

Reynolds-Rivera v Simon
2017 NY Slip Op 31112(U)
May 19, 2017
Supreme Court, Suffolk County
Docket Number: 08-3834
Judge: Daniel Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

P R E S E N T :Hon. DANIEL MARTIN

MOTION DATE 12-14-16 (007)
 MOTION DATE 12-13-16 (008)
 ADJ. DATE 3-7-17
 Mot. Seq. # 007 - WDN
 # 008 - MG

-----X-----
 HELEN REYNOLDS-RIVERA and
 RICARDO RIVERA,

Plaintiffs,

- against -

JOHN M. SIMON, M.D., JOHN M. SIMON,
 PHYSICIAN, P.C., a/k/a JOHN M. SIMON,
 M.D., F.A.C.S., P.C., JOHN F. GALLAGHER,
 M.D., JOHN F. GALLAGHER, M.D., P.C.,
 JOHN W. FRANCFORT, M.D., JOHN W.
 FRANCFORT, M.D., P.C., MICHAEL J.
 SACCA, M.D., MICHAEL J. SACCA, M.D.,
 P.C., ELLEN C. McCORMICK, M.D., ELLEN
 C. McCORMICK, M.D., P.C., EDWARD M.
 TIMMINS, D.O., EDWARD M. TIMMINS,
 D.O., P.C., LYNNDEY C. COOK, R.P.A.,
 LYNNDEY C. COOK, R.P.A., GREAT SOUTH
 BAY SURGICAL ASSOCIATES AND
 VASCULAR LAB, L.L.P. AND SOUTHSIDE
 HOSPITAL,

Defendants.

-----X-----
 LAW OFFICE OF STANLEY ORZECHOWSKI
 Attorney for Plaintiffs
 104 Bellmore Avenue, Suite 2
 East Northport, New York 11731

BOWER LAW, P.C.
 Attorney for Defendants Great South Bay
 Surgical Associates and Vascular Lab, Simon,
 John M. Simon, Physician, P.C., Francfort &
 John W. Francfort, M.D., P.C.
 110 Marcus Blvd., Suite 500
 Hauppauge, New York 11788

BARTLETT, McDONOUGH &
 MONAGHAN LLP
 Attorney for Defendant Southside Hospital
 170 Old Country Road
 Mineola, New York 11501

Upon the following papers numbered 1 to 1 - 45 read on these motions for summary judgment; Notice of Motion/
 Order to Show Cause and supporting papers 1 - 11; 12 - 22; Notice of Cross Motion and supporting papers ; Answering
 Affidavits and supporting papers 23 - 39; Replying Affidavits and supporting papers 40 - 44; 45; Other ; (and after
 hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Southside Hospital and the motion by defendants John W. Francfort, M.D. and John W. Francfort are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Southside Hospital for summary judgment in its favor dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the motion by defendants John W. Francfort, M.D. and John W. Francfort for summary judgment in their favor dismissing the complaint and all cross claims asserted against them shall be marked withdrawn in accordance with correspondence from movants' counsel dated March 13, 2017.

Plaintiff and her husband, Ricardo Rivera, commenced this action to recover for personal injuries to plaintiff related to alleged negligence and medical malpractice in the performance of a laparoscopic right hemicolectomy. Issue has been joined, discovery is complete, and a note of issue was filed on July 26, 2016.

Southside Hospital now moves for summary judgment in its favor dismissing the complaint and all cross claims asserted against it. In support of the motion, Southside Hospital submits, among other things, copies of the pleadings, plaintiff's medical records, an expert affirmation of Edward B. Borden, M.D., and the deposition transcript of John Simon, M.D. In opposition, plaintiffs submit portions of the deposition transcript of Sally Eilbeck, R.N., various correspondence, plaintiff's medical records, the deposition transcript of John Simons, M.D., and an affidavit of Felice Jones-Lee, R.N. Plaintiffs' sur-reply has not been considered.

Plaintiff's medical records reveal that Dr. Mariwalla, a non-party, performed a colonoscopy on plaintiff on December 16, 2005. Dr. Mariwalla reported "hepatic flexure-carcinoma, biopsy taken, tattooed with India ink and ascending colon/snare cautery polypectomy done, poly less than 1 cm in size." His impression was "diverticulosis of the colon, polyp of the colon, malignant neoplasm of the colon and hepatic flexure." Dr. Mariwalla referred plaintiff to Dr. John Simon. Dr. Simon testified that on December 21, 2005, he examined plaintiff and recommended a laparoscopic hemicolectomy, a surgical procedure to remove one side of the colon. Dr. Simon testified he explained the risks, benefits, and alternatives to the proposed surgery including bleeding, infection, and leakage at the anastomosis site. Dr. Simon testified plaintiff consented to the surgery and it was scheduled at Southside Hospital.

On January 13, 2006, plaintiff was admitted to Southside Hospital for the procedure. Dr. Simon was assisted by Herman Rutlig, P.A. Dr. Simon testified that P.A. Rutlig performed all tasks under his supervision, direction, and control. Dr. Simon testified that during the surgery he located the tattoo under some adipose, he brought the colon out through the incision, and used a GIA stapler fired proximally and distally. The mesentery was taken out with ligature side to side, and the stapler was used to close the remaining defect. Dr. Simon testified that the "dissecting, the cutting, stapling, the sewing" was all done by him. He further testified that he did not indicate in his operative report that stitches were put in, but his routine is to put in stitches at the angle of the anastomosis, the actual joint. Dr. Simon explained, "We put in some additional sutures so that there is no extra pull on the angle of the joint. And at the end of the procedure we have to close our extraction incisions which is sutured closed." He also testified that he used

the GIA stapler as opposed to suturing the anastomosis because staplers have been found to be superior to sewing.

The surgical pathology report found adenocarcinoma without mucas component. The cancer was noted to be grade III, and poorly differentiated with a maximal thickness of 1.2 cm. There were no operative complications noted and Dr. Simon's directed that plaintiff be transferred to a regular floor.

The medical records indicate that on January 18, 2006, plaintiff complained of severe pain. Dr. Edward M. Timmons, a covering physician for Dr. Simon, ordered Dilaudid. On January 19, 2006, at 6:45 a.m., plaintiff was in respiratory distress with apparent epigastric pain. She was transported to the ICU and chest x-rays revealed the presence of pneumoperitoneum. At 12:19 p.m., plaintiff was resuscitated and taken to the operating room. Dr. Simon performed an exploratory laparotomy with resection of the ileocolonic anastomosis. Dr. Simon's operative report indicates that the colo-colonic anastomosis was visualized and that there was a small opening on the lateral aspect of the proximal colo-colonic suture line. The surgical pathology report noted no gross or microscopic perforation; however, the presence of anastomotic inflammation and peritonitis suggested an anastomotic leak. Dr. Simons testified that he repaired that leak using both staples and sutures.

Plaintiff remained at Southside Hospital, being treated for acute chronic respiratory failure on ventilator support, sepsis, acute renal failure, anemia, and pneumonia, until April 26, 2006. Thereafter, she stabilized and was transferred to Regal Heights Rehabilitation.

To make a *prima facie* showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant 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 physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she 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]).

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

Reynolds-Rivera v Simon

Index No. 08-03834

Page 4

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]). 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]).

Southside Hospital has established a *prima facie* case of entitlement to summary judgment. Southside Hospital's expert, Dr. Edward Borden, opines that Southside Hospital did not commit any departures from good and acceptable medical practice in connection to treatment rendered to plaintiff. He is further of the opinion that Southside Hospital was not the proximate cause of the injuries alleged by plaintiff. Dr. Borden states that plaintiff presented as a private patient of Dr. Simon. He opines that plaintiff was appropriately evaluated, properly advised of the risks of the surgery, and that admission to Southside Hospital for a laparoscopic-assisted right hemicolectomy "was not contraindicated." He further states that the hospital employees who assisted in the operation did so under the direction of Dr. Simon. Post-operatively, Dr. Borden opines that plaintiff was appropriately monitored, and that there was no delay in returning plaintiff to surgery on January 19, 2006. Finally, Dr. Borden opines that from January 19, 2006 until plaintiff's discharge on April 26, 2006, that Southside Hospital's care and treatment of plaintiff was in accordance with good and accepted medical practice.

In opposition, plaintiffs have failed to raise a triable issue of fact. Initially, plaintiffs maintain that the motion is untimely. Pursuant to CPLR §3212 (a), a motion shall be made no later than one hundred and twenty days after the filing of the note of issue, except with leave of court on good cause shown. The Supreme Court computerized case management system records indicate the note of issue was filed on July 26, 2016. Plaintiff originally filed a note of issue on July 6, 2016; however, that document was rejected based upon plaintiffs' failure to submit a proper caption inclusive of all parties. Contrary to plaintiffs' position, the rejected note of issue did not commence the 120-day statutory period for filing motions for summary judgment. Therefore, the motion is timely.

Plaintiffs next argue that Southside Hospital "has not presented the entire record" of all witnesses who testified at examinations before trial. Plaintiffs offer no legal support for this position. Under New York law a defendant 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 (*Castro v New York City Health & Hosps. Corp*, *supra*). There is no requirement that all discovery items be presented to the Court.

Plaintiffs' position that plaintiff was not properly monitored after the surgery of January 13, 2006, and that P.A. Rutlig failed to intervene and make certain Dr. Simon properly repair plaintiff's colon is unsupported by expert affirmation, speculative, and insufficient to defeat the Hospital's motion for summary judgment. Plaintiffs further allegation that Dr. Simon's failed to properly suture the initial colonic

Reynolds-Rivera v Simon
Index No. 08-3834
Page 5

repair as opposed to both stapling and suturing "as he did on January 19, 2006" is also unsupported by expert affirmation, speculative, and insufficient to defeat the Hospital's motion for summary judgment. Plaintiffs' argument that Dr. Simon "was far more than just a private attending physician," as he was also chief of surgery for Southside Hospital, and that the positions "are indivisible," is misleading. Plaintiff was referred to Dr. Simon as a private attending physician, and he performed the January 13 and January 19, 2006 operations in his capacity as a private attending physician. Moreover, without expert testimony, plaintiff has not shown that Dr. Simon deviated from good and accepted medical practice in the treatment of the plaintiff or that his care and treatment was the proximate cause of plaintiff's injuries.

Finally, plaintiffs' position regarding peer review reports is not properly before the Court. On July 26, 2016, plaintiffs, in filing the note of issue and certifying that discovery has been completed, abandoned the issue. Accordingly, Southside Hospital's motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

Dated: MAY 19, 2017



A handwritten signature in black ink, appearing to read "Daniel Martin", is written over a horizontal line. Below the signature, the initials "A.J.S.C." are printed in a smaller font.

 FINAL DISPOSITION X NON-FINAL DISPOSITION