

Castle v Dreznin

2007 NY Slip Op 31021(U)

April 25, 2007

Supreme Court, Queens County

Docket Number: 0000544/2004

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

CELESTE CASTLE, as Administratrix of the
Estate of DAVID CASTLE

Plaintiff

-against-

STEPHEN DREZNIN, M.D., PAUL FRIEDMANN, M.D.,
RENAL CARE ASSOCIATES, P.C., MARTIN
MINES, M.D., PERRY A. WYNER, M.D., LONG
ISLAND INTERNAL MEDICAL ASSOCIATES,
NORMA LEE WENGER, M.D. ISLAND RENAL
PHYSICIANS, P.C., MERCY MEDICAL CENTER,
SHERYL BRUSTEIN, M.D., NEW YORK UNIVERSITY
MEDICAL CENTER, and BARRY STOKES, M.D.

Defendants

Index No: 544/04

Motion Date: 4/18/07

Motion Cal. No.: 5,6,7

Motion Seq. No.: 1,2,3

The following papers numbered 1 to 75 read on these motions and cross-motions by defendants, New York University Medical Center (NYU), Mines, Wyner, Long Island Internal Medical Associates (collectively LI Internal Med.), Brustein and Mercy Medical Center (Mercy) for summary judgment dismissing the complaint on the ground that they were not negligent; and cross-motions by defendants, Dreznin, Friedman and Renal Care Assocs. (collectively Renal Care), Mercy, NYU and Brustein, for partial summary judgment dismissing the plaintiff's medical malpractice cause of action as being barred by the applicable statute of limitations and cross-motion by plaintiff to strike the answer of the defendants, Mines, Wyner and Long Island Internal Medicine Associates; Wenger and Island Renal Physicians; Mercy Medical Center and Brustein; and NYU Medical Center for failure to appear for depositions in accordance with three prior Orders, or to compel the defendants to appear for depositions and to stay the determination of the summary judgment motions until the depositions have been held.

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Upon the foregoing papers it is ordered that these motions and cross-motions are determined as follows.

The defendants', NYU, LI Internal Med. and Mercy motion for summary judgment is denied pursuant to CPLR 3212(f). The plaintiff's cross-motion is granted to the extent that the defendants shall appear for a deposition commencing on May 21, 2007 at 10:00 a.m. at a place to be agreed upon by the parties. The depositions shall continue day to day until completed.

The defendants', Renal Care., Mercy, NYU and Brustein, cross-motions for partial summary judgment dismissing the cause of action to recover for the decedent's pain and suffering caused by the defendants' alleged medical malpractice as being barred by the applicable statute of limitations is denied.

This is an action to recover damages for the defendants'

alleged medical malpractice and for wrongful death based upon such alleged medical malpractice.

On November 13, 2000 Mr. Castle, who was then 30 years old, consulted with defendants, LI Internal Med. His primary care physicians. After evaluation, Mr. Castle was referred to Renal Care. On November 16, 2000 Mr. Castle went to Renal Care and was examined by Dr. Dreznin who ordered various tests including an abdominal sonogram. On November 21, 2000 Dr. Dreznin performed a biopsy of Mr. Castle's left kidney at Mercy. Dr. Brustein, Associate Director of Pathology at Mercy, forwarded the biopsy specimen on to NYU. Dr. Stokes, a pathologist at NYU, examined the specimen and provided a pathology report. Thereafter Mr. Castle was diagnosed with minimal change disease and was treated at Renal Care for this condition with steroids until about February, 2001. In February, 2001 Mr. Castle sought treatment with Dr. Wenger who found, inter alia, that he was suffering from "steroid dependent nephrosis". Dr. Wenger continued to treat Mr. Castle for minimal change nephritis and attempted to reduce and discontinue the use of steroids.

While under the care of Dr. Wenger, on January 7, 2002 Mr. Castle went to the emergency room of Mercy complaining of left mid-back pain. Blood tests and chest x-rays were performed, he was diagnosed with musculoskeletal back pain and referred for follow up with Dr. Wenger. On January 8, 2002 Mr. Castle returned to LI Internal Med. complaining of low mid-back pain. Mr. Castle also returned to LI Internal Med. on January 15, 2002 complaining of chest pain. He was examined by Dr. Perlmutter on both dates.

In May, 2002 Dr. Wenger ordered an abdominal sonogram of Mr. Castle. The abdominal sonogram was performed on May 22, 2002 and revealed a 9 cm. mass in the right kidney which was ultimately diagnosed as right kidney cancer with metastases. The cancer lead to Mr. Castle 's death on March 11, 2003. Plaintiff commenced this action on March 9, 2004 against the defendants for medical malpractice in, inter alia, failing to timely diagnose and treat the decedent's right kidney cancer and wrongful death.

The defendants, NYU, LI Internal Med. and Mercy move for summary judgment dismissing the complaint insofar as it is asserted against them on the ground that they were not negligent. In addition, the defendants, Renal Care., Mercy, NYU and Brustein move for partial summary judgment dismissing the cause of action based upon medical malpractice to recover for the decedent pain and suffering sustained prior to his death due to the defendants' alleged medical malpractice as being barred by the applicable statute of limitations.

In opposition to the defendants', NYU, LI Internal Med. and Mercy motion for summary judgment, plaintiff submitted the affidavit of an expert who asserts that in order to properly oppose the summary judgment motions, it is necessary to have depositions of all of the defendants and he cannot specifically identify any departures because the information in the medical records is insufficient to do so. The plaintiff also cross-moves to punish the defendants pursuant to CPLR 3126 for failure to appear for depositions or to compel defendants to appear for depositions and to stay the determination of the summary judgment motions until completion of the depositions.

Although significant discovery remains outstanding, most notably the deposition of all of the defendants except doctors Dreznin and Friedmann, the plaintiff was compelled to file a note of issue on August 22, 2006 as directed in the Compliance Conference Order. In a subsequent stipulation, so Ordered by Judge Ritholtz, dated August 15, 2006, depositions of all the defendants was scheduled and the time to move for summary judgment was extended. Only the deposition of the plaintiff and Dr. Dreznin was held as scheduled due, in part, to plaintiff's counsel's illness which required hospitalization. As the last date for moving for summary judgment approached, defendants felt compelled to make their motions. As a result, defendants refused to produce their clients for depositions until the determination of the motions (CPLR 3214[b]).

It is noted that the Preliminary Conference Order and the Compliance Conference Order contain numerous demands for medical records from plaintiff as well as dates for depositions of the plaintiff and the defendants. However, none of the parties appeared for depositions as scheduled and none of the defendants appeared until the so Ordered stipulation of Judge Ritholtz. Moreover, after plaintiff was deposed, the defendants moved for summary judgment effectively cutting off the plaintiff's opportunity to conduct discovery. Under the circumstances, the plaintiff has not had a reasonable opportunity to conduct any meaningful discovery (see Betz v. N.Y.C. Premier Properties, Inc., ___ AD3d ___ [2007], 2007 WL 926842). In addition, the affidavit of plaintiff's expert is sufficient to raise issues warranting further discovery. Accordingly, the defendants', NYU, LI Internal Med. and Mercy motion for summary judgment is denied pursuant to CPLR 3212(f). The plaintiff's cross-motion is granted to the extent that the defendants shall appear for a deposition as scheduled above.

The defendants', Renal Care., Mercy, NYU and Brustein, cross-motions for partial summary judgment dismissing the cause of action to recover for the decedent's pain and suffering caused

by the defendants' alleged medical malpractice is denied. Since the statute of limitations as to the decedent's cause of action based upon medical malpractice had not expired with respect to any defendant on March 11, 2003, the date of his death, the time within an action to recover damages for medical malpractice, including pain and suffering, was extended until March 11, 2004 (CPLR 210[a]). Inasmuch as the instant action was commenced on March 9, 2004, all causes of action asserted therein are timely (Norum v. Landau, 22 AD3d 650 [2005]; Fritz v. Southside Hosp., 182 AD2d 671 [1992]).

Dated: April 25, 2007
D# 30

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J.S.C.