

**Alvarado v Puapan**

2007 NY Slip Op 30933(U)

April 19, 2007

Supreme Court, Kings County

Docket Number: 0026045/2003

Judge: David I. Schmidt

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At an IAS Term, SCP Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> day of April, 2007

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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BRIGGETTE ALVARADO, RENALDO RIVERA, and  
KASSANDRA RIVERA, infants by their mother and  
Natural Guardian, BRIGGETTE ALVARADO,

Plaintiffs,

- against -

Index No. 26045/03

PAIBON PUAPAN, et al.,

Defendants.

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The following papers numbered 1 to 2 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1_____
Opposing Affidavits (Affirmations)_____	2_____
Reply Affidavits (Affirmations)_____	3_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, Sudhakar S. Bhagavath, M.D. moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserted against him.

In this action sounding in medical malpractice, plaintiffs allege that defendants Paibon Puapan, M.D., Sudhakar S. Bhagavath, M.D. and Parkway Medical Office negligently failed to timely test the infant plaintiffs Briggette Alvarado, Renaldo Rivera and Kassandra Rivera for the presence of elevated lead levels in their blood and further failed to provide guidance to their mother as to the prevention of lead poisoning in her children. Plaintiffs allege that these failures were the proximate cause of the injuries suffered by the infant plaintiffs as a result of their exposure to lead in their home.

Dr. Puapan did not appear in this action and, on or about November 15, 2003, plaintiffs' motion for a default judgment against Dr. Puapan was granted.

Dr. Bhagavath now makes this motion for summary judgment.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury or damage (*see Holbrook v United Hospital Medical Center*, 248 AD2d 358, 358-359 [1998]; *Bloom v City of New York*, 202 AD2d 465 [1994]). As in any other action, the proponent of a summary judgment motion in a medical malpractice case must make a *prima facie* showing of entitlement to judgment as a matter of law through the submission of admissible evidence sufficient to show the absence of any material issue of fact on any relevant issue raised by the pleadings (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stone v Continental Insurance Co.*, 234 AD2d 282, 284 [1996]).

Moreover, in order to grant the drastic remedy of summary judgment “it must clearly appear that no material and triable issue of fact is presented .. ‘issue finding rather than issue-determination is the key to [a motion for summary judgment]’” (*Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976], quoting, *Sillman v Twentieth Century - Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Finally, the evidence presented by the nonmoving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to him or her (*id.*). “Where there is any significant doubt whether there is a material triable issue of fact or where the material issue of fact is ‘arguable’ summary judgment must be denied” (*Strychalski v Mekus*, 54 AD2d at 1069, quoting, *Moyer v Briggs*, 47 AD2d 64, 66-67 [1975]).

Applying the afore-mentioned principals to the case at bar, the court concludes that Dr. Bhagavath’s motion must be denied.

It is beyond dispute that on or about August 11, 1994, the New York City Department of Health conducted an inspection of the apartment in which the infant plaintiffs lived and found it to contain multiple areas of paint containing lead in excess of regulatory limits. This examination was conducted after the infant plaintiff Briggette Alvarado was found to have a blood lead level of 36.8 and was admitted to the hospital for treatment of lead poisoning. At approximately the same time, both Renaldo and Kassandra also exhibited elevated blood lead levels. According to plaintiffs, each child suffers from cognitive impairments as a result of their exposure to lead.

In support of his motion for summary judgment, Dr. Bhagavath submits the affirmation of Marvin Lieber, M.D. who opines that Dr. Bhagavath's treatment of each of the infant plaintiffs was in accord with good and accepted standards of pediatric practice. Dr. Lieber notes that each child was a regular patient of Dr. Bhagavath for a relatively short time before the age of one and that they then began to see Dr. Puapan as their primary care physician, and, thereafter, had appointments with Dr. Bhagavath intermittently, when they were sick. According to Dr. Lieber, there was no indication the children were in the "high risk" category for lead paint poisoning and, thus, it was not necessary for Dr. Bhagavath to test their blood lead levels before they turned one year old.

Dr. Lieber also states that Dr. Bhagavath properly discussed the dangers of lead paint poisoning with the infant plaintiff's mother, provided anticipatory guidance and assessed each infants' risk for lead poisoning. The doctor notes that the mother testified at her deposition that Dr. Bhagavath advised her how to prevent lead poisoning before the date that her children tested with elevated levels in 1994. Doctor Lieber concludes that "given [that Dr. Bhagavath] advised the infant plaintiffs' mother on how to prevent lead paint poisoning before the infant plaintiffs tested with an elevated blood level [Dr. Bhagavath's] anticipatory guidance was provided with the appropriate standard of pediatric care, and if applied properly could have prevented the infant plaintiffs from suffering from an elevated blood lead level."

Because the court finds that a question of fact exists on the issue of whether the proper anticipatory guidance was provided to the infant plaintiffs' mother by Dr. Bhagavath and whether such guidance could have prevented the alleged injuries suffered by the infant plaintiffs, it need not address the more complicated issue of whether Dr. Bhagavath should have tested the infant plaintiffs for lead levels during their visits with him. Specifically, in an affirmation submitted by plaintiffs in opposition to the motion for summary judgment, Dr. John Rosen notes that the 1991 CDC Statement advises pediatricians that in addition to assessing each patient's risk factors for lead paint poisoning, the pediatrician should educate the parent as to the hazards of lead poisoning, the danger of chipping and peeling paint and the ways to limit or eliminate a child's exposure to this risk. Dr. Rosen states that there is no indication in Dr. Bhagavath's medical records for the infant plaintiffs that he either assessed the children's risks for developing lead poisoning or that he gave the required anticipatory guidance to their mother so that the injuries suffered by the plaintiffs could have been avoided.

In arguing that no issue of fact exists on this issue, defendant notes Dr. Bhagavath testified at his deposition that he gave anticipatory warnings to the senior Brigette Alvarado and that Brigette Alvarado herself testified at her deposition that Dr. Bhagavath did discuss the dangers of lead paint. First, in an affidavit attached to this motion, the mother states that she had been confused and in error when she stated in her deposition that Dr. Bhagavath had given her anticipatory guidance about the danger of lead poisoning and that it had, in fact,

been Dr. Puopan who had spoken to her about lead poisoning danger and that that discussion had not occurred until after her daughter was hospitalized with lead poisoning.

Defendant contends that Ms. Alvarado's affidavit must be disregarded on this issue because it is direct contradiction to her deposition testimony, suggesting that it has been tailored to defeat the motion for summary judgment. However, the court declines to do so. Indeed, there is evidence to support Ms. Alvarado's statement that she confused the doctor's in her deposition testimony, since she stated in that testimony that she was given the warnings about lead poisoning "just before the children got sick," at a time when defendant concedes Dr. Puopan was the children's primary doctor. Moreover, even without the affidavit, a question of fact remains as to the timeliness of any information given by Dr. Bhagavath – that is, if, as Ms. Alvarado testified at her deposition, she was not warned about the dangers of lead paint until just before her children got sick, it may have been too late for her to have prevented the injuries which they allegedly suffered as a result of that exposure.

An issue of fact also exists on the issue of whether any lack of anticipatory guidance was the proximate cause of the injuries allegedly suffered by the infant plaintiffs. In that regard, Ms. Alvarado states in her affidavit that, had she been so instructed, she would have moved her children out of the subject apartment or cleaned it in a way to remove the paint chips. Ms. Alvarado also states that she would have kept the children off the floor and, had she been told to do so, she would have fed her children green leafy vegetables to minimize the dangers of any lead ingestion.

In short, Ms. Alvarado's testimony together with her affidavit presents a question of fact as to what she was told as to the dangers and avoidance of lead paint exposure, when she was told it and by whom. Dr. Bhagavath's testimony at his deposition that he always gives anticipatory warnings about lead paint and assesses each child's risk factors for developing lead poisoning as well as his explanation that those facts were not listed in the infants' charts also presents a question of fact as to the existence of such warnings and assessments in this case.

Accordingly, Dr. Bhagavath's motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserted against him is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. DAVID I. SCHMIDT