

Orlowski v Guido

2013 NY Slip Op 32752(U)

September 16, 2013

Sup Ct, Suffolk County

Docket Number: 10-16423

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 5-2-13
ADJ. DATE 8-7-13
Mot. Seq. # 001 - MD

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JOHN J. ORLOWSKI and HELEN ORLOWSKI,

Plaintiffs,

- against -

MICHAEL GUIDO III, M.D., NEUROLOGY
ASSOCIATES OF STONY BROOK, UNIVERSITY
FACULTY PRACTICE CORPORATION,
CANDICE G. PERKINS, M.D., HENRY HEESANG
WOO, M.D., and WENDY C. GAZA, M.D.,

Defendants.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-17; Repeating Affidavits and supporting papers 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by defendants, Michael Guido, III, M.D., Neurology Associates of Stony Brook, University Faculty Practice Corporation, Candice G. Perkins, M.D., Henry Heesang Woo, M.D. and Wendy C. Gaza, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is denied.

In this medical malpractice action, the plaintiff, John J. Orłowski, seeks damages for personal injuries alleged to have been sustained due to the negligent departures from the accepted standards of care and treatment by the defendants. The plaintiff came under the care and treatment of the defendants on or about February 4, 2009 through February 11, 2009. It is alleged that the defendants failed to diagnose the signs of an impending stroke and failed to timely perform diagnostic testing and a carotid endarterectomy, resulting in the plaintiff suffering a stroke and causing loss of the full use of his right hand and right leg; deformity of the right hand; difficulty ambulating; neurological deficits, and difficulty with the activities of daily life, among other things. Causes of action have been pleaded for negligence and lack of informed consent, as well as a derivative claim by plaintiff's spouse, Helen Orłowski, for loss of services.

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 [1979]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [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 [2nd Dept 1981]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; the affidavit of Robert April, M.D. which is not notarized; copies of the summons and complaint, answers served by defendants Perkins, University Faculty Practice Corporation, and Neurology Associates of Stony Brook, plaintiffs' verified bill of particulars as to defendant Guido, Perkins, Gaza, Neurology Associates of Stony Brook, University Faculty Practice Corporation, plaintiffs' amended supplemental bill of particulars as to defendants Neurology Associates of Stony Brook, University Faculty Practice Corporation, Woo, Perkins, Gaza, Guido; transcripts of the examinations before trial of John Orlowski dated April 5, 2011, Helen Orlowski dated June 22, 2011 which are not in admissible form and are not accompanied by an affidavit of service pursuant to CPLR 3116; unsigned and uncertified transcript of the examination before trial of Henry Heesang Woo dated December 22, 2011 which is considered as adopted as accurate by the moving defendant (see, Ashif v Won Ok Lee, 57 AD3d 700 [2nd Dept 2008]); and an uncertified medical record which is not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212 and 4518 (Friends of Animals v Associated Fur Mfrs., supra). Expert testimony is limited to facts in evidence. (see, Allen v Uh, 82 AD3d 1025 [2nd Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2nd Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2nd Dept 1988]; O'Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2nd Dept 1984]; Hornbrook v Peak Resorts, Inc., 194 Misc2d 273 [Sup Ct, Tomkins County 2002]), and the uncertified records are not in evidence. The answers served by defendants Guido, Woo and Gaza have not been provided with the moving papers as required pursuant to CPLR 3212. The affidavit of Robert April, M.D. is considered as the plaintiff has not objected to the use thereof, despite its lack of notarization, and the affidavit is treated herein as having a technical defect in form (see, CPLR §§ 2001, 2106; Sam v Town of Rotterdam, 248 AD2d 850; Uscudera v Mahbubur, 299 AD2d 535 [2nd Dept 2002]).

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 [2nd Dept 1998], *app denied* 92 NY2d 818). 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 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2nd 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 [1985]; Lyons v McCauley, 252 AD2d 516, [2nd Dept 1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2nd Dept 1994]).

Robert April, M.D. avers that he is licensed to practice medicine in New York State and is board certified in neurology. He has, however, not set forth his education and training and the basis to qualify as an expert in this matter. Dr. April has set forth the various documents and medical records reviewed, although not identified to this court and included in support of the motion. Dr. April opined within a reasonable degree of medical certainty that the moving defendants, at all times in question, conformed with the accepted care and that there were no deviations from accepted standards of practice, or their agents or employees. He further opined that there is nothing that the defendants did or failed to do which was a proximate cause of the plaintiff's claimed injuries.

Dr. April stated that Mr. Orlowski suffered a stroke in 2007, but does not describe the stroke with any particularity and does not indicate whether or not the plaintiff suffered any related residual disabilities. He continued that about three months after that stroke, the plaintiff was seen on a periodic basis by Dr. Perkins at the Stony Brook University Medical Center Neuroclinic where followup regarding speech arrest was conducted, as well as surveillance and testing to evaluate blood flow to the brain, and carotid flow. Dr. April does not set forth which tests were done and the results of such testing, and simply stated that the "medical records of the care that had been rendered prior to the admission in February 2009 do not reflect a progression of atherosclerosis. Dr. Perkins last saw the plaintiff on January 8, 2009. Dr. April then sets forth in a conclusory statement that Dr. Perkins care was appropriate, and within the accepted standards of medical practice and was not the proximate cause of any injury claimed by the plaintiff. Dr. April does not set forth the specific tests performed, the results of such testing, the standard of care, and how the care and treatment by Dr. Perkins comported with the standard of care.

Dr. April then set forth that Dr. Guido's primary contact with the plaintiff was during a telephone conversation on January 29, 2009 wherein Dr. Guido advised the plaintiff to go to the Stony Brook Medical Center for further workup of his condition. However, Dr. April does not indicate what complaints were presented to Dr. Guido, but continued to opine that the plaintiff had been properly worked up, a timely and appropriate diagnosis had been made, appropriate and proper consults were called, and a medically appropriate course of a surgical procedure was scheduled and ultimately performed by Dr. Woo on February 9, 2008.¹ Dr. April, did not set forth the standard of care, and the treatment provided by Dr. Guido. Rather, Dr. April set forth in a conclusory and unsupported statement that the care provided by Dr. Guido was appropriate and within the accepted standards of medical practice, and was not the proximate cause of the plaintiff's injuries.

Dr. April stated that Dr. Woo first saw Mr. Orlowski on neurosurgical consultation on February 6, 2008 after a radiological study revealed high grade stenosis in the left internal carotid artery. It was agreed that the plaintiff would undergo a left carotid endarterectomy. It is Dr. April's opinion that this was the proper course of action and the appropriate surgical procedure given the plaintiff's condition and medical history. Following the procedure on February 9, 2008, the plaintiff was monitored, observed, and discharged home on February 10, 2008 about 31 hours following the procedure, without neurologic or medical symptoms, and after a normal CAT scan. Dr. April does not address any of the plaintiff's complaints or presentation postoperatively, such as aphasia, right arm weakness, slurred speech, or labile blood pressure for which the plaintiff was being monitored. Dr. April opined that Dr. Woo provided care and treatment that was within the accepted standards of medical practice.

¹The affidavit sets forth the year as 2008.

Dr. April continued that on February 11, 2008, Mr. Orlowski suffered a hemorrhagic stroke secondary to re-perfusion and was taken back to Stony Brook Medical Center. Dr. April stated that a re-perfusion hemorrhage and resultant hemorrhagic stroke is unpreventable, and even if the plaintiff were still in the hospital, it would not have been prevented and earlier surgical intervention would not have prevented it either.

Based upon the foregoing, even considering the defendants' evidentiary proof which was not in admissible form for a motion for summary judgment, it is determined that the defendants' have failed to establish *prima facie* entitlement to summary judgment dismissing the complaint. "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (Toomey v Adirondack Surgical Assoc., 280 AD2d 754 [3rd Dept 2001][citations omitted]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Machac v Anderson, 261 AD2d 811 [3rd Dept 1999]). It is determined that the affidavit by Dr. April was cursory, conclusory and unsupported with the standards of care, and how such standards were complied with by the various defendants. It is further determined that the plaintiff has submitted an expert affirmation which raises a triable issue of fact which precludes summary judgment from being granted to the defendants.

Plaintiff's expert has affirmed that he/she is a physician licensed to practice medicine in New York and California, and is board certified in surgery. He set forth his education and training to qualify as an expert, including having performed countless endarterectomies, and his knowledge of the standards of care in the performance of endarterectomies and post-operative care and treatment. He stated that the plaintiff suffered a left artery dissection in 2007 after compression of the carotid artery, causing right arm weakness, and sensory issues on the right side which gradually improved. A transcranial doppler of the anterior and posterior circulations in February 2008 show no focal flow disturbances. Following that study, he had episodes of speech arrest lasting less than a minute, with no accompanying loss of consciousness. An electroencephalography (EEG) performed on December 11, 2008 revealed a normal waking EEG. There was nothing that the plaintiff could not do and he continued to work, golf and fish. The plaintiff's expert set forth the materials and records which he reviewed and opined within a reasonable degree of medical certainty that Dr. Perkins, Dr. Guido, Dr. Woo and Dr. Gaza departed from the accepted standards of care and treatment during the plaintiff's February 4, 2009 admission to Stony Brook University Hospital, proximately causing the plaintiff's claimed injuries.

Plaintiff's expert set forth that an endarterectomy is the surgical removal of plaque from an artery which has become narrowed or blocked, and its purpose is to treat blockages in the carotid arteries. An incision is made into the affected artery and the plaque is removed that is contained in the artery's inner lining. The vessel is clamped around the area of occlusion, and after the clamps are removed, and following removal of the thrombus, a mandatory back-bleed of the vessel is performed wherein the blood is flowed from the brain downwards to confirm that all plaque has been removed. A graft is placed over the incision so as not to further decrease the width of the vessel, allowing blood to freely pass.

The plaintiff's expert continued that on February 4, 2009, the plaintiff was admitted to Stony Brook Hospital by Candice Perkins, M.D. to be worked up for possible seizure, and was seen by Michael Guido, III, M.D. a neurologist. An MRI of the brain and MRIs of the neck and head on February 4, 2009 showed an old watershed infarct in the left fronto-parietal lobe with no evidence of acute infarction, and a near complete occlusion at the proximal left internal carotid artery (ICA). A CT angiogram on February 6, 2009 showed 95-99% stenosis of the left proximal internal carotid artery, for which a left carotid endarterectomy with a hemashield graft was performed by Dr. Woo. Following the procedure at 11:07 a.m., Mr. Orlowski suffered instability in the form of unstable blood pressure, right-sided deficits, and aphasia (difficulty speaking), both

signs of a neurological issue indicative of vascular instability and/or impending stroke in the post-operative period. The standard of care, stated the plaintiff's expert, required that any and all neurological signs and symptoms following a carotid endarterectomy be fully worked up as if the symptoms were new, and further required that the patient's post-operative blood pressure be stable for a significant period of time prior to discharge.

The plaintiff's expert stated that the plaintiff had complaints of right-sided weakness at 12:11 a.m. on February 10, 2009, less than thirteen hours after the surgery ended. At 4:30 a.m., his right arm was slightly weaker than the left. At 9:10 a.m., an endovascular surgery fellow, Wendy Gaza, M.D., and Dr. Woo saw the plaintiff at which time it was noted that he had decreased temperature sensation in his right face, trace weakness in his right hand, and mild decrease in sensation to temperature of the right upper extremity. Between 11:45 a.m. and 12:15 p.m., the plaintiff was evaluated by a physical therapist who noted that the plaintiff was weak with decreased strength in his right upper and lower extremities as compared to the left, and that he had decreased coordination in the right upper and lower extremities as compared to the baseline left. This was also noted by the SICU nurse at 12:15 p.m. The aphasia began at 9:10 a.m. on the morning of February 10, 2009 evidenced by difficulties in word finding and expression, as noted by the neurology nurse and Dr. Perkins. A repeat CT scan of the brain was obtained at 10:22 a.m. on the morning of discharge. A carotid duplex showed no hemodynamic stenosis. The plaintiff was to be discharged home with speech therapy. At 3:43 p.m., slurring of the plaintiff's speech was noted. Despite the same, the plaintiff was discharged home on February 10, 2009 at 6:00 p.m.

On February 11, 2009, the plaintiff returned to Stony Brook University Hospital by ambulance with complaints of headache and dizziness, numbness and weakness of the right arm, and he was unable to walk. By the following day, he was aphasic and hemiplegic. He developed deep vein thrombosis and an IVC filter was placed. On February 20, 2009, the plaintiff was discharged to St. Charles Rehabilitation. He now wears a brace on his right leg and walks with a cane. He has foot drop and falls due to lack of balance resulting from weakness in his right leg. He has severe difficulty finding words and in speech. His cognitive thought processes are slowed and impaired. He has urinary incontinence, impaired emotional status, and suffers extreme depression and anxiety.

The plaintiff's expert opined that Dr. Woo deviated and/or departed from the accepted standards of care by his failure to back-bleed the plaintiff's brain following the endarterectomy and prior to the surgical closure, and his failure to remove the entire area of occlusion from the origin of the external carotid artery. Plaintiff's expert continued that the defendants failed to address the post-operative neurological deficits suffered by the plaintiff, and failed to investigate and/or control the plaintiff's labile blood pressure, and prematurely discharged him home. The plaintiff's expert opined that had the plaintiff's brain been back-bled during the endarterectomy, leftover debris which was located above or trapped under Dr. Woo's clamp would have been discovered and immediately removed. Instead, the debris remained in the internal and external arteries causing a series of TIAs while the plaintiff was still a patient at Stony Brook Hospital. The debris ultimately traveled to the brain creating an ischemic stroke in the region of the callosa marginal branch which converted to a hemorrhagic stroke. The plaintiff's injuries would have been spared with the performance of a back-bleed opined plaintiff's expert.

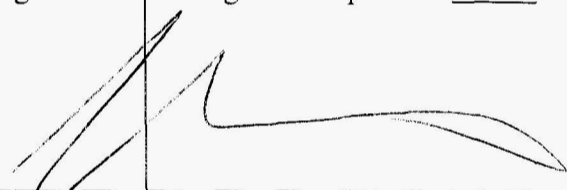
The plaintiff's expert further opined that had the plaintiff's post-operative complaints been properly and timely investigated, and had he been admitted, the impending and/or evolving ischemic stroke which converted to a hemorrhagic stroke in the brain would have been timely recognized and treated before it progressed into a severe and detrimental brain hemorrhage. The plaintiff's expert stated that the post-operative complaints of

both right sided deficits and expressive aphasia are evidence that the left carotid artery contained a remnant of plaque after the procedure, causing an occlusion and neurological symptoms due to diminished blood flow to the areas of the brain controlling the affected functions. Dr. Perkins, Dr. Gaza, and Dr. Woo deviated from the accepted standards of medical care in the failure to address the plaintiff's post-operative neurological complaints, including right-sided deficits and aphasia. A CT angiogram of the neck should have been performed to confirm a remaining embolic or ongoing occlusion, so that it could be removed surgically. Plaintiff's labile blood pressure post-endarterectomy was not addressed and a workup should have been done to discover the cause of this vascular abnormality, which is a symptom of instability post-operatively. All the defendants further deviated from the standards of care in discharging the plaintiff who should have been admitted to remain at the hospital until the cause for the instability, both neurologically and vascularly, had been determined and treated. Based upon the foregoing, the plaintiff's expert has raised multiple factual issues concerning the alleged departures from the standard of care by the named defendants, and the proximate cause of the injuries sustained by the plaintiff.

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 [2nd Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (Bengston v Wang, 41 AD3d 625 [2nd Dept 2007]; see also, Shields v Baktidy, 11 AD3d 671 [2nd Dept 2004]; Barbuto v Winthrop Univ. Hosp., 305 AD2d 623 [2nd Dept 2003]; Halkias v Otolaryngology-Facial Plastic Surgery Assoc., 282 AD2d 650 [2nd Dept 2001]). In the instant action, had the defendant established prima facie entitlement to summary judgment, plaintiff's expert has raised many factual issues which preclude summary judgment, including the expert's respective opinions relating to re-perfusion and the failure to bleed-back the plaintiff's brain at the completion of surgery as the cause of plaintiff's injuries.

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint is denied.

Dated: September 16, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

___ FINAL DISPOSITION ___ X NON-FINAL DISPOSITION