

**Giannicos v Bellevue Hospital Medical Center**

2004 NY Slip Op 30256(U)

February 20, 2004

Supreme Court, New York County

Docket Number: 113964/01

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN

PART 0

J.S.C. Justice

0113964/2001

GIANNICOS, PETER  
VS  
BELLEVUE HOSPITAL

INDEX NO.

113964/01

MOTION DATE

11/07/03

MOTION SEQ. NO.

01

MOTION CAL. NO.

07

SEQ. 1

SUMMARY JUDGMENT

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ Summa judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

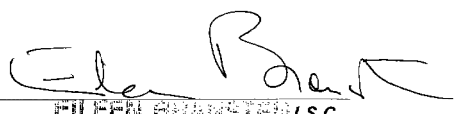
IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED

MAR 02 2004

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2-20-04



EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

-----X  
PETER GIANNICOS and GEORGIA GIANNICOS,

Plaintiffs.

-against-

BELLEVUE HOSPITAL MEDICAL CENTER, NEW  
YORK CITY HEALTH and HOSPITALS  
CORPORATION, MIGUEL FICUEROA, NEW  
YORK EYE AND EAR INFIRMARY and BARBARA  
ZEIFER,

Defendants.

-----X-  
PRESENT: EILEEN BRANSTEN. J.

Index No. 1 13964101  
Motion Date: 11/07/03  
Motion Scq. No.: 01  
Motion Cal. No.: 07

Pursuant to CPLR 3212, defendants, Bellevue Hospital, New York City Health and Hospitals Corporation and Miguel Figueroa, move for summary judgment dismissal of this medical malpractice complaint. Plaintiffs, Peter Giannicos (“Mr. Giannicos”) and Georgia Giannicos, cross-move to amend the caption to add, Francis Giannicos, as Guardian of the Person and Property of Peter Giannicos, an Incapacitated Person.

*Background*

On January 24, 1999, while filling his taxi with gas, Mr. Giannicos was hit in the eye and head with a hard object by an unknown perpetrator. Several bones were fractured around his eyes.

During the course of treatment for his injuries, he went to the neurology clinic at Bellevue Hospital. While there, he was diagnosed with hydrocephalus. Miguel Figueroa,

M.D. prescribed and performed a lumbar puncture on Mr. Giannicos. Nine days later, Mr. Giannicos suffered a hemorrhagic stroke.

On July 20, 2001, plaintiffs commenced this action by filing a summons and complaint. Plaintiffs allege that the lumbar puncture was contra-indicated and caused Mr. Giannicos' stroke. The Note of Issue was filed on March 28, 2003.

Defendants, Bellevue Hospital, New York City Health and Hospitals Corporation and Miguel Figueroa, have moved for summary judgment, arguing that they did not depart from accepted medical procedure. In support of their motion, they have provided the expert affidavit of Raymond Coll, M.D., a board certified neurologist.

Plaintiffs, in addition to opposing the summary judgment motion, cross-move to amend the caption. Their cross-motion is unopposed.

#### *Analysis*

Pursuant to CPLR 3212, a movant for summary judgment must make a showing sufficient "to warrant the court as a matter of law in directing judgment in favor of the [movant]." CPLR 3212(b). Thus, the movant must tender "sufficient evidence to eliminate any material issue of fact from the case." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 852 (1985). The evidence must be in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980). In directing judgment as a matter of law, a court must find "that by no rational process could a trier of fact find for the nonmoving party." *Blum v. Fresh*

*Grown Preserve Corp.*, 292 N.Y. 241,245 (1944). *Storniolo v. Bauer*, 176 A.D.2d 550 (1<sup>st</sup> Dep't 1991); *Gayle v. Neyman*, 91 A.D.2d 75 (1<sup>st</sup> Dep't 1983); *Rodriguez v. Primack*, 122 A.D.2d 936,937 (2d Dep't 1986). In other words, the movant for summary judgment must present sufficient evidence establishing that a reasonable trier of fact must find for him. Once this burden is met, the plaintiff must respond with sufficient evidence showing a triable issue of fact. *Alvarez v. Prospect Hosp.*, *supra*, 68 N.Y.2d, at 327; *see also, Margolese v. Uribe*, 238 A.D.2d 164, 167 (1st Dep't 1997); *Koepfel v. Park*, 228 A.D.2d 288, 289-290 (1st Dep't 1996); *Ferrara v. South Shore Orthopedic Assocs. P.C.*, 178 A.D.2d 364, 365 (1st Dep't 1991).

In medical malpractice actions, an expert opinion is generally required to establish or negate that a departure from accepted medical procedure occurred and that a causal link exists between the departure and the alleged injury. *Prete v. Rafta-Demetrious*, 224 A.D.2d 674 (2d Dep't 1996). On a motion for summary judgment, that expert opinion is given in the form of an affidavit. CPLR 3212(b). Unlike expert testimony at trial, where an expert can give his opinion without first specifying the data on which it is based, *see*, CPLR 4515, an expert affidavit must include specific references to the record to indicate that the opinion is not speculative and conclusory. *See, Romano v. Stanley*, 90 N.Y.2d 444 (1997); *Filippone v. St. Vincent's Hosp. & Med. Ctr.*, 253 A.D.2d 616 (1<sup>st</sup> Dep't 1998); *Margolese v. Uribe*,

238 A.D.2d 164 (1<sup>st</sup> Dep't 1997). These references go to the affidavit's sufficiency, and not its weight. *Amatulli v. Delhi Construction Corp.*, 77 N.Y.2d 525, 533 (1991).

Here, in support of their motion, defendants have offered an expert affidavit of no probative value. Dr. Coll, in offering his opinion, fails to refer to sufficient facts on the record to indicate that his opinion is not conclusory and speculative. In fact, the affidavit consists primarily of conclusory allegations that the defendants did not depart from accepted medical procedure. These conclusory allegations predominate over medical facts. *Filippone v. St. Vincent's Hosp. & Med. Ct.*, 253 A.D.2d 616 (1<sup>st</sup> Dep't 1998). Because this affidavit has no probative value, it is insufficient to shift the burden of production to plaintiffs.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that FRANCIS GIANNICOS, as Guardian of the Person and Property of PETER GIANNICOS, an Incapacitated Person, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, PETER GIANNICOS, without prejudice to any proceedings heretofore had herein, and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of FRANCIS GIANNICOS, as Guardian of the Person and Property of PETER GIANNICOS, an Incapacitated Person as plaintiff in the place and stead

of PETER GIANNICOS, without prejudice to the proceedings heretofore had herein, and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

Dated New York, New York  
February 20, 2004

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten

**FILED**

FEB 22 2004