

Skrobul v Brathwaite
2007 NY Slip Op 31914(U)
June 25, 2007
Supreme Court, Suffolk County
Docket Number: 0012055/2003
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 2/15/07
ADJ. DATE 4/30/07
Mot. Seq. # 002 - MotD
003 - MotD
004 - XMD

-----X
WILLIAM SKROBUL, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 COLLIN E. BRATHWAITE, M.D., BARBARA :
 SMITH, N.P., JONAS P. DeMURO, M.D., :
 STEVE MARTINEZ, M.D. and STONY BROOK :
 SURGICAL ASSOCIATES, P.C., :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 37 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-24 ; Notice of Cross Motion and supporting papers 25 - 30 ; Answering Affidavits and supporting papers 31 - 35 ; Replying Affidavits and supporting papers 36 - 37 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) for summary judgment and this motion (#003) to preclude are consolidated and decided together with the cross motion (#004) for summary judgment; and it is further

ORDERED that this motion (#002) by defendants Barbara Smith, N.P., Jonas P. DeMuro, M.D. and Steve Martinez, M.D. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is determined herein; and it is further

ORDERED that this motion (#003) by plaintiff for an order precluding the remaining co-defendants from seeking limited liability under CPLR Article 16 based on any alleged acts or omissions of malpractice by defendants Barbara Smith, N.P., Jonas P. DeMuro, M.D. and Steve Martinez, M.D. and any other defendant in whose favor summary judgment may be granted, is determined herein; and it is further

ORDERED that this cross motion (#004) by defendants Collin E. Brathwaite, M.D. and Stony Brook Surgical Associates, P.C. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is denied as untimely.

This is a medical malpractice action to recover damages for injuries allegedly sustained by plaintiff as a result of defendants' negligence in placing a suture in plaintiff's small bowel while performing an elective Roux-en-Y gastric bypass procedure on December 29, 2000 at Stony Brook University Hospital and Medical Center (Stony Brook University Hospital). Plaintiff alleges that defendants' negligence required his having to undergo further surgery on June 4, 2001 at non-party Good Samaritan Hospital Medical Center (Good Samaritan Hospital) to treat a ventral incisional hernia and an enterocutaneous fistula. The elective gastric bypass procedure was performed by defendant Collin E. Brathwaite, M.D. (Dr. Brathwaite), a surgeon, whose office was located at defendant Stony Brook Surgical Associates, P.C. (Stony Brook Surgical), part of Stony Brook University Hospital's surgery department. Dr. Brathwaite was assisted during the procedure by two resident physicians, defendant Jonas P. DeMuro, M.D. (Dr. DeMuro) and defendant Steve Martinez, M.D. (Dr. Martinez). Defendant Barbara Smith, N.P. (Nurse Smith) worked with Dr. Brathwaite at Stony Brook Surgical and was present during plaintiff's surgery but did not participate in the surgery.

By his complaint, plaintiff alleges a first cause of action for medical malpractice based on negligence and a second cause of action for medical malpractice based on lack of informed consent. Counsel for plaintiff and counsel for defendants Nurse Smith, Dr. DeMuro, and Dr. Martinez executed a stipulation dated June 2005 agreeing that the subject action and any cross claims as against defendants Dr. DeMuro and Dr. Martinez were discontinued with prejudice. The Court's computer records indicate that the note of issue in this action was filed on September 27, 2006.

Defendants Nurse Smith, Dr. DeMuro and Dr. Martinez now move (#002) for summary judgment in their favor dismissing the complaint as against them. However, the motion is actually for summary judgment on behalf of Nurse Smith on the grounds that she did not depart from accepted standards of medical care in her capacity as Nurse Practitioner and did not cause or contribute to plaintiff's injuries and for the Court to so-order a stipulation by which plaintiff voluntarily discontinued the action as against Drs. DeMuro and Martinez. In support of the motion, said defendants submit, among other things, the affidavit dated January 23, 2007 of their expert Howard L. Beaton, M.D.; the summons and complaint; the answers of all of the defendants; plaintiff's bill of particulars and supplemental bill of particulars with respect to Nurse Smith; the deposition transcripts of plaintiff, Dr. Brathwaite, and Nurse Smith; a copy of "Surgery For Severe Obesity: What Patients Should Know"; plaintiff's consent form dated December 18, 2000 consenting to the Roux en Y Gastric Bypass, Choleystectomy, and the insertion of a Greenfield Filter; the Obesity Surgery Patient Comprehension Quiz signed by plaintiff; plaintiff's certified records from Stony Brook University Hospital; the report of operation of plaintiff's subsequent procedure on June 4, 2001 at Good Samaritan Hospital; the stipulation dated June 2005 executed by counsel for plaintiff and counsel for defendants Drs. Smith, DeMuro and Martinez to discontinue this action and any cross claims against defendants Drs. Smith, DeMuro and Martinez with prejudice.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage

(*Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Anderson v Lamaute*, 306 AD2d 232, 233, 761 NYS2d 87 [2d Dept 2003]). On a motion for summary judgment, a defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 368, 783 NYS2d 664 [2d Dept 2004]). In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury (*Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325, 508 NYS2d 923 [1986]; *Thompson v Orner*, *supra*; *DiMitre v Monsouri*, 302 AD2d 420, 421, 754 NYS2d 674 [2d Dept 2003]).

The primary duty of a hospital's nursing staff is to follow the physician's orders unless the orders are clearly contraindicated (*Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 292 NYS2d 440 [1968]). It is clear that when an attending physician gives direct and explicit orders to hospital staff, nurses are not authorized to unilaterally depart from them, and thus, a hospital is normally protected from tort liability if its staff follows orders (*Georgetti v United Hosp. Med. Ctr.*, 204 AD2d 271, 611 NYS2d 583 [2d Dept 1994]).

With respect to Nurse Smith, plaintiff alleges in his bills of particular that Nurse Smith was negligent in, among other things, failing to recognize and respond to the clinical significance of the persistent non-healing of plaintiff's abdominal wall wound and infection and the presence of a ventral incisional hernia and a draining sinus tract; failing to note that a suture had perforated plaintiff's small intestine; failing to properly and timely recommend the necessary and appropriate surgical procedures to repair the sinus tract and ventral incisional hernia; failing to place plaintiff on IV antibiotics; failing to timely and properly perform cultures and order blood tests; and failing to recognize and respond to the clinical significance of the continued extrusion of suture materials from the wound.

In his affidavit, defendants' expert Howard L. Beaton, M.D. (Dr. Beaton) indicates that at the time of the gastric bypass procedure plaintiff weighed over 400 pounds with a body mass index of over 50, had a history of diabetes, hypertension, venous status disease, depression and endocarditis, and had attempted numerous weight loss regimens. In addition, he indicates that the office records revealed that plaintiff was seen by Nurse Smith and Dr. Brathwaite during his post-operative visits and that Nurse Smith's notes were countersigned by Dr. Brathwaite when plaintiff was only seen by Nurse Smith. According to Dr. Beaton, the records indicated that during the four months of plaintiff's post-operative visits Nurse Smith was very attentive to plaintiff's care and did everything necessary and proper in her capacity as Nurse Practitioner regarding plaintiff's post-operative care. He specifies that Nurse Smith appropriately assessed and treated the wound and arranged for a visiting nurse service to provide daily wound care at home, noting that a slow healing wound is not unusual for a patient such as plaintiff. Dr. Beaton adds that given plaintiff's presentation with a localized wound infection, Nurse Smith could not have recognized and treated an enterocutaneous fistula or a ventral incisional hernia, there was no indication for antibiotic, and there was no need to refer plaintiff to a specialist because plaintiff was being followed by his bariatric surgeon.

According to Dr. Beaton, the next step in plaintiff's post-operative care would have been

surgical exploration which is not within the purview of a Nurse Practitioner and which, in any event, would have been premature since plaintiff was in the process of healing. He also points out that any allegations of lack of informed consent as against Nurse Smith would be inappropriate since the surgeon performing the procedure has the ultimate responsibility for obtaining such consent. Dr. Beaton states that in any event, the records clearly show that plaintiff was fully aware of all the risks and benefits of the gastric bypass surgery and chose to have the surgery. In conclusion, Dr. Beaton opines within a reasonable degree of medical certainty that there were no departures by Nurse Smith and that she did not cause or contribute to plaintiff's alleged injuries.

Here, through plaintiff's medical records, the submitted deposition testimony, and the expert's affidavit, defendant Nurse Smith established her entitlement to judgment as a matter of law dismissing the first cause of action (*see, Gargiulo v Geiss*, ___ NYS2d ___, 2007 WL 1441561, 2007 NY Slip Op 04259 [NYAD 2 Dept May 15, 2007]). In addition, in support of that branch of the motion which was for summary judgment dismissing the second cause of action sounding in lack of informed consent, defendant Nurse Smith established her entitlement to judgment as a matter of law (*see, Thompson v Orner, supra*). Inasmuch as plaintiff is not opposing the motion for summary judgment by defendants Nurse Smith, Dr. DeMuro and Dr. Martinez¹, the motion for summary judgment dismissing the complaint as against defendant Nurse Smith is granted (*see, Ericson v Palleschi*, 23 AD3d 608, 806 NYS2d 667 [2d Dept 2005]).

Regarding the request for the Court to so-order the submitted stipulation, a plaintiff may discontinue an action against a party pursuant to CPLR 3217 (a) by filing with the Clerk of the Court a written stipulation signed by the attorneys of record for all the parties (*see, Tucker v Tucker*, 55 NY2d 378, 449 NYS2d 683 [1982]). In addition, the Court, in its sound discretion, has the authority to grant or deny an application to discontinue an action made pursuant to CPLR 3217 (b) (*id.*). Ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (*id.* at 383). In exercising that authority, the Court may impose such terms and conditions as it deems proper (CPLR 3217 [b]). A discontinuance should be permitted in the absence of prejudice to the substantial rights of the other parties to the action or an injustice (*County of Westchester v Welton Becket Assocs.*, 102 AD2d 34, 478 NYS2d 305 [1984], *aff'd* 66 NY2d 642, 495 NYS2d 364). Although CPLR 3217 (b) authorizes a voluntary discontinuance by court order on motion of "a party asserting a claim," this provision may not be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion (*Shamley v ITT Corp.*, 67 NY2d 910, 501 NYS2d 810 [1986]).

Here, since the subject stipulation has not been signed by counsel for defendants Dr. Brathwaite and Stony Brook Surgical, CPLR 3217 (a) is inapplicable. However, CPLR 3217 (b) is applicable and co-defendants Dr. Brathwaite and Stony Brook Surgical have not submitted any opposition to the requests for a discontinuance. In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should

¹Counsel for plaintiff states in his affirmation in opposition to the cross motion that plaintiff is not opposing the motion for summary judgment by defendants Nurse Smith, Dr. DeMuro and Dr. Martinez and is instead moving for relief under CPLR Article 16 in response to said motion.

be granted (*see, Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32, 732 NYS2d 223 [1st Dept 2001]; *Citibank v Nagrotsky*, 239 AD2d 456, 457, 658 NYS2d 966 [2d Dept 1997]). Therefore, the requests to discontinue the action as against defendant Drs. DeMuro and Martinez are granted (*see, Mathias v Daily News, L.P.*, 301 AD2d 503, 752 NYS2d 896 [2d Dept 2003]). It so follows that the requests for summary judgment dismissing the complaint and any cross claims² as against defendant Drs. DeMuro and Martinez are denied as moot.

Plaintiff now moves (#003) to preclude the remaining co-defendants from seeking limited liability under CPLR Article 16 based on any purported negligence of defendants Nurse Smith, Dr. DeMuro and Dr. Martinez on the grounds that the co-defendants did not adequately oppose the motion of defendants Nurse Smith, Dr. DeMuro and Dr. Martinez³. Said request is based on the holding of the court in *Brooker v South Nassau Communities Hosp.*, 175 Misc 2d 181, 669 NYS2d 169 (Sup Ct, Nassau County, 1998), that 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. 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 599 West Associates*, 188 Misc 2d 119, 726 NYS2d 237 [Sup Ct, Bronx County, 2001]). Here, none of the remaining co-defendants submitted any opposition to the motion for summary judgment by defendants Nurse Smith, Dr. DeMuro and Dr. Martinez. Therefore, plaintiff's request is granted to the extent that the remaining defendants herein, Dr. Brathwaite and Stony Brook Surgical, have forfeited the opportunity to limit their liability with respect to the acts or omissions of defendants Nurse Smith, Dr. DeMuro and Dr. Martinez. 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.

Defendants Dr. Brathwaite and Stony Brook Surgical now cross-move (#004) for summary judgment⁴ as against them on the grounds that Dr. Brathwaite acted in accordance with good and accepted medical practice in all phases his care of plaintiff and that plaintiff received extensive consultation and literature regarding the benefits, risks and alternatives to bariatric surgery. In support

²Co-defendants Dr. Brathwaite and Stony Brook Surgical cross-claim for contribution and indemnification in their respective answers.

³Although plaintiff also seeks leave of Court for a perceived delay in bringing this motion, the 120-day limitation and the requirement of showing "good cause" are inapplicable inasmuch as his motion is not for summary judgment (*see, CPLR 3212 [a]*).

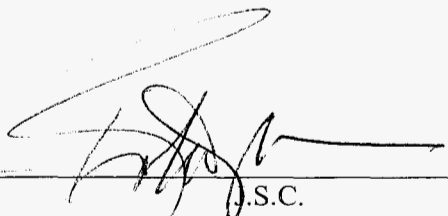
⁴Plaintiff has submitted an unidentified expert's affirmation with his opposition papers and an unredacted copy for *in camera* review (*see, Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]). The Court has conducted an *in-camera* inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name and location. The Court has returned the unredacted affirmation to plaintiff's counsel by ordinary mail.

of their cross motion, they submit the affidavit dated March 25, 2007 of Dr. Brathwaite; the affidavit of service of the cross motion dated March 26, 2007; and the summons and complaint and their answers.

CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). Defendants Dr. Brathwaite and Stony Brook Surgical made their cross motion on March 26, 2007, as indicated in their affidavit of service of the cross motion, which is more than two months after January 25, 2007, the 120-day deadline following the filing of the note of issue thereby rendering the cross motion untimely (*see*, CPLR 3212[a]; **Brill v City of New York**, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, defendants Dr. Brathwaite and Stony Brook Surgical did not seek leave to file a late motion for summary judgment in their notice of cross motion (*see e.g.* **Welch v City of Glen Cove**, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for defendants Dr. Brathwaite and Stony Brook Surgical has provided no explanation or “good cause” for serving the cross motion two months late, and thus, the Court has no discretion to entertain it on the merits (*see*, **Brill v City of New York**, *supra*; **Rivers v City of New York**, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Contrary to counsel’s characterization, a two month delay is not minimal (*compare*, **Miranda v Devlin**, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see*, **Gaines v Shell-Mar Foods, Inc.**, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]). The Court notes that this cross motion does not fall under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.*, **Grande v Peteroy**, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; **Bressingham v Jamaica Hosp. Med. Ctr.**, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; **James v Jamie Towers Hous. Co.**, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). Although defendant Nurse Smith timely moved for summary judgment, the Court considered the issues of whether she deviated from the accepted standard of care as a Nurse Practitioner, which is different from whether Dr. Brathwaite deviated from the accepted standard of care as the supervising surgeon. Finally, the fact that the cross motion was timely served in accordance with the stipulations of adjournment executed by counsel for the parties does not render the cross motion timely pursuant to the statute.

Accordingly, the request (#002) for summary judgment and for a so-ordered stipulation is granted to the extent that the complaint is dismissed solely as against defendants Nurse Smith, Dr. DeMuro and Dr. Martinez; plaintiff’s request (#003) to preclude the remaining co-defendants, Dr. Brathwaite and Stony Brook Surgical, from seeking limited liability under CPLR Article 16 based on any purported negligence of defendants Nurse Smith, Dr. DeMuro and Dr. Martinez is granted; and the request (#004) by defendants Dr. Brathwaite and Stony Brook Surgical for summary judgment is denied as untimely. The action is severed and continued against the remaining defendants Dr. Brathwaite and Stony Brook Surgical.

Dated: JUN 25 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION