

Mincieli v Anderson

2013 NY Slip Op 31863(U)

August 5, 2013

Sup Ct, Suffolk County

Docket Number: 08-17223

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-10-13 (#004)
MOTION DATE 5-29-13 (#005)
ADJ. DATE 6-3-13
Mot. Seq. # 004 - MG
 # 005 - WDN

-----X

MARK MINCIELI, as Limited Administrator of the
Estate of MICHAEL MINCIELI, Deceased, and
HELEN MINCIELI, Individually,

Plaintiffs,

- against -

JOSEPH C. ANDERSON, M.D., JINGXUAN LIU,
M.D., JAMES H. SUH, M.D., STONY BROOK
UNIVERSITY PHYSICIANS and UNIVERSITY
FACULTY PRACTICE CORPORATION,

Defendants.

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Action No. 1
Index No. 08-17223

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KELLY, RODE & KELLY, LLP
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M.D., Stony Brook University Physicians and
University Faculty Practice
330 Old Country Road
Mineola, New York 11530

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MICHAEL MINCIELI and HELEN MINCIELI,

Plaintiffs,

-against-

JEFFREY TRILLING, M.D., STONY BROOK
FAMILY MEDICINE, P.C., ZELIK FRISCHER,
M.D., ALEXANDER KIRSHENBAUM, M.D.,
STONY BROOK UNIVERSITY PHYSICIANS and
UNIVERSITY FAMILY PRACTICE
CORPORATION,

Defendants.

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Action No. 2
Index No. 08-40590

ERIC T. SCHNEIDERMAN, ESQ.
ATTORNEY GENERAL, STATE OF NY
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-13; (005) 14-34; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motions (004)(005) are consolidated and decided as follows; and it is further

ORDERED that motion (004) by the defendant, Jingxuan Liu, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that motion (005) by the defendants, Jeffrey Trilling, M.D. and Stony Brook Family Medicine, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them shall be marked withdrawn on the basis of counsel's letter dated June 20, 2013 withdrawing the motion and indicating that the plaintiffs have discontinued the action as against them.

By way of the order dated October 26, 2010 (Whelan, J.) the actions pending under Index Numbers 08-17223 and 08-40590 were consolidated for joint trial. The order directed that motions be interposed only in the action to which they relate and be captioned only in the title of that action. Here, the motion by Trilling and Stony Brook Family Medicine interposed under the captions of both related actions was improper. In any event, motion (005) has been withdrawn.

It is noted that, the action was also discontinued as against defendant James H. Suh, a pathology resident, by order dated March 20, 2013 (Whelan, J.), and further discontinued as against defendant Zelik Fischer, M.D. pursuant to a stipulation of discontinuance dated March 26, 2010.

It is alleged that the plaintiff Michael Mincielli, a retired teacher, came under the care and treatment of Jingxuan Liu, M.D. from August 28, 2003 through August 8, 2006 for a colonoscopy which was allegedly negligently performed by him, resulting in the failure to properly remove polyps and the failure to timely and properly diagnose and treat the decedent for colon cancer, resulting in the decedent's premature death from cancer. The decedent was allegedly under the care and treatment of Jeffrey Trilling, M.D. and Stony Brook Family Medicine, M.D. from the 1980's and was referred periodically for colonoscopies to defendant Joseph C. Anderson, M.D. in 2003 and 2006. He was also treated by Dr. Zelik Fischer, M.D. in 2006 for the removal of a cancerous prostate gland. In 2007, surgical evaluation for a possible right hernia revealed abnormal hemoglobin and hematocrit levels for which the plaintiff's decedent was referred by Dr. Trilling for gastroenterology evaluation by Dr. Robert Richards. A repeat colonoscopy on December 4, 2007 by Dr. Richards revealed a cancerous lesion at the hepatic flexure of the colon. Subsequent imaging studies revealed cancer of the liver. Unsuccessful oncology care and treatment was provided for the decedent who died on July 27, 2009.

In motion (004), Jingxuan Liu, M.D. seeks summary judgment dismissing the complaint asserted against him which sets forth causes of action for negligent departures by the defendants from the good and accepted standards of medical care and treatment of decedent, Michael Mincieli; lack of informed consent; a derivative claim on behalf of plaintiff Helen Mincieli; and wrongful death of the decedent.

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]).

In support of motion (004), defendant Liu has submitted, inter alia, an attorney's affirmation; the expert affirmation of Stephen Factor, M.D.; copies of the summons and complaint, defendant's answer and demands, plaintiffs' verified bill of particulars; supplemental summons and amended verified complaint, defendant's answer to the amended complaint with demands, plaintiffs verified bill of particulars; transcripts of the examinations before trial of Michael Mincieli dated April 24, 2009, Helen Mincieli dated May 28, 2009 and July 6, 2011, Mark Mincieli dated July 6, 2011, Joseph Anderson, M.D. dated November 16, 2011; James Suh, M.D. dated June 27, 2012; Jingxuan Liu dated April 30, 2012 (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); and medical records.

Michael Mincieli testified to the extent that he was diagnosed with colon cancer, basal cell cancer on his neck, squamous cell carcinoma on his nose, and prostate cancer. He stated that Dr. Trilling was his primary care physician from about 1989, and that Dr. Trilling referred him to Dr. Anderson for a colonoscopy in 2003. After the colonoscopy was done, he was told to return in three years. He believed he was told that a polyp was found but it was benign. He discussed his care and treatment provided by Dr. Potter, Dr. Kiewe, and Dr. Frischer. In 2004, he had an elevated PSA level, so Dr. Trilling referred him to Dr. Frischer who performed a biopsy in August 2006 and diagnosed prostate cancer. In 2006, he had another colonoscopy by Dr. Anderson who advised him after the procedure to return in five years. In September 2007, he thought he felt a small lump in his groin and was told by a doctor at Dr. Trilling's office that had a hernia. He was not cleared for surgery as his hematocrit had decreased from 39 to 29 from the year prior, so Dr. Trilling sent him for another colonoscopy and an endoscopy. Because Dr. Anderson was no longer in practice at his former office, he saw Dr. Robert Richards who performed the colonoscopy at Stony Brook University Hospital and found a polyp. Mincieli stated that Dr. Richards told him that someone dropped the ball and that the polyp condition should have been corrected a year ago with removal of a four inch section of the colon. A CT scan was then done and he was referred to an oncologist by Dr. Richards for stage IV cancer. He thereafter followed with Dr. Garcia as his oncologist. He began chemotherapy treatment with Avast in, Oxaliplatin, Camptosar, Xeloda, and 5FU in January 2008, and died July 27, 2009.

Jingxuan Liu, M.D. testified to the extent that he is a physician duly licensed to practice medicine in New York State and is board certified in anatomic and clinical pathology. He first became employed at Stony Brook University Hospital in 2003 as a surgical pathologist and clinical assistant professor. He does general surgical pathology, but his subspeciality is breast and genitourinary pathology. He reviewed the

August 8, 2006 colonoscopy specimen, and he issued a report diagnosing the specimen as tubular adenoma. He did not report cancer.

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 [1999]). 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*, 224 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

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]).

Turning to motion (004), Stephen Factor, M.D., defendant Liu's expert, affirms that he is licensed to practice medicine in New York State and is board certified in anatomic and clinical pathology. He set forth the records and materials which he reviewed in this matter, including the pathology slides concerning the pathology report of August 9, 2006. It is Dr. Factor's opinion within a reasonable degree of medical certainty that Dr. Liu properly reviewed and accurately reported the findings noted within the pathology report dated August 9, 2006; that Dr. Liu did not otherwise participate in any of the alleged medical treatment concerning the plaintiff's decedent; and he did not deviate from accepted standards of medical care with regard to his review and report of August 9, 2006. Dr. Factor additionally stated that upon his review of the pathology slides, he concurs the slides are consistent with the gross description of the specimen and that the diagnosis of tubular adenoma is accurate and there is no evidence of any other pathology.

Dr. Factor continued that, as a pathologist, he can unequivocally state that Dr. Liu, in the role of a pathologist, would have no duty to perform or opportunity to participate in the process of colonoscopy, polypectomy, biopsy, or otherwise participate in the removal of polyps, tissue, and specimens during colonoscopy and polypectomy. As such, Dr. Liu would not have disregarded and/or failed to remove and biopsy noted and tagged polyps, irregularities and abnormalities presented on colonoscopy. Dr. Factor continued that the specimens were adequate; that Dr. Liu had no duty to order or recommend further study or diagnostic tests or procedures absent pathological indication to do so; he accurately reported the tubular adenoma; and did not cause, permit or allow the decedent's colon cancer to grow, spread, and metastasize to the liver and other organs, nor did he deprive the decedent of the opportunity for a cure. Dr. Factor addressed the remaining alleged departures, concluding that Dr. Liu did not depart from good and accepted

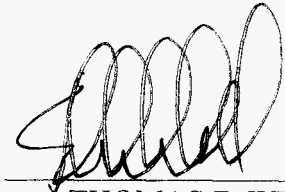
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standards of medical/pathology review and treatment of the decedent, complied with the standards of care, and did not proximately cause the injuries to the decedent as alleged by the plaintiffs.

Based upon the foregoing, the defendant Dr. Liu has established prima facie entitlement to summary judgment dismissing all causes of action asserted against him in the complaint. The plaintiffs have not opposed this motion and have thus failed to raise a triable issue of fact to preclude summary judgment dismissing the complaint.

Accordingly, motion (004) by Dr. Liu for summary judgment dismissing the complaint as asserted against him is granted.

Dated: 8/5/13



THOMAS F. WHELAN, J.S.C.