

Welsh v John Doe Group, P.C.

2007 NY Slip Op 30793(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0031931/2002

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-18-06
Mot. Seq. # 003 - MD

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THOMAS WELSH and PATRICIA WELSH,	:	THOMAS WELSH, <i>Pro Se</i>
	:	148 Oakside Drive
	:	Smithtown, New York 11787
Plaintiffs,	:	
	:	WAGNER, DOMAN & LETO, P.C.
- against -	:	Attorneys for Deft. Robinson
	:	227 Mineola Blvd.
“JOHN DOE GROUP, P.C.” (this name being	:	Mineola, New York 11501
fictitious pending identification of the true name of	:	
the medical group to which JOHN ROBINSON,	:	BARTLETT, MC DONOUGH, BASTONE
M.D. belonged), JOHN ROBINSON, M.D., P.C.	:	Attorneys for Deft. St. Catherine
and ST. CATHERINE OF SIENA MEDICAL	:	300 Old Country Road
CENTER,	:	Mineola, New York 11501
	:	
Defendants.	:	
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (003) by defendant St. Catherine of Siena Medical Center pursuant to CPLR 2221 for an order granting renewal of its prior motion which sought an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, unopposed by plaintiffs Thomas Welsh an Patricia Welsh, is granted, and upon renewal of the prior motion, summary judgment is granted, unopposed, and the complaint is dismissed as against defendant St. Catherine of Siena Medical Center.

By order dated February 6, 2006 (J. Doyle), the motion of defendant St. Catherine of Siena, made pursuant to CPLR 3212 for an order granting summary judgment as to the moving defendant, was dismissed without prejudice to renewal upon the expiration of the stay imposed for sixty days after service of a copy of the order upon plaintiffs (defendant’s Exhibit L). In bringing this motion to renew, the moving defendant has failed to demonstrate compliance with the order of February 6, 2006 in that a copy of the affidavit of service for service of the order upon plaintiff with notice of entry of the order has not been submitted. However, moving counsel has set forth in his attorney’s affirmation at paragraph 12 that in the months since the order was rendered, there have been several court conferences has agreed to accept the case. Also, in that a copy of this motion has been served upon plaintiffs and

there being no opposition to the motion, this Court grants renewal and turns to the motion for summary judgment.

This is an action sounding in medical malpractice and lack of informed consent, wherein the complaint of the action (Exhibit A) alleges defendant John Robinson, M.D. rendered patient care to plaintiff, Thomas W. Welsh, at defendant hospital St. Catherine of Siena (*hereinafter* SCSMC). Plaintiff alleges defendants were negligent in their care and treatment of him from April 18, 2001 through May 14, 2001. A derivative claim was asserted by the spouse of plaintiff, Patricia Welsh. In the bill of particulars (Exhibit B), plaintiff alleges the claimed departures took place at SCSMC where he claims SCSMC departed from good and accepted standards of care and treatment in improperly performing surgery on April 18, 2001 by causing the inguinal nerve to become entrapped, failing to diagnose the nerve entrapment and in failing to prevent permanent injury to the inguinal nerve. Plaintiff sets forth he underwent surgery under general anesthesia on January 2, 2002 at Long Island Jewish Medical Center for exploration of the left groin, excision of a mesh plug and redo of mesh hernia repair. Plaintiff claims as a result of defendants' alleged negligence that he sustained, inter alia, an altered and/or diminished sensation and/or numbness at and/or around the scrotum, nerve damage, pain, sexual and erectile dysfunction, hematospermia and loss of the inguinal nerve.

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).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503).

In support of this motion, the moving defendant, St. Catherine of Siena, has submitted, inter alia, copies of the pleadings; verified bill of particulars; a copy of the unsigned, unsworn deposition of Thomas W. Welsh; an unsigned, unsworn copy of the deposition of defendant John Robinson, M.D.; the affidavit of Joanne Sampson; signed and sworn affidavit of Burton Glass, M.D.; and an uncertified copy

of the consent for surgery dated April 18, 2001 with witnessed signature of Thomas W. Welsh.

It is set forth in the affidavit of Joanne Sampson (Exhibit I) that a search of the records of defendant SCSMC has been made, and she has ascertained that John Robinson, M.D. was a voluntary attending physician at the time of plaintiff's treatment in 2001, was not a hospital employee, and was not paid by SCSMC for the treatment John Robinson, M.D. rendered to plaintiff.

Defendant SCSMC's expert, Dr. Glass, sets forth in his affidavit at paragraph 7. that Dr. Robinson performed the ambulatory surgery at St. Catherine of Siena Medical Center on April 18, 2001. He reviewed Dr. Robinson's deposition testimony and Dr. Robinson testified he performed the surgery without an assistant and that he was the only one who manipulated the ileoinguinal nerve. The scrub nurse performed retraction, but Dr. Robinson stated that it was he, as the operating surgeon, who identified the ileoinguinal nerve, retracted it and moved it back into position at the end of the surgery. Dr. Glass further sets for that Dr. Robinson clearly testified that it was he who performed the positioning and suturing of the mesh plug, and it was he who closed the surgical wound once surgery was completed. At paragraph 8 Dr. Glass sets forth that based upon the nursing notes, the patient was properly monitored after the surgery, was discharged home on the date of the surgery in accordance with Dr. Robinson's plan, and the hospital chart indicates the patient met all short stay discharge criteria before he was released from the hospital. On or about May 29, 2001, plaintiff began to experience severe pain in the groin. Dr. Glass sets forth at paragraph 12. that on June 12, 2001, plaintiff returned to Dr. Robinson's office with continuing complaints of left groin pain, which Dr. Robinson opined to be due to nerve entrapment caused by scar tissue, and that the symptoms would abate over time. He was referred to a pain management specialist. Dr. Robinson injected the area with a combination of anesthetic/steroid medications. At paragraph 14 Dr. Glass states plaintiff saw other physicians and came under the care of Dr. Gecelter, who recommended an exploratory procedure, which was done. Dr. Gecelter made the intraoperative finding of inguinal nerve entrapment. Dr. Glass opines to a reasonable degree of medical certainty that St. Catherine of Siena Medical Center staff acted properly in all regards with respect to monitoring patient's condition post-operatively and there was nothing hospital staff members did or failed to do which caused or contributed to plaintiff's injuries during surgery or after surgery.

Based upon the foregoing, it is determined that defendant St. Catherine of Siena Medical Center has submitted sufficient competent evidence to demonstrate it did not depart from good and accepted standards of care and did not cause plaintiff's claimed injuries. Plaintiff has not come forward in opposing the motion for summary judgment and has not raised any factual issues which would preclude an order granting summary judgment to the moving defendant.

Accordingly, summary judgment is granted to defendant St. Catherine of Siena Medical Center on the issues of departures from good and accepted standards of care and proximate cause of plaintiff's claimed injuries, and the complaint is hereby dismissed as asserted against St. Catherine of Siena Medical Center. The action is severed and shall continue against the remaining defendant.

Dated: MAR 27 2007

_____ J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION