

Bazakos v Lewis

2006 NY Slip Op 30401(U)

November 14, 2006

Supreme Court, Nassau County

Docket Number: 14242/2004

Judge: R. Bruce Cozzens

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 12
NASSAU COUNTY

LEWIS J. BAZAKOS

Plaintiff(s),

-against-

PHILIP LEWIS, M.D., and "684" ASSOCIATES,
INC., d/b/a "D & D ASSOCIATES"

Defendant(s).

MOTION #003
INDEX#14242/2004
MOTION DATE:
November 14, 2006

The following papers read on this motion:

Notice of Motion.....	1
Answering Affidavits.....	1
Briefs: Plaintiff's.....	1

This matter is pending on the jury trial calendar. It was assigned to this Court for a motion *in limine* which counsel agreed to have decided prior to jury selection.

In the defendants' motion, it is contended that the gravamen of the plaintiff's claim sounds in medical malpractice. The parties agreed that the matter was not commenced within the two and one-half year limitations period set forth for medical malpractice actions by CPLR §214-a.

The plaintiff contends that the acts of defendant Philip Lewis, M.D., ("Lewis") were acts of simple negligence and not medical malpractice. Lewis is an orthopedic surgeon who conducted an independent medical examination of the plaintiff on November 27, 2001. Plaintiff had previously been injured in a motor vehicle accident in 1998. The plaintiff claims that during the course of his examination Lewis injured the plaintiff's neck as a result of simple negligence.

This action was commenced in October 2004, two years and eleven months after the physical examination was conducted. The commencement date falls outside the limitations period set for medical malpractice actions but within the three-year commencement period for personal injury actions arising from negligence. (CPLR §214).

The defendants contend that because Lewis was performing a medical examination, whether he acted improperly is an issue requiring medical expertise. As such, a cause of action can only be sustained if the proper medical testimony is elicited.

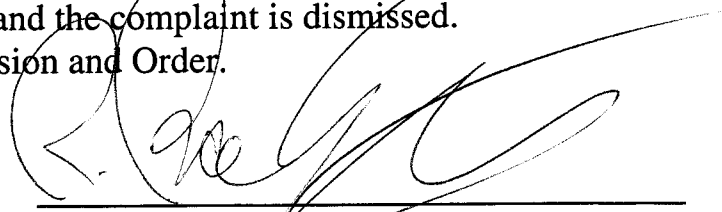
In opposition to the defendants' motion, the plaintiff cites *Savarese v Allstate Insurance Company* [2nd Dept., 2001] 287 AD2d 492, 731NYS2d 226. In that case, the plaintiff claimed the failures of the defendant physicians caused the wrongful termination of her no fault medical benefits. Under those circumstances, the Court found that when the examination is done to determine whether benefits are to be continued, no physician-patient relationship was established. No action was allowed for damages arising from medical malpractice.

In the instant case, the plaintiff alleges in his complaint that during the medical examination Lewis "took plaintiff's head in his hands and forcefully rotated it" causing personal injury. In *Evangelista v Zolan* [2nd Dept., 1998] 247 AD2d 508, 669 NYS2d 325, the injured plaintiff was examined by the defendant physician on behalf of a workers' compensation insurance carrier. During the course of that examination, the plaintiff claimed that the examining physician wrenched and twisted his previously injured shoulder causing further damage. The Court held that these allegations constitute medical malpractice not simple negligence. The complaint was dismissed as having been commenced after the statutory period had run.

In this action, the plaintiff's action is founded on medical malpractice and was not timely commenced. The defendants' motion is granted and the complaint is dismissed.

The foregoing constitutes the Court's Decision and Order.

Dated: NOV 14 2006



J.S.C.
XXX

ENTERED

NOV 17 2006

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**