

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18308
Y/prt

_____AD3d_____

Argued - January 29, 2008

ROBERT A. LIFSON, J.P.
DAVID S. RITTER
ANITA R. FLORIO
EDWARD D. CARNI, JJ.

2006-09762
2006-11896

DECISION & ORDER

Felipe Cardenales, etc., et al., appellants-respondents,
v Queens-Long Island Medical Group, P.C., et al.,
respondents-appellants, Hak Yuen,
defendant-respondent.

(Index No. 17653/01)

Lawrence P. Biondi (Lisa M. Comeau, Garden City, N.Y., of counsel), for appellants-respondents.

Marulli, Lindenbaum & Tomaszewski, LLP, New York, N.Y. (Claudia E. Solis of counsel), for respondent-appellant Queens-Long Island Medical Group, P.C.

Fumuso, Kelly, Deverna, Snyder, Swart & Farrell, LLP, (Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains, N.Y. [Edward J. Guardaro, Jr., and Gina B. DiFolco] of counsel), for respondent-appellant Donald Nicolardi.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, (Mauro Goldberg & Lilling, LLP, Great Neck, N.Y. [Barbara DeCrow Goldberg] of counsel), for respondent-appellant Liviu Schapira.

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Robert Devine of counsel), for defendant-respondent.

In an action to recover damages for medical malpractice and wrongful death, etc., the

plaintiff appeals, as limited by his brief, from (1) so much of an order of the Supreme Court, Queens County (Taylor, J.) dated September 5, 2006, as granted those branches of the separate motions of the defendants Donald Nicolardi and Liviu Schapira which were pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the plaintiff and against each of them and for a new trial as against them, and (2) from a judgment of the same court entered November 16, 2006, which, upon a jury verdict, is in favor of the defendant Hak Yuen and against him, in effect, dismissing the complaint insofar as asserted against that defendant, and the defendant Queens-Long Island Medical Group, P.C., cross-appeals, as limited by its brief, from so much of the order dated September 5, 2006, as denied its motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages, and the defendants Donald Nicolardi and Liviu Schapira separately cross-appeal (1), as limited by their briefs, from so much of the order dated September 5, 2006, as denied those branches of their separate motions which were pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the plaintiff and against them and for judgment as a matter of law, and (2) from the judgment entered November 16, 2006.

ORDERED that the cross appeals from the judgment entered November 16, 2006, are dismissed as abandoned, without costs or disbursements; and it is further,

ORDERED that the order dated September 5, 2006, is affirmed insofar as appealed and cross-appealed from, without costs or disbursements, and it is further,

ORDERED that the judgment entered November 16, 2006, is affirmed, without costs or disbursements.

The contention of the defendants Donald Nicolardi and Liviu Schapira, that the continuous treatment doctrine did not toll the statute of limitations as against them, has already been resolved against them by this Court's prior holding (*see Cardenales v Queens-Long Is. Med. Group, P.C.*, 18 AD3d 689; *White v Murphy*, 290 AD2d 704).

We reject the argument of Nicolardi and Schapira that they established their entitlement to judgment as a matter of law pursuant to CPLR 4404(a). Viewing the evidence in the light most favorable to the plaintiff, rational jurors could conclude that these defendants departed from good and accepted medical practice, and that their departures were a substantial factor in causing the death of the decedent (*see Cohen v Hallmark Cards*, 45 NY2d 493; *O'Boyle v Avis Rent-A-Car*, 78 AD2d 431).

Notwithstanding the foregoing, we agree with the Supreme Court that the verdict against Nicolardi and Schapira was against the weight of the evidence. The evidence at trial so preponderated in favor of finding that neither of these defendants failed to perform complete colonoscopies to the cecum, in 1996 and again in 1997, that the jury verdict finding that they departed from good and accepted medical practice by failing to do so, could not have been reached upon any fair interpretation of the evidence (*see Nicastro v Park*, 113 AD2d 129; *Speciale v Achari*, 29 AD3d 674).

Contrary to the plaintiff's contention, the jury verdict in favor of the defendant Hak

Yuen was not against the weight of the evidence (*see Nicastro v Park*, 113 AD2d 129).

In light of our determination, it is unnecessary to reach the parties' remaining contentions.

LIFSON, J.P., RITTER, FLORIO and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court