

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

D12813
G/kmb

_____AD3d_____

Argued - October 26, 2006

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2005-03823

DECISION & ORDER

Sergey Sushchenko, et al., appellants, v Dyker
Emergency Physicians Service, P.C., et al.,
respondents, et al., defendant.

(Index No. 16004/00)

Andrew Mead Von Salis, New York, N.Y., for appellants.

Garson, Gerspach, Decorato & Cohen, LLP, New York, N.Y. (Joshua R. Cohen, Andrew S. Garson, and Lauren J. Daniels of counsel), for respondents Dyker Emergency Physicians Service, P.C., and B.N. Nigam.

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Brian E. Lee of counsel), for respondent Jagannath Singh.

Martin Clearwater & Bell, LLP, New York, N.Y. (Ellen B. Fishman, Joseph L. DeMarzo, and Jeff Lawton of counsel), for respondent Victory Memorial Hospital.

McAloon & Friedman, P.C., New York, N.Y. (Timothy J. O'Shaughnessy and Charles K. Faillace of counsel), for respondent Ajoy Kumar Pandey.

In a consolidated action to recover damages for medical malpractice, etc., the plaintiffs appeal from a judgment of the Supreme Court, Kings County (Spodek, J.), dated March 16, 2005, which, upon the granting of the motion of the defendants Dyker Emergency Physicians Service, P.C., B.N. Nigam, Jagannath Singh, Victory Memorial Hospital, and Ajoy Kumar Pandey pursuant to CPLR 4401 for judgment as a matter of law at the close of the plaintiffs' case at a jury trial, is in favor of those defendants and against them, dismissing the complaint insofar as asserted against those defendants.

July 26, 2011

Page 1.

SUSHCHENKO v DYKER EMERGENCY PHYSICIANS SERVICE, P.C.

ORDERED that the judgment is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The trial court providently exercised its discretion in precluding the plaintiffs' expert witness from testifying regarding causation on the ground that proper CPLR 3101(d) disclosure was not provided (*see Schwartzberg v Kingsbridge Hgts. Care Ctr.*, 28 AD3d 463, 464; *Hubbard v Platzer*, 260 AD2d 605; *Rassaei v Kessler*, 252 AD2d 577; *cf. McGlaulin v Wadhwa*, 265 AD2d 534. Proper disclosure of an expert neurologist who was to testify on the subject of causation was not provided to the respondents until several days after the trial had commenced (*see Schwartzberg v Kingsbridge Hgts. Care Ctr.*, 28 AD3d at 464-465; *Hubbard v Platzer*, 260 AD2d at 605; *Rassaei v Kessler*, 252 AD2d at 577). The plaintiffs failed to show good cause for this untimely disclosure (*see Quinn v Artcraft Constr.*, 203 AD2d 444, 445; *Corning v Carlin*, 178 AD2d 576, 577).

Expert testimony is necessary to prove a deviation from the accepted standard of medical care and to establish proximate cause where, as here, the matter is not within the experience of the ordinary juror (*see Lyons v McCauley*, 252 AD2d 516, 517). When the testimony of a necessary expert witness is precluded, and it is therefore impossible to make out a prima facie case, it is proper to dismiss the complaint (*see Bickford v St. Francis Hosp.*, 19 AD3d 344, 346; *Rossi v Matkovic*, 227 AD2d 609; *Kalkan v Nyack Hosp.*, 214 AD2d 538, 539). The complaint was, therefore, properly dismissed insofar as asserted against the respondents pursuant to CPLR 4401 (*see Szczerbiak v Pilat*, 90 NY2d 553, 556; *Godlewska v Niznikiewicz*, 8 AD3d 430, 431; *Smith v Vosburgh*, 176 AD2d 259).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

RIVERA, J.P., FLORIO, ENG and LEVENTHAL, JJ., concur.

2005-03823

DECISION & ORDER ON MOTION

Sergey Sushchenko, et al., appellants, v Dyker
Emergency Physicians Service, P.C., et al.,
respondents, et al., defendant.

(Index No. 16004/00)

Motion by the respondents Dyker Emergency Physicians Service, P.C., and B.N. Nigam on an appeal from a judgment of the Supreme Court, Kings County, dated March 16, 2005, to strike stated portions of the appellants' brief and reply brief. By decision and order on motion of

July 26, 2011

Page 2.

SUSHCHENKO v DYKER EMERGENCY PHYSICIANS SERVICE, P.C.

this Court dated September 15, 2006, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied.

RIVERA, J.P., FLORIO, ENG and LEVENTHAL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court