SHORT FORM ORDER

INDEX No. 03-28338
CAL. No. 06-02291-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 2-20-07 (005)
2-28-07 (006)
2-21-07 (007)
ADJ DATE 4-4-07
Mot Seq. # 005 - MD
006 - XMG
007 - XMG

NANCY C. BAYLIS, as Administratrix of the Estate of JAMES BAYLIS, deceased, Plaintiff, - against - KRISTEN P. NASO, M.D., LUIGI BUONO, M.D., RICHARD CAPPELLO, M.D., DHIREN C. MEHTA, M.D., SOUTHAMPTON HOSPITAL, EASTERN LONG ISLAND HOSPITAL and CENTRAL SUFFOLK HOSPITAL, Defendants.	PEARLMAN, APAT, et al. Attorneys for Plaintiff 80-02 Kew Gardens Road, Suite 5001 Kew Gardens, New York 11415 SANTANGELO & SLATTERY Attys for Defts Cappello & Buono 1999 Marcus Avenue, Suite 200 Lake Success, New York 11042 GARSON GERSPACH DeCORATO, et al. Attys for Deft Central Suffolk Hospital 110 Wall Street, 10th Floor New York, New York 10005

Upon the following papers numbered 1 to 62 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 36-49; 50-62 ; Answering Affidavits and supporting papers 16 - 33 ; Replying Affidavits and supporting papers 34 - 35 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by defendant Central Suffolk Hospital for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims against them with prejudice, opposed by plaintiff Nancy C. Baylis as Administrator of the Estate of James Baylis, deceased, is denied.

Plaintiff does not oppose the summary judgment motions (006) and (007) filed on behalf of Richard Cappello, D.O. and Eastern Long Island Hospital, and consents to the entry of judgment dismissing the complaint as against those defendants; and it is further

ORDERED that this motion (006) by defendant Richard Cappello, D.O., s/h/a Richard Cappello, M.D., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, unopposed and consented to by plaintiff, is granted and the complaint of the action is dismissed as asserted against Richard Capello, D.O.; and it is further

ORDERED that this motion (007) by defendant Eastern Long Island Hospital for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, unopposed and consented to by plaintiff, is granted and the complaint of the action is dismissed as asserted against Eastern Long Island Hospital.

This is an action premised upon the alleged medical malpractice by defendants in the care and treatment rendered to plaintiff's decedent for ulcerative colitis. Causes of action sounding in negligence and wrongful death have been set forth by plaintiff. Plaintiff's decedent died on August 10, 2002, at age 49. In motions (005) defendant Central Suffolk Hospital 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 [1979]) 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

[1981]). 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 [1979]).

In motion (005), defendant Central Suffolk Hospital seeks an order granting summary judgment dismissing the complaint against them. In support of the application, defendant Central Suffolk Hospital has submitted, *inter alia*, an attorney's affirmation; affirmation of a physician board certified in Internal Medicine; copies of the summons and complaint; answer of defendant Central Suffolk Hospital; copy of an amended verified complaint; verified answer of defendant Central Suffolk Hospital to amended complaint; copy of the verified bill of particulars; an unsigned and unsworn copy of the deposition of plaintiff Nancy C. Baylis; an unsigned and unsworn copy of the deposition of Dhiren C. Mehta, M.D.; an unsigned and unsworn copy of the deposition of Carol Conroy; and an uncertified copy of Central Suffolk Hospital records.

In reviewing the affirmation of defendant Central Suffolk Hospital's expert physician (defendant's exhibit A) defendant's expert states that upon his review of the relevant materials, it is his opinion with a reasonable degree of medical certainty that, at all times, Central Suffolk Hospital rendered care and treatment to the decedent within accepted standards of medical care. He states that decedent was admitted to Central Suffolk Hospital on August 3, 2002 and was attended to by his private physicians, none of whom were employees of Central Suffolk Hospital. Mr. Baylis' admitting diagnosis was ulcerative colitis and rule out sepsis from toxic megacolon. Plaintiff's decedent underwent diagnostic testing at the request of the private attending physicians. Dr. Mehta, a private attending gastroenterologist, who defendant's expert states is not an employee of Central Suffolk Hospital, contacted Dr. David Chapman of Mt. Sinai Hospital to arrange for a timely transfer of Mr. Baylis to that facility on August 6, 2002. Defendant's expert states that Mr. Baylis was timely and appropriately transferred to Mt. Sinai when the bed became available. Dr. Mehta continued in his attempts to have the patient transferred and on August 7, 2002 at 6:12 p.m., the patient was transferred by ambulance. No alleged delay in transferring the patient to Mt. Sinai Hospital can be attributed to the employees of Central Suffolk Hospital.

It is determined that defendant Central Suffolk Hospital has demonstrated prima facie entitlement to an order granting summary judgment.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see,* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.,*** 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.,*** 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Plaintiff has opposed the motion, submitting an attorney's affirmation; affidavit of Elaine Kinsella; the affirmation of a physician board certified in Gastroenterology; the affirmation of a physician board certified in Radiology; uncertified partial copies of deposition transcripts of Dr. Naso, nurse Conroy, and Dr. Mehta; and a copy of the autopsy report.

In opposition to this motion, plaintiff has submitted the affirmation of James Marion, M.D., a board certified Gastroenterologist, who sets forth he was the physician involved in the care of the patient from his transfer from Central Suffolk until his demise three days later in Mt. Sinai. Dr. Marion is the partner of Dr. Chapman to whom Mr. Baylis was originally referred to and who was referred to in this motion and the depositions of Dr. Mehta and the hospital chart. Dr. Marion said these conversations with Dr. Chapman could not have occurred as Dr. Chapman was not available at the time, which is why he assumed the care of Mr. Baylis. Dr. Marion states that at no time were the physicians or staff at Mt. Sinai advised by the staff or physicians at Central Suffolk Hospital that this was an emergent transfer, that the patient had toxic megacolon or that he was septic. Based upon the information provided by Central Suffolk Hospital, this was a non-emergent transfer. All of the arrangements for the transfer were made by Central Suffolk Hospital, including transportation. He states they agreed to the transfer, but were not provided any medical records prior to the arrival of the patient at Mt. Sinai at 9:00 p.m. on August 7, 2002. Mr. Baylis' presentation upon arrival at Mt. Sinai was consistent with toxic megacolon. He had a rapid heartbeat, rapid respiration, an altered consciousness, his abdomen was distended and tender with decreased or absent bowel sounds and positive tympanic. He had edema in his lower extremities. His blood tests revealed severe anemia, metabolic disarray and dehydration. The last G.I. progress note in the chart indicated that the colon was distended to 8 cm. The initial x-rays at Mt. Sinai demonstrated free air under the diaphragm indicating a perforation of the colon. An emergency exploratory was done on August 8th and it was found that Mr. Baylis' colon was perforated in multiple locations. His abdominal cavity was filled with pus and fecal matter. His entire abdominal cavity was contaminated. He was septic and shortly went into septic shock. Mr. Baylis died on August 10, 2002. Dr. Marion opines with a reasonable degree of medical probability that had Mr. Baylis' transfer to Mt. Sinai been accomplished on August 5th or even August 6th they would have been able to save his life. By the time Mr. Baylis was transferred to Mt. Sinai, it was already too late; his bowel had perforated, he had become septic and was too sick to recover.

Based upon the foregoing, it is determined that plaintiff's expert has demonstrated that there are factual issues that concerning the timeliness of plaintiff's transfer and the failure to communicate the severity of plaintiff's decedent's condition which preclude an order granting summary judgment.

The affirmation submitted by plaintiff's radiology expert sets forth he reviewed the x-ray of August 3, 2002 and August 5, 2002 as well as the CT scan of August 3, 2002 and the hospital record, and upon that review, has formed an opinion based upon a reasonable degree of medical probability that there were departures from good and accepted practice by the hospital radiologist in the interpretation of the studies, the reporting of the studies, as well as failure to recommend follow up x-ray studies. Plaintiff's expert states, as a radiologist, the first radiographic criterion is evidenced colonic dilation, the extent of dilation of the colon, wall thickening and abnormal air collection, all important factors to be considered. When there is a positive history of ulcerative colitis, dilation of the colon over 5.5 cm and wall thickening are suspicious for toxic megacolon and require careful follow up as there is danger of perforation of the colon with resultant sepsis. Mr. Baylis presented with clinical signs of toxic magacolon with a fever of 104, tachycardia and electrolyte imbalance, and continuing to run a fever despite medication. The CT of August 3, 2002 showed the bowel dilated slightly more than 6 cm with intramural air in the right colon. Plaintiff's expert further opined that the report was not wrong,

however, to merely state that the colon was dilated without noting the severity of the dilation was a departure from good and accepted practice, and the failure to report the severity of dilation of 6 cm on the August 3rd CT scan substantially contributed to the failure to timely diagnose current or imminent toxic megacolon. The radiographic findings with the clinical presentation were diagnostic of toxic megacolon, a life threatening condition.

Plaintiff's radiology expert further opined the x-ray from August 5, 2002 showed further dilation to 7 cm and suggestion of wall thickening (thumb printing), and the dilation may have been even greater as a portion of the bowel was not adequately visualized. The report does not raise the suspicion of toxic megacolon, is vague and did not recommend further evaluation or radiographic follow-up. Plaintiff's expert stated failure to accurately, precisely and completely report the findings from the x-rays and CT scan was a departure from good and accepted practice, which proximately caused a delay in the diagnosis and effective treatment of this patient.

Plaintiff's expert further stated radiographs should have been followed every 12 to 24 hours, horizontal radiographs should have been performed as well as serial radiographs. This is a failure, opines plaintiff's expert, and the standard of care is for the radiologist to raise the suspicion of toxic megacolon and suggest further evaluation and follow-up studies. The radiologists' recommendations were not only incorrect, but they were dangerous because the recommendation of Hypaque enema could have precipitated a perforation. Plaintiff's expert also states that a follow-up x-ray was ordered to be performed on August 4, 2002, and the hospital chart contains no documentation that the study was performed and no report is in the chart for the x-ray performed August 7th prior to transfer. The failure to take or report these studies constitutes a departure from good and accepted practice which substantially contributed to a significant delay in the diagnosis of toxic megacolon.

It is plaintiff's expert radiologist's opinion with a reasonable degree of medical probability, that the hospital radiologists who reviewed the studies, and the hospital radiology department, departed from good and accepted practice of radiology and that such departures were a substantial contributing cause to the failure to timely diagnose and effectively treat the patient, and that these departures ultimately lead to the death of the patient from toxic megacolon complicated by perforation and peritonitis.

Based upon the foregoing, it is determined that plaintiff has demonstrated the existence of material factual issues concerning alleged departures from good and accepted standards of radiological care which preclude an order granting summary judgment.

Plaintiff's decedent has also submitted the affirmation of their expert, Elaine Kinsella, a nurse licensed to practice nursing in New York State. She states she reviewed the charts of Central Suffolk Hospital and Mt. Sinai Hospital in connection with the August, 2002, admission of Mr. Baylis. She states as a nurse responsible for patient discharges, it is vital to have a basic understanding of the condition and needs of the patient, and in this case, it was obvious that Mr. Baylis was in critical condition on the 6th and 7th of August. He was suffering from documented severe ulcerative colitis and was not responding to treatment. On admission he had a rapid heartbeat, was weak, dehydrated, suffering from metabolic imbalance, a fever, with a recent history of a high fever, continued rectal

bleeding, diarrhea and continued anemia despite multiple transfusions. The x-ray and CT scan reported a prominent dilation of the colon. On the last day of admission, there is a progress note that the colon was dilated to 8 cm. The record reflects that his physicians were considering toxic megacolon as a differential diagnosis. Through the hospital stay, his condition deteriorated with new complaints of abdominal pain, abdominal distention and a change from hyperactive to hypoactive bowel sounds, indicating that his colon was no longer properly functioning. There was a clear and rapid progression of the distention of his colon. On August 6th, Mr. Baylis' physician wrote an order for the hospital to arrange a transfer to Mt. Sinai, as it was clear they were considering surgical management. The order was not picked up until 8:25 p.m. When the order was picked up, the Nurse Manager at Central Suffolk Hospital had already left for the day and did not return until 8 a.m. the following day. Plaintiff's expert states that when the order was picked up, the nursing supervisor should have either contacted the Nurse Manager or made prompt arrangements for this patient to be transferred, and should not have waited until the next day. Nurse Kinsella states this failure to act on what was on its face an emergent transfer for a critically ill patient was a departure from good and accepted practice.

Nurse Kinsella further states that when nurse Conroy, the Nurse Manager, came in the next morning on the 7th of August, she received a call from Dr. Buono who expressed great concern that his patient had not been transferred. Thereafter, nurse Conroy did not communicate to Mt. Sinai Mr. Baylis' condition and that this was an emergency transfer. She did not indicate to the ambulance which was going to transfer Mr. Baylis that this was an emergency transfer. Nurse Kinsella sets forth that the statement that no bed was available is not valid because, if a patient is critically ill, he can be admitted through a hospital emergency room, and there are many other hospitals which could have performed the emergency surgery to save Mr. Baylis' life. It is nurse Kinsella's opinion that the nursing staff of Central Suffolk Hospital departed from good and accepted practice of nursing in the manner in which this transfer was effectuated, causing a significant delay in the transfer of Mr. Baylis to a hospital where effective treatment, medical or surgical, could have been provided. More than 24 hours transpired from the time the order was written until the transfer was made. Mr. Baylis' condition substantially deteriorated during this time. It is nurse Kinsella's further opinion that this patient's death could be attributed to poor communication by the nurse with the treating doctors, the family and the receiving institution, together with the failure to use good judgment to protect the safety of the patient, and these are departures from good and accepted practice.

Dr. Mehta testified at his examination before trial (defendant's exhibit I) that during conversation with Dr. Buono, he wanted the surgeon from Mt. Sinai to be involved with any surgical care of the patient. Dr. Mehta felt a surgical consult was necessary on the morning of August 6th because Mr. Baylis was not improving, and he discussed this surgical option with the family. Dr. Mehta discussed toxic megacolon with the family, which he described as a dilated colon, which, if not resected or resolved, can lead to perforation or poor outcome. Mr. Baylis was initially referred to Dr. Chapman by Dr. Naso. Dr. Mehta told Mr. Baylis and his wife around 8 o'clock in the morning on August 6th that Mr. Baylis should be transferred as soon as possible, because he was considering the diagnosis of toxic megacolon, he had not improved after forty-eight hours of IV steroids and antibiotics, so at that point in his judgment, he needed surgical intervention. That surgical intervention was needed as soon as possible for his safety, to get the best clinical outcome as possible. When asked what "as soon as possible" meant in terms of time, he replied "Same day or within 24 hours." He told Mr. and Mrs. Baylis that he would like him to

be transferred the same day. Dr. Mehta then notified the social worker at Central Suffolk Hospital. He talked to Dr. Chapman himself on August 6th, and Dr. Chapman said he'll explain to them that the patient needs to be transferred as soon as possible because of his condition, and he was told by him that he'll make arrangements for the patient to be accepted at Mt. Sinai the same day. Dr. Mehta felt a surgical consult was necessary on August 4th, but since Mr. Baylis was being transferred on the 6th, he did not bring up the surgical consult on the 6th as Mrs. Baylis did not want surgery done at Central Suffolk Hospital.

Dr. Mehta testified Dr. Buono had also written an order at 9:30 a.m. to contact Dr. Chapman on August 6th, and that order was picked up at 8:25 p.m.. Dr. Mehta believed he spoke with Dr. Chapman on the morning of August 7th to find out if he knew why Mr. Baylis had not been transferred and advised him that there was a change in Mr. Baylis' condition and he needed surgical intervention. Dr. Chapman said he was waiting for the patient to get there. Mr. Baylis was transferred at 6:12 p.m. on the evening of August 7th. Dr. Mehta was advised that Mr. Baylis died after the operation, and that he had a perforation.

Dr. Mehta also testified that Dr. Naso wrote an order requesting a social work consult by Central Suffolk Hospital to help facilitate the transfer to Mt. Sinai when the bed was available. A note was written at 3:15 p.m. by the case management on August 6th. Case management is the social work department (defendant's exhibit J, p. 38). That note states "Patient was admitted to hospital on 08/03/02. Diagnosis - rule out sepsis, pneumonia. PMH - hernia repair, ulcerative colitis, anemia. Social - lives with spouse and family. Plan - home, with M.D. follow up" (p. 109). There is a note from August 7th which states, "Spoke with Dr. Buono re transfer to Mt. Sinai. Accepting M.D. Dr. Chapman. NS ambulance called".

At her examination before trial (defendant's exhibit J), nurse Conroy testified she saw Mr. Baylis on August 6th at 3:15 p.m., but was not aware of the plan to transfer the patient to Mount Sinai Hospital at that time. She had not been contacted by anyone with respect to arranging a transfer. She did not call an ambulance, a hospital, or do anything to make arrangements to facilitate a transfer on August 6th as his plan was to be sent home with an M.D. follow up. No one in her department was contacted in order to facilitate or arrange such a transfer. She testified this was a non-emergent transfer, and stated "We don't usually have anybody that's scheduled on other shifts to do it, and if it's in and of itself, if it's non-emergent, it can wait..."(p. 43). She did not become aware of the transfer order until August 7th when she received a phone call from Dr. Buono at 8:30 a.m. wherein he told her he was very concerned that Mr. Baylis was still there, he had a conversation on the evening of the 6th with Dr. Mehta who spoke with Dr. Chapman who accepted the patient for transfer, that Mount Sinai was arranging for the transport, and to please look into what was the hold up or what was going on and to look into it and call him back. She said Dr. Buono never told her it was an emergent transfer. She spoke to Dr. Chapman's office nurse/manager at about 9 a.m on the 7th, and was advised that Dr. Chapman had not notified the hospital or admitting of the transfer. Thereafter, nurse Conroy spoke with Dr. Buono and told him she was working on making the arrangements for the patient to be transferred.

Plaintiff has clearly demonstrated there are material factual issues concerning the actions and alleged failure to act by employees of Central Suffolk Hospital in failing to timely communicate the

order for the transfer, in failing to timely arrange for and transport plaintiff's decedent to Mt. Sinai Hospital, and in failing to recognize the seriousness of decedent's condition or to heed Dr. Mehta's and Dr. Buono's concerns that he should have been transferred sooner. These factual issues also preclude an order granting summary judgment to Central Suffolk Hospital as a medical facility can be held vicariously liable for the negligence and/or malpractice of its employees (***O'Regan v. Lundie,*** 299 AD2d 531; 751 NYS2d 274 [2002]).

Accordingly, motion (005), by defendant Central Suffolk Hospital for an order granting summary judgment dismissing the complaint, is denied.

Dated: MAY 2 1 2007

J.S.C.

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

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