

**Esposito v Dubrow**

2007 NY Slip Op 30121(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0003697

Judge: Robert W. Doyle

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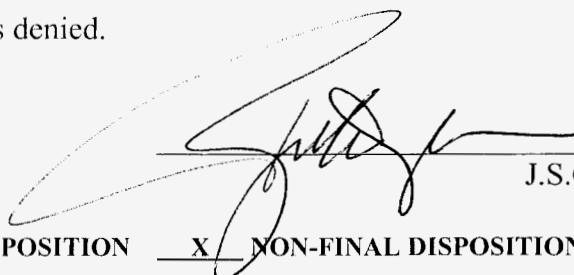
defendant's office who told him to disregard the September 1<sup>st</sup> note and that he could return to work the following week. The plaintiff's file contains a copy of the note with a line through it and a handwritten notation that "patient should not have gotten this note". A second note in the file is dated September 2, 1999 and provides that the plaintiff may return to work on September 6<sup>th</sup> "within comfort tolerance". The plaintiff claims that he never saw the second note and, upon returning to work, was advised by his employer that he could work with no restrictions. A short time later the plaintiff, a mechanic, injured his elbow again and ultimately was required to undergo a second surgical procedure. The plaintiff then commenced this medical malpractice action alleging that the defendant was negligent in directing him to return to work earlier than medically appropriate. Following discovery, the defendants Dubrow, Orthopedic Associates of Long Island LLP and Kristen Sohl now move for summary judgment in their favor.

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 eliminate any material issue of fact (*see, Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851).

Here, the defendants submit medical records, very limited pages from the defendants' depositions and an affirmation from Dr. Jay Wagner, who concludes that the care and treatment rendered to the plaintiff was within good and accepted medical practice. Dr. Wagner asserts that the September 2<sup>nd</sup> note, which allowed the plaintiff to return to work with restrictions six weeks after surgery, was medically appropriate. However, Dr. Wagner failed to address the fact that a note dated one day earlier advised the plaintiff not to return to work and to be evaluated September 22<sup>nd</sup>, which was consistent with the instructions following the August examination. In addition, Dr. Wagner did not address the plaintiff's allegations that he was never given the second note or advised about any limitation in his activities. Thus, the defendants have failed to make a prima facie showing of their entitlement to summary judgment. In any event, even if the defendants did make such a showing, the record demonstrates that triable issues of fact exist regarding the circumstances surrounding the two notes and whether the plaintiff was ever advised about limiting his activities upon his return to work (*see e.g. Heller v Peekskill Community Hospital*, 198 AD2d 265 [2d Dept 1993]).

Accordingly, the motion is denied.

Dated: MAR 05 2007

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION