

Evans v Becker

2007 NY Slip Op 32345(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0023615/2004

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-29-07
ADJ. DATE 6-12-07
Mot. Seq. # 001 - MD

-----X
ROBERT EVANS, as Administrator of the Estate :
of EDWARD EVANS, :
 :
Plaintiff, :
 :
- against - :
 :
MARK A. BECKER, D.L., TERESA MASCITTI, :
N.P. and MARK A BECKER, D.O., P.C., :
 :
Defendants. :
-----X

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-11; Replying Affidavits and supporting papers 12-13; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Theresa Mascitti, N.P. for summary judgment dismissing the complaint and all cross-claims, is denied.

This is an action premised upon the alleged medical malpractice by defendants in the failure to properly diagnose and treat plaintiff's decedent, Edward Evans, for a coronary artery disease. Plaintiff asserts that defendant Mascitti saw decedent on June 15, 2002, reviewed his blood tests, diagnosed his condition as hyperlipidemia, and recommended that he follow a low fat/low cholesterol diet-life style modification. and be rechecked in three months. Defendant claims that she only saw decedent on this one visit, she did not have an ongoing treatment relationship with him, and that decedent continued treating with defendant Dr. Becker for this condition. Edward Evans died on May 25, 2004 at 36 years of age as a result of a massive heart attack on a cruise ship while on vacation with his father.

The complaint sets forth causes of action sounding in medical malpractice, and a second cause of action sounding in wrongful death. Plaintiff claims that defendant Mascitti, after diagnosing decedent with hyperlipidemia and knowing the risk factors, failed to refer decedent to a cardiologist or for

additional blood testing or a stress test.

Defendant Mascitti, seeks summary judgment, arguing she was not negligent in her care and treatment of plaintiff, and that decedent followed with Dr. Becker who continued treating him until the time of decedent's death.

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]).

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 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 [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 [2nd Dept 1979]).

In support of this motion, defendant Mascitti has submitted copies of the summons and complaint and her verified answer, but not the answer of defendant Becker with the alleged cross-claim; bill of particulars; and transcripts from the examinations before trial of defendant Mascitti, Mark Becker, D.O., and Robert J. Evans. Upon reviewing defendant Mascitti's submissions, it is determined defendant Mascitti has not demonstrated prima facie entitlement to summary judgment as a matter of law as she has not submitted a supporting expert affidavit.

The practice of a registered nurse practitioner as defined in N.Y. Educ. Law § 6902(3)(a) includes diagnosis of illness and physical conditions and the performance of therapeutic and corrective measures in collaboration with a licensed physician qualified to collaborate in the specialty involved (*Quirk v Zuckerman*, 196 Misc2d 496, 765 NYS2d 440 [2nd Dept 2003]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or

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]).

Theresa Mascitti testified that she was employed by Mark Becker, D.O as a certified adult nurse practitioner since 2000 or 2001 pursuant to a collaborative agreement mandated by the state and filed in Albany. That collaborative agreement provided that she would work with Dr. Becker, together or independently, and that Dr. Becker would be available for consult if needed, he has the final say, will review records periodically, and be available for consult or have someone in his absence available for consult.

Her duties were to take a history from a patient, perform a physical, assess for risk factors, diagnose, prescribe different modalities of treatment be it physical therapy, writing prescriptions, ordering diets, nebulizers or any type of prescriptive modality, EKG, stress test. She could refer a patient to a specialist on her own unless it was something of grave concern at the time. If she was sending someone to an emergency room for acute chest pain, she would consult with Dr. Becker as a courtesy, but under normal circumstances, they did not usually confer with one another.

She had no independent recollection of Edward Evans, and never saw him again or spoke with him after the June 15, 2002 visit. At that visit, decedent had been previously seen by Dr. Becker who ordered blood tests on June 10, 2002, which blood test results had been previously checked by Dr. Becker. In 2002, there was an ATP3 guideline, the gold standard in medicine, an antilogarithm used to determine risk factors for a patient with reference to a cardiovascular event or stroke, and the protocol. It gives numbers for cholesterol read-outs that tell that a patient is at risk. Without risk factors, the cholesterol should be 200 or less; with risk factors, the number drops much lower. Decedent smoked two cigarettes a day which she considered a subtle risk factor. She thought someone in his family had diabetes. He was not obese.

On June 15, 2002, when she saw decedent, she made the diagnosis of hyperlipidemia and discussed with him that his cholesterol was elevated. She ordered a low fat diet, a recheck of the blood work in three months and follow up visit. She did not know if she spoke to him about exercise. This life-style modification is the first step. She testified, however, that the blood test had been taken three hours postprandial, and was not a fasting analysis, although he should have been fasting eight to twelve hours before the blood work was drawn. She therefore considered this a tainted test, but did not order new blood tests although she had the authority to order more testing and refer decedent for further evaluation. She testified decedent did not return in three months, but came back January 21, 2003, although he was instructed to return if his symptoms recurred or if he had any problems, as he had been previously seen by Dr. Becker for fatigue and fever of unknown origin.

Based upon the foregoing, it is determined that defendant Mascitti has demonstrated that her duties and responsibilities concerning her care and treatment of plaintiff's decedent are not within the ordinary experience and knowledge of laymen as she was performing medical care and treatment by diagnosing and treating plaintiff's decedent. Therefore, it is concluded by this court that it is necessary for defendant Mascitti to submit expert medical opinion in support of her motion for summary judgment, which she has failed to do. It is further determined that the transcript of defendant Mascitti's examination before trial, as an expert opinion, does not resolve factual issues concerning whether or not defendant

an expert opinion, does not resolve factual issues concerning whether or not defendant Mascitti departed from accepted standards of medical care in treating decedent on June 15, 2002.

Dr. Becker testified Theresa Mascitti worked for him as an independent contractor, pursuant to his contract with her, but he did not know how long or when. He had an independent recollection of decedent, and testified he spoke with the coroner who advised him the cause of death was an occlusion of his coronary artery. Dr. Becker testified that he never suggested that decedent undergo a stress test, or an echocardiogram. Decedent had no family history of coronary artery disease. Dr. Becker testified the risk factors for coronary artery disease are family history, smoking, obesity, hypertension, increased cholesterol or triglycerides. When decedent first presented to Dr. Becker on June 10, 2002, he was smoking two packs of cigarettes a day, but stopped January 21, 2003. Mr. Evans was not obese, and did not have hypertension or diabetes. He was diagnosed as having increased cholesterol levels, but testified Theresa Mascitti had seen him with the results and discussed his cholesterol level on June 15, 2002. It was his custom and practice to have the nurse practitioner go over blood work with patients, or sometimes he would do it. He did not discuss the June 15, 2002 visit with Ms. Mascitti. When he saw Mr. Evans after that date and read her note, he thought Mr. Evans should have gone back to the lab and have his cholesterol rechecked.

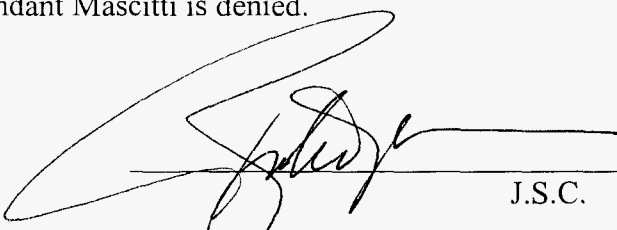
Upon review of Dr. Becker's examination before trial, it is determined that he offered no expert testimony in support of Ms. Mascitti's claim that she did not depart from accepted standards of medical care in her care and treatment of decedent, and in fact, raises a factual issue in that he testified that after he read defendant Mascitti's note, he thought Mr. Evans' blood tests for cholesterol should have been rechecked.

In that defendant Mascitti has failed submit a supporting expert affidavit and that Dr. Becker's testimony raises a factual issue concerning his belief that Mr. Evans' blood tests should have been repeated, it is determined that defendant Mascitti has failed to demonstrate prima facie entitlement to summary judgment.

Since defendant Mascitti failed to establish her entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; *Zuckerman v City of New York*, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (*Krayn v Torella*, 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, motion (001) by defendant Mascitti is denied.

Dated: JUL 24 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION