of the doctors who were treating the decedent. The monitoring of vital signs was within the province of the nurses assigned to monitor the decedent at the hospital. Dr. Garbitelli opines that the various allegations of negligence and malpractice raised by plaintiff are allegations which have no relevance to Sussi, as well as providing informed consent, which was the responsibility of the surgeon. He opines that no fault can be imputed to Sussi for any claimed failure to undertake any further work up for claimed lung problems.

Sussi established her entitlement to judgment as a matter of law (*see Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; *Whalen v Victory Memorial Hosp.*, 187 AD2d 503, 589 NYS2d 590 [2d Dept 1992]). Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (*see Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]).

In opposition, plaintiff submits, *inter alia*, an affirmation of her medical expert, whose name has been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994).² The original unredacted affidavit has been submitted to the court for inspection under separate cover. The expert states that he is duly licensed to practice medicine in the State of New York and is board certified in anesthesia and pain management. The expert opines, within a reasonable degree of medical certainty, that the dosage and frequency of dilaudid was excessive under the circumstances and


² The Court has conducted an *in camera* inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

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more than likely contributed to respiratory depression. He reviewed the medical chart and noted that on November 9, 2005, decedent received dilaudid at 9:30 a.m., 11:30 a.m., 6:00 p.m., 8:45 p.m. and 11:00 p.m., as well as four doses of Xanax, an antianxiety medication. The respiratory depression would more than likely have caused or accelerated post operative pneumonia, which along with the pre-existing pulmonary condition, synergistically caused decedent's death. The expert concluded that Sussi departed from good and accepted medical practice. This conflicting opinion precludes a finding of summary judgment (*Viti v Franklin General Hospital*, 190 AD2d 790, 593 NYS2d 840 [2d Dept 1993]).

Accordingly, the motion for summary judgment is denied.

Dated: August 16, 2011



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION