

**Allen v Southampton Hosp.**

2016 NY Slip Op 32179(U)

September 7, 2016

Supreme Court, Suffolk County

Docket Number: 11-38742

Judge: Ralph T. Gazzillo

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INDEX No. 11-38742

CAL. No. 15-00669MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 9-17-15 (002)  
MOTION DATE 12-3-15 (003)  
ADJ. DATE 12-17-15  
Mot. Seq. #002 - MG  
                  #003 - MotD

-----X  
ANNEMARIE ALLEN, as administratrix of the  
Estate of MATTHEW MCKINNON, Deceased  
and ANNEMARIE ALLEN, individually,

Plaintiff,

- against -

SOUTHAMPTON HOSPITAL,  
SOUTHAMPTON PEDIATRIC ASSOCIATES,  
P.C., ROBERT GOTTLIEB, ROBERT LEMP,  
P.A., MITCHELL CAPLIN, and 24/7  
EMERGENCY CARE, P.C.

Defendants.  
-----X

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment and cross motion to preclude;  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 23 - 27;  
Answering Affidavits and supporting papers 20 - 22; 28 - 31 ; Replying Affidavits and supporting papers 32 - 33 ;  
Other        ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant Southampton Hospital for an order dismissing all claims and cross claims brought against the defendant Southampton Hospital except for the vicarious liability for the acts and/or omissions of defendant Robert Lemp, P.A., and Dr. Mitchell Caplin is granted; and it is further

**ORDERED** that the cross motion by plaintiff for, inter alia, an order precluding any defendant from obtaining the limited liability benefits of CPLR Article 16 is denied.

Plaintiff Annemarie Allen, as administratrix of the estate of her 13-year-old son, Matthew McKinnon, and individually, commenced this action against defendants Southampton Hospital, Southampton Pediatric Associates, P.C., Dr. Robert Gottlieb, Robert Lemp, P.A., Dr. Mitchell Caplin, and 24/7 Emergency Care, P.C., to recover damages for medical malpractice, loss of services and society, and wrongful death. The gravamen of plaintiff's complaint against Southampton Hospital is that its staff failed to timely and properly diagnose and treat Matthew McKinnon's nephrotic syndrome and pulmonary embolism, which resulted in his death. Plaintiff further alleges that Southampton Hospital's misdiagnosis of Matthew McKinnon resulted in its failure to transfer him to Long Island Jewish Hospital to receive appropriate care for his condition, and that Southampton Hospital failed to timely order and interpret diagnostic tests and laboratory results.

Defendant Southampton Hospital now moves for summary judgment dismissing all claims and cross claims against it except for those asserting liability for the acts and/or omissions of Robert Lemp, P.A. and Dr. Mitchell Caplin. In support of the motion Southampton Hospital submits, among other things, an expert affirmation of radiologist Dr. James B. Naidich; an expert affirmation and amended affirmation of emergency medicine physician Dr. Timothy G. Haydock; the pleadings; the deposition transcripts of plaintiff, Dr. Robert J. Gottlieb, Robert Lemp, P.A., Dr. Mitchell Caplin, Dr. Joseph Quinn, Dr. Barbara J. Cusumano; the medical records; and Southampton Hospital's medical staff policy manual. Defendants Southampton Pediatric Associates, P.C., and Dr. Robert Gottlieb oppose the motion and submit an affirmation of counsel in opposition. Plaintiff stipulates to the partial discontinuance against Southampton Hospital, and cross-moves for an order precluding any defendant from obtaining the limited liability benefits of CPLR Article 16. In support of the cross motion plaintiff submits an affirmation of counsel and a partially executed stipulation of discontinuance. Defendants Robert Lemp, P.A., Dr. Mitchell Caplin, and 24/7 Emergency Care oppose the cross motion and submit an affirmation of counsel.

On January 11, 2011, 13-year-old Matthew McKinnon was seen by Dr. Barbara J. Cusumano at Southampton Pediatric Associates, P.C., and was diagnosed with an upper respiratory infection. On January 14, 2011, he was seen at the emergency room at Southampton Hospital. His chief complaint was neck pain and a cough. At 5:40 p.m. triage nurse Kevin Costello recorded Matthew's blood pressure 122/77, heart rate 100, respiration rate 18, temperature 98.3 and O2Sats 97%. He was not in acute distress and was taking Fragmin, Prednisone and Augmentin. He had allergies to Zithromax and benzodiazepines. He reported a pain level of 7 out of 10 and constant neck pain. Matthew's past medical history included nephrotic syndrome, pseudotumor cerebri and pulmonary embolisms.

Matthew was admitted to the emergency room treatment area and was evaluated by Nurse Sarah Posillico. She recorded that Matthew appeared in no acute distress but was in pain and crying. At 6:11 p.m.

he saw physician's assistant Robert Lemp. P.A. Lemp noted that Matthew's pain was dull and aching and worsened with rotation of the head to the right. P.A. Lemp testified at his deposition that he was aware that Matthew had a prior pulmonary embolus that was surgically removed. A physical examination of Matthew revealed muscle spasms of the neck and soft tissue tenderness, but no lymphadenopathy or meningeal signs. At 6:48 p.m., P.A. Lemp ordered a complete blood count (CBC) without differential stat, basic metabolic panel (bmp) stat, urinalysis stat, liver function test (lft) stat, magnesium stat, phosphorous stat, and influenza A & B antigen stat. IV fluids were also ordered. At 7:20 p.m. blood was drawn and urine was collected. At 7:40 p.m. Dr. Mitchell Caplin, an emergency room physician, ordered chest X-rays stat. The X-rays were completed at 7:57 p.m. P.A. Lemp read them and noted "no acute disease." Labs were completed by 8:33 p.m.

Urinalysis revealed bacteria and epithelial cells in Matthew's urine. Blood and protein were also present in the urine. Total protein, albumin and ALT were low. The blood test revealed an elevated white blood count of 18.3, an elevated red blood count of 6.57 and critically elevated hemoglobin at 18.5. Hematocrit was elevated at 53.9 and platelets elevated at 527. Kevin Costello recorded that the hemoglobin was called to the emergency room physician and P.A. Lemp at 8:12 p.m.

On January 14, 2011, at 10:22 p.m., Dr. Caplin reviewed the X-rays prior to discharging Matthew. The P.A.'s notes, co-signed by Dr. Caplin, indicate "[d]iscussed case with patient's personal physician. (gottlieb). Reviewed test results. Agreed upon treatment plan. Physician will see patient in office." Dr. Gottlieb testified that the lab results were not discussed with him. "We never discussed blood results on the phone." "Bob Lemp thought (Matthew's neck pain) was musculoskeletal in nature. Neck pain resolved." Dr. Gottlieb advised warm compresses. P.A. Lemp testified that he did not recall the conversation. At 11:04 p.m. Matthew was discharged with acetaminophen and instructions to rest for two days until better, to not engage in strenuous activity and to see Dr. Gottlieb in two days if not better. On January 15, 2011, at 9:47 a.m., radiologist Dr. Justin Zack interpreted the X-rays and reported no active disease. On January 16, 2011, Matthew died from a massive pulmonary embolism.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A hospital owes a duty of reasonable care to its patients and will generally be insulated from liability where there is evidence that it conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012];

*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (see *Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). Specifically, in a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (see *Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, defendant Southampton Hospital's expert radiologist, Dr. James Naidich, has established that the radiology services rendered to Matthew McKinnon on January 14, 2011, did not deviate from the accepted standard of care in the field of radiology. Dr. Justin Zack's interpretation of the chest X-ray, formally reported on January 15, 2011, with the impression "no acute disease" was correct. Dr. Naidich opines that there were no findings on the chest X-ray to diagnose or even suggest a diagnosis of pulmonary embolism. The X-rays, according to Dr. Naidich, did not display the Palla sign of prominence of the right descending pulmonary artery or the Westermark sign of peripheral asymmetric hyperlucency, either of which might suggest a diagnosis of pulmonary embolism. Dr. Naidich explains further that there was no Hampton's hump sign to suggest a pulmonary infarction and no evidence of right heart strain which would suggest pulmonary hypertension. He concludes the X-rays of Matthew McKinnon on January 14, 2011 were normal.


Dr. Timothy Haydock, defendant Southampton Hospital's emergency medicine expert, opines that the nurses and staff at Southampton Hospital, excluding the treatment rendered by Dr. Mitchell Caplin and P.A. Robert Lemp, did not deviate from the standard of care in the field of emergency medicine. Based upon the affirmations of both experts, excluding the treatment rendered by Dr. Mitchell Caplin and P.A. Robert Lemp, Southampton Hospital has established its prima facie entitlement to summary judgment that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was the proximate cause of plaintiff's injuries.

In opposition, plaintiff provides no expert affidavits and has offered to stipulate to discontinue against Southampton Hospital except as to any potential vicarious liability for the acts and/or omissions of defendants Robert Lemp and Dr. Mitchell Caplin. Defendants Southampton Pediatric Associates and Dr. Robert Gottlieb oppose the motion, contending that the expert affirmations are conclusory regarding the role of the nursing staff at Southampton Hospital, but offer no expert affidavits in opposition. Defendants Robert

Lemp, Dr. Mitchell Caplin, and 24/7 Emergency Care do not oppose the motion, but point out the discontinuance against Southampton Hospital is only a partial discontinuance. As no party has raised a triable issue of fact with respect to the element of the cause of action or theory of nonliability against defendant Southampton Hospital, the motion is granted.

Plaintiff cross-moves for an order precluding any defendant from obtaining the limited liability benefits of CPLR Article 16 in relation to the acts or omissions of a defendant who is granted summary judgment and dismissal of plaintiff's claims against it. CPLR 1601(1) provides that a defendant may only be held jointly and severally liable for non-economic damages if he or she is held more than 50 percent liable. The motion for dismissal by Southampton Hospital is opposed by defendants Southampton Pediatric Associates, P.C., and Dr. Robert Gottlieb. Since a motion for summary judgment is the equivalent of a trial, the limited liability benefits for defendants under Article 16 are forfeited as to any codefendant who was awarded summary judgment in its favor (*see Drooker v South Nassau Community Hosp.*, 175 Misc2d 181, 669 NYS2d 169 [Sup Ct Nassau County 1998]). Defendants Southampton Pediatric Associates, P.C., and Dr. Robert Gottlieb submit no affidavit or affirmation of any expert in opposition to the Hospital's motion. However, Southampton Hospital has only moved for partial summary judgment, excluding the acts and/or omissions of Robert Lemp and Dr. Mitchell Caplin. Southampton Hospital remains a defendant in the case, and therefore, the remaining defendants stand in the same position as they did prior to the granting of partial summary judgment and they remain defendants in the case whose liability, if any, is yet to be determined. The cross motion must be denied as no defendant has forfeited, at this point, any rights they may have under Article 16 because Southampton Hospital continues as a defendant. Issues regarding the timeliness of the cross motion and the sufficiency of Dr. Haydock's expert affirmation have been resolved by the so-ordered stipulation of the parties adjourning the motion until December 17, 2015, and by Dr. Haydock's supplemental affirmation, which corrected the typographical error. Accordingly, the cross motion is denied.

Dated: 9/7/16

  
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A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION