| **Aharonowicz v Huntington Hospital** |
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| 2004 NY Slip Op 30091(U) |
| March 29, 2004 |
| Supreme Court, Suffolk County |
| Docket Number: 0020825/0825 |
| Judge: Ralph F. Costello |
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SHORT FORM ORDER

INDEX No. 00-20825

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

***PRESENT:***

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

Mot. Seq. # 004 - MG
# 005 - MotD

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| MORDECHAI AHARONOWICZ, Plaintiff, | SIBEN & FERBER, LLP<br>Attorneys for the Plaintiff<br>1455 Veterans Memorial Highway<br>Hauppauge, New York 11749 |
| - against - | FUREY, KERLY, WALSH, MATERA, et al.<br>Attorneys for the Defendants<br>200 Old Country Road, Suite 600<br>Mineola, New York 11501 |
| HUNTINGTON HOSPITAL, MICHELLE BALTUS, M.D., JACQUES WINTER, M.D., P.C., MAX RUDANSKY, M.D., ALAN MECHANIC, M.D., GARY STONE, M.D., CYNTHIA GURIAN, M.D., ROBERT CARRAS, M.D., and DOUGLAS C. MILLER, M.D., Ph.D., Defendants. | SHAUB, AHMUTY, CITRIN & SPRATT<br>Attorneys for Defendant R. Carras, M.D.<br>1983 Marcus Avenue<br>Lake Success, New York 11040<br><br>BARTLETT, McDONOUGH, et al.<br>Attorneys for Defendant Douglas Miller, M.D.<br>300 Old Country Road, Suite 301<br>Mineola, New York 11501 |

Upon the following papers numbered 1 to 16 read on this motion to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; 4 - 8 ; Notice of Cross Motion and supporting papers ____________; Answering Affidavits and supporting papers 9 - 10; 11 - 12 ; Replying Affidavits and supporting papers 13 - 14; 15 - 16 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#004) by defendant Robert Carras, M.D. dismissing the action pursuant to CPLR 214-a is granted; and it is further

***ORDERED*** that the motion (#005) by defendants Cynthia Gurian, M.D. and Gary Stone, M.D. dismissing the complaint pursuant to CPLR 214-a and by defendants Huntington Hospital, Alan Mechanic, M.D., Cynthia Gurian, M.D., Gary Stone, M.D. and Michelle Baltus, M.D. for summary judgment dismissing the complaint pursuant to CPLR 3212 is decided as follows.

In this medical malpractice action, plaintiff Mordechai Aharonowicz alleges that defendants departed from accepted standards of medical care from January, 1996 through March, 1998. The gravamen of the complaint is that defendants departed from accepted standards of medical care by unnecessarily performing neurosurgery; failing to assess the effects of the medications plaintiff was taking in relation to his neurological symptoms; failing to use a certain pathology stain on a brain biopsy specimen; failing to discharge plaintiff when no further medical treatment was indicated; and negligently failing to monitor his dental care during his hospital stays. Plaintiff alleges in the bill of particulars that as a result of the above malpractice and negligence, he sustained headaches, scarring to the right forehead and temporal region, trigeminal neuropathy, peripheral neuropathy, mental deterioration, anxiety, depression, and the loss of multiple teeth with substantial dental surgery. Defendants Carras, Stone and Gurian move to dismiss the action on Statute of Limitations grounds. Defendants hospital, Baltus and Mechanic move for summary judgment dismissing the complaint. Procedurally, the Court notes that the action was previously discontinued as against Dr. Miller.

The record reveals that while under the care of defendant Michelle Baltus, M.D., plaintiff began to experience neurological symptoms in or about January 1996. After performing certain neurological examinations, defendant Baltus referred plaintiff to defendant Jacques Winter, M.D., a neurosurgeon, whose examinations of plaintiff included a negative MRI of the brain. Defendant Winter diagnosed plaintiff with a sixth nerve palsy and prescribed prednisone, pamelor, xanax, tagamet and ativan. Over the next six months, defendant Winter noted an improvement in the symptoms. However, when plaintiff complained of difficulty walking in August, 1996, defendant Winter admitted plaintiff to defendant hospital. After further tests and a temporal artery biopsy which were determined to be negative, plaintiff was discharged and referred to non-party John Halperin, M.D., a neurologist at non-party North Shore University Hospital, who performed further examinations. Dr. Halperin requested a biopsy of the right frontal area of the brain by defendant Robert Carras, M.D., a neurosurgeon, in October, 1996. The record reveals that the brain biopsy was not diagnostic.

In November, 1996, plaintiff was readmitted to the hospital by defendant Baltus, where he was diagnosed with encephalopathy and progressive dementia. The record reveals that plaintiff exhibited confusion, headaches and agitation and was medicated with pamelor and xanax while a patient in the hospital for the following eight months.

In November, 1997, plaintiff's physicians re-admitted him to defendant hospital to reassess his neurological condition. Defendant Alan Mechanic, M.D., a neurosurgeon, was consulted by defendant Max Rudansky, M.D., a neurologist, to perform a brain biopsy of a different site, the right temporal lobe on June 17, 1997. The specimen was initially stained by defendants Cynthia Gurian, M.D. and Gary Stone, M.D., staff pathologists at the hospital and was subsequently sent for analysis to Douglas Miller, M.D. a neuropathologist. Dr. Miller diagnosed plaintiff to be suffering from multiple system atrophies, with no form of treatment.

Plaintiff was readmitted to the hospital in November, 1997 to the psychiatric service due to alleged aggressive behavior to his fiancé and remained in the hospital for approximately four months. Sometime in March, 1998, plaintiff was discharged to the care of his brother in a vegetative state and during that time, no medications were administered to him. The record reveals that Dr. Miller retracted his diagnoses rendered in 1997 after receiving a visit by the plaintiff in July, 1998, during which time plaintiff stated that the neurological symptoms had disappeared and he had made a full recovery.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [1986]; ***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [1992]). The issue of the duty owed as between physicians, and, ultimately, to the patient, is a question of law (***Lipton by Lipton v Kaye***, 214 AD2d 319, 624 NYS2d 590 [1995], *reh den, sub nom* 1995 NY App Div LEXIS 8590). 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 demonstrate the absence of any material issues of fact (***Winegrad v New York University Medical Center***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Zuckerman v New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980], *reh den,* 3 NY2d 941; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1957], *reh den* 3 NY2d 941).

Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Zuckerman v New York,*** *supra*). In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Fileccia v Massapequa General Hospital***, 63 NY2d 639, 479 NYS2d 520, *affd.* 99 AD2d 796 [1984]; ***Neuman v Greenstein***, 99 AD2d 1018, 473 NYS2d 806 [1984]; ***Buonagurio v Drago***, 65 AD2d 830, 409 NYS2d 835, *lv denied* 46 NY2d 708). General allegations of medical malpractice, merely conclusory and unsupported by

competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324-325, 508 NYS2d 923 [1986]).

In support of his motion to dismiss, defendant Carras contends that he last saw plaintiff on October 11, 1996. He further avers that the period of limitation set forth in CPLR 214-a ran two and one-half years thereafter, and that this action, commenced by the filing a summons and complaint on August 29, 2000, was therefore untimely. In support, he submits, *inter alia*, the medical records from North Shore University Hospital and a copy of his examination before trial testimony. The medical records reveal that defendant performed a burr hole and needle biopsy of the brain on October 11, 1996 and that plaintiff was discharged from the hospital on October 13, 1996. Defendant testified to the effect that his only contact with plaintiff was during this admission. Defendant met his burden on the motion by establishing that the statute of limitations had expired prior to commencement of the action against him (*see* CPLR 214-a). The burden shifts to plaintiff to demonstrate with sufficient evidence to show that the relation-back doctrine applies (*see* ***Austin v Interfaith Med. Ctr.***, 264 AD2d 702, 694 NYS2d 730 [1999]; CPLR 203 [c]).

In opposition, although plaintiff concedes that the action as against defendant Carras was commenced after the statutory limitations period of two years and six months, he claims that there are issues of fact as to agency, unity of interest and vicarious liability between defendant Carras and defendant Mechanic, against whom the action was timely commenced. Plaintiff submits, *inter alia*, copies of the examination before trial transcripts of defendants Carras and Mechanic. Defendant Carras testified to the effect that he was a shareholder in the Long Island Neurological Associates group. Defendant Carras further stated that he did not supervise defendant Mechanic in any way. Defendant Mechanic testified at his examination before trial to the effect that he was an employee of the Long Island Neurological Associates. He further stated that he never conferred with defendant Carras regarding his treatment of plaintiff and was not under the supervision or control of any other physician during the time he treated plaintiff.

Plaintiff's claims of unity of interest (CPLR 203[b]) or agency are unpersuasive. Moreover, neither the common law nor section 1505 of the Business Corporation Law imposes vicarious liability upon a shareholder, officer or employee of a professional service corporation for the tortious acts of his coshareholders, officers or employees (***Paciello v Patel***, 83 AD2d 73, 443 NYS2d 403 [1981]). Accordingly, the action as against defendant Carras is dismissed as untimely.

Turning to the motion to dismiss by defendants Gurian and Stone, defendants asserted the affirmative defense that the action against them was not commenced within the two and one half year Statute of Limitations pursuant to CPLR 214-a. Defendants Stone and Gurian contend that

their only involvement in plaintiff's care occurred in June, 1997 when they received the brain biopsy specimen which was performed on June 17 at Huntington Hospital. However, the specimen was subsequently sent to Dr. Miller on June 20, 1997 for neuropathological analysis and for statute of limitations purposes, the action as against them accrued on that day. Defendants Gurian and Stone assert that plaintiff had until December 20, 1999 to file an action against them, however, the statute of limitations had run by the time the summons and complaint were filed on August 29, 2000. Defendants Gurian and Stone have established their affirmative defense by prima facie proof that the time within which to sue has expired.

Plaintiff bases his complaint on the continuous treatment doctrine. However, the record is devoid of facts which demonstrate a relationship between plaintiff and defendants Stone and Gurian after July 20, 1997, or of any agency relationship between plaintiff's physicians and these defendants before or after that date (***Meath v Mishrick***, 120 AD2d 327, 501 NYS2d 350 [1986], *affd* 68 NY2d 992). The continuous treatment doctrine does not apply to an independent pathologist since he/she does not have the opportunity to discover an error in a report (***McDermott v Torre***, 56 NY2d 399, 452 NYS2d 351 [1982]). Instead he/she must rely on the treating physician to discover any diagnostic mistake (***McDermott v Torre***, *supra*). In addition, there is no evidence here that either defendant Gurian or defendant Stone had a continuing relationship with plaintiff or acted in an agency relationship with the treating physician, defendant Baltus. Accordingly, inasmuch as the action was commenced more than three years after their sole contact with plaintiff, the action as against defendants Gurian and Stone is time barred.

Turning to the motion for summary judgment by defendants Huntington Hospital, Mechanic, Winter, and Baltus, defendants submit, *inter alia*, affirmations by their experts, Herbert B. Feldman, M.D., board certified in family medicine; and Oded Gerber, M.D., board certified in neurological medicine. Dr. Feldman opines that the care and treatment administered by defendant Baltus was at all times in accordance with the standards of good and accepted medical practice. He further states that defendant properly referred plaintiff to the care of a neurologist and a psychiatrist and properly deferred all issues of neurological care, treatment, testing and medication to those specialists. He also avers that there is no evidence to indicate that the medications prescribed by defendant to assist plaintiff's physical complaints and symptoms, were contraindicated, and thus, caused him physical harm.

Dr. Gerber opines that the care and treatment administered by the hospital was at all times in accordance with the standards of good and accepted medical practice. Dr. Gerber opines that the treatment rendered by the residents, nurses and staff of the hospital in no way deviated from good and accepted medical practice. While the patient was admitted to the hospital, he was at all times, under the supervision and control of his attending physicians. He notes that although

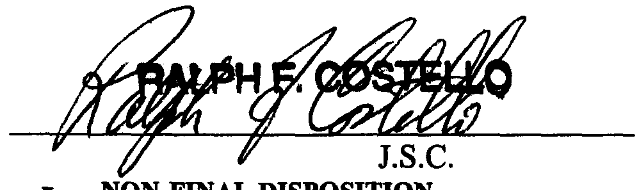
plaintiff is alleging that the hospital employees were negligent in the administration of certain medications, no nurse or staff member of the hospital is authorized to prescribe any medications to a patient. He further states that there is no evidence to indicate that any independent act committed by a hospital resident, nurse or staff was a departure from accepted medical practice. With this evidence, defendants Baltus and hospital have failed to demonstrate their entitlement to judgment as a matter of law, since the above experts have not addressed plaintiff's allegations that he suffered severe physical and dental injuries due to his prolonged hospitalizations. Accordingly, the motions for summary judgment by defendants Baltus and the hospital are denied.

Defendant Mechanic contends that he is entitled to summary judgment since he acted as a consultant and performed one procedure, the open brain biopsy, on June 17, 1977. After removing the staples on June 26, the record reveals that he signed off in plaintiff's hospital chart with instructions to call him if needed. Dr. Gerber opines that the brain biopsy performed by defendant Mechanic was not a departure from good and accepted medical practice and the decision to perform the biopsy was reasonable and proper. He notes that in May, 1997, the neurologist administered a series of tests which illustrated abnormalities consisting of elevated protein in the spinal fluid, an elevated sedimentation rate and a repeat brain magnetic resonance image ("MRI") which showed progressive atrophy. In addition, he states that the hospital records reveal that defendant Mechanic reviewed the results of plaintiff's neurological tests, consulted with a neurologist who evaluated the plaintiff's condition and properly determined that a repeat biopsy would be beneficial. He further notes that there were no complications that resulted from the procedure. Dr. Gerber also avers that defendant discussed the repeat biopsy with the plaintiff, advised him of the risks of the procedure and obtained his consent to perform the biopsy.

In opposition, plaintiff submits, *inter alia*, the unredacted affirmation of his expert, who affirms that he is board certified in internal medicine. The expert opines that defendant Mechanic failed to develop a differential diagnosis. In addition, defendant departed from good and accepted medical care by failing to stop the medications which were not necessary to sustain the patient's life and observe whether there was an improvement in the patient's condition. The expert further states that defendant Mechanic performed the brain biopsy merely because defendant Rudansky suggested that he do it. The expert avers that had the drugs been discontinued, he believes with a reasonable degree of certainty, that the plaintiff would not have needed the surgery. While it is true that Dr. Mechanic had a duty of care as a consultant to advise and make appropriate recommendations to the plaintiff's treating physician, the plaintiff's evidence fails to show that Dr. Mechanic breached such duty (***Malki v Krieger***, 213 AD2d 331, 624 NYS2d 167 [1995]). In addition, since plaintiff's expert failed to state an opinion regarding informed consent, plaintiff has not raised an issue of fact sufficient to defeat defendant's motion for summary judgment (***Alvarez v Prospect Hospital***, supra). Accordingly, defendant Mechanic's motion for summary judgment is granted.

Accordingly, the motions for summary judgment by the hospital and defendant Baltus are denied. The complaint is dismissed as against defendants Carras, Gurian, Stone and Mechanic. The action is severed and continues as to the remaining defendants.

Dated: March 29, 2004




J.S.C.

____ **FINAL DISPOSITION** __x__ **NON-FINAL DISPOSITION**