

Germaine v Yu

2007 NY Slip Op 31488(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0003765/2004

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-1-07 (003)
2-6-07 (004)
ADJ. DATE 4-16-07
Mot. Seq. # 003 - MD
004 - MD

-----X			DUFFY, DUFFY & BURDO
FLORENCE GERMAINE,	:		Attorneys for Plaintiff
	:		1370 Reckson Plaza, West Tower, 13 th Floor
	:	Plaintiff,	Uniondale, New York 11556-1370
	:		
	:		KELLY, RODE & KELLY, LLP
	:		Attorneys for Defendant Singer
	:	- against -	218 Griffing Avenue
	:		Riverhead, New York 11901
STANLEY YU, M.D. and ADAM J. SINGER,	:		
M.D.,	:		ANDREW M. CUOMO, NYS Atty. Gen.
	:		By: Daniel Chu, Esq.
	:	Defendants.	Attorneys for Defendant Yu
	:		120 Broadway, 23 rd Floor
-----X			New York, New York 10271

Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers 17-31; Answering Affidavits and supporting papers 32-40; Replying Affidavits and supporting papers 41-43; 44-45; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (003) by defendant Adam J. Singer, M.D., for an order pursuant to CPLR 3212 granting summary judgment, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (004) by defendant Stanley Yu, M.D. for an order pursuant to CPLR 3212 granting summary judgment, opposed by plaintiff, is denied.

This is an action sounding in medical malpractice wherein it is alleged by plaintiff, Florence Germaine, that defendants failed to diagnose an intestinal obstruction when she presented to Stony

Brook University Hospital Emergency Department on September 15, 2002, and was discharged home. Plaintiff claims as a result of being misdiagnosed, she was cause to suffer a bowel perforation and caused to undergo emergency surgery at St. Catherine of Sienna Medical Center on September 19, 2002.

Dr. Singer moves for summary judgment asserting the allegations of negligence asserted against him are without merit because he was no longer rendering care and treatment to plaintiff at the time of her discharge from the emergency room on September 15, 2002.

Dr. Yu moves for an order granting summary judgment asserting that plaintiff is unable to prove that his alleged acts or omissions as a resident physician constituted deviations which proximately caused plaintiff's injuries as he was performing his duties with respect to Florence Germaine while under the direct supervision of two different physicians.

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*, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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 [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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [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]).

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Turning to motion (003), defendant Singer has submitted, *inter alia*, copies of the pleadings; copy of plaintiff's verified bill of particulars; copy of the Stony Brook University Hospital emergency department record of plaintiff, Florence Germaine; affidavit of Adam Singer, M.D.; copy of the transcript of the examinations before trial of plaintiff, and Dr. Stanley Yu; and the affidavit of defendant's expert, Dr. Gerald Brody.

Defendant Singer states in his affirmation (defendant's exhibit J) submitted in support of his motion for summary judgment that he was an emergency room physician who saw plaintiff at 12:45 p.m. on September 15, 2002 and was involved in the early stages of plaintiff's care at Stony Brook University Hospital. He took the initial history and performed the initial physical examination of plaintiff. He claims he was present when a flat plate of plaintiff's abdomen and laboratory tests were ordered and performed, however, he states, he left the hospital at 4 p.m. at the end of his shift and signed over his care and treatment of the plaintiff to another emergency room attending, Dr. David Cohen.

Defendant Singer's exhibit I contains the emergency department record of plaintiff dated September 15, 2002. It is noted on the Emergency Department Encounter and Treatment Patient Sheet, Dr. Stanley Yu's name is signed at the bottom of the page. Under his name there is writing that looks like "C--- for Singer." The discharge sheet sets forth the diagnosis of Diverticulitis, and indicates patient was placed on Cipro 500 mg every 12 hours for 10 days; clear diet for several days or until abdominal symptoms resolve; then diet high in fiber; return if you develop worsening abdominal pain, nausea with vomiting, fever, and any other symptoms of concern. The discharge time is noted to be 21:40 hours.

It is the opinion and conclusion of defendant Singer's expert, Dr. Brody, that Dr. Singer exercised appropriate medical judgment and did not deviate from accepted standards of medical care with regard to his treatment of the plaintiff. Dr. Brody sets forth the care and treatment, including various testing ordered by Dr. Singer, was appropriate, and that Dr. Singer left the emergency department at 4 p.m. He states Dr. Singer testified it was his custom and practice to transfer the care of patients in the emergency room over to the next attending. Defendant Singer's expert states plaintiff was discharged by Dr. Cohen, the subsequent treating physician. He states Dr. Singer testified he did not discharge plaintiff. It is Dr. Brody's opinion based on a reasonable degree of medical certainty that Dr. Singer's care and treatment of plaintiff, during her emergency room hospitalization of September 15, 2002, did not deviate from accepted standards of medical care. He further opines that the care and treatment rendered to plaintiff was consistent with the parameters of good and accepted practice and in no way contributed to any injuries alleged by plaintiff in connection with this lawsuit.

In support of motion (004), defendant Yu has submitted, *inter alia*, the affirmation of Mark Korsten, M.D., a physician board certified in Internal Medicine and Gastroenterology,

Dr. Yu states in his examination before trial (defendant Yu's exhibit G) that he was a 2nd year resident at Stony Brook University Hospital on the date of the within incident. Dr. Yu claims it was the attending physicians who provided the medical management of the plaintiff while she was in the emergency room. He testified plaintiff was discharged home on Cipro by an attending physician, with instructions to follow up with her private medical doctor in two to three days. Dr. Yu testified all

patients have to be discharged home by an attending physician. He believes the other attending physician was Dr. David Cohen, but he was not sure. He was unable to identify an attending physician after Dr. Singer went off duty at 4 p.m. that day, but believed Dr. Cohen may have been the attending following Dr. Singer.

Defendant Yu's expert, Mark Korsten, M.D. sets forth in his affirmation that pursuant to the custom and practice at teaching hospitals in the New York metropolitan region, while a resident or clinical fellow may assist in the care and/or workup of a patient, the medical management remains the responsibility of the attending physicians. The medical records and deposition testimonies establish that such a custom and practice was followed in this case, with the attending physicians having responsibility for the management of Florence Germaine's care and treatment at SBUH. He further states (citing to Dr. Yu's testimony), that finalizing a plan for the patient and deciding on a final disposition, i.e., whether to discharge, admit the patient or calling for a specialist consult was the responsibility of the attending physician. He states that it is his opinion based upon a reasonable degree of medical certainty that there was no indication that the plaintiff's sigmoid colon was perforated or needed surgery during any time that she was in the emergency room at SBUH.

Based upon the foregoing, it is determined defendants Adam Singer, M.D. and Stanley Yu, M.D. have demonstrated prima facie entitlement to an order granting summary judgment on the issue of liability.

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)).

In opposing these two motions for summary judgment, plaintiff has submitted, inter alia, the affirmation of an expert witness with the expert's name redacted.¹

Plaintiff's expert, a physician Board Certified in Internal Medicine and Gastroenterology, opines that the standards of medical care in 2002 required a physician treating a patient who presented in an emergency room setting with signs and symptoms suggestive of diverticulitis, including abdominal pain, nausea and constipation, to consider whether the patient was suffering from diverticulitis. Diverticulitis may be detected by a CT scan. If the CT scan revealed diverticulitis, accepted standards of care in 2002 then required the physician to assess the extent of the diverticulitis to determine if the patient had or was likely to develop a bowel obstruction. The accepted standard of care required the patient then be admitted so that the diverticulitis could be monitored and controlled by preventing oral intake by the

¹A copy of plaintiff's expert's affirmation with the expert's name and signature have been provided to this court under separate cover, is identical to the redacted copy, and has been returned to plaintiff's counsel.

patient and by administering intravenous antibiotics, to prevent the patient's condition from progressing to bowel obstruction and/or perforation, which are potentially lethal.

Plaintiff's expert states a CT scan was done at SBUH on September 15, 2002, and the preliminary wet read report revealed there was fluid in the right paracolic gutter, and a finding of diverticulosis in the descending colon which the radiologist noted "may represent diverticulitis in appropriate clinical setting." The primary discharge diagnosis was diverticulitis. Plaintiff was discharged home with a prescription for an antibiotic and a recommendation to see her private physician in 2-3 days. On September 18, 2002, Ms. Germaine presented to St. Catherine of Siena Hospital with a markedly distended abdomen, and a CT scan showed obstruction at the sigmoid colon. Exploratory surgery was done on September 19, 2002, which revealed peritonitis and a perforated sigmoid colon. Therefore, a colostomy was performed and she remained hospitalized until October 10, 2002.

Plaintiff's expert also states that Dr. Singer, an attending physician, examined Ms. Germaine and recorded findings of a distended abdomen, hypertympanic, mild diffuse tenderness, no peritoneal signs and decreased bowel sounds. Plaintiff complained of crampy abdominal pain for three to four days, no bowel movement for four days, abdominal distension and nausea. Dr. Singer testified that these signs were certainly suggestive that a bowel obstruction needed to be ruled out at this point. However, states plaintiff's expert, Dr. Singer did not write a plan of care for Ms. Germaine and did not recall having given orders for Dr. Yu, a resident physician, to carry out.

Plaintiff's expert also stated in 2002 the standard of care required that resident physicians be supervised by attending physicians, and a patient's diagnosis and a decision to discharge a patient were required to be made by an attending physician. A resident physician was required to consult with and obtain approval from an attending physician. It is also plaintiff's expert's opinion, stated with a reasonable degree of medical certainty, that Dr. Yu departed from accepted standards of medical care in 2002 by discharging the patient home without consulting with an attending physician. Accepted practice requires a resident physician to consult with an attending physician and obtain the attending physician's approval regarding a patient's diagnosis and whether the patient should be discharged. To the extent that Dr. Yu failed to do so, which, plaintiff's expert states, appears to be the case given the absence of indicia in the records and testimony that such consultation and approval was made, Dr. Yu departed from accepted standards of care.

N.Y. Education Law §6526(1) provides in pertinent part that, "The following persons under the following limitation may practice medicine within the state without a license: (1) Any physician who is employed as a resident in a public hospital, provided such practice is limited to such hospital and is under the supervision of a licensed physician."

Plaintiff's expert further opined with a reasonable degree of medical certainty that Dr. Singer departed from accepted standards of medical care by failing to properly supervise Dr. Yu or leaving Dr. Yu unsupervised with respect to Ms. Germaine's care. The records do not reflect the required consultation and decision-making on behalf of Dr. Singer to constitute proper supervision of a resident physician by an attending physician.

Plaintiff's expert states it is his opinion with a reasonable degree of medical certainty, that defendants departed from accepted standards of medical care in 2002 by discharging Mr. Germaine home rather than admitting her for monitoring and treatment of the diverticulitis, including preventing her from oral intake and administering intravenous antibiotics. He further opines that on September 15, 2002, plaintiff was then progressing to a total bowel obstruction, which was suggested by her history of not having had a bowel movement in four days, the x-ray finding of a significant amount of stool in her right colon, and the finding on the CT scan of diverticulitis. This combination of signs, symptoms and findings, plaintiff's expert opines, were consistent with a worsening bowel condition, and the physicians should not have discharged Ms. Germaine home at that time.

It is plaintiff's expert's further opinion, stated with a reasonable degree of medical certainty, that the foregoing departures caused or substantially contributed to Ms. Germaine's injuries. If she had not been improperly discharged and her condition had been properly monitored and treated, her bowel condition, including the obstruction, would not have worsened to the point of becoming a total bowel obstruction and perforation.

Plaintiff also submitted a copy of the transcript of the examination before trial (plaintiff's exhibit B) of Dr. David Cohen who testified that he was an attending in the emergency room at SBUH on September 15, 2002, working the 6 p.m. to 2 a.m. shift. However, he states his signature does not appear on Ms. Germaine's discharge sheet, he did not sign a discharge home order for her, he did not give anyone permission to sign his name to her record, and he has no recollection of seeing or discharging Florence Germaine. He does not recognize the handwriting which sets forth the diagnosis of plaintiff on the record. He does not recall examining the patient for which the resident wrote the note. He does not recall giving Dr. Yu any directions with regard to the care and treatment for Florence Germaine.

Dr. Cohen also testified he does not recall any conversations with Dr. Singer about Florence Germaine on September 15, 2002. Dr. Cohen testified that on September 15, 2002, he was working in the trauma area of the emergency department, and Ms. Germaine was in room 3B. There is nothing to indicate she was moved from that room to anywhere else. He testified Dr. Singer covered rooms 1 through 6 and that Dr. Tarsia came in at 4 p.m. and covered rooms 1 through 6. Dr. Cohen did not cover rooms 1 through 6 during his shift, which would have included room 3B.

When Dr. Cohen was shown the front cover of Ms. Germaine's record, he was asked if he knew an attending physician, David Cooling, whose name was typed in, and he responded he did not know why Dr. Cooling's name was typed in, and did not see any notation on the chart that Dr. Cooling rendered any care or treatment to Ms. Germaine.

Based upon the foregoing, and in consideration of the entirety of the exhibits submitted by all parties, it is determined by this Court that plaintiff has raised material issues of fact to preclude an order granting summary judgment.

There are factual issues concerning the standard of care in 2002 for a patient diagnosed with diverticulitis and whether plaintiff should have been admitted to the hospital, and whether she should

have been placed on intravenous antibiotics, and restricted oral intake to prevent a worsening of Ms. Germaine's condition, including obstruction and bowel perforation.

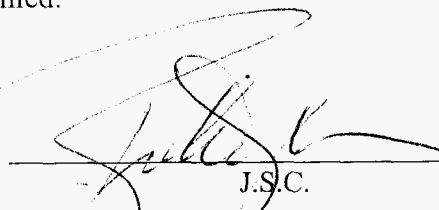
There are factual issues concerning whether Dr. Singer signed off to another attending physician prior to leaving the patient in the emergency department at 4 p.m. on September 15, 2002. Dr. Singer testified at his examination before trial (defendant Yu's exhibit H) that he has never spoken to Dr. Cohen at any time, whether on September 15, 2002 or any other time. Dr. Singer also testified that he did not have a recollection who Florence Germaine was. He did not know who the other attending physicians in the emergency department were on September 15, 2002. He did not recognize other signatures on the chart. He did not know if Dr. Cohen was on that day as an attending. He did not know the name of the attending who came on at 4 p.m. when he left and he did not recall any conversations with that attending. He also affirms in his affirmation that Dr. Cohen and Dr. Stanley Yu, a resident, completed the work up which included an enema and a CT with contrast, and discharged plaintiff at 9:45 p.m. He testified he did not discharge Ms. Germaine and did not give permission to anyone to sign his name after he left having completed his shift at 4 p.m. Dr. Singer said he did not sign the discharge order.

There are factual issues concerning whether Dr. Yu continued to work under the supervision of an attending physician after Dr. Singer left.

There are factual issues concerning if Dr. Cohen was the attending physician after Dr. Singer left the hospital, and if he was not, who the attending physician, if anyone, was.

Accordingly, motions (003) and (004) by defendants Dr. Singer and Dr. Yu for an order granting summary judgment dismissing the complaint are denied.

Dated: MAY 31 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION