

Hollander v Stiber

2007 NY Slip Op 34605(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 113259/04

Judge: Eileen Bransten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
BETTY HOLLANDER and JACK HOLLANDER,

Plaintiffs,

-against-

Index No. 113259/04
Motion Date: 7/3/07
Motion Seq. No.: 02

ANDREW STIBER, M.D., BALA R.
SUBRAMANYAM, M..D. and DR. BALA R.
SUBRAMANYAM RADIOLOGY, P.C.,

Defendants.

-----X
PRESENT: EILLEN BRANSTEN, J.

FILED

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COURT OF CLERKS

In this medical malpractice action, plaintiffs Phyllis Unger, as the Administratrix of the Estate of Betty Hollander and Jack Hollander, Individually (collectively "Plaintiffs") move pursuant to CPLR 3025 to amend the complaint in this action to include a cause of action for wrongful death.* Defendants Andrew Stiber, M.D. ("Dr. Stiber") and Bala R. Subramanyam, M.D. ("Dr. Subramanyam") and Dr. Bala R. Subramanyam, P.C. ("Subramanyam Defendants") (all of the defendants will collectively be referred to as "Defendants") oppose the motion.

* In a Stipulation dated May 8, 2007 (annexed to the moving papers as Ex. A), the parties agreed to amend the caption to reflect substitution of the decedent's representative as plaintiff. Because the records in this case have not yet been properly amended, the caption for this Decision does not reflect the properly agreed-upon substitution and the Order directs amendment of the caption as well.

Background

This medical-malpractice action, which was commenced by Betty and Jack Hollander in March 2007, arises from the alleged failure to adhere to good and accepted medical practice relating to the monitoring, diagnosis and treatment of Betty Hollander's metastatic uterine cancer. Affirmation in Support ("Supp."), at ¶¶ 1,5. On December 22, 2005, Betty Hollander died. Supp., at ¶ 1. Plaintiffs now move to amend the complaint to assert a claim for her wrongful death.

In support of their motion, Plaintiffs rely on an affidavit from Gregory Berk, M.D. ("Dr. Berk"), a physician licensed to practice in New York and California who is board certified in internal medicine and medical oncology. Supp., Ex. B, at ¶ 1.

Based on review of the medical records, he opines:

"within a reasonable degree of medical certainty that [Defendants] failed to properly perform appropriate tests, studies and procedures of the decedent during the time period 1997-2003 which would have permitted them to diagnose the decedent's uterine cancer when it was at a highly curable stage. [Defendants] further failed to heed and appreciate the patient's clinical signs and symptoms of uterine cancer, including post menopausal bleeding, and they failed to take appropriate steps necessary to rule out uterine cancer. It is further my opinion within a reasonable degree of medical certainty, that [Defendants'] delay in diagnosing the decedent's uterine cancer caused the decedent to suffer a lost chance at curing her illness and was a substantial contributing factor to her death from metastatic uterine cancer."

Supp., Ex. B., at ¶ 2.

Defendants oppose the motion, urging that Dr. Berk's affidavit is insufficient to support the amendment because it does not establish a causal connection between the alleged departure from the standard of care and Betty Hollander's death. *See generally*, Affirmation in Opposition on behalf of Subramanyam Defendants ("Subramanyam Opp."); Affirmation in Opposition on behalf of Dr. Stiber ("Stiber Opp."). Specifically, they attack the affidavit on the ground that Dr. Berk does not set forth which tests or procedures should have been performed and this "lack of specificity is a critical defect to Plaintiffs' motion as it prevents a causal connection from being established between the alleged negligence and the decedent's death." Subramanyam Opp., at ¶¶ 11, 17; *see also*, Stiber Opp., at ¶ 5. The Subramanyam Defendants further assert that Dr. Berk is not qualified to opine that they are responsible for Betty Hollander's death since he is not a radiologist.

Analysis

CPLR 3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." To support a wrongful death amendment there must be "competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff." *Gambles v. Davis*, 32 A.D.3d 224, 225 (1st Dept. 2006). Significantly, the "competent medical proof" need not be as detailed as that

required to defeat a summary judgment motion once a defendant has made a *prima facie* showing of entitlement to judgment as a matter of law. *Id.*, at 226. All that is necessary is a statement “with exactitude that the same departures supporting decedent’s claims for medical malpractice precipitated her untimely death.” *Id.* (reversing denial of motion to amend where physician opined that “the alleged failure to diagnose urethral cancer was causally connected to the plaintiffs’ decedent’s death”); *see also, Wynter v. Our Lady of Mercy Medical Ctr.*, 3 A.D.3d 376, 379 (1st Dept. 2004) (emphasizing “liberal policy to permit amended pleadings”).

In support of the motion to amend, Dr. Berk, a licensed physician qualified to offer medical proof, opines “within a reasonable degree of medical certainty, that [Defendants’] delay in diagnosing the decedent’s uterine cancer caused the decedent to suffer a lost chance at curing her illness and was a substantial contributing factor to her death from metastatic uterine cancer.” Supp., Ex. B., at ¶ 2. Thus, Plaintiffs have supplied the requisite proof of the causal connection between the alleged malpractice and Mrs. Hollander’s death.

Additionally, Defendants will be given an opportunity to conduct additional depositions and seek disclosure related to the wrongful death amendment within 45 days of the date of this Decision and Order. Thus, they will not be prejudiced by the proposed amendment “which does not substantially expand the decedent’s original complaint.”

Gambles v. Davis, 32 A.D.3d, at 226. The trial of this case, moreover, is not until February 5, 2008; therefore, there is more than ample time to prepare a defense to the wrongful death claim and if Defendants would like to move for summary judgment dismissal of the wrongful death cause of action they must do so by Order to Show Cause within 90 days of the date of this Decision and Order.

Accordingly, it is

ORDERED that Plaintiffs' motion to amend the complaint is granted and the amended summons and complaint attached to the moving papers as Exhibit C is deemed served on Defendants *nunc pro tunc*; it is further

ORDERED that Defendants shall conduct any additional depositions and make any disclosure demands related to the amended complaint no later than 45 days from the date of this Decision and Order and if Defendants would like to move for summary judgment dismissal of the wrongful death cause of action they must do so by Order to Show Cause within 90 days of the date of this Decision and Order; it is further

ORDERED that Phyllis Unger, as Administratrix of the Estate of Betty Hollander, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Betty Hollander, without prejudice to any proceedings heretofore had herein, and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of Phyllis Unger, as Administratrix of the Estate of Betty Hollander, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein (thus the amended caption should list "PHYLLIS UNGER, as Administratrix of the Estate of BETTY HOLLANDER and JACK HOLLANDER, Individually," as Plaintiffs); and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

The parties are to appear for a further settlement conference on November 27, 2007, at 10:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 16, 2007

ENTER


Hon. Eileen Bransten

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