Musicus v Sherman
2007 NY Slip Op 32487(U)
July 30, 2007
Supreme Court, New York County
Docket Number: 0103595/2006
Judge: Eileen Bransten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 8/13/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten PART 06

Index Number : 103595/2006

MUSICUS, LUCILLE

VS

SHERMAN, M.D., ALEX

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 103595/06

MOTION DATE 5-31-07

MOTION SEQ. NO. 01

MOTION CAL. NO. ______

The following papers, numbered 1 to 3 were read on this motion to/for Partial summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7-30-07

Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX
--X
LUCILLE MUSICUS,

Plaintiff,

-against-

Index No. 103595/06
Motion Date: 5/31/07
Motion Seq. No.: 01

ALEX SHERMAN, M.D. and CONCORDE MEDICAL GROUP, PLLC,

Defendants.
--X
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendants Alex Sherman, M.D. ("Dr. Sherman") and Concorde Medical Group, PLLC (collectively "Defendants") move for partial summary judgment dismissal of the action commenced by plaintiff Lucille Musicus ("Ms. Musicus"). Ms. Musicus opposes Defendants' motion.

Because Defendants failed to establish entitlement to judgment as a matter of law, their motion is denied.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Background

Ninety-year old Ms. Musicus was a patient of Dr. Sherman, gastroenterologist, from 2000 to 2005. Defendants' Affirmation in Support of Motion ("Supp."), at 5. During that time, she was treated for a variety of gastrointestinal complaints at the Concorde Medical Group and Kips Bay Endoscopy Center. Id.

Because there was evidence that she was experiencing rectal bleeding, on May 31, 2005, Ms. Musicus underwent an elective out-patient colonoscopy, which was performed

by Dr. Sherman. Id. Dr. Sherman did not administer prophylactic antibiotics prior to the colonoscopy. Plaintiff's Affirmation in Opposition to Defendant's Motion ("Opp."), at ¶ 3.

On June 19, 2005, Ms. Musicus was hospitalized because she had a fever, shortness of breath, pains, and chills. Supp., at 6. Her condition deteriorated and she was diagnosed with endocarditis (inflammation of the lining of the heart and its valves), sepsis (a toxic condition resulting from the spread of bacteria or their products from a focus of infection), and congestive heart failure. Opp., at ¶ 3. After a month-long stay, Ms. Musicus was admitted to Park Avenue Extended Care, a rehabilitation facility, for three months. Opp., at ¶¶ 3,4. Her recovery progressed, and she was discharged from the facility on October 25, 2005. Opp., at ¶ 4. The discharge summary noted that Ms. Musicus was "able to ambulate 200 feet with RW (regular weight) and CCG (constant contact guarding), but would have buckling on lower extremities." Supp., at 8. It further set forth that Ms. Musicus was "able to ascend and descend four (4) steps holding onto side rails with CCG." Supp., at 8.

Ms. Musicus stayed with her son, Ronald Musicus, after her discharge from Park Avenue Extended Care. Opp., at ¶ 4. While there, she received physical therapy from the Visiting Nurse Service approximately twice a week. Supp., at 8. On November 24, 2005, almost a month after her discharge from the rehabilitation facility, Ms. Musicus fell

while walking in her son's apartment. Opp., at ¶ 4. Ms. Musicus had been watching a video in her bedroom when she got up to use the bathroom. Supp., at 9. As she walked to the bathroom, she held onto the wall for support. Opp., at ¶ 4. There was a gap where "there was no wall and Ms. Musicus had to take three steps without holding onto anything." Opp. at ¶ 4. Her legs "gave out" and she fell on her hip. Opp., at ¶ 4. An ambulance took Ms. Musicus to NYU Medical Center where she was diagnosed with a fractured hip. Id.

In this medical malpractice action--commenced March 16, 2006--Ms. Musicus claims that because of Defendants' negligent failure to administer prophylactic antibiotics, she sustained "fever, endocarditis, sepsis, hypoalbuminemia [an abnormally low level of albumin in the blood], hypertension, congestive heart failure and thrombocytopenia [decrease in number of platelets in circulating blood]." Supp., Ex. A, at ¶¶ 12-13. Ms. Musicus also claims that because of her weakness due to these injuries, she fell on November 24, 2005 and sustained a displaced fracture of her left femur necessitating hemiarthroplasty (an operation similar to hip replacement but involving only half of the hip). Supp., at 4.

Defendants now move for partial summary judgment dismissing the claim for damages that specifically relates to the injuries Ms. Musicus sustained as a result of her fall on November 24, 2005. Supp., at 3. In support of their motion, they argue that Ms.

Musicus' fall on November 24, 2005--nearly six months after Dr. Sherman's treatment--was unforeseeable. Supp., at 13-14. Defendants argue that by "asserting that plaintiff's hip injury * * * is causally related to the alleged negligence [she is imposing] a duty on [Dr. Sherman] where one does not exist." Supp., at 14. Defendants point to Ms. Muscius' own testimony that she had previously taken three steps without holding a wall or furniture as evidence that her conduct constituted "intervening conduct" that broke "the chain of causal connection" between Defendants' alleged breach of duty and the ensuing injury. Supp., at 16.

They further contend that the evidence, including therapy records and her son's observations, establishes that Ms. Musicus' walking had dramatically improved, and therefore, her fall was not a result of the alleged malpractice. Supp., at 14-16. In sum, Defendants assert that based "on the dramatic improvement that [Ms. Musicus] had made in that five (5) week period and the fact that she had previously walked the 'same three steps' on her own before the accident, no one could have reasonably foreseen that [she] would fall on November 24, 2005." Supp., at 15.

Ms. Musicus opposes the motion, arguing that Defendants have not sustained their burden of proof for purposes of obtaining summary judgment. Opp., at ¶ 11. She further relies on an affirmation from Ralph D'Angelo, M.D., a board-certified cardiologist, in which he opines "with a reasonable degree of medical certainty that Defendants'

deviation from accepted standards of medical care caused [Ms. Musicus] to suffer endocarditis, which resulted in her confinement to the hospital for one month and caused her to suffer severe deconditioning, causing her to fall and fracture her hip on November 24, 2005." Opp., Ex. G, at ¶ 5.

On reply, Defendants argue that Ms. Musicus' expert evidence is "highly conclusory and speculative and should not be considered." Reply Affirmation ("Reply"), at 2. Defendants contend that Visiting Nurse Service records they provided "confirm that [Ms. Musicus'] gait training showed that she had made excellent progress" and could walk greater and greater distances with assistance. Reply, at 3. They contend that even Ron Musicus acknowledged dramatic improvement in his mother's condition and assert that she was perfectly capable of taking a few steps by that point without falling. Reply, at 3-4.

Because Defendants' have not definitively established that Ms. Musicus' fall was unrelated to the alleged malpractice, their motion for partial summary judgment is denied.

<u>Analysis</u>

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); see also *Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st

Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991). Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

At the outset, the proponent of a summary judgment motion has the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence to eliminate any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *see also* , *Stewart v. Presbyterian Hosp.*, 12 A.D.3d 201, 202 (1st Dept. 2004) (summary judgment properly granted to defendant physicians who established that they did not commit malpractice); *Masucci v. Feder*, 196 A.D.2d 416, 420 (1st Dept. 1993) (movant must establish that plaintiff's cause of action has no merit to demonstrate prima facie entitlement to judgment as a matter of law).

"Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Consequently, in a

medical malpractice case, summary judgment dismissal is inappropriate unless a defendant comes forward with expert evidence establishing that there were no departures from accepted medical practice that caused plaintiff any injury. *See, Joswick v. Lenox Hill Hosp.*, 161 A.D.2d 352, 354 (1st Dept. 1990) (absent testimony and expert evidence establishing lack of malpractice, no entitlement to summary judgment).

Here, Defendants have not set forth sufficient evidence establishing that they cannot be liable for Ms. Musicus' hip fracture as a matter of law. They have not eliminated all questions of fact because the question of whether Dr. Sherman's failure to administer prophylactic antibiotics was the proximate cause of Ms. Musicus' hip injury remains arguable. Opp., at ¶ 11. Significantly, Dr. Sherman and Concorde Medical Group have not adduced expert medical evidence establishing that the failure to administer prophylactic antibiotics had no possible connection to Ms. Musicus' fall and her ensuing injuries. Opp., at ¶ 11. Nor have they set forth case law establishing that as a matter of law, Ms. Musicus' fall and resulting hip injury cannot be consequences of the alleged malpractice. Records or testimony showing that Ms. Musicus improved over time do not definitively demonstrate that her fall was not proximately caused by her weakened state that resulted directly from the malpractice.

Because Defendants have not made a *prima facie* showing of entitlement to judgment as a matter of law with respect to the hip-related injuries--they failed to prove

that there is no relationship between Ms. Musicus' fall and the alleged malpractice--Ms. Musicus does not have to refute anything. Regardless, Ms. Musicus has established through sufficient medical evidence that there are questions of fact as to whether the Defendants' failure to administer antibiotics was the proximate cause of her hip injury. Dr. D'Angelo opines that Defendants' deviation from the standard of care "caused [Ms. Musicus'] deconditioned state which caused her legs to buckle, causing her to fall to the ground and fracture her hip." Opp., at ¶ 10.

Although Defendants have provided evidence that Ms. Musicus' fall *may* not have been a result of any malpractice, they have not ruled out the reasonable possibility that her weakness caused her to fall and that their malpractice caused her weakness. Thus, the malpractice could have been a substantial factor in causing her fall and partial summary judgment is denied.

In the end, Defendants' argument that Ms. Musicus' fall was unforeseeable and unrelated to any malpractice centers on proximate cause and not on duty. There is no doubt that at the time of the alleged malpractice--in May 2005--Defendants owed Ms. Musicus a duty to provide medical care consistent with accepted medical practice. The question of whether the alleged malpractice played a role in Ms. Musicus' fall (as her expert posits) or whether her fall was too attenuated from Defendants' conduct--a proximate cause inquiry--must be addressed by the jury. *See*, *Brown v. Bauman*, ___

A.D.3d ___, 2007 NY Slip Op. 06251 (1st Dept. July 26, 2007) (foreseeability and causation are both generally factual issues to be resolved by the fact finder); *see also*, *Ocampo v. Boiler*, 33 A.D.3d 332, 333 (1st Dept. 2006); *Donnelly v. Treeline Companies*, 13 A.D.3d 143, 144 (1st Dept. 2004) (proximate cause is "quintessentially a factual issue").

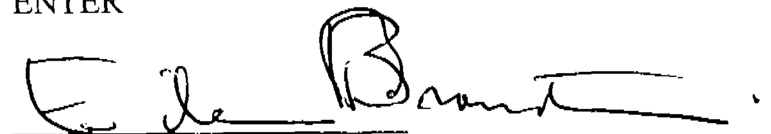
Accordingly, it is

ORDERED that Defendants' motion for partial summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 30, 2007

ENTER



Hon. Eileen Bransten

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE