

Masera v Romeo

2007 NY Slip Op 31467(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0022999/2004

Judge: Robert W. Doyle

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This is an action premised upon the alleged medical malpractice, wrongful death and lack of informed consent on behalf of plaintiff's decedent, a 37 year old male firefighter with FDNY who was admitted to Stony Brook University Hospital for a total hip replacement on January, 27, 2004, and suffered cardio-respiratory arrest several hours after the surgery. Plaintiff's decedent died on February 22, 2004 after suffering global ischemic anoxia allegedly as a result of the cardio-respiratory arrest. Defendant Louis C. Romeo, M.D., of defendant Stony Brook Orthopaedic Associates, P.C., was the admitting physician who performed the hip replacement surgery on plaintiff's decedent. Pre-operatively, plaintiff's decedent was referred by his medical doctor, defendant Richard A. Balter, M.D., to defendant Thomas P. Ribaldo, M.D., an officer, shareholder and employee of defendant North Suffolk Cardiology Associates, P.C., for a cardiac evaluation (defendant's exhibit H). In motions (003) and (004), defendants seek 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, Derdarian 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 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 (003), defendants Louis C. Romeo and Stony Brook Orthopaedic Associates, P.C. seek an order granting summary judgment dismissing the complaint as against them. In support of their application, defendants have submitted an attorney's affirmation; copies of the summons and complaints and answers of defendants Romeo, Balter and Ribaud; a signed and sworn copy of the deposition of plaintiff; unsigned and unsworn copies of the depositions of defendants Romeo, Ribaud, Bridget Hargaden, Michele Caggiano; uncertified copy of the office records of defendant Romeo; an uncertified copy of the hospital record from Stony Brook University Hospital; an uncertified copy of the records of Dr. Balter; and the affirmation of Benjamin Nachamie, M.D., orthopedic surgeon. There is no affidavit submitted by defendants.

Except for plaintiff's decedent's signed deposition transcript, and defendant's expert affirmation, none of defendants' submissions, medical records and transcripts, are in admissible form to support an order granting summary judgment. However, none of the parties have objected to them, so this court will consider them in determining these motions for summary judgment.

In reviewing the affirmation of Benjamin Nachamie (defendants exhibit O), defendants' expert, it is set forth Mr. Masera, 36 years old and unmarried, and whose primary care provider was Dr. Richard Balter, first present to Dr. Romeo's office on July 11, 2002. He complained of pain and decreased mobility of the left hip which first developed "a couple of years" prior. He was having difficulty putting on shoes and socks, and difficulty getting out of a car. Mr. Masera had been unable to work in his capacity as a firefighter since June 5, 2002 because of his pain. He experienced no relief with physical therapy.

Dr. Nachamie set forth that Dr. Romeo testified at his deposition that he elicited the patient's medical history and past medical history revealed no illnesses except for a history of arthritis, no medications, and a surgical history significant only for left shoulder surgery in 1995. X-rays reviewed by Dr. Romeo showed severe arthritis of the left hip. Mr. Masera had previously seen Dr. Jose Rodriguez at Lenox Hill Hospital who had recommended an eventual total hip replacement. Dr. Romeo discussed the different types of hip replacements, the limitations that may be expected after surgery, recommended that he wait as long as possible to have the surgery, and that Mr. Masera agreed to wait until he was absolutely miserable.

Mr. Masera then returned to Dr. Romeo on November 17, 2002, reporting he was absolutely miserable and a decision was made to go forward with a total hip replacement. Dr. Nachamie states that Dr. Romeo testified at his deposition that his resident, Dr. Namkoong, would have interviewed the patient on that date, and that Dr. Namkoong was not told of any cardiac history." Dr. Nachamie further reported that a history and physical was conducted January 7, 2004, with the patient reporting no past medical history and no use of medications. On that same date, January 7, 2004, Mr. Masera underwent a "Pre-operative Assessment" at Stony Brook. Dr. Nachamie set forth that according to that assessment, past medical history was negative for cardiovascular problems and pulmonary problems, and the EKG was reported normal. Dr. Nachamie further sets forth that Dr. Balter, who performed medical clearance on Mr. Masera, advised there was "no medical contraindication to surgery."

Dr. Nachamie also set forth that a "Pre-operative Nursing Transfer Note" dated January 27 at 6 a.m. indicates that the patient denied any past medical history, as did a Nursing Progress Note timed at

6:10 am. Dr. Nachamie also states Dr. Romeo testified at his deposition that at no time prior to surgery was he ever made aware that the patient had any cardiac history.

Defendants' expert also forth that the discharge summary from Stony Brook Hospital documents that Mr. Masera "coded" after surgery on January 27, 2004 at approximately 2:50 pm, with fifteen minutes of resuscitation. He was thereafter transferred to the Surgical Intensive Care Unit. Subsequent neurological evaluations showed Mr. Masera was not responsive to noxious stimuli or verbal commands. A CT scan of the head performed on January 29 showed diffuse hypoxic, ischemic encephalopathy.

Dr. Nachamie makes reference to plaintiff's bill of particulars and asserts various claims do not even apply to Dr. Romeo. It is Dr. Nachamie's opinion that because Dr. Romeo was never advised by the patient of his cardiac history, and because Dr. Romeo obtained a proper pre-operative clearance, and was not involved in the patient's pain management after surgery, plaintiff's claims as to Dr. Romeo have no merit.

Based upon the foregoing, defendants Romeo and Stony Brook Orthopaedic Associates have 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, the affirmation of a physician certified in Internal Medicine, uncertified copy of the Fawcett Memorial Hospital record, and a copy of the autopsy report. In reply, defendants have submitted an affirmation in reply by their expert, Dr. Nachamie; additional uncertified medical records; and the unsigned, unsworn deposition transcript of Robert I. Katz, M.D.

Plaintiff's expert has submitted an affirmation (plaintiff's exhibit A) opposing the motion of Dr. Romeo and Stony Brook Orthopaedic Associates, P.C., and sets forth that after Mr. Masera was seen by Dr. Namkoong at Stony Brook Orthopaedic Associates on November 13, 2003. He was then seen on January 7, 2004 for a "history and physical." Pre-admission testing was performed on that date as well, a medical consult was to be performed by Dr. Balter, and an anesthesia consult was to be performed by Dr. Katz. Blood work, chest x-ray, and EKG were also performed.

Plaintiff's expert sets forth that Dr. Romeo testified that at no point prior to performing the January 27, 2004 surgery upon Mr. Masera did Dr. Romeo become aware of Mr. Masera's cardiac history. Plaintiff's expert set forth that Mr. Masera had been seen by various practitioners regarding cardiac complaints in the past, including an admission to Fawcett Memorial Hospital in Florida from June 26, 2002 through June 28, 2002 for complaints of chest pressure and pain for which he underwent a cardiac catheterization which revealed mild left ventricular dysfunction, and an echocardiogram which

showed a decreased ejection fraction of approximately 48 %. A transthoracic cardiogram at St. Francis Hospital on July 24, 2002, revealed atrial fibrillation, mildly decreased global left ventricle systolic function, global hypokinesis of the left ventricle with minor regional variation.

Plaintiff's expert also sets forth that Mr. Masera presented to Stony Brook University Hospital on January 27, 2004 for total hip replacement. The Initial Nursing Assessment by Nurse Bridget Hargaden notes Mr. Masera was last hospitalized in June 2002 for an angiogram. From the time Mr. Masera was discharged from AICU to the time he coded, Dr. Romeo did not see him. He was seen at 12:30 p.m. for an orthopedic postoperative check up in which it is noted Mr. Masera had no complaints. His pain was being controlled by an epidural. The next notation in the chart is on the "Code Blue/Resuscitation Record" at approximately 2:35 pm. The autopsy report reveals plaintiff's decedent's cause of death as multiple complications following cardiac arrest due to dilated cardiomyopathy following hip replacement surgery (plaintiff's exhibit C). Autopsy findings were: dilated cardiomyopathy, microscopic scarring of the heart in the area of the conducting system, cardiac arrhythmia following hip replacement surgery on 1/27/04, cerebral edema and anoxic encephalopathy, stasis (sic) post tracheotomy tube placement and gastric feeding tube placement, and Adult Respiratory Distress Syndrome (Id., C).

Plaintiff's expert sets forth with reasonable medical certainty that the failure of Dr. Romeo to learn of the cardiac condition of John Masera prior to surgery and take the necessary precautions was a departure from good and accepted practice due to the failure to take a detailed and extensive medical history from a patient to insure the proper precautions and monitoring post operatively. He further stated the surgeon cannot shield himself from this responsibility by obtaining a general medical clearance.

Plaintiff's expert states that patients themselves may not realize a certain detail is significant and therefore the physician must be thorough in questioning the patient regarding past medical and surgical history. Good practice dictates that the surgeon ask about diagnosed conditions, current symptoms beyond those they are undergoing surgery for, and any hospitalizations or emergency room visits. He further opines that cardiac risk is one of the most-feared and most-studied complication of surgery. If a patient reports past cardiac complaints, a cardiac consultation tailored to meet their needs is necessary and should be ordered by the surgeon.

Plaintiff's expert opines the failure of Dr. Romeo to obtain a cardiac history from plaintiff led to a failure to undergo the necessary preoperative testing; this led to the failure to implement preventative measures and indicated monitoring in the perioperative period; this departure was a substantial factor and proximate cause of his pain, suffering and ultimate death.

In reviewing the experts' affirmations, it is determined there are factual issues raised by plaintiff's expert concerning the alleged departures from good and accepted standards of care concerning whether defendant Romeo and Stony Brook Orthopaedics Associates, P.C. properly managed the pre-operative screening, care and evaluation of plaintiff's decedent prior to surgery, as well as preventive measures and monitoring in the perioperative period. Defendants' expert opines Dr. Romeo properly ordered a medical screening. Plaintiff's expert opines defendant Romeo should have obtained a detailed and extensive medical history from his patient and cannot shield himself from this

responsibility by obtaining general medical clearance.

Concerning the issue of whether Dr. Romeo had, or should have had, actual notice prior to surgery that Mr. Masera had been previously admitted to a hospital for an angiogram, Dr. Nachamie, as set forth above, stated the “Pre-operative Nursing Transfer Note” dated January 27 at 6 a.m. indicates that the patient denied any past medical history, as did a Nursing Progress Note timed at 6:10 a.m. He also set forth at paragraph 14 of his affirmation that Dr. Romeo testified at his deposition that at no time prior to surgery was he ever made aware that the patient had any cardiac history. In the deposition transcript of Nurse Bridget Hargaden, R.N. (defendant Romeo, exhibit I, p.20), however, she testified that she had “written date of last hospital admission 6/02 and the reason was angiogram.” When asked at page 21, “Where did you get the information that he had had a hospital admission in June ‘02 for an angiogram?” she answered, “He would have told me.” This information was contained in the pre-op nursing transfer note dated 1/27/04, time 06:00 (defendant Romeo exhibit I, p.16). Accordingly, there is a factual issue concerning whether Dr. Romeo was put on notice of the prior cardiac admission pre-operatively and failed to consider the same or failed to review the Nursing Progress Note prior to surgery.

As set forth in *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2nd Dept 2005], “[S]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury.”

Accordingly, defendant Romeo’s motion (003) for an order granting summary judgment is denied.

A medical facility can be held vicariously liable for the negligence and/or malpractice of its employees (*O’Regan v Lundie*, 299 AD2d 531 [2nd Dept 2002]). Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment (*Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 34 [1st Dept 1998], Cf., *Beauchamp v City of New York*, 3 AD3d 465, 771 NYS2d 129 [2nd Dept 2004]). It is undisputed that plaintiff was seen and treated by defendant Romeo, and seen by the physician’s assistant Dennis Caruana, both employees of Stony Brook Orthopaedic Associates, and by Dr. Namkoong, Dr. Romeo’s intern. All are alleged to have had a duty of care as to plaintiff’s decedent and to have breached that duty to plaintiff’s decedent in failing to learn of plaintiff’s cardiac history. In that the facility can be held vicariously liable for the alleged departures claimed in this action, and in that there are factual issues concerning their care and treatment and failure to ascertain, test, and monitor based upon plaintiff’s prior cardiac history, summary judgment is precluded as a matter of law as to Stony Brook Orthopaedic Associates as well.

Accordingly, motion (003) is denied as to Stony Brook Orthopedic Associates, P.C.

Turning to motion (004), defendants Thomas P. Ribaldo, M.D. and North Suffolk Cardiology seek an order pursuant to CPLR 3212 granting summary judgment on the issue of liability. In opposing this motion, plaintiff requests that this Court require co-defendants to make a prima facie showing as to the malpractice of defendants Ribaldo and North Suffolk Cardiology Associates or be precluded from asserting their rights under Article 16 at the time of trial.

In support of motion (004), defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint; answer; verified bill of particulars; notarized affidavit of Stanley A. Shanies, M.D.; and an uncertified copy of medical records at exhibit E. There is no affirmation or affidavit submitted on behalf of defendant Ribaudo or North Suffolk Cardiology (CPLR 3212 [b]).

Stanley A. Shanies, M.D., expert for defendants Ribaudo and North Suffolk Cardiology, opines in his report (defendant exhibit D) that there were no deviations from accepted medical practice by Thomas P. Ribaudo, M.D. in connection with his medical care of Mr. Masera. Dr. Shanies states that on June 26, 2002, Mr. Masera was admitted to Fawcett Memorial Hospital in Florida with complaints of chest pain; cardiac catheterization and echocardiogram were performed and were essentially normal; the ejection fraction was slightly low at 48%; and a mild depression of the left ventricular systolic function was also noted. Defendants' expert opines these findings are consistent with early myocardomyopathy but are considered to be normal findings. Upon Mr. Masera's return to New York, he underwent another echocardiogram at St. Francis Hospital, for which, Dr. Shanies states, two different reports were generated. Mr. Masera was then referred to North Suffolk Cardiology Associates where he underwent another echocardiogram, interpreted by Dr. Riccio on August 21, 2002 to be similar to the findings of Fawcett Memorial Hospital and to one of the two reports generated by St. Francis Hospital. The report stated Mr. Masera had mild cardiomyopathy with an estimated ejection fraction of approximately 45%. It is Dr. Shanies' opinion that all of these echocardiograms were essentially normal.

On December 6, 2002, Mr. Masera presented to Dr. Ribaudo's office where it was documented he had no history of cardiac disease, was taking no medication, and that he had mild cardiomyopathy. Dr. Shanies then states Dr. Ribaudo, by letter, advised the referring physician of his findings and indicated he did not need cardiac medication at that time or any restriction in his daily activities, and that he have a repeat echocardiogram in one year in order to see if there had been any progression in his mild cardiomyopathy. If there was no change, no further evaluation would be necessary unless the patient showed exercise intolerance. Dr. Shanies sets forth that during the thirteen (13) months between his consultation with Dr. Ribaudo and the hip replacement surgery, Mr. Masera never returned to see Dr. Ribaudo, and Dr. Ribaudo was never asked to participate in clearing Mr. Masera for the surgery. Dr. Shanies also sets forth that it is his opinion with medical certainty that in no way did Dr. Ribaudo deviate from accepted standards of care in the medical community; that the examination of December, 2002 was thorough and accurate, his recommendations were entirely appropriate, and that Dr. Ribaudo acted in accordance with the standard of care in the medical community, and that nothing Dr. Ribaudo did or did not do contributed in any way to the death of Mr. Masera.

Based upon the foregoing, it is determined that the moving defendants have established prima facie entitlement to an order granting summary judgment dismissing the complaint.

In opposing motion (004), plaintiff has submitted an attorney's affirmation and a copy of an unpublished decision dated April 25, 2006 (Spinola, J.). Plaintiff has not opposed the motion for summary judgment by the submission of evidence in admissible form and has failed to "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*

[*supra*], *Joseph P. Day Realty Corp. v Aeroxon Prods., supra*).

Defendants Romeo and Stony Brook Orthopaedic Associates, P.C. do not oppose this motion, and have not come forward with admissible evidence to demonstrate liability as to the moving defendants, Ribaldo and North Suffolk Cardiology.

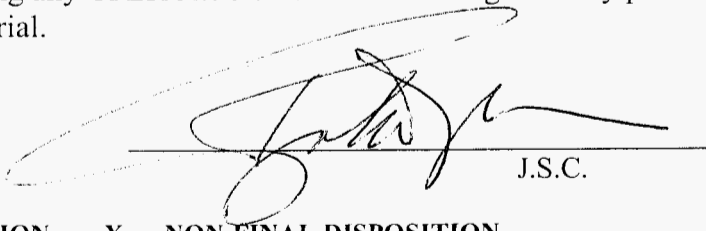
Accordingly, motion (004) by defendants Thomas P. Ribaldo, M.D. and North Suffolk Cardiology Associates, P.C. is granted and the complaint is dismissed as against them.

The decision annexed as exhibit A of plaintiff's opposing papers, *Yanatos v Pogo* et al, Supreme Court of Nassau, sets forth that since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented (citing *Drooker v South Nassau Communities Hospital*, 175 Misc2d 181, 669 NYS2d 169 [Sup. Ct. 1998]). Article 16 of the CPLR provides for several liability for non-economic loss when the liability of a joint tortfeasor is found to be fifty percent or less of the total liability assigned to all persons liable, subject to specified exceptions (*see*, CPLR 1601; *Maria E. v West Associates*, 188 Misc 2d 119, 726 NYS2d 237 [Sup Ct, Bronx County, 2001]). In *Drooker*, *supra*, following the granting of summary judgment in favor of a physician in a medical malpractice case, the remaining defendants who failed to oppose said physician's prima facie showing of entitlement to summary judgment and failed to make any evidentiary showing regarding that physician's responsibility for plaintiff's injury, thereby forfeited their opportunity to limit their liability with respect to that physician's acts or omissions under Article 16 of the CPLR.

There is no requirement in Article 16 that defendants disclose prior to trial the persons whose joint liability will be invoked (*Rodi v Landau*, 170 Misc.2d 180, 650 NYS2d 514). This application for summary judgment, however, is the procedural equivalent of a trial. It therefore follows that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented. In that defendant's Ribaldo and North Suffolk Cardiology have demonstrated prima facie entitlement to an order granting summary judgment, and no co-defendant has come forward opposing motion (004), it is determined that the co-defendants have failed to satisfy this evidentiary burden that shifted upon the movant's prima facie showing of entitlement to an order granting summary judgment, and have forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Thomas P. Ribaldo, M.D. and North Suffolk Cardiology Associates, P.C.

Accordingly, this action is severed and continued as against the remaining defendants who have forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Thomas Ribaldo and North Suffolk Cardiology Associates, P.C. However, the remaining defendants are not foreclosed from asserting any CPLR Article 16 defenses as against any potential defendants or non-parties to the action at trial.

Dated: MAY 31 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION