Bongiovanni v Cavagnuolo
2013 NY Slip Op 34027(U)
September 18, 2013
Supreme Court, Nassau County
Docket Number: 17701/11
Judge: Roy S. Mahon

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

LINDA BONGIOVANNI,

Plaintiff(s),

- against -

SCOTT L. CAVAGNUOLO, D.C.,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 17701/11

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: July 17, 2013

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR §3212 granting summary judgment, dismissing plaintiff's complaint against the defendant, Scott Cavagnuolo, D.C., upon the grounds the cause of action is without merit, is determined as hereinafter provided:

The instant action sounding in chiropractic malpractice involves certain care and treatment rendered to the plaintiff by the defendant on August 9, 10 and 11, 2011.

The plaintiff in the plaintiff's Verified Further Bill of Particulars dated July 22, 2012 sets forth:

> "3-4. Defendant failed to render proper chiropractic care and treatment to plaintiff, in that he was negligent, careless, reckless and departed from proper medical and chiropractic practice in that his actions constituted chiropractic malpractice: by failing to properly heed the patient's signs, symptoms, and complaints; by failing to properly heed the patient's sign's symptoms, and complaints; by failing to recognize plaintiff's clinical presentation and complaints; in performing chiropractic adjustments to the plaintiff's neck and back lacking awareness of plaintiff's medical history; in negligently manipulating plaintiff's body; in performing chiropractic adjustments to plaintiff's neck and back that was contraindicated by plaintiff's prior medical history; in failing to provide proper chiropractic care as indicated by the plaintiff's history; in failing to order an MRI prior to performing chiropractic

> adjustments on the plaintiff, in failing to order x-rays prior to performing chiropractic adjustments on the plaintiff; in providing improper chiropractic treatments to plaintiff; in failing to properly examine, diagnose, and appropriately treat plaintiff in accordance with appropriate policies and protocols; in failing to timely render proper chiropractic care, in failing to properly and/or adequately take a medical history; in failing, neglecting and omitting to exercise use and employ that degree of knowledge, skill, care and diligence commonly and ordinarily possessed by and required of chiropractors in the locality where the defendant practiced and was located as aforesaid; in performing various services in connection with the care and treatment of plaintiff without proper and/or adequate personnel, supervision and assistance and that in general defendant failed to use that degree of care and caution warranted under all of the surrounding circumstances, among other acts and/or omissions."

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that 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. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). 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 (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment 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 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The defendant is support of the defendant's requested relief submit an affirmed letter report dated March 1, 2013 of Scott S. Coyne, MD, a radiologist, of a review of certain radiological studies of the plaintiff and an affirmation of Jeffrey Meyer, MD, an orthopedist. In substance, the respective submissions set forth that any alleged injuries to the plaintiff were due to degenerative disc disease rather than any chiropractic care rendered by the defendant.

The Court observes that neither Dr. Coyne nor Dr. Meyer are chiropractors. In examining this issue, the Court in **Behar v Coren**, 21 AD3d 1045, 803 NYS2d 629 (Second Dept., 2005) stated:

> "In opposition, the plaintiff came forward with the affidavit of a pathologist who contested the opinions of the appellants' respective experts concerning the surgical and gastroenterological treatment administered to the infant plaintiff. The affidavit of the plaintiffs' expert did not mention whether he had any specific training or expertise in surgery, gastroenterology, or pediatrics. Moreover, the affidavit did not indicate that he had familiarized himself with

> the relevant literature or otherwise set forth how he was, or became, familiar with the applicable standards of care in this specialized area of practice. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience form which it can be assumed that the opinion rendered is reliable" (*Postlethwaite v United Health Servs. Hosps., 5 AD3d 892, 895,, 773 NYS2d 480 [internal quotation omitted]; see LaMarque v North Shore Univ. Hosp., supra at 594, 643 NYS2d 221* ["An expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable"]. Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (*see Romano v Stanley, 90 NY2d 444, 451-452, 661 NYS2d 589, 684 NE2d 19; Nangano v Mount Sinai Hosp., 305 AD2d 473, 759 NYS2d 538).* In the circumstances of this case, as the plaintiffs' expert failed to lay the requisite foundation for his asserted familiarity with the applicable standards of care, his affidavit was of no probative value."
>
> **Behar v Coren, supra at 631**

The Court finds upon review of the submissions of Dr. Coyne and Dr. Meyer that neither physician has offered the requisite foundation to establish their familiarity with chiropractic care and treatment (see, **Behar v Coren**, supra). In the absence of same, the defendant has not made a prima facie showing to substantiate the requested relief. As such, the defendant's application for an Order pursuant to CPLR §3212 granting summary judgment, dismissing plaintiff's complaint against the defendant, Scott Cavagnuolo, D.C., upon the grounds the cause of action is without merit, is **denied**.

SO ORDERED.

DATED: 9/18/2013

Roy S. Mahon
J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE