Judge v Queens Long Island Med. Group, P.C.

2007 NY Slip Op 31369(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0014354/2005

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 05-14354
CAL. No. 06-02111-MM

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-31-07
ADJ. DATE 4-4-07
Mot. Seq. # 002 - MD
003 - MD

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LYNDA JUDGE, Administratrix of the Estate of BERNARD JUDGE, deceased and LYNDA JUDGE, individually,

Plaintiff,

- against -

QUEENS LONG ISLAND MEDICAL GROUP, P.C., OPKAR CHAWLA, M.D. and MICHAEL ROSENFELD, M.D.,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 18 ; Answering Affidavits and supporting papers 19 - 24 ; Replying Affidavits and supporting papers 25 - 27 ; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant Michael Rosenfeld, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, opposed by plaintiff Lynda Judge, is denied; and it is further

ORDERED that this motion (003) by defendant Queens-Long Island Medical Group for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint against them has been rendered academic by denial of motion (002) and is accordingly denied as moot.

This is an action premised upon the alleged medical malpractice of defendants in diagnosing and treating decedent Bernard Judge for Primary Biliary Cirrhosis, resulting in the progression of the disease, need for a liver transplant, and Mr. Judge's death from the disease.

In motion (002) defendant Michael Rosenfeld, M.D. seeks an order granting summary judgment dismissing the complaint on the issue of liability.

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 [2nd Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [3rd Dept 1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

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 [1957]). 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 [1985]). 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 [1980]). 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 [2nd Dept 1989]) 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 [2nd Dept 1981]). Summary judgment shall be granted only 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 [1979]).

In motion (002), defendant Michael Rosenfeld, M.D. supports his application with an attorney's affirmation; affidavit of Michael Rosenfeld, M.D.; copies of the summons and complaint and answers of defendants; verified bill of particulars; unsigned and unsworn partial copy of the deposition of Linda Judge; unsigned and unsworn partial copy of the deposition of defendant Chawla, M.D.; unsigned and unsworn copies of the depositions of defendant Michael Rosenfeld, M.D.; uncertified copy of medical records; and in the Reply, an unsworn, unsigned copy of the deposition of defendant Chawla, M.D.

Defendant Rosenfeld sets forth in his supporting affidavit that when he rendered care to Bernard Judge, he was affiliated with Queens Long Island Medical Group. It is his opinion, based upon a reasonable degree of medical certainty, that he did not deviate from good and accepted medical practice in connection with the treatment rendered to plaintiff, Bernard Judge, from April 16, 2002 through 2004, and that his care and treatment was not the proximate cause of plaintiff's alleged injuries.

Defendant Rosenfeld states he rendered medical treatment to Mr. Judge from April 16, 2002 through 2004. Defendant Rosenfeld first saw Mr. Judge on April 16, 2002. After reviewing the medical records of Mr. Judge, including laboratory data and test results, and a documented elevated alkaline phosphatase level, defendant Rosenfeld suspected the patient was suffering from primary biliary cirrhosis (PBC). He ordered an AMA (antimitochondrial antibody) test, because an elevated level is the primary indicator of primary biliary cirrhosis. Mr. Judge's bilirubin level was 1.1, which defendant Rosenfeld considered mildly elevated. At that first visit, primary biliary cirrhosis was his leading medical diagnosis on the differential to explain the high alkaline phosphatase levels and the other symptoms reported by Mr. Judge. Due to elevated AMA levels, defendant Rosenfeld states he diagnosed Mr. Judge with primary biliary cirrhosis and placed him on Ursodiol, a medicine to reduce toxic bile acids and reduce inflammation around the bile ducts. He states he advised Mr. Judge that he had primary biliary cirrhosis and needed to take Ursodiol continuously for the balance of his life to slow progression of the disease.

On May 24, 2002, defendant Rosenfeld states he made a recommendation to Mr. Judge to have a liver biopsy to provide an indication as to the status of his condition. This biopsy, defendant Rosenfeld states, would be scheduled by the patient's primary care physician. The biopsy report would then be forwarded to the Queens Long Island Medical Group and placed in the chart.

Defendant Rosenfeld saw Mr. Judge on a third visit on June 24, 2002, at which time a colonoscopy was performed, unrelated to his condition. Defendant Rosenfeld further states he did not provide any care and treatment to Mr. Judge from June 25, 2002 through March, 2004.

Defendant Rosenfeld avers in his affidavit that following the care and treatment rendered to Mr. Judge, an entry would be made in the chart regarding any findings, and the diagnosis of primary biliary cirrhosis is noted in the chart, which was available for review by Mr. Judge's primary care physician at each of plaintiff's subsequent visits. He further states Mr. Judge was instructed to follow up with his primary care physician to schedule a liver biopsy and return to the primary care physician after the biopsy had been performed, and to be followed by his primary physician for his condition. Defendant Rosenfeld also set forth that an additional visit with him would only be scheduled if specifically requested by the patient or if there was a change in his condition and the primary care physician referred the patient back to him. Defendant Rosenfeld stated between June 2002 and March 2004, that Mr. Judge continued to receive care and treatment from Dr. Chawla and at no time during that interval did either Mr. Judge or Dr. Chawla attempt to contact him regarding the care and treatment rendered to Mr. Judge.

It is defendant Rosenfeld's opinion to a reasonable degree of medical certainty that it was proper and in accordance with good and accepted medical care and practice for the patient to be monitored by his primary medical care physician in a referral-based practice such as Queens Long Island Medical Group and to rely upon the primary care physician to refer the patient back to him if the patient's condition warranted further care and treatment. He further opined that in April, May and June, 2002, Mr. Judge did

not demonstrate any signs and symptoms of liver failure and was not a candidate at that point in time for a liver transplant, and at no time prior to March, 2004, was he notified of any change in the patient's condition, physical symptoms, blood work, liver enzyme test or any other change in his overall health and well being.

Defendant Rosenfeld further opined that in a referral-based practice, it is proper and in accordance with accepted medical care and practice to rely upon the primary care physician to provide treatment to the patient including performing routine blood work and to renew any prescriptions for medication. Defendant Rosenfeld further sets forth in his affidavit that based upon the testimony of Dr. Chawla and various entries made in the chart, that it would appear that Mr. Judge was told to follow up with a gastroenterologist on a number of occasions, failed to follow Dr. Chawla's recommendations, at no time were the referrals, or the alleged failure of Mr. Judge to follow the instructions of Dr. Chawla, conveyed to him.

Defendant Rosenfeld further opined that it was proper and in accordance with good and accepted medical care and practice to notify the patient's primary care physician, in a referral-based practice, such as Queens Long Island Medical Group, of the diagnosis of primary biliary cirrhosis by entering the diagnosis and findings in the patient's chart.

It is noted that there are inconsistencies between defendant Rosenfeld's supporting affidavit and his testimony at his examination before trial (defendant's exhibit G). Although defendant Rosenfeld testified he recommended that plaintiff have a liver biopsy done and follow up after that, he had no recollection of speaking with Dr. Chawla at any time prior to the April 16, 2002 appointment, and has no recollection of ever having a conversation with Dr. Chawla about plaintiff (p.42). He testified he had no reason to speak with Dr. Chawla based upon his consultations and contact with plaintiff in 2002. He put a note in the chart as is his custom (p.43). He stated that almost every patient he could think of follows up with their internist and continues on their medication, has their blood monitored, and if there is any change, they will be referred back (p.43-44). When asked if there was any reason why it was necessary as his gastroenterologist who made the diagnosis, to follow him, he replied, "I had recommended at that time that he have a liver biopsy done and follow up after that (p. 45). When asked, "So it is your answer that your custom would be not to speak to Dr. Chawla because you would rely upon Dr. Chawla to read your entries in the chart when he saw the patient?" he replied, "Well, two reasons. One because I rely on somebody who sent me a patient for a consult to read my consult whenever he sees the patient again which they are invariably going to do. And the other thing is because I'm sending them back to him to set up the liver biopsy"(p.46). When asked, "In the two years between the two visits, according to the policy of the group, was there any obligation on your part to follow up with this patient?" he replied, "No, as I said before, they can be sent back to me at any time" (p.100).

When defendant Rosenfeld was asked if May 24, 2002 was the date you told him (Mr. Judge) he had PBC, he replied, "Yeah, I told him, I had a discussion" (p.82). When asked, "Although you don't use the word PBC in your note ... you don't write it anywhere, do you?" (p.83). He replied, "No" (p.83). When asked if there was any note by him that he made the diagnosis of PBC in this chart so that Dr. Chawla would know it, he replied, "Well, I'm saying that he had--if he has PBC--I'm saying I got the AMA to confirm the fact that he's to have PBC. I'm writing a note that it's positive" (p.83). Then when asked, "But you're relying on Dr. Chawla to interpret the fact that his AMA is elevated and hence he has

PBC, correct, because you don't write that he has PBC?" Defendant Rosenfeld's answer was, "It's common knowledge and I'm sure that he knows that" (p.83). When asked, "But you don't write it in the chart, that's the diagnosis, correct?" he replied, "No" (p.84). However, defendant Rosenfeld opined in his supporting affidavit that it was proper and in accordance with good and accepted medical care and practice to notify the patient's primary care physician, in a referral-based practice, such as Queens Long Island Medical Group, of the diagnosis of primary biliary cirrhosis by entering the diagnosis and findings in the patient's chart.

Based upon the forgoing, it is determined defendant Rosenfeld has raised his own factual issue in that he admits he did not write the diagnosis of PBC on plaintiff's decedent's medical record, but in his affidavit, states he did, and that this was in accordance with good and accepted medical care and practice. Defendant Rosenfeld also stated he did not feel it was necessary to follow Mr. Judge's care and treatment, and, as his custom, he would not speak to Dr. Chawla but would rely upon Dr. Chawla to read his entries in the chart when he saw the patient. Therefore, there are inconsistencies between defendant Rosenfeld's testimony at the examination before trial and his supporting affidavit concerning whether or not he made an entry of Mr. Judge's diagnosis on his chart, whether that diagnosis was in any way communicated to Dr. Chawla, and whether the failure to either write plaintiff's diagnosis in his medical record or communicate with Dr. Chawla was a departure from good and accepted standards of medical care and treatment, and whether that departure contributed to the worsening of plaintiff's condition and his death.

Based upon the foregoing, it is determined that defendant Rosenfeld's affidavit and submissions do not demonstrate that there are no material issues of fact with regard to the alleged departures by him, or that there is no merit to the action as asserted against him (***Winegrad v New York University Medical Center,*** supra). It is further determined after reviewing the affidavit of defendant Rosenfeld and all the submissions on these motions that the affidavit of defendant Rosenfeld is self-serving and conclusory and does not make out a prima facie case of entitlement to an order granting summary judgment.

Accordingly, motion (002) by defendant Rosenfeld is denied.

Despite the same, this Court finds that plaintiff has come forward with sufficient evidence in admissible form to raise triable issues of fact to preclude an order granting summary judgment to defendant Rosenfeld.

In opposing motion (002), plaintiff has submitted the affidavit of plaintiff's expert, who is Board Certified in Internal Medicine and Gastroenterology (plaintiff's exhibit A). Plaintiff's expert states he reviewed the medical records of the deceased Bernard Judge as well as the transcripts from the examinations before trial of defendants Chawla and Rosenfeld. It is his opinion with a reasonable degree of medical certainty that the care rendered to Bernard Judge fell outside the accepted professional standards of medical, and more specifically, gastroenterological practice.

Plaintiff's expert states that Mr. Judge was a patient at the Queens Long Island Medical Group since 1973, and for a number of years, Mr. Judge was treating with Dr. Guarin, where, in September and October of 2000 and again in April, 2001, Mr. Judge demonstrated elevated liver function tests (LFT's). On June 27, 2001, Dr. Chawla assumed the primary care of Mr. Judge as his internist, and during his initial visit with Dr. Chawla in June, 2001, Mr. Judge again demonstrated elevated LFT's. Mr. Judge

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followed up three or four times after June, 2001, and during one of those visits was given a referral for a consult with a gastroenterologist. That referral was with Dr. Rosenfeld, who generated a formal consult sheet (plaintiff's exhibit B), that included his impression, namely, to rule out primary biliary cirrhosis, which plaintiff's expert states at paragraph nine, is a chronic liver disease that causes progressive destruction of bile ducts in the liver and continued liver inflammation causing scarring, eventually leading to cirrhosis A laboratory profile, including an AMA analysis, was done. The AMA was positive with a level of 4.58. An elevated or positive AMA level which is greater than 1.10, coupled with elevated LFT's is strong evidence that the patient has PBC.

Plaintiff's expert sets forth that on the May 4, 2002 visit with Dr. Rosenfeld, he noted Mr. Judge's AMA level to be 4.58, and that Dr. Rosenfeld testified at his examination before trial that it was during this visit that he made the diagnosis of PBC, but did not document the diagnosis in Mr. Judge's medical chart. As a course of treatment, Mr. Judge was subsequently started on Ursodiol, an oral medication prescribed as a long-term treatment plan to arrest the progression of PBC. Plaintiff's expert further sets forth at paragraph 10 that Dr. Rosenfeld stated in his testimony that he recommended a CT guided liver biopsy and a repeat series of LFT's, but Dr. Rosenfeld's medical chart does not reflect that these recommendations were made to Mr. Judge, nor is there a note that he made a referral for a radiologist to perform the CT guided liver biopsy. Most notable, states plaintiff's expert, that despite diagnosing Mr. Judge with Primary Biliary Cirrhosis, a life threatening disease, Dr. Rosenfeld did not write his diagnosis anywhere in the chart. Thereafter, on June 24, 2002, when Mr. Judge was seen for a colonoscopy, Dr. Rosenfeld did not make a note in the chart that Mr. Judge was a patient with PBC or that he had diagnosed him with this disease, nor inquire as to whether Mr. Judge had gone for or even scheduled the liver biopsy or whether he followed up with Dr. Chawla regarding his disease. It was not until March 16, 2004 that Dr. Rosenfeld made a notation in Mr. Judge's chart that he had diagnosed him with PBC.

Plaintiff's expert further states that it is clear from the testimony of Dr. Chawla, whom Mr. Judge saw approximately five times during 2003, that he was not aware of the fact that Dr. Rosenfeld had made a diagnosis of PBC and that he was in fact suffering from this potentially life threatening disease. He also stated that the serum laboratory studies on Mr. Judge were continued by Dr. Chawla to rule out hepatitis as the cause of Mr. Judge's elevated LFT's, not as a measure to monitor Mr. Judge as a patient with PBC.

Plaintiff's expert further states that during the twenty two months between May 4, 2002 and March 16, 2004 consultations, Dr. Rosenfeld did not inquire with Mr. Judge on June 24, 2002 whether he had had the liver biopsy yet or even scheduled it, or inquire of Mr. Judge or Dr. Chawla as to whether Mr. Judge was continuing to take the Ursodiol, and never made any effort to follow up on a patient that he himself diagnosed with PBC.

It is the opinion with a reasonable degree of medical certainty of plaintiff's expert that had Dr. Rosenfeld either made a notation in Mr. Judge's chart that he had diagnosed the patient with PBC, or made any effort to follow up with Dr. Chawla or the patient during nearly two years after making his diagnosis, Mr. Judge's condition would have been more timely diagnosed and a proper course of treatment could have been instituted and followed.

On March 16, 2004, when Mr. Judge visited with Dr. Rosenfeld it was noted that Mr. Judge's condition had deteriorated significantly, that he had ascites in his abdomen, was exhibiting encephalopathy and renal insufficiency, and that by this time was a very poor candidate for survival of

such an operation for liver transplant.

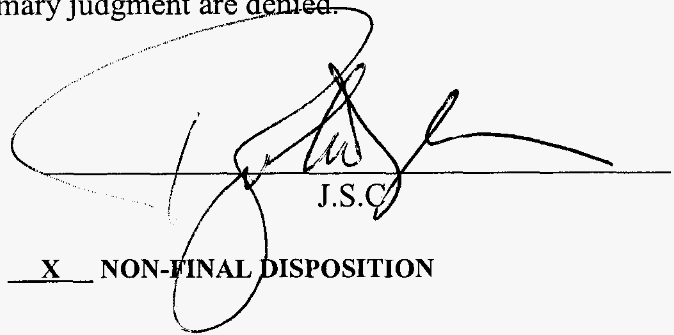
It is plaintiff's expert's opinion with a reasonable degree of medical certainty that Dr. Rosenfeld's failure to properly make a notation of his diagnosis in the patient's chart, failure to timely and properly inform the patient and his primary care physician of his disease, and the failure to follow up on a patient with a potentially life threatening disease constituted departures from the accepted standards of medical practice and caused the significant delay in Mr. Judge's receiving and continuing to receive a proper course of treatment for his life threatening disease, and that these failures caused the disease to progress unmonitored and untreated for nearly two years, eventually resulting in Mr. Judge suffering hepato-renal failure and contributing to his death.

Thus the Court finds that even if defendant Rosenfeld had met his burden of proof on this motion, it is determined that plaintiff's expert has raised material factual issues concerning the alleged departures by defendant Rosenfeld concerning his care and treatment of Mr. Judge, the progression of Mr. Judge's condition, and his resulting death from hepato-renal failure. Summary judgment in favor of defendant Rosenfeld is not warranted.

In motion (003), defendant Queens-Long Island Medical Group, P.C. seeks an order dismissing any claims and/or cross claims of vicarious liability alleged against them in the event summary judgment is granted to co-defendant Michael Rosenfeld, M.D. In that summary judgment was denied to defendant Michael Rosenfeld, M.D., motion (003) has been rendered academic.

Accordingly, defendants' motions for summary judgment are denied.

Dated: MAY 2 1 2007



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**