

DeAngelis v Farr

2007 NY Slip Op 32628(U)

August 1, 2007

Supreme Court, Suffolk County

Docket Number: 0024723/2004

Judge: Emily Pines

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-20-07
ADJ. DATE 7-20-07
Mot. Seq. # 002 - MG

-----X		DUFFY, DUFFY & BURDO
MARY ANN T. DeANGELIS, individually and as :		Attorneys for Plaintiff
Executrix of the Estate of DOMENIC P. :		1370 RexCorp Plaza, West Tower 13 th Floor
DeANGELIS, deceased, :		Uniondale, New York 11556-0188
:		:
:		VINCENT D. McNAMARA, ESQ.
Plaintiff, :		Attorney for Defendants Lazar
:		Tower Square, 1045 Oyster Bay Rd., Suite 1
:		East Norwich, New York 11732
- against - :		:
:		BARTLETT, McDONOUGH, BASTONE, et al.
:		Attys for Defendant St. Catherine of Siena
:		300 Old Country Road
DAVID FARR, M.D., DAVID FARR, M.D., P.C., :		Mineola, New York 11501
SUFFOLK HEART GROUP, LLP, ANTHONY :		
JOHN SPADARO, M.D., INTERNAL MEDICINE :		WAGNER, DOMAN & LETO, P.C.
ASSOCIATES OF SMITHTOWN, P.C., JOHN :		Attorneys for Defendants Robinson
CHARLES ROBINSON, M.D., JOHN C. :		227 Mineola Boulevard
ROBINSON, M.D., P.C., ROBERT MICHAEL :		Mineola, New York 11501
LAZAR, M.D., ROBERT M. LAZAR, M.D., P.C., :		
ST. CATHERINE OF SIENA MEDICAL :		LEWIS JOHS AVALLONE AVILES, et al.
CENTER. :		Attys for Defts Spadaro & Internal Med. Assocs.
:		425 Broadhollow Road, Suite 400
:		Melville, New York 11747
:		
:		SHAUB, AHMUTY, CITRIN & SPRATT
Defendants. :		Attys for Defts Farr and Suffolk Heart Group
:		198 Marcus Avenue, Suite 140
-----X		Lake Success, New York 11042

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1- 15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-18; 19-21; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants Robert M. Lazar, M.D. and Robert M. Lazar, M.D., P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against them is granted.

This is an action sounding in medical malpractice arising out of the care and treatment rendered to plaintiff's decedent, Domenic DeAngelis, by defendants. The complaint of this action sets forth causes of action sounding in medical malpractice, lack of informed consent, and wrongful death, with a derivative cause of action on behalf of decedent's wife, Mary Ann T. DeAngelis.

The verified bill of particulars sets forth that the negligent acts and omissions asserted against defendant Robert M. Lazar, M.D. occurred during a continuous course of treatment from on or about April 7, 2003 up to and including April 15, 2003 wherein it is alleged, inter alia, defendant failed to timely and properly diagnose decedent's rectal cancer, negligently prescribed Toradol to decedent, improperly cleared plaintiff's decedent for surgery consisting of a lower anterior bowel resection, failed to timely call a cardiac consult, and caused plaintiff to suffer cardiogenic shock and death.

Defendant Lazar seeks summary judgment, asserting he did not depart from good and accepted medical standards, the claims of departures are inappropriately addressed against him, and he did not proximately cause plaintiff's injuries.

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 [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]).

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]). 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 [3rd Dept 1985]; *Lyons v McCauley*, 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]).

In support of this application, the moving defendant has submitted copies of the pleadings, the answer of the moving defendant, verified bill of particulars; copy of the transcript of the examination before trial of defendant Lazar; various medical records, and the affirmation of Sanford R. Goldberg, M.D.

Dr. Goldberg states he is a physician licensed to practice medicine in the State of New York and is board certified in Internal Medicine and Gastroenterology. It is his opinion within a reasonable degree of medical certainty that Dr. Robert Lazar did not depart from accepted standards of medical practice during his care and treatment of plaintiff's decedent.

Dr. Goldberg stated that he properly obtained cardiac clearance by Dr. Stephen Shappell, M.D. prior to performing a colonoscopy on plaintiff's decedent. The colonoscopy was performed on April 7, 2003, at which time polyps were removed from the cecum and ascending colon and multiple biopsies were taken in the distal sigmoid to rule out cancer. At the time of the colonoscopy, as confirmed in Dr. Lazar's report, a rectal examination and retroflexion of the scope was done and no distal lesions were seen in the rectum. Dr. Goldberg set forth that any lesion that could be felt by digital examination should be able to be seen by a retroflexed colonoscope.

Any claim that Dr. Lazar improperly measured the distance the tumor was located from the anal verge, or that he improperly communicated the location of the tumor to the treating surgeon is without basis. It is understood that a colonoscopy is often inaccurate in precisely determining the site of a lesion due to the inherent problems with measurement in an elastic organ such as the colon. A site felt to be above or below the peritoneal reflection is often located in a position different from that recorded by the colonoscopist. Because of the elasticity and twisting of the colon, it is known that while colonoscopy is very sensitive in detecting colorectal cancer, it will often fail to correctly localize and/or identify the tumor location. Therefore, the location of the tumor, as opined by Dr. Goldberg, and as testified to by Dr. Lazar, is an estimate of the area where the tumor is located. Thereafter, states Dr. Goldberg, the only other involvement that Dr. Lazar had with Mr. DeAngelis was in speaking with the surgeon, Dr. Robinson, sometime prior to the surgical procedure which was performed on April 14, 2003 by Dr. Robinson.

Based upon the foregoing, it is determined that defendants, Robert Lazar, M.D. and Robert Lazar, M.D., P.C., have demonstrated prima facie entitlement to summary judgment.

Plaintiff does not oppose this motion, but requests that either defendants make a prima facie showing as to the malpractice of defendant Lazar, or be precluded from asserting their rights under Article 16 at the time of trial. Defendant St. Catherine of Siena Medical Center partially opposes defendant's Lazar's motion in that, although they do not take any position as to the relief requested by Dr.

Lazar, state they do not waive any rights that they have pursuant to Article 16 and the General Obligations Law. In support of this opposition, defendant Medical Center has submitted merely copies of pleadings, answers and demands.

It is determined by this court that none of the codefendants, including St. Catherine of Siena Medical Center, nor plaintiff, have demonstrated a prima facie showing as to the malpractice of defendant Lazar as no expert has come forward to refute the opinions offered by Dr. Goldberg in support of Dr. Lazar's motion.

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 West Associates*, 188 Misc 2d 119, 726 NYS2d 237 [Sup Ct, Bronx County, 2001]). In *Yanatos v Pogo et al*, (Spinola, J.) (Sup Ct Nassau, April 25, 2006), the court set forth that since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented (citing *Drooker v South Nassau Communities Hospital*, 175 Misc2d 181, 669 NYS2d 169 [NY Sup. Ct. 1998]). In *Drooker*, supra, 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.

There is no requirement in Article 16 that defendants disclose prior to trial the persons whose joint liability will be invoked (*Rodi v Landau*, 170 Misc.2d 180, 650 NYS2d 514[NY Sup Ct 1996]). This application for summary judgment, however, is the procedural equivalent of a trial. It therefore follows that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented. In that no co-defendant has demonstrated prima facie entitlement to an order granting summary judgment, and no co-defendant has come forward opposing motion (012) by the Lazar defendants, it is determined that the co-defendants have failed to satisfy this evidentiary burden that shifted upon the movant's prima facie showing of entitlement to an order granting summary judgment, and have forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Robert Lazar, M.D. or Dr. Robert Lazar, M.D., P.C.

Accordingly, this action is severed and continued as against the remaining defendants who have all forfeited the opportunity to limit their liability with respect to the acts or omissions of Dr. Robert Lazar, M.D. or Dr. Robert Lazar, M.D., P.C. in this action. The remaining defendants are not foreclosed from asserting any CPLR Article 16 defenses as against any other potential defendants or non-parties to the action at trial.

Dated: 8/1/07

Emely Pines
J.S.C

FINAL DISPOSITION NON-FINAL DISPOSITION