

Cardineau v Hito

2007 NY Slip Op 32620(U)

August 9, 2007

Supreme Court, Suffolk County

Docket Number: 0019145/2004

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 7-3-07
Mot. Seq. # 002 - MotD

-----X		PEARLMAN, APAT & FUTTERMAN, LLP
LINDA CARDINEAU, as Administratrix of the	:	Attorneys for Plaintiff
Estate of WARREN CARDINEAU, deceased,	:	80-02 Kew Gardens Road, Suite 5001
	:	Kew Gardens, New York 11415
	:	
Plaintiff,	:	
	:	VARDARO & HELWIG, LLP
- against -	:	Attys for Defts Saxena, D'Silva & Island
	:	732 Smithtown Bypass, Suite 203
	:	Smithtown, New York 11787
HASSAN HITO, M.D., RAJIV SAXENA, M.D.,	:	
NOEL A. D'SILVA, M.D., ISLAND GASTRO	:	KRAL, CLERKIN, REDMOND, et al.
CONSULTANTS, P.C. and GOOD SAMARITAN	:	Attys for Defts Hito & Good Samaritan
HOSPITAL MEDICAL CENTER,	:	496 Smithtown Bypass
	:	Smithtown, New York 11787
Defendants.	:	
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 14; Replying Affidavits and supporting papers 15 - 16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that the motion (002) by defendants, Rajiv Saxena, M.D., Noel A. D'Silva, M.D., and Island Castro Consultants, P.C. for summary judgment dismissing the complaint as against them pursuant to CPLR 3212 is granted to the extent that the action is dismissed as against defendant D'Silva. The action continues as against the remaining defendants.

In this medical malpractice action, plaintiff, Linda Cardineau, as Administratrix of the Estate of Warren Cardineau, deceased, alleges that defendants departed from accepted medical standards of care in the treatment of Mr. Cardineau (hereinafter "the patient") from August 27, 2003 through September 10, 2003 while a patient at defendant Good Samaritan Hospital (hereinafter "hospital"). The medical record reveals that the patient was admitted to the hospital by his internist, Hassan Hito, M.D., with complaints of rib pain after falling and was diagnosed with pneumonia. The patient was known to have a history of cirrhosis of the liver, diabetes and hypertension. Subsequently, members of defendant, Island Gastroenterology Consultants, P.C., were called upon to consult regarding the patient's elevated liver enzymes and gastrointestinal status. Defendant, Noel A. D'Silva, M.D., an employee of the professional corporation, evaluated the patient on August 28, 2003. In addition, Raj Meriwalla, M.D., a shareholder of the professional corporation, evaluated the patient on August 29, 2003. Defendant,

Rajiv Saxena, M.D., a shareholder and President of the professional corporation, evaluated the patient on September 8 and 9, 2003.

The record reveals that plaintiff's medical condition did not improve and he developed other medical problems, including constipation. The x-rays revealed a possible ileus or bowel obstruction which required further studies to confirm. The discharge summary, as dictated by defendant Hito, reveals that the patient's vital signs dropped and he exhibited signs and symptoms of septic shock. On September 9, the patient was transferred to the intensive care unit pursuant to an order by defendant Saxena. Although a nasogastric tube and endotracheal tube were inserted to decompress the intestine and assist the patient's breathing, an x-ray revealed that both tubes were not placed correctly. However, the tubes were not repositioned by the staff or the physicians, which caused an ulceration in the esophagus and inadequate oxygenation. The patient died on September 10, 2003 as a result of cardiac and respiratory failure, fulminant liver failure and diabetes. In the bill of particulars, plaintiff alleges, among other things, that defendants failed to order the appropriate diagnostic tests or a surgical consultation in time to correct the patient's worsening condition, which led to his untimely death. Before the court is a motion for summary judgment by defendants Saxena, D'Silva and Island Gastroenterology Consultants, P.C. dismissing the plaintiff's complaint.

The elements of proof in an action to recover damages for medical malpractice are deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (*Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]). To prove a prima facie case of medical malpractice, a plaintiff must establish that the 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*, 224 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, supra*).

In support of the motion, defendants submit, among other things, the pleadings; bill of particulars; a copy of the patient's Good Samaritan Hospital medical record; examination before trial transcripts of defendants D'Silva, Saxena, and Raj Mariwalla, M.D. Defendants also submit the affirmation of Milton Levine, M.D.

At his examination before trial, defendant D'Silva testified to the effect that he evaluated the patient on August 28, 2003. He noted that the plaintiff's liver enzymes were elevated and the chromotomographic scan ("CT Scan") revealed cirrhosis of the liver and an enlarged spleen. He concluded that the patient was stable and wrote "continue management as per Dr. Hito." He stated that he recommended an advanced diet. He did not recall any further interaction with the patient, the hospital staff or defendant Hito.

At his examination before trial, Raj Mariwalla, M.D. testified to the effect that he evaluated the patient on September 29, 2003. He noted that the patient had no abdominal pain. He had no recollection of seeing the patient after that date. However, Dr. Mariwalla gave a telephone order on

September 8 to administer a tap water enema to the patient. Another telephone order was given to provide the patient with a pain medication, percocet, later in the evening. A final telephone order was given by Dr. Mariwalla on September 9 for one on one observation.

At his examination before trial, defendant Saxena testified to the effect that his group had treated the patient previous to this hospital admission, but the office records had been purged. He stated that he was called in to the hospital to see the patient due to left lower quadrant pain on September 8. Defendant Saxena made a differential diagnosis of recurring diverticulitis or fecal impaction. He then wrote orders for an x-ray, blood work and an enema. He felt that the patient was stable at that time.

Defendant Saxena testified that on September 9 the hospital staff informed him that the patient developed altered mental status and a distended abdomen. He ordered a nasogastric tube, additional tests and a surgical consultation. He received a call from the hospital staff regarding the lab tests which revealed a metabolic disturbance demonstrating kidney failure. In response, he ordered consultations by renal and infectious disease specialists and that the patient be transferred to the intensive care unit. He evaluated the patient on September 9 and wrote two progress notes. He stated that he did not see the patient again after 11:45 a.m. on September 9.

Dr. Levine affirms that he is board certified in gastroenterology. He opines that the care rendered by defendants D'Silva, Saxena and Island Gastroenterology Consultants, P.C., s/h/a Island Gastro Consultants, P.C., was not the proximate cause of any alleged injury including ileus, sepsis and death. Dr. Levine avers that after defendant D'Silva properly examined the patient on August 28, 2003 he noted that the patient was clinically stable from a gastroenterology perspective and did not render any further treatment to the patient. On August 29, 2003, Dr. Levine avers that the patient was seen by Island Gastroenterology Consultants by Dr. Mariwalla. He states that Dr. Mariwalla noted that the patient's abdomen was non-tender on palpation and no complaints of constipation or abdominal pain.

The patient's gastrointestinal condition was apparently stable until September 8, 2003 when defendant Saxena was asked to re-evaluate the patient. On that date the patient was complaining of left lower quadrant pain. The physical examination by Saxena revealed a soft abdomen with left lower quadrant tenderness and positive bowel sounds. Saxena ordered changes to the diet, lab work and x-rays of the abdomen. On September 9, 2003, Saxena was called to re-evaluate the patient for altered mental status and distended abdomen. He recommended placing a nasogastric tube, CT scan of the abdomen and a surgical consultation. The patient was transferred to the intensive care unit where his condition continued to deteriorate. Dr. Levine opines that the defendants timely diagnosed the decedent plaintiff's condition and timely instituted proper and adequate medical treatment, including appropriate referrals to specialists including infectious disease and surgery in accordance with good and accepted standards of care. These submissions demonstrate defendants' entitlement to judgment as a matter of law (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

In opposition, plaintiff's counsel affirms that plaintiff will not oppose defendant D'Silva's request for summary judgment. Accordingly, that branch of the motion for summary judgment is granted in favor of defendant D'Silva dismissing the complaint as against him. In opposition to remaining branch of defendants' motion, plaintiff submits, among other things, an affirmation of her

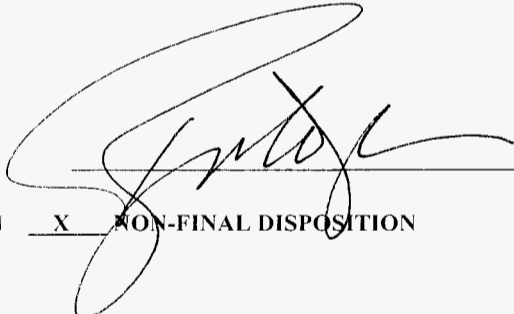
medical expert¹, whose name has been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 517 NYS2d 51 (1994). The original unredacted affidavit has been submitted to the court for inspection under separate cover.

The expert states that he is board certified in the area of internal medicine and gastroenterology. He opines that defendant Saxena and his medical group, Island Gastroenterology Consultants, P.C., departed from the good and accepted practice of medicine in their care and treatment of the patient and that those departures were proximately related to the patient's death. He found no departures by defendant D'Silva, however. The expert opines that on September 8, Saxena should have ordered follow up radiological studies on that date since the x-ray showed a possible paralytic ileus. In addition, the patient was receiving a continuous administration of percocet, as prescribed by Dr. Mariwalla, which could contribute to the development of an ileus.

The expert further avers that Saxena and his group should have been more aggressive in his treatment of the patient's symptoms. He notes that the surgical consult determined that the patient did, in fact, have an ileus due to a metabolic imbalance, but it was too late for surgical intervention. Once in the intensive care unit, a nasogastric tube was inserted by a physician's assistant, however, later in the day, an x-ray confirmed that the tube was not positioned correctly, thus, there was no decompression of the intestines. In addition, Saxena and his group failed to follow up the patient's progress in the intensive care unit, which constituted a departure from good and accepted practice. Instead, the expert concludes, both Saxena and Mariwalla left the management of a critical gastrointestinal condition in the hands of a hospital physician's assistant and an internist, which was a substantial or contributing cause to the patient's death.

Therefore, there are issues of fact as to whether any care provided by the defendants to the patient departed from good and accepted medical practice, and as to whether any such departure was a proximate cause of the patient's injuries (*Wienk-Evans v North Shore Univ. Hospital*, 269 AD2d 443, 702 NYS2d 917 [2000]). Plaintiff also raises triable issues as to whether these physicians breached their duties to Mr. Cardineau by failing to advise and make appropriate recommendations to the patient's treating physician (*compare Aharonowicz v. Huntington Hosp.*, 22 AD3d 614, 801 NYS2d 919 [2005]; *Malki v Krieger*, 213 AD2d 331, 624 NYS2d 167 [1995]). Accordingly, the motion for summary judgment is denied

Dated: AUG 09 2007



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION

¹The 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. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.