

Jacaruso v Stein

2008 NY Slip Op 30772(U)

March 10, 2008

Supreme Court, Nassau County

Docket Number: 3940-99/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

RICHARD JACARUSO, as Administrator of
Goods, Chattels and Credits, of CARMELA
JACARUSO, deceased, and RICHARD
JACARUSO, individually,
Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY
Index No. 13940/99
Motion Sequence No. 010, 011

- against -

PETER D. STEIN, M.D., ORTHOPAEDIC
ASSOCIATES OF MANHASSET, P.C. and
NORTH SHORE UNIVERSITY HOSPITAL,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u>6</u>

The defendant North Shore University Hospital moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the plaintiffs' complaint and any and cross claims. The defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. cross move pursuant to CPLR 3212 for summary judgment and dismissing the complaint. The plaintiffs oppose the motion and cross motion. The underlying personal injury action arises from an alleged injury the plaintiff Carmela Jacaruso sustained when she fell in front of her home on August 2, 1997, and was later treated by various medical providers and facilities.

The attorney for the defendant North Shore University Hospital asserts, in a supporting affirmation dated August 2, 2007, argues in a supporting legal memorandum dated August 2, 2007, while pointing to the supporting affirmation dated August 2, 2007, by Peter Langan, M.D., an orthopedic surgeon, the complaint must be dismissed against this defendant because the decedent was the private patient of Dr. Stein, and any treatment decisions by him are not attributable to the defendant North Shore University Hospital. The attorney for the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. states, in a supporting affirmation dated August 8, 2007, the plaintiff's medical malpractice claims against these defendants are without merit, and are not casually related to the injuries allegedly suffered by the decedent. The attorney for the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. states the surgery by Dr. Stein, including the Hemovac drain was in accord with good and accepted medical practice, and did not cause osteomyelitis or deep infection in this patient, so there is no material issue of fact.

The plaintiffs' attorney points , in an opposing affirmation dated October 29, 2007, to the plaintiff's expert affirmation of merits in support of the plaintiff's opposition, referenced portions of the hospital records of North Shore University Hospital, Columbia Presbyterian Hospital, and Winthrop University Hospital, the plaintiffs' bill of particulars and other pleadings, and the deposition of Dr. Stein and referenced portions of the decedent's deposition. The plaintiffs' attorney contends the cross motion of the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C., *ab initio*, defective on its face because it is based solely on the affirmation of the submitting attorney without any expert affirmation submitted by the defendants in support of it. The plaintiffs' attorney avers the

motion of the defendant North Shore University Hospital, *ab initio*, as the defendant admits negligence *per se* by acknowledging, in the moving papers, an incident where the plaintiff ended up on the floor while in the care of hospital employees, and another circumstance where a hospital physician assisted during surgery which raise an issues of fact regarding the negligence claim. The plaintiffs' attorney refers to the pretrial testimony regarding the plaintiffs' claims, and argues the testimony tilts toward liability in favor of the plaintiff, or at the very least allows for a difference of opinion as to the medical significance of the defendant surgeon's decision to leave the retained drain within the decedent's anatomy rather than removing it. The plaintiffs' attorney contends the defense position as to the manner of the fall and the lack of subsequent complaint of injury is contradicted by the plaintiffs and the defendant surgeon's testimony. The plaintiffs' attorney notes the plaintiffs' testimony confirms the hospital incident, albeit in a different manner, and with a different level of supervision as asserted by the defendant North Shore University Hospital. The plaintiffs' attorney states the decedent attests to complaints of pain and discomfort in the knee following the fall incident which is different from the contentions of the hospital. The plaintiffs' attorney opines the sworn statements of the experts of the plaintiffs and defense conflict as to the appropriateness of the medical treatment provided to the patient, and there resides the questions of fact regarding medical malpractice and negligence which preclude dismissal.

The attorney for the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. states, in a reply affirmation dated November 13, 2007, these defendants rely upon the expert affirmation submitted on behalf of the defendant North Shore University Hospital in support of the cross motion for summary judgment. The attorney for the

defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. states the cross motion is not defective because that expert affirmation also supports the cross motion. The attorney for the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. contends the affirmation of the plaintiffs' expert is based upon surmise, conjecture and suspicion, and fails to establish material issues of sufficient import to create a triable issue of fact.

The attorney for the defendant North Shore University Hospital states, in a reply affirmation dated November 14, 2007, the only evidence offered in opposition to this defendant's motion is the expert affidavit of a physician specializing in infectious diseases which is insufficient to raise a triable issue of fact as to the treatment and care rendered by the defendant North Shore University Hospital. The attorney for the defendant North Shore University Hospital asserts no expert opinion is offered as to any claims of malpractice, including the initial surgery where the hospital's physician assisted, so the sworn statement of the plaintiff's expert fails to raise a triable issue of fact against this defendant, and dismissal of the claims against it are warranted. The attorney for the defendant North Shore University Hospital states the request for summary judgment can also permit a narrowing of the issues present for resolution at trial, even where the Court finds an expert sworn statement is sufficient to raise triable issues of fact on some claims. The attorney for the defendant North Shore University Hospital points out a close inspection of the sworn statement of the plaintiff's expert, who while licensed to practice medicine in New York State, is a consultant in infectious diseases, epidemiology, infection control and pharmaceuticals, so the sworn statement is insufficient, as a matter of law as to orthopedic standards of care. The attorney

for the defendant North Shore University Hospital notes, regarding the alleged left knee injury, the plaintiffs proffer no expert evidence to rebut the establishment of a *prima facie* entitlement to summary judgment by the defendant North Shore University Hospital since an affirmation by the plaintiffs' counsel is clearly insufficient as a matter of law. The attorney for the defendant North Shore University Hospital avers the defendant North Shore University Hospital has established, through hospital records and an expert affidavit, that the decedent did not suffer any trauma to the knees while admitted to the hospital, and points to the affidavit of Dr. Peter Langan, Physical Therapy Evaluation of Grace Plaza, Cardiac Consultation Report of August 3, 1997, and Care Coordinator Note of August 9, 1997 of North Shore University Hospital submitted with the moving papers. The attorney for the defendant North Shore University Hospital reports Dr. Langan specifically opines that any complaints referable to the knees were preexisting, and not the result of being lowered to the floor during an admission to North Shore University Hospital. The attorney for the defendant North Shore University Hospital also writes the decedent's orthopedist, Dr. Stein, found no evidence of injury after the incident which is highlighted by the plaintiffs' counsel focus on testimony by the doctor.

This Court has reviewed and considered all of the papers submitted by the parties with respect to the motion and cross motion. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied

if any party shall show facts sufficient to require a trial of any issue of fact.”

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, *quoting from Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). This Court finds there are no genuine issues of material fact with regard to the claims against the defendant North Shore University Hospital, but there are genuine issues of material fact with regard to the claims against the defendants Peter D. Stein, M.D. and Orthopedic Associates of Manhasset, P.C. which warrant a trial (*Andre v. Pomeroy*, 35 NY2d 361).

Accordingly, the motion by the defendant North Shore University Hospital is granted,

and cross motion by the defendants Peter D. Stein, M.D. and Orthopedic Associates of
Manhasset, P.C. is denied.

So ordered.

Dated: **March 10, 2008**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

HON. ANTONIO I. BRANDVEEN

ENTERED

MAR 13 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**