

Aresco v Sussman

2008 NY Slip Op 30457(U)

February 11, 2008

Supreme Court, Nassau County

Docket Number: 0776-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

SALVATORE ARESKO and ROSEALIE ARESKO,

Plaintiff,

ORIGINAL RETURN DATE: 8/29/07
SUBMISSION DATE: 01/09/08
INDEX NO. 0776/06

-against-

MICHAEL SUSSMAN, M.D. and
WINTHROP UNIVERSITY HOSPITAL,

MOTION SEQUENCE #s 1, 2

Defendants.

The following papers read on this motion:

Notices of Motion.....	1,2
Answering Papers.....	3
Memorandum of Law.....	4, 5
Reply.....	6

Motion [sequence #1] by defendant, Michael H. Sussman, M.D. ("Dr. Sussman"), and motion [sequence #2] by defendant, Winthrop University Hospital (the "Hospital"), each seeking an order pursuant to CPLR 3212 awarding them summary judgment dismissing plaintiffs' complaint are granted.

Plaintiffs commenced the within personal injury action sounding in medical malpractice on or about January 13, 2006. Issue was thereafter joined upon the interposition of verified answers from each defendant in or about February 2006 and March 2006.

Plaintiff, Salvatore Aresco ("Mr. Aresco"), suffered from hypertension and angina, as well as transient ischemic attacks, non-insulin dependent diabetes and elevated cholesterol. He was under the care of Dr. Sussman, as well as neurologist, Dr. Mazurek, and his internist, Dr. Eisen. On February 25, 2005, he was admitted to Nassau University Medical Center for a right subcortical cerebral vascular accident ("CVA") and transferred to the Hospital on March 5, 2005. The day after his discharge on March 14, 2005, he suffered another CVA and was brought to North Shore University Hospital at Plainview. Thereafter, on April 5, 2005, a carotid endarterectomy was performed by a Dr. Hines.

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After Mr. Aresco's initial admission on February 25, 2005, a neurology consult was called in. On March 7, 2005, Dr. Sussman examined Mr. Aresco and noted that he would "continue as per neurology" although Dr. Sussman continued to see the patient through March 11, 2005 (Horowitz Aff. ¶11). According to Dr. Sussman's testimony the neurology consult were directing the care of Mr. Aresco and ordered an MRI of the brain and MRA of the brain and neck, as well as an echo and Holter and additional blood work. SubQ Heparin was added to the continuation of aspirin and Plavix. On March 8, 2005, Dr. Sussman noted that the patient was "stable, awake and alert, talking well" and that the carotid showed moderate obstruction, which the neuro was evaluating (Horowitz Aff., Ex. H, p. 18). Referring to the progress notes of March 7, 2005, Dr. Sussman testified that the results were: "Right internal carotid artery 50 to 79 percent obstruction, left internal carotid artery, 16 to 49 percent obstruction" (Id., p.21). Although Dr. Sussman found these results noteworthy, he did not feel a need to alter therapy at that point.

As amplified in plaintiffs' verified bill of particulars, plaintiffs allege the following with respect to Dr. Sussman: Dr. Sussman was negligent (1) in failing to render proper medical care and treatment to the plaintiff; (2) in failing to order/perform appropriate diagnostic testing, particularly ultrasound, angiography, CT Scan and/or MRI in order to diagnose complete extent of carotid artery blockage; (3) in failing to promptly and timely order/perform endarterectomy or stenting; (4) and in failing to consider plaintiff's prior medical history, particularly those of TIA with resolution of symptoms (Horowitz Aff. Ex. C, Verified Bill of Particulars). Plaintiffs further allege that Dr. Sussman "failed to heed and identify signs and symptoms of significant carotid artery blockage requiring immediate surgery including doppler results and plaintiff's past history of TIA with resolution of symptoms" (Id., ¶7a-b).

With regard to the Hospital, plaintiffs allege that the Hospital was negligent (1) in failing to render proper medical care and treatment to the plaintiff; (2) in failing to order/perform appropriate diagnostic testing, particularly ultrasound, angiography, CT Scan and/or MRI in order to diagnose complete extent of carotid artery blockage; (3) in failing to promptly and timely order/perform endarterectomy or stenting; (4) and in failing to consider plaintiff's prior medical history, particularly those of TIA with resolution of symptoms. (Rach Aff. Ex. E, Verified Bill of Particulars). Plaintiffs further allege that the Hospital "ignored signs and symptoms of carotid artery blockage, particularly the results of doppler studies taken during the relevant admission" (Id., ¶24).

It is submitted that it is standard treatment for a neurologist to manage the care of a patient suffering from CVA and that Dr. Sussman, therefore, "properly deferred to the neurologist in this case and left that aspect of Mr. Aresco's care to the appropriate specialist" (Horowitz Aff. ¶12). In support of his application, Dr. Sussman provides the affirmations of Monty Bodenheimer, M.D. and Raymond Coll, M.D. Dr. Bodenheimer states that he is board certified in the field of cardiology and that he has reviewed the medical records of Drs. Sussman, Eisen, Hines and Mazurek, Nassau County Medical Center, Winthrop University Hospital, North Shore Hospital at Plainview and the VA Medical Center, as well as the deposition transcripts of the parties and plaintiffs' bill of particulars. Predicated upon that review, Dr. Bodenheimer avers that within a reasonable degree of medical

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certainly the care and treatment afforded Mr. Aresco by Dr. Sussman was in accord with accepted medical standards and did not cause or contribute to the injuries claimed (Horowitz Aff. Ex. D, Bodenheimer Aff.). It is the opinion of Dr. Bodenheimer that Dr. Sussman properly deferred the managing of the CVA to the neurology consult, the appropriate specialist for this neurologic issue, noting that it is not a cardiology issue and that it was Dr. Sussman's observation that Mr. Aresco's cardiac issues were stable. Dr. Bodenheimer further posits that neurologist, Dr. Klinger, "noted that the patient was status post acute small vessel event with positive carotid disease. [Dr. Klinger] also noted, 'intervention to be decided in future after healing period of several weeks post acute CVA'" (Id. ¶11). It is the further opinion of Dr. Bodenheimer that the "recommendations of Dr. Klinger were entirely reasonable and appropriate and there was no medical reason for Dr. Sussman to question those recommendations" which were "entirely in accordance with the standard of care in 2005" (Id. ¶12). Dr. Bodenheimer additionally opines that it was clearly appropriate for Mr. Aresco to be discharged on March 14, 2005, as the patient's condition was stable.

To further support his contention that Dr. Sussman acted entirely in accordance with the standards of good and accepted medical practice, Dr. Bodenheimer notes that when Mr. Aresco was admitted to North Shore University Hospital at Plainview with another CVA on March 15, 2005, Dr. Hines recommended that he perform a carotid endarterectomy "... 'several weeks past from the time of his last neurologic event'" (Id. ¶17). Dr. Bodenheimer concludes that Dr. Hines was in agreement "with the plan of management set forth by the neurologist at Winthrop" (Id. ¶17) and that there was "nothing further that Dr. Sussman could have done to prevent the stroke that occurred on March 15th" (Id. ¶18).

Dr. Coll is board certified in the field of neurology. He also reviewed the medical records of Drs. Sussman, Eisen, Hines and Mazurek, Nasssau County Medical Center, Winthrop University Hospital, North Shore Hospital at Plainview and the VA Medical Center, as well as the deposition transcripts of the parties and plaintiffs' bill of particulars. Predicated upon that review, Dr. Bodenheimer avers that within a reasonable degree of medical certainty the care and treatment afforded Mr. Aresco by Dr. Sussman was in accord with accepted medical standards and did not cause or contribute to the injuries claimed (Horowitz Aff. Ex. I, Coll Aff.). Dr. Coll asserts that the "[m]anagement of CVA is something that is routinely handled by neurologists" and opines "that the neurology consult was called in a timely fashion and properly took over that aspects [sic] of the plaintiff's care" (Id. ¶9). It is the contention of Dr. Coll that Dr. Sussman's role, as Mr. Aresco's cardiologist, "was to manage the plaintiff's cardiac issues which were noted to be stable" (Id. ¶10) and that "Dr. Sussman was justified in relying on the recommendations of the neurologist in terms of plans for surgical management of this patient in the future" (Id. ¶11). Moreover, Dr. Coll opines that it was proper to discharge Mr. Aresco on March 14, 2005, as the patient's condition was stable. It is Dr. Coll's opinion that "Dr. Sussman's care during the entire admission was entirely in accordance with good and accepted medical practice" (Id. ¶14).

The Hospital submits the affirmation of Howard B. Reiser, M.D., who is board certified in neurology and neurosonology. Dr. Reiser's opinion supports those of Drs. Bodenheimer and

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Coll. It is the opinion of Dr. Reiser, after reviewing the pertinent medical records and deposition testimonies, that "within a reasonable degree of medical certainty, . . . the care and treatment rendered to the plaintiff, SALAVTORE ARESKO, by the WINTHROP UNIVERSITY HOSPITAL staff was at all times within good and accepted standards of medical practice: (Reiser Aff. ¶3). Dr. Reiser submits that "the Neurologist's plan to wait a period of several weeks post acute CVA to determine what the appropriate intervention [should be] was entirely in accordance with the standard of care" (Id. ¶5) and that "it was entirely appropriate for the patient to be discharged on March 14, 2005" (Id. ¶6).

Within the particular context of a medical malpractice action, a plaintiff opposing a defendant doctor's motion for summary judgment is required to proffer evidentiary facts sufficient to rebut the doctor's *prima facie* showing that he or she was not negligent when rendering medical care to plaintiff (*Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept. 1994]). Allegations of a general and conclusory nature which are not supported by competent and admissible evidence and which do not demonstrate the essential elements of a medical malpractice action are not sufficient to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The essential elements of a medical malpractice action are comprised of the following: (1) a deviation or departure from accepted medical practice and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358 [2d Dept. 1998]).

With regard to the scope of a physician's duty, the general duty of care owed by physicians to their patients may be limited to those medical functions undertaken by the physician and relied upon by the patient. (*Boone v North Shore University Hosp. at Forest Hills*, 12 AD3d 338 [2d Dept. 2004] quoting *Wasserman v Staten Island Radiological Associates*, 2 AD3d 713 [2d Dept. 2003]).

The affirmations of defendants' experts are competent evidence that defendants did not depart from good and accepted medical practice when Mr. Aresco was treated. In the matter *sub judice*, based upon the heretofore referenced deposition testimony coupled with the Bodenheime, Coll and Reiser affirmations and the averments therein contained, defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to plaintiffs to submit competent evidence showing a departure from accepted medical practice and a nexus between the alleged medical malpractice and plaintiff's injury (*Alvarez v Prospect Hosp.*, *supra*).

In opposition to Dr. Sussman's application, plaintiffs submit the affirmation of a physician who is board certified in internal medicine with an additional certification in cardiovascular disease. After reviewing the medical records of the Hospital and the testimony of Dr. Sussman, he opines that "there was a noticeable discrepancy in diagnostic testing performed during the plaintiff's admissions at Winthrop in March 2005" (Modelewski Aff. Ex. A. ¶3) and that "the failure to reconcile the vastly different results subjected the plaintiff to injury by virtue of the stroke he suffered the very next day" after discharge (Id. ¶9). No opposition has been submitted to the Hospital's application.

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"It is well settled that an expert's opinion must be based upon facts in the record or personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusions." (*Erbstein v Savasatit*, 274 AD2d 445, 446 [2d Dept. 2000]). The judgment espoused by the particular expert must, considered in totality, indicate a particular level of certitude so as to be admissible. (*Gross v Friedman*, 138 AD2d 571 [2d Dept. 1988]).

As to the contention espoused by plaintiff's expert that there were discrepancies in the diagnostic testing, Dr. Sussman submits copies of the Discharge Summary and the Vascular Laboratory results of the Cerebrovascular Duplex Scan, both of which show a 50-79% stenosis of the right proximal internal carotid artery. It is further submitted that the tests were ordered by the neurologist and not by Dr. Sussman.

Viewing the evidence in a light most favorable to plaintiffs as is required when deciding a motion for summary judgment, the court concludes that the expert affirmation submitted by plaintiffs has failed to raise a triable issue of fact.

Defendants are accordingly awarded summary judgment dismissing plaintiffs claims against them.

Plaintiffs' complaint is dismissed. Dismissal is without costs.

This decision constitutes the order of the court.

Dated: February 11, 2008

HON THOMAS P. PHELAN


THOMAS P. PHELAN, J.S.C.

ENTERED

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