

**Leach v Harris**

2013 NY Slip Op 31102(U)

May 13, 2013

Sup Ct, Suffolk County

Docket Number: 10-35844

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 12-27-12 (#005)  
MOTION DATE 1-13-13 (#006)  
ADJ. DATE 3-28-13  
Mot. Seq. # 005 - MG  
# 006 - MG

-----X  
LAURA LEACH and JOHN J. LEACH,  
  
Plaintiffs,

ALAN W. CLARK & ASSOCIATES, LLC  
Attorney for Plaintiffs  
650 Wantagh Avenue  
Levittown, New York 11756

KELLY, RODE & KELLY, LLP  
Attorney for Stephen Harris, M.D. and Harris  
Plastic Surgery  
330 Old Country Road  
Mineola, New York 11530

- against -

STEPHEN HARRIS, M.D., HARRIS PLASTIC  
SURGERY, ANTHONY CAPIZZI, M.D.,  
SOUTH SHORE SURGICAL SPECIALISTS,  
and GOOD SAMARITAN HOSPITAL  
MEDICAL CENTER,  
  
Defendants.

MITCHELL J. ANGEL, PLLC  
Attorney for Defendants Capizzi, M.D. and South  
Shore Surgical Specialists  
170 Old Country Road  
Mineola, New York 11501

BOWER LAW, P.C.  
Attorney for Defendant Good Samaritan Hospital  
1220 RXR Plaza  
Uniondale, New York 11556

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Upon the following papers numbered 1 to 29 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-12; (006)13-27; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers   ; Other 28-29; it is,

**ORDERED** that this motion (seq. #005) by defendant, Good Samaritan Hospital, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted and the complaint as asserted against it is dismissed; and it is further

**ORDERED** that this motion (seq. #006) by defendants, Anthony Capizzi, M.D. and South Shore Surgical Specialists, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted against them is granted.

This medical malpractice action is premised upon the alleged negligence of the defendants in their care and treatment of the plaintiff, Laura Leach, during a course of treatment from about June 30, 2008 to approximately December 22, 2008. On July 16, 2008 through July 22, 2008, the plaintiff was admitted to defendant Good Samaritan Hospital Medical Center (“Good Samaritan”). On July 16, 2008, a bilateral simple mastectomy and sentinel node dissection was performed by defendant Dr. Anthony Capizzi. Upon completion of the procedure, defendant Dr. Stephen Harris performed a bilateral pedicle TRAM flap breast reconstruction and reconstruction of the abdominal wall. During that surgery, Dr. Harris noted an incarcerated hernia, and called Dr. Capizzi back to the operating room to perform a repair of a ventral incisional hernia. On August 11, 2008 through August 22, 2008, the plaintiff was admitted to Good Samaritan to treat an infection. Mesh was removed on August 13, 2008, and the abdominal wall and bilateral breasts were debrided. It is alleged that the defendants were careless and negligent, and departed from good and accepted standards of medical care during their treatment of the plaintiff, and failed to treat an infection, causing her to sustain injury and conscious pain and suffering. The plaintiff’s spouse, John J. Leach, has asserted a derivative claim.

Defendant Good Samaritan Hospital seeks summary judgment dismissing the complaint on the bases that it is not vicariously liable for the acts and/or omissions of Dr. Harris or Dr. Capizzi; that the bill of particulars served by the plaintiff does not name any hospital employees or set forth specific acts of negligence; and that there is no basis for the cause of action for lack of informed consent. However, in reviewing the plaintiff’s complaint, no cause of action for lack of informed consent has been set forth.

Defendant Anthony Capizzi, M.D. seeks summary judgment dismissing the complaint on the basis that he did not depart from the accepted standards of care and did not proximately cause the injuries alleged by the plaintiffs.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are: (1) a deviation or departure from accepted practice; and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (*see*

*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). 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, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Medical records are required to be submitted in admissible form which requires that they be certified pursuant to CPLR 3212 and 4518 (*Friends of Animals v Associated Fur Mfrs.*, *supra*). Expert testimony is limited to facts in evidence (see also *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc 2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). It is noted that neither moving party has submitted medical records in admissible form in that none of the records have been certified pursuant to CPLR 4518. Counsel in both motions and have attempted to certify Good Samaritan's Hospital records via counsel's own certification which is not permitted. Pursuant to CPLR 4518 (c), such hospital records must be certified by "the head of the hospital . . . or by an employee delegated for that purpose or by a qualified physician" (see *New York County District Attorney's Office v Rodriguez*, 141 Misc 2d 1050 [Civ Ct, New York County 1988]), not by an attorney for the defendants.

In support of its motion, defendant Good Samaritan has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, its answer, and plaintiffs' verified bill of particulars; copies of plaintiff's Good Samaritan Hospital record which are improperly certified by plaintiffs' counsel and thus inadmissible; an unsigned and double sided transcript of the plaintiff's examination before trial dated December 7, 2011, which fails to comport with 22 NYCRR 202.5 (a); and the affirmation of Joseph Weinberg, M.D. and the affidavit of Fred Landon, both submitted with font size which does not comport with CPLR 2101.<sup>1</sup> The plaintiffs have not opposed the motion.

In support of his motion, defendants Anthony Capizzi, M.D. and South Shore Surgical Specialists have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, their answer, plaintiffs' verified bill of particulars, the amended verified complaint, and their answer to the amended complaint; an unsigned but certified copy of the transcript of Anthony Capizzi, M.D. dated May 23, 2012, which is considered as adopted as accurate by the moving defendant (see *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); the affidavit of defendant Capizzi certifying the records of South Shore Surgical Specialists; a copy of the Good Samaritan Hospital record which is improperly certified by counsel for Good Samaritan Hospital pursuant to CPLR 4518 (see *New York County District Attorney's Office v Rodriguez*, *supra*); and the affirmation of Gregory Zito, M.D. The plaintiffs have not opposed the motion.

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<sup>1</sup> Double sided documents are required to be bound on the side.

Turning to motion seq. 005, as required pursuant to CPLR 3212, Good Samaritan has not submitted a copy of the amended complaint, or its answer in response to the amended complaint if one were served. It is further supported with evidentiary submissions which are not in admissible form.

Even if the submissions were in admissible form, it is determined that defendant's expert, Joseph Feinberg, M.D., has failed to set forth the basis for his experience or provide a copy of his curriculum vitae to qualify as an expert. Defendant has further failed to submit the records of Dr. Harris, Dr. Capizzi and Dr. LaRosa of the Island Surgical & Vascular Group, New York Pain Consultants, upon which Dr. Feinberg bases his opinion in part. It is further determined that defendant's expert, Dr. Feinberg, has opined in a conclusory, unsupported manner that the care and treatment rendered to Laura Leach by the hospital staff did not deviate from good and accepted standards of care and that the treatment and was well within the parameters of good and acceptable hospital care and treatment. He has not addressed the alleged departures set forth in plaintiff's bill of particulars in support of his opinion, or demonstrated how the defendant comported with such standards in addressing the alleged departures.

It is noted, however, that the bill of particulars does not name any hospital personnel involved in the alleged malpractice nor does it specify mistakes made by the unidentified personnel, making it impossible to determine any merit in the plaintiff's claim against the defendant Good Samaritan Hospital (*see Batson v LaGuardia Hospital*, 194 AD2d 705, 600 NYS2d 110 [2d Dept 1993]). Thus, Dr. Feinberg could not opine as to any particular individual or departure. Based upon the foregoing, defendant Good Samaritan Hospital has established *prima facie* entitlement to summary judgment dismissing the complaint as asserted against it as a matter of law, regardless of the sufficiency of the moving papers.

Turning to motion seq. #006, it is determined that defendants Anthony Capizzi, M.D. and South Shore Surgical Specialists have established *prima facie* entitlement to summary judgment dismissing the complaint as asserted against them.

Dr. Capizzi testified that he is a licensed physician who is board certified in general surgery. Within the area of general surgery, he specializes in breast surgery, mainly limited to breast cancer, and did so in 2008. He maintains a private office and has a professional corporation known as Anthony J. Capizzi, M.D., which does business as South Shore Surgical Specialists. He is the only officer of that corporation. Dr. Lee is an associate at his office. He stated that he knew Stephen Harris, M.D., a plastic surgeon, and referred some patients to him in 2008. He had no independent recollection of Laura Leach. His records indicated that he first saw the plaintiff on June 30, 2008, as she had been referred to him because of a diagnosis of breast cancer. He performed surgery on July 16, 2008, consisting of a bilateral mastectomy and sentinel node dissection. He also repaired a hernia that same date. Dr. Harris performed reconstruction consisting of a TRAM flap.

Dr. Capizzi testified that post-operatively, a patient can run a fever for three to five days unrelated to an infection. He is comfortable with the patient having a temperature under 101. A fever three to five days post-operative would give him concern for possible atelectasis or possible urinary tract infection. He continued that delayed healing, redness, chills, and weakness could be signs of wound infection. He stated that a wound culture would be taken if an infection is suspected and if the wound does not look right. Dr. Capizzi testified that when he saw the plaintiff on July 19, 2008, post-operatively, she had a maximum temperature of 101 and her wounds were clean with minimal drainage. When he saw the plaintiff on July 20, 2008, her fourth post-operative day, she complained of incisional pain. She was afebrile (without fever)

at the time, had a maximum temperature of 101, and her wound was clean. He did not know if either he or Dr. Harris discharged the plaintiff, but she was discharged on July 22, 2008. His office record noted that a message was left with Laura Leach by his nurse, Evelyn Demers, to please call regarding how she was feeling and what she was doing. It would be his practice to have her follow-up with him in one week to follow-up on pathologies and give appropriate referrals for further treatment if necessary.

Dr. Capizzi stated that he became aware that the plaintiff was hospitalized on August 11, 2008, concerning an infected mesh. He was away for a week, so Dr. Lee took care of the plaintiff. The plaintiff had an office visit with him on September 8, 2008. He did not recall speaking to the plaintiff between July 22, 2008 and September 8, 2008, and did not recall speaking to anyone else about her. At the September 8, 2008 visit, he noted that she had been treated for an infection by Dr. Harris as there was an open wound that was granulating at that point, and she complained of pain and swelling in the wound. He saw her on December 22, 2008 and June 10, 2009.

Gregory Zito, M.D., the expert for Dr. Capizzi and South Shore Surgical Specialists, affirmed that he is licensed to practice medicine in New York State and is board certified in surgery. He set forth his education and training and opined within a reasonable degree of medical certainty that there were no departures from the accepted medical practice by Dr. Capizzi who at all times acted in accordance with relevant standards of care in the surgical community, and that there was no reason for Dr. Capizzi to suspect that the plaintiff had a post-operative wound infection, or to order a diagnostic work up, or initiate additional or different treatment. He further opined that the post-operative elevated temperatures sustained by the plaintiff in the days immediately following surgery were normal sequelae of that surgery and were not caused by a post-operative infection.

Dr. Zito stated that the plaintiff was admitted to Good Samaritan Hospital on July 16, 2008, for a diagnosis of right breast cancer, for which a right therapeutic and left prophylactic mastectomy and bilateral reconstruction of the breasts via TRAM flap reconstruction were performed. The right and left simple mastectomies with right sentinel node dissection for biopsy were performed by Dr. Capizzi, a breast surgeon. The TRAM flap reconstruction was performed by Dr. Harris, a plastic surgeon by using muscle, fat and skin from the abdomen to create new breast mounds. During the surgery, Dr. Harris noted an incarcerated ventral incision hernia and called Dr. Capizzi to the operating room. The hernia repair was performed with mesh by Dr. Capizzi. Dr. Zito stated that there are no claims that Dr. Capizzi departed from any standards of care and treatment of the plaintiff with regard to the pre-admission care, the formulation of a surgical plan, or the surgeries themselves. The plaintiff was discharged from Good Samaritan Hospital six days after surgery, with discharge instructions given by Dr. Harris, with whom the plaintiff was to follow with in the immediate future.

Dr. Zito opined that during the plaintiff's admission, she was noted to have some post-operative incisional pain and discomfort of the abdomen, with some blistering and ecchymosis around and about the abdominal donor site, consistent with the surgery itself and not indicative of infection. There were no otherwise historical references or findings of concern upon physical examination. The immediate post-operative white blood cell count of 16.4 was not unusual in the context of surgery, and there was no need to repeat the blood tests on post-operative days three or four. Plaintiff did not have post-operative temperature elevations over 101 on post-operative days one, two and three, except one elevation of 102. Upon discharge, her temperature was 99. Dr. Zito opined that if these immediate post-operative temperature elevations were not caused by a post-operative MRSA infection as the temperature elevations would have been significantly greater, significantly more prolonged, and would have been accompanied by clinical

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signs of systemic wound infection, such as purulence, warmth, redness and/or sepsis. He continued that Dr. Capizzi saw the plaintiff on July 19, 2008 and July 20, 2008, and that Dr. Harris saw her on more than one occasion both prior and subsequent to those two visits by Dr. Capizzi. In that there was no indication that the plaintiff had infection, there was no basis to refer the plaintiff to an infectious disease specialist, and no reason to debride or culture the wounds.

Based upon the foregoing, it is determined that defendants Anthony Capizzi, M.D. and South Shore Surgical Specialists have demonstrated *prima facie* entitlement to summary judgment dismissing the complaint as asserted against them.

To rebut a *prima facie* showing of entitlement to an Order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). Here, the plaintiffs have not submitted opposition to raise a factual issue with regard to these motions and the moving defendants' entitlement to summary judgment dismissing the complaint.

Accordingly, the instant motions are granted, and the complaint is dismissed as asserted against the moving defendants, Good Samaritan Hospital, Anthony Cappizi, M.D., and South Shore Surgical Specialists.

Dated: May 13, 2013

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION