

Makinen v Torelli

2012 NY Slip Op 31373(U)

May 8, 2012

Sup Ct, Suffolk County

Docket Number: 0029963/2006

Judge: John J.J. Jones Jr

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SHORT FORM ORDER



INDEX NO.: 0029963/2006
SUBMIT DATE: 2/1/2012
MTN. SEQ.#: 009; 010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 009 - 8/17/2011
010 - 9/23/2011
MOTION NO.: 009 - MOT D
010 - MOT D

-----X
CEANNA MAKINEN, Individually and as the
Administratrix of the Estate of MICHAEL
MAKINEN, Deceased,

Plaintiffs,

-against-

MICHAEL WILLIAM TORELLI, M.D., SOUTH SHORE
FAMILY PRACTICE ASSOCIATES, P.C., IRENE
AUDREY SCHULMAN, M.D., LONG ISLAND
MEDICAL DIAGNOSTIC IMAGING, P.C., JOHN
STEPHEN WALSH, M.D. and KERRI ANN
PETITPAIN, R.N., L.N.P.,

Defendants.
-----X

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Upon the following papers numbered 1 to 44 read on this application for reargument of prior motion and cross-motion for summary judgment and separate motion to reargue application for non-party disclosure; Notice of Motion/Order to Show Cause and supporting papers 1-31; 39-42 ;

Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 32-33; 34-36; 43-44; Replying Affidavits and supporting papers 37-38; Other ____; it is

ORDERED that this motion by plaintiff, Ceanna Makinen, individually and as the Administratrix of the Estate of Michael Makinen, deceased, for an order granting leave to reargue the motion by defendant Kerri Ann Petitpain and the cross-motion by defendants Michael Torelli and South Shore Family Practice Associates, P.C., for summary judgment dismissing the complaint is granted, and the separate motion by defendant Long Island Medical Diagnostic Imaging, P.C., for an order granting leave to reargue the motion for an order directing non-party County of Suffolk, Department of Health Services, Division of Medical-Legal Investigations and Forensic Sciences, to produce a complete, certified copy of the autopsy records of the deceased, Michael Makinen, is also granted, and upon such reargument, the Order of this Court dated July 7, 2011 is hereby recalled and vacated in its entirety; and it is further

ORDERED that the motion by defendant Kerri Ann Petitpain and the cross-motion by defendants Michael Torelli and South Shore Family Practice Associates, P.C., for summary judgment dismissing the complaint are granted only to the extent that the plaintiff's third cause of action for recovery for lack of informed consent is dismissed and in all other respects the motion and cross-motion are denied; and it is further

ORDERED that the motion by defendant Long Island Medical Diagnostic Imaging, P.C., for an order directing non-party County of Suffolk, Department of Health Services, Division of Medical-Legal Investigations and Forensic Sciences, to produce a complete, certified copy of the autopsy records of the deceased, Michael Makinen, is granted, and a complete, certified copy of the aforementioned autopsy records shall be produced upon payment of appropriate fees, if any.

Plaintiff Ceanna Makinen, individually and as the Administrator of the Estate of Michael Makinen, commenced this action to recover damages for alleged medical malpractice, wrongful death, lack of informed consent, and loss of services against defendants. By Orders of the Court dated September 17, 2009, and October 5, 2009, summary judgment was granted in favor of Irene Audrey Schulman, M.D. and John Stephen Walsh, M.D., respectively, and the complaint was dismissed as against each of them. Thereafter, defendant Kerri Ann Petitpain moved and defendants Michael William Torelli and South Shore Family Practice Associates, P.C. (South Shore), cross-moved for an order granting summary judgment in their favor dismissing the complaint against them. In addition, defendant Long Island Medical Diagnostic Imaging, P.C., moved for an order directing the disclosure of a complete, certified copy of records maintained by the Suffolk County Medical Examiner's Office pertaining to the autopsy performed on Michael Makinen. By Order of this Court dated July 7, 2011, the applications for summary judgment were granted and the motion to compel non-party disclosure was denied. Plaintiff now moves for an order granting leave to reargue the prior applications. Defendants have opposed the motion. Defendant Long Island Medical Diagnostic Imaging, P.C.

has also moved to reargue its application. It is well settled that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law (*Three Brothers Estates, Inc. v Guli*, 205 AD2d 525, 613 NYS2d 56 [2d Dept 1994]; *Swenning v Wankel*, 140 AD2d 428, 528 NYS2d 130 [2d Dept 1988]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). It is the determination of this Court that review and reconsideration of these applications is appropriate.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see Gilbert Frank Corp. v Federal Insurance Co.*, *supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

Michael Makinen was a patient of South Shore from 2001 until his death on April 17, 2005 at the age of 42. Defendant Kerri Ann Petitpain, R.N., L.N.P., testified at her deposition that she examined, evaluated, diagnosed and prepared treatment plans for patients at South Shore. When she saw Makinen on April 13, 2005, he complained of chest congestion, sore throat and "upper back pain/spasms." Makinen was noted to have a history of back pain. He was also noted to be a cigarette smoker. An examination was undertaken and a blood pressure reading of 95/58 was noted. A repeat blood pressure was taken which read 100/68. Petitpain testified that a normal blood pressure reading is 120/80, and that hypertension can cause cardiomyopathy, a heart attack, a stroke, an aortic dissection, and that it can lead to worsening heart disease. In addition, Petitpain explained in her deposition testimony that an aortic dissection occurs when the inner wall of the lining of the aorta dissects, or splits, and that it is caused by high pressure. It was also her testimony that she reviewed office notes during Makinen's visit on April 13, 2005, and noticed what his blood pressure readings were on other occasions that he was in the office. On February 23, 2005, his blood pressure was 126/88, on November 22, 2004 his blood pressure was 160/100, on an unspecified previous date it was 152/120, on November 17, 2004 it was 130/80, on July 21, 2004 it was 141/91, and on June 7, 2004 his blood pressure was 132/82. Petitpain also testified that Makinen's blood

pressure readings during those prior visits was not within the same range at 100/68 when the reading was repeated on April 13, 2005. Petitpain also noted that Makinen had a history of high blood pressure, that he was not on blood pressure medication but was taking medication for anxiety and depression. She diagnosed Makinen to have thoracic pain, muscular spasm, bronchitis, upper respiratory infection with cough, and pharyngitis, and noted that strep should be ruled out. Petitpain never considered performing an EKG on Makinen. Petitpain's notes also indicated that Makinen was given a pulmonary function test which showed a decreased FEV1 with obstruction as well as low vital capacity, possibly from a concomitant restrictive defect, and notes were made about "poor effort" and patient's difficulty secondary to increased coughing. A note was made to repeat the spirometry.

Makinen returned to South Shore on April 16, 2005, but this time he was examined by Michael W. Torelli, M.D., who reviewed Nurse Petitpain's notes from her April 13th evaluation of Mr. Makinen. According to Torelli's deposition testimony, the notes included complaints of thoracic pain and muscle spasm, but no note of any history of trauma. Notes about Makinen's complaints indicated that he was being seen as a follow-up for bronchitis and that he was still sick with mild fatigue. Skin was moist and cool, and the lungs were positive for "wheeze and rhonchi." Blood pressure was 141/86, and temperature was normal. A repeat spirometry with nebulizer again showed that Makinen had difficulty breathing, but his breathing felt improved after he received the nebulizer. Dr. Torelli diagnosed Mr. Makinen with bronchitis and he referred Makinen to Long Island Medical Diagnostic Imaging, P.C. for a chest x-ray to rule out pneumonia.

On April 16, 2005, a chest x-ray was performed and read by Dr. Seth Steinman, who saw infiltrate in the lower lobes and who concluded that Mr. Makinen had pneumonia. At his deposition, Dr. Steinman compared a chest x-ray, PA view, taken on November 17, 2004 with the April 16, 2005 x-ray, and noted that there was a change in the width of the mediastinum between the two views. He testified that "the finding of widening of the mediastinum can be seen with an aortic dissection", the symptoms of which included "severe and acute onset of chest pain or back pain." Dr. Steinman's interpretation of Mr. Makinen's x-ray was confirmed by Dr. Schulman in her report dated April 18, 2005.

The transcript of deposition testimony given by non-party Gwen Harleman, M.D., was also submitted by defendant in support of the underlying application. Dr. Harleman performed the autopsy on Makinen and found that the cause of death was cardiac tamponade due to ruptured aortic dissection, with a contributory factor of hypertensive-type cardiovascular disease.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage (*Ballek v Aldana-Bernier*, ___ AD3d ___, 2012 NY App Div LEXIS 2827, 2-3 [2d Dept 2012], citing *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 1006, 903 NYS2d 152). On a motion for summary judgment,

a defendant physician has the burden of establishing the absence of any deviation or departure, or that the patient was not injured thereby and, in opposition, the plaintiff need only raise a triable issue of fact as to elements on which the defendant has met its *prima facie* burden (*Ballek v Aldana-Bernier*, ___ AD3d ___, 2012 NY App Div LEXIS 2827, 2-3 [2d Dept 2012], citing *Stukas v Streiter*, 83 AD3d 18, 30, 918 NYS2d 176).

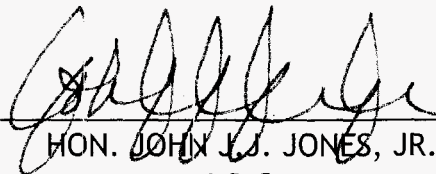
The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986], *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, *supra* at 68 NY2d 324, citing *Winegrad v New York Univ. Med. Center*, *supra* at 64 NY2d 853). Here, a review of the submissions in the underlying motion demonstrate that the defendants failed to make a *prima facie* showing of entitlement to judgment as a matter of law. Petitpain acknowledged in her deposition testimony that the decedent had a history of high blood pressure readings taken during his visits to South Shore, and she admitted that hypertension can cause cardiomyopathy, a heart attack, a stroke, an aortic dissection, and it can lead to worsening heart disease. Moreover, it was noted that blood pressure readings are evaluated in the context of a patient's history and, therefore, the low blood pressure readings taken at the time of decedent's visit were significant in the context of Makinen's history of high blood pressure readings. Furthermore, Petitpain admitted that she did not consider any other causes of Makinen's upper back pain at the time of his visit on April 13, 2005, other than that it was a result of spasm from an upper respiratory infection.

Even if defendants were found to have sustained their burden on the applications for summary judgment, the affirmation of plaintiff's expert physician, redacted pursuant to *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 (2d Dept 1994), raises triable issues of fact. It is the expert's contention that the decedent Makinen had hypertension which, left untreated, led to physiological changes in the heart resulting in the development of aortic dissection, which ruptured and caused cardiac tamponade, the immediate cause of his death. Symptoms of dissection include back or chest pain, dizziness, difficulty breathing, fainting, anxiety, and sweating/clammy skin. High blood pressure and cigarette smoking can increase the risk of an aneurysm. According to plaintiff's expert, typical symptoms of thoracic aortic aneurysms are "pain (usually high in the back), cough, and wheezing." It is asserted that aortic dissection is life threatening but can be cured if surgery is performed before the aorta ruptures. It is also contended that good and accepted medical practice in 2005 for patients with a history of hypertension would include the institution of an appropriate medication regimen as well as a cardiac work-up, which was not done. In the opinion of the expert, the clinician who evaluates a patient with a history of hypertensive blood pressure readings who presents with thoracic back pain, coughing, congestion and wheezing and who is found to have hypotensive pressure readings should be considered for aortic aneurysm and

aortic dissection in the clinician's differential diagnosis. In addition, the evidence that Makinen had difficulty breathing is consistent with aortic dissection and/or aneurysm. In the opinion of the expert, the defendants departed from accepted standards of care in failing to appropriately elicit information about Makinen's back pain, in failing to properly examine him and arrange for appropriate diagnostic studies, in failing to include acute cardiac issues on the differential diagnosis and in failing to properly evaluate his condition, and that the departures were substantial contributing factors in the progression of his cardiac condition and his ultimate demise. Thus, the evidence before this Court raises issues of fact sufficient to require a trial.

The record before this Court shows that the third cause of action in the complaint for recovery for lack of informed consent must be dismissed (*see Berger v Becker*, 272 AD2d 565, 709 NYS2d 418 [2d Dept 2000]), but in all other respects the denial of defendants' motion and cross-motion for summary judgment is warranted.

DATED: 8 May 2012


HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION