

Sinclair v Bortuzzo

2008 NY Slip Op 30667(U)

March 5, 2008

Supreme Court, New York County

Docket Number: 0101880/2006

Judge: Eileen Bransten

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

PRESENT: BRANSTEN
Justice

PART 6

SINCLAIR, MILLICENT

INDEX NO. 101880/06

MOTION DATE 2/26/08

- v -

MOTION SEQ. NO. 03

CHRISTIANA BORTUZZO, M.D.,
ETAL

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 11 2008

NEW YORK
COUNTY CLERK'S OFFICE

TO DECIDE THE MOTION AND TO
THE ACCOMPANYING MEMORANDUM

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

Dated: March 5, 2008. Edin Bort
J.S.C.

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

MILLICENT SINCLAIR,

Plaintiff,

-against-

Index No.: 101880/06

Motion Date: 2/26/08

Motion Sequence No.:003

CRISTINA BORTUZZO, M.D.; TALAT F. ADDASI,
M.D.; and THE NEW YORK HOSPITAL MEDICAL
CENTER OF QUEENS,

Defendants.

----- X

PRESENT: EILEEN BRANSTEN, J:

Defendant Cristina Bortuzzo, M.D. (“Dr. Bortuzzo”) moves for summary judgment pursuant to CPLR 3212. Plaintiff Millicent Sinclair (“Ms. Sinclair”) opposes the motion.

BACKGROUND

On January 29, 2001, Ms. Sinclair visited board-certified-Gastroenterologist Dr. Bortuzzo because she suffered from constipation and abdominal pain. *See*, Bortuzzo Aff’d at 3, ¶ 7; Katz Aff. in Opp. at 3, ¶ 12. Dr. Bortuzzo performed a colonoscopy on April 23, 2002 and found diverticuli and a polyp on the left colon, which she removed. *See*, Katz Aff. in Opp. at 3, ¶ 13. She recommended that Ms. Sinclair receive a follow-up colonoscopy within the following five or six years. *See*, Bortuzzo Aff’d at 6, ¶ 14.

Ms. Sinclair periodically visited Dr.Bortuzzo’s office between May 2002 and May 2005, where she continued to complain about constipation and epigastric pain. *See*, Katz

Aff. in Opp. at 3, ¶ 15. On May 20, 2004, Dr. Bortuzzo performed an upper endoscopy, which revealed gastritis, a hiatal hernia, and gastroscophagael reflux disease. *See*, Bortuzzo Aff'd at 7, ¶ 16.

In winter/early spring 2005, Ms. Sinclair went to the emergency room because she experienced severe abdominal pain. *Id.*, ¶ 18; Katz Aff. in Opp. at 3, ¶ 16. A CT scan revealed nothing abnormal. *Id.*; Bortuzzo Aff'd at 7, ¶ 18. Dr. Bortuzzo reviewed the CT scan and recommended another colonoscopy, which was performed on May 6, 2005. *See*, Katz Aff. in Opp. at 4, ¶ 17.

At the conoloscopy's conclusion, Dr. Bortuzzo noticed mesenteric fat protruding, which is indicative of a perforation in the sigmoid colon. *Id.*, ¶ 18; Bortuzzo Aff'd at 11, ¶ 27. Ms. Sinclair was taken to the Emergency Room at New York Hospital Queens, where Talat F. Addasi, M.D. ("Dr. Addasi") repaired the perforation. *See*, Katz Aff. in Opp. at 4, ¶ 19-20. She was discharged on May 11, 2005.

Ms. Sinclair subsequently began to complain about abdominal pain, nausea, and diarrhea and was admitted to the Emergency Room of Long Island Jewish Hospital. *Id.*, ¶ 21. A CT scan revealed multiple intra-abdominal fluid collections in the periphrenic and paracolic gutter as well as an infection. *Id.* She was treated with antibiotics and released

on May 20, 2005. *Id.*, ¶ 22. As of the date of this motion's submission, Ms. Sinclair continues to complain about constipation and abdominal pain.

Ms. Sinclair commenced this medical malpractice action on February 3, 2006, where she alleges that Dr. Bortuzzo recklessly, carelessly or negligently failed to properly test, diagnose, and treat her; performed an unnecessary colonoscopy; and failed to get her informed consent. * In this motion, Dr. Bortuzzo seeks summary judgment disposition averring that there is no issue of material fact that she acted in accordance with accepted medical standards and that Ms. Sinclair was aware of the potential risks of the colonoscopy. Ms. Sinclair opposes the motion.

ANALYSIS

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue of fact. *See, 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 deprives a party of a day in court, relief should not be granted where an issue of fact is even arguable. *See, Henderson v. City of New York*, 178 A.D.2d 129, 130

* The action was originally commenced against Dr. Bortuzzo, Dr. Addasi, and New York Hospital Medical Center Queens. Ms. Sinclair discontinued the action against the latter two with prejudice pursuant to a stipulation dated October 3, 2007.

(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).

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. *See, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.*

General allegations of medical malpractice that are unsupported by competent medical evidence are insufficient to defeat a motion for summary judgment. *See, Neuman v. Greenstein*, 99 A.D.2d 1018 (1st Dept. 1984). Thus, on a motion for summary judgment where a medical malpractice defendant demonstrates that treatment was provided in accordance with accepted standards of medical practice, the plaintiff must respond with medical evidence establishing a departure from accepted medical procedure. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 327.

In support of her motion for summary judgment, Dr. Bortuzzo proffers her own affidavit. With respect to the diagnosis and treatment of Ms. Sinclair, Dr. Bortuzzo attests that:

“I did a physical examination of Ms. Sinclair [on January 29, 2001]. * * * It was my assessment that since Ms. Sinclair had left lower quadrant pain and tenderness and a new onset of constipation, I had to rule out the presence of colon cancer or a polyp.

Bortuzzo Aff'd at 3-4, ¶ 8-9.

* * *

“During the colonoscopy on April 23, 2002, I found internal hemorrhoids and a sessile polyp which I removed. I also found some diverticulosis in the left lower quadrant (sigmoid) of the colon. I felt this may have been the cause of her * * * constipation.

Id., at 6, ¶ 14.

* * *

“Ms. Sinclair came to my office on May 13, 2002 for followup and at that time she complained of epigastric pain and some dyspepsia of one or two weeks duration. * * * I planned to do an upper endoscopy. On June 4, 2002, because Ms. Sinclair no longer had symptoms, she canceled the schedule procedure.

Id., ¶ 15.

* * *

“Ms. Sinclair came to my office next on May 17, 2004, almost two years later. She told me that for the prior six weeks she had “on and off” epigastric pain. My plan was to reschedule the upper endoscopy. I was deferring the colonoscopy because there was no indication for it at this time. I did the upper endoscopy at my office on May 20, 2004. The findings were consistent with

gastritis, a hiatal hernia, and gastroscophageal reflux disease * * *.

Id., at 6-7, ¶ 16.

* * *

“Ms. Sinclair followed up with me on June 21, 2004 * * *. From my note, I see that she was scheduled for further follow up on October 4, 2004, after her course of therapy was complete, but she did not return until April 11, 2005 * * *.”

Id., at 7, ¶ 17.

* * *

“The standard of care was met by me with respect to Ms. Sinclair while she was my patient. * * * During the colonoscopy, I proceeded to examine the colon in the standard fashion, the way I have done hundreds of times before.”

Id., at 12-13, ¶ 33-34.

As to the necessity of the May 6, 2005 colonoscopy, Dr. Bortuzzo asserts that:

“Because of Ms. Sinclair’s increased difficulties with her bowel movements, her history of constipation, coupled with her abdominal pain which had prompted her emergency room visit, I wanted to rule out any recurrence of the polyp, but mainly a more serious pathology, such as colon cancer. My plan was to repeat the colonoscopy * * *. This evaluation by me * * * was in accordance with good and accepted medical practice as was my recommendation of a colonoscopy to check her colon. The fact that no pathology had been seen in the CT scan at the hospital did not render my colonoscopy unnecessary, as lesions may escape detection without direct examination. In short, a colonoscopy is better at detecting a potentially dangerous colon polyp than CT scanning is.”

Id., at 8, ¶ 20.

Finally, with respect to the informed consent, Dr. Bortuzzo attests that:

“I recommended that [Ms. Sinclair have a colonoscopy]. Based on my custom and practice, I know that I discussed with her the risks and benefits of the colonoscopy. I would have advised her about the test in detail * * *. I describe that the possibility of a tear in the colon developing was reported * * * and that a tear, should it occur, may need surgical repair. I also advised that there is a risk of bleeding and the possibility of her experiencing some pain. I do not remember a specific conversation with her in this regard, but this is my custom and practice.”

Id., at 4, ¶10 - 11.

Based on her submission, Dr. Bortuzzo has established a *prime facie* showing of entitlement to judgment as a matter of law. Indeed, she sets forth that throughout the time Ms. Sinclair was under her care, she rendered her proper and competent diagnosis and treatment; had a sound, medical reason for performing the second colonoscopy; and that it was her practice to inform her patients about the risks associated with a colonoscopy. The burden now shifts to Ms. Sinclair, the motion’s opponent, to raise triable factual issues warranting its denial.

Ms. Sinclair proffers the affirmation of Mark Korsten, M.D. (“Dr. Korsten”), a board-certified gastroenterologist. He opines that:

“* * * It is my professional medical opinion that a repeat colonoscopy on May 6, 2005 was not indicated. Therefore, the performance of this second colonoscopy was a violation of the relevant standard of care and constituted medical malpractice. * * * This is primarily true based on the facts that Ms. Sinclair’s initial colonoscopy showed only diverticuli and hyperplastic polyps.

This is significant because there is no chance that hyperplastic polyps being or becoming malignant. As such, the standard of care indicates a repeat colonoscopy in 10 years.

Korsten Aff, at 4, ¶ 22-23.

* * *

“Had the defendant, Dr. Bortuzzo, not performed an unnecessary colonoscopy, plaintiff would not have suffered the perforated sigmoid colon, and would not have endured the resultant additional open surgery, pain, infection, scarring, and extended hospital stays. As such, it is quite easy to say that, within a reasonable degree of medical certainty, that the unnecessary colonoscopy was a proximate cause of the injuries sustained by the plaintiff, Ms. Sinclair.”

Id., ¶ 25.

Here, Ms. Sinclair has raised a triable issue of fact as to whether Dr. Bortuzzo deviated from the acceptable standard of care by performing a second colonoscopy. She has not, however, raised triable factual issues as to whether Dr. Bortuzzo failed to properly treat and diagnose her on a whole since she first came under her care in January 2001. Indeed, Dr. Kortsen does not challenge Dr. Bortuzzo’s treatment and diagnosis aside from the second colonoscopy. Nor does he refute Dr. Bortuzzo’s evidence that it is her custom to advise her patients about the known side effects or establish that Ms. Sinclair would not have undergone the colonoscopy had she known about the associated risks. Accordingly, the only factual issue is whether the second colonoscopy was necessary.

Accordingly, it is

ORDERED that the motion for a summary judgment is DENIED solely with respect to the issue of the second colonoscopy's necessity, and GRANTED in all other respects.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

March 5, 2008

FILED
MAR 11 2008
CLERK OF COURT
COUNTY OF ALBANY OFFICE

ENTER



Hon. Eileen Bransten

HON. EILEEN BRANSTEN