

Braun v Lewis

2013 NY Slip Op 31948(U)

August 16, 2013

Sup Ct, New York County

Docket Number: 112408/09

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____
_____ *vice*

IA PART 16
PART _____

Index Number : 112408/2009
BRAUN, RAFAEL
vs
LEWIS, M.D. BLAIR S.
Sequence Number : 003
RESTORE PRIOR MOTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants
for summary judgment is denied in
accordance with the accompanying
memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

AUG 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

AUG 16 2013

Dated: _____


_____, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
RAFAEL BRAUN, as Executor of the Estate of
BOZENA BRAUN, and RAFAEL BRAUN, Individually,

Plaintiffs,

-against-

BLAIR S. LEWIS, M.D., and
BLAIR S. LEWIS, M.D., P.C.,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 112408/09
Motion Seq. No. 003

FILED

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NEW YORK

This motion is the second attempt by defendant Dr. Blair S. Lewis and his professional corporation to summarily dismiss this action. The underlying dispute relates to the untimely death of Bozena Braun on June 15, 2009, at the age of 57 due to colon cancer that was first diagnosed in August of the preceding year by a provider not a party here.

By decision dated July 26, 2011, this Court denied defendant's motion to dismiss plaintiffs' claims as time-barred pursuant to CPLR §§ 3211(a)(5) and 214-a. This Court reasoned that further discovery was warranted regarding the medical malpractice claims on the issue of the continuation of the physician-patient relationship for treatment of the same condition; namely, the health of Mrs. Braun's colon with particular attention to the polyps found therein. Further, based on *Bennett v Long Is. Jewish Med. Ctr.*, 51 AD3d 959 (2nd Dep't 2008), this Court also denied dismissal of the alternative cause of action sounding in common law negligence.

The Appellate Division modified to the extent of dismissing the medical malpractice claims, finding that no viable basis existed for the application of the continuous treatment doctrine on the facts presented; i.e., that the defendant doctor had

last performed colonoscopies on Mrs. Braun in February and August 2006, that plaintiffs did not commence this action until August 31, 2009, more than 2½ years later, and that the relationship did not continue during the intervening period. As evidence that the relationship did not continue, the appellate court pointed to Mr. Braun's response to the defendant doctor's March 5, 2007 letter advising Mrs. Braun to schedule an appointment by indicating that his wife was not yet due for a colonoscopy and by requesting a copy of the prior test results. However, the Appellate Division agreed with this Court that the common law negligence claim remained viable in light of the evidence, stating that: "While defendant sent letters to plaintiff's primary care physician after each colonoscopy, there is nothing in the record indicating that he forwarded the pathology reports that were subsequently issued." 99 AD3d 574, 575 (1st Dep't 2012).

With discovery now complete, defendants have moved to dismiss the remaining negligence claim pursuant to CPLR § 3212. In support of the motion, defendants offer the affidavit of the decedent's gastroenterologist Dr. Mark Friedman, who referred the patient to Dr. Lewis for evaluation of a large cecal polyp in her colon (Exh 1). Dr. Friedman confirms that defendant Dr. Lewis sent him the February 10, 2006 pathology report that referred to "carcinoma in situ," in response to which Dr. Friedman recommended a follow-up examination in six months, even though Dr. Lewis had opined that a one-year interval was appropriate. Mrs. Braun acted on the recommendation by having Dr. Lewis perform another colonoscopy in August of that year. Dr. Friedman confirms that he received the August pathology report, which contained no reference to "carcinoma in situ." Therefore, Dr. Friedman agreed with Dr. Lewis that no follow-up examination was needed for three years. Dr. Friedman also states that he did not send copies of the pathology reports to Mrs. Braun or tell her what they said.

Based on this set of facts, defendants claim that they have offered the proof noted to be missing by the Appellate Division and that Dr. Lewis cannot be held liable in negligence based on an alleged failure to communicate the pathology findings to the patient, as he discharged his duty by sending the reports to the referring physician Dr. Friedman. Even if Dr. Lewis somehow had a duty to send the test results directly to the patient, plaintiffs cannot establish that such acts would have lead to the earlier diagnosis and treatment of Mrs. Braun's colon cancer, particularly without framing their claims in terms of medical malpractice, which the Appellate Division has prohibited as time-barred.

Plaintiffs vigorously oppose. They assert that Dr. Lewis breached his duty to communicate the findings of the colonoscopies directly to the patient, particularly after the plaintiff requested in writing the results of the August 28, 2006 colonoscopy. Counsel asserts (at ¶ 4) that the "decedent's ignorance to her true colonic health led her to ignore abdominal pain for over one year causing the cancer in her colon to metastasize and cause her death on 6/15/09."

Had Mrs. Braun been aware of the test results, she would have followed up more affirmatively, plaintiffs claim. The pathology report from the February 10, 2006 biopsy performed by Dr. Lewis indicated : "Fragments of colonic mucosa with tubulovillous adenoma containing areas of high grade dysplasia (carcinoma in situ). There was a crushed area containing atypical changes, however definitive infiltration was not found." (Exh A to Aff in Opp). This finding of *carcinoma in situ* was never communicated to the patient, though a follow up examination was recommended, plaintiffs claim.

At the follow up on August 28, 2006, Dr. Lewis found "a small amount of residual adenomatous tissue," which he claimed he removed. The pathology report included the

finding of “fragments of a sessile polypoid adenomatous lesion composed of low grade dysplastic colonic glands arranged in a tubular and villous architecture ... Fragments of sessile tubulovillous adenoma.” (Exh B). While this information was sent to Dr. Friedman, it was not sent to the patient. Dr. Lewis failed to send the information, despite plaintiffs’ written request.

Unaware of any issues relating to cancer, the decedent followed up in 2007 and 2008 with her primary care physician Dr. Lipetz for complaints of abdominal pain and shortness of breath. On August 27, 2008, she sought a second opinion from Dr. Sosnowik, who referred her to Parkway Hospital where a diagnosis of colon cancer was made that same day. Mrs. Braun died about ten months later.

The law is well established that a defendant may be held liable for ordinary negligence upon his failure to communicate significant medical findings to a patient. *Bennett, supra*, 51 AD3d at 961; *see also, Yaniv v Taub*, 256 AD2d 273, 274 (1st Dep’t 1998). Dr. Lewis was on notice from plaintiffs’ letter requesting the test results that Mrs. Braun did not know the results. Our courts have treated the failure to disclose the existence of a known danger as the equivalent of misrepresentation, where it is reasonable to expect that the patient will rely upon the appearance of safety. *McKinney v Bellevue Hosp.*, 183 AD2d 563, 565 (1st Dep’t 1992). According to plaintiffs, that is precisely what happened here, leading Mrs. Braun to follow up with her primary care physician rather than Dr. Lewis. At a minimum, plaintiffs have created a triable issue of fact, they claim.

Pointing in Reply to the decedent’s deposition testimony, defendants contend that Mrs. Braun was, in fact, aware of the results of the February 2006 pathology report finding *carcinoma in situ*. In any event, counsel contends, any complaint relating to the

alleged failure to communicate the results of the February 13, 2006 test results would be time-barred under the three-year statute of limitations for negligence, as the action was not commenced until August 31, 2009. Further, plaintiffs' letter requesting the results of the August 2006 biopsy did not put Dr. Lewis on notice that Mrs. Braun had not been advised of the February test results. Additionally, defendants continue to maintain that Dr. Lewis fulfilled his duty by forwarding the reports to the referring physician Dr. Friedman, the only physician to whom the decedent had requested that the reports be sent. What is more, as it was the position of Dr. Lewis that all irregular cells had been removed in August 2006, there was no "injurious condition" that he failed to report to the patient.

This Court finds on the record as a whole that plaintiffs have presented enough evidence in opposition to defendants' motion to defeat the request for summary judgment and allow this case to go forward to trial. A jury may well find under these circumstances that Dr. Lewis negligently failed to fully advise Mrs. Braun of the true state of her colon health so that she could take appropriate action in response to her continuing complaints of abdominal pain by consulting a specialist to investigate the threat of cancer instead of obtaining routine treatment for ordinary ills from her primary care physician.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Blair S. Lewis, M.D., and Blair S. Lewis, M.D., P.C., is denied.

Dated: August 16, 2013

AUG 16 2013

FILED

AUG 20 2013

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER

COUNTY CLERK'S OFFICE
NEW YORK