

**Farley v Central Suffolk Hosp.**

2007 NY Slip Op 30775(U)

March 29, 2007

Supreme Court, Suffolk County

Docket Number: 0011691/2004

Judge: Emily Pines

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Suffolk Hospital, opposed by defendant, is denied.

This is an action sounding in medical malpractice. On August 17, 2002, plaintiff Josephine M. Farley and plaintiff's decedent John F. Farley, were involved in an automobile accident. Josephine M. Farley was the operator of the motor vehicle and John F. Farley was a passenger. They were both taken by ambulance to Central Suffolk Hospital Emergency Department where decedent John F. Farley was admitted with complaints of neck pain, noted to be trachea midline and posterior cervical spine. Examination by the emergency department physician, Dr. Stowell, revealed reflexes of 1+ of the upper extremities and 2+ of the lower extremities. Plaintiff's decedent bit the tip of his tongue, had ecchymosis of the left ear, abrasions on the left wrist and right hand, a skin tear on his left forearm, appeared diaphoretic and flushed, and complained of weakness on his left side and pain in his back, neck and shoulders. He was medicated with Motrin 800 mg at 1615 hours, Percocet at 1750 and 1930 hours, Morphine Sulfate 4 mg IV at 2050 and 2130 hours, and Valium 5 mg IV at 2345 hours. X-rays were taken of the chest and cervical spine and a CT was taken of the neck. The neck and CT films, according to the emergency department record were negative for fractures. The radiology report signed by defendant Martin J. Van Dyne, M.D., dated August 18, 2002 for the x-rays performed August 17, 2002 indicated there were no fractures of the cervical spine. Defendant Van Dyne also found there to be no fractures or subluxation on the CAT scan exam of the cervical spine. Plaintiff's decedent's EKG detected atrial fibrillation and anticoagulation was recommended. He was thereafter discharged from the emergency department of Central Suffolk Hospital and did not have any further medical care or treatment until August 24, 2002 when he presented to Northport Veterans Administration Hospital outpatient facility where additional x-rays were taken of his cervical spine. Initially, the x-rays were read as negative and plaintiff's decedent was discharged from the Northport VA outpatient department. On August 26, 2002, decedent was notified by the VA Hospital that the x-rays of his cervical spine revealed a subluxation of C6/7 and a fracture. Plaintiff's decedent returned to the VA Hospital where CT scans were taken and revealed cervical fractures and subluxation at the C6/7 level of the cervical spine for which he was transferred to the VA Hospital in Manhattan for neurological evaluation and treatment. He was subsequently placed in cervical traction, but early in the morning of August 27, 2002, John F. Farley died. The certified copy of the Autopsy Report reveals the cause of death as atherosclerotic and hypertensive cardiovascular disease; the contributing cause of death as blunt force trauma with fractures of the cervical vertebra; and manner of death as accident. The Bill of Particulars, in pertinent part, alleges defendants departed from good and accepted standards of medical care by failing to properly diagnose fractures and a subluxation of the cervical spine of plaintiff's decedent, John F. Farley, resulting in spinal cord compression, paralysis and his death on August 27, 2002 at the age of 76.

Plaintiff has commenced this medical malpractice action premised upon the alleged departures from good and accepted standards of medical care based upon defendants alleged failure to properly and timely diagnose several injuries suffered by decedent John F. Farley, including fractures of the C-2 and C-6 vertebral bodies and a subluxation of the C-6 vertebral body relative to the C-7 vertebral body with compression on the spinal cord. Defendant David Prentiss seeks to have the complaint against him dismissed as he claims he did not see, examine or treat plaintiff's decedent at any time or consult in his care and treatment. Plaintiff does not oppose motion #004 and seeks summary judgment against defendants Martin Van Dyne, North Fork Radiology, and Central Suffolk Hospital in motion #005.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 ). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790).

In motion #004, defendant David Prentiss, M.D. seeks an order pursuant to CPLR 3212 granting summary judgment against plaintiff and dismissing the complaint as against him. None of defendant Prentiss' supporting exhibits are found to be in admissible form as the depositions have not been signed and sworn to and the medical records are not certified. However, plaintiff does not oppose the motion and has cross moved for summary judgment against the remaining defendants only. In that motion #004 is supported by defendant Prentiss' affidavit which indicates that although his name was put on the emergency department pedigree sheet, he did not see, examine or treat plaintiff's decedent or consult in this matter. Accordingly, defendant David Prentiss has demonstrated entitlement to an order granting summary judgment dismissing the complaint against him (*Soraya Latiff, an Infant, by her Mother and Natural Guardian, Alicia Latiff, et al, v Wyckoff Heights Hospital et al*, 144 AD2d 650, 545 NYS2d 2). Plaintiff has not come forward with evidentiary facts sufficient to require a trial of any issue of fact relative to his claim that he did not treat plaintiff's decedent (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 ), and a search of the records does not reveal factual issues to preclude dismissal of the complaint against defendant Prentiss.

Accordingly, motion #004 is granted and the complaint is dismissed as against defendant David Prentiss, M.D.

In motion #005 plaintiff seeks an order granting summary judgment against the remaining defendants, Martin Van Dyne, M.D., North Fork Radiology, P.C. and Central Suffolk Hospital, alleging defendants failed to diagnose and treat plaintiff's decedent for the injuries he sustained in the automobile accident of August 17, 2002. In support of the application, plaintiff has submitted, inter alia, copies of the pleadings, bills of particulars, unsigned and unsworn copies of the depositions of Josephine M. Farley, Martin Van Dyne, Dr. Joseph Stowell, uncertified copies of the emergency department record of Central Suffolk Hospital and the outpatient records of Northport VA Hospital, plaintiff's 3101(d) expert

Northport VA outpatient record. There are no supporting affidavits submitted on behalf of defendants Van Dyne and North Fork Radiology with the papers opposing this application to summary judgment, except for the attorney's affidavit. Based upon defendant Van Dyne's deposition testimony wherein he states he did not appreciate the fracture at the C-2 level and missed the bone fragments into the spinal column at the C-2 level on the CT films, and considering the affirmation of Dr. Pfeffer, unrebutted by defendant Van Dyne, it is determined that plaintiff has demonstrated entitlement to an order granting summary judgment as against defendant Martin Van Dyne and North Fork Radiology, who have not come forward with admissible evidence or facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (CPLR 3212[b]; *Zuckerman v City of New York, supra*).

Accordingly, that part of plaintiff's motion #005 which seeks an order granting summary judgment as against defendants Martin Van Dyne, M.D. and North Fork Radiology, P.C. is granted.

Turning to that part of motion #005 wherein plaintiff seeks an order granting summary judgment against Central Suffolk Hospital, defendant Hospital, in opposing the motion, has submitted, inter alia, an attorney's affirmation copies of various pleadings, answer, bill of particulars; unsigned, unsworn copies of the depositions of plaintiff, Denise Misiewicz, defendant Martin Van Dyne, Joseph Stowell, Paula Murphy; uncertified copies of medical records from Northport VA Hospital; an affidavit of defendant David Prentiss dated April 22, 2005; and two affidavits from defendant's expert witness. It is determined that defendant's expert witness affidavits (Exhibits I and L) are not in admissible form as the names of the experts have been redacted and the signed copies were not submitted to this court for in camera inspection, as is required (*Marano v Mercy Hospital*, 241 AD2d 48, 50, 670 NYS2d 570; *McCarty v Community Hosp. of Glen Cove*, 203 AD2d 432, 610 NYS2d 588). However, in that plaintiff has not produced an affirmation from any expert witness demonstrating departures against defendant Central Suffolk Hospital, and in that there are factual issues as to whether or not Central Suffolk Hospital has vicarious liability in this matter, plaintiff has not demonstrated entitlement to an order granting summary judgment against defendant Central Suffolk Hospital.

Accordingly, that part of plaintiff's motion #005 for an order pursuant to CPLR 3212 granting summary judgment against defendant Central Suffolk Hospital is denied.

Dated: 3/29/07

Emily Pines  
**HON. EMILY PINES, C.**

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION