

**Stukas v Streiter**

2008 NY Slip Op 30909(U)

March 19, 2008

Supreme Court, Suffolk County

Docket Number: 0000204/2002

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 36 - SUFFOLK COUNTY

**PRESENT:**

Hon. PAUL J. BAISLEY, JR.  
Justice of the Supreme Court

MOTION DATE 12-6-07  
ADJ. DATE 1-31-08  
Mot. Seq. # 004 - MD

|   |   |                                     |
|---|---|-------------------------------------|
| -----X                                  |   |                                     |
| ROBERT STUKAS, as Administrator of the  | : | WEITZ, KLEINICK & WEITZ             |
| Estate of BARBARA STUKAS, deceased, and | : | Attorneys for Plaintiff             |
| ROBERT STUKAS, individually,            | : | 233 Broadway, 5 <sup>th</sup> Floor |
|   | : | New York, New York 10279-0003       |
|   | : |                                     |
| Plaintiffs,                             | : |                                     |
| - against -                             | : | FUREY, FUREY, LEVERAGE, MANZIONE,   |
|   | : | WILLIAMS & DARLINGTON, P.C.         |
|   | : | Attorneys for Defendants            |
| MICHAEL STREITER and HUNTINGTON         | : | 600 Front Street                    |
| HOSPITAL,                               | : | Hempstead, New York 11550           |
|   | : |                                     |
| Defendants.                             | : |                                     |
| -----X                                  |   |                                     |

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 22 - 24; Replying Affidavits and supporting papers 25 - 27; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is

**ORDERED** that this motion (004) by defendants, Michael Streiter, M.D. and Huntington Hospital, pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint, opposed by plaintiff, is denied.

The amended summons and amended verified complaint in this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of decedent Barbara Stukas, and causes of action derivatively on behalf of Robert Stukas, spouse of decedent, and for the wrongful death of plaintiff's decedent. This action was originally commenced by the filing of a summons and complaint on January 24, 2002, however, Barbara Stukas died on July 8, 2004, staying this action until Robert Stukas was appointed Administrator of the Estate of Barbara Stukas. Thereafter, the stay was lifted and the action restored to the court's calendar and an amended summons and complaint were served asserting the cause of action for the wrongful death of plaintiff's decedent. The cause of action for lack of informed consent was later withdrawn by stipulation dated April 12, 2007 and "So Ordered" by the undersigned.

The claims against Dr. Streiter and Huntington Hospital arise out of an alleged failure of ~~defendants to diagnose breast cancer on a CT scan of the decedent's chest that was interpreted by Dr.~~ Streiter on January 15, 2000, after plaintiff's decedent complained of a lump in her right axilla on June 21, 1999, which axillary lump was diagnosed by her treating physician Dr. Hearney. Plaintiff had a recent medical history of tuberculosis exposure and mitral valve replacement and was taking Coumadin at that time. The decedent did consent to treatment of the axillary lump with antibiotics, but initially refused a mammography.

The moving defendants allege there were no departures from the appropriate radiological standards of care and that plaintiff's decedent refused to have a mammography performed for a period of six months following discovery of the axillary lump and also refused excisional biopsy during that time. Defendants argue that when the CT scan was performed on January 15, 2000, it was properly and correctly interpreted by Dr. Streiter. They further argue that on February 1, 2000, a mammogram was performed at North Shore Medical Group and was interpreted as negative by non-party radiologist Dr. Elaine Marie Freiler, who recommended further screening in one year. By July 26, 2001, metastatic cancer to the bone had been diagnosed through MRIs of decedent's spine. Defendants further argue that additional mammography studies performed on July 26, 2001, conducted at BAB Radiology and interpreted by Dr. Michelle Multz, were read as negative even after comparing the same with the previous mammography films. CT scans of the chest, abdomen and pelvis were also conducted on that date and allegedly read as normal with no significant adenopathy. Thus the moving defendants seek an order granting summary judgment dismissing the complaint.

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*, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrius*, 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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

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 "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 [2nd Dept 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 [1979]).

In support of their motion (004), Dr. Streiter and Huntington Hospital have submitted, *inter alia*, an attorney's affirmation; the sworn affidavit of defendant's radiology expert, Solomon Spector, M.D.; copies of the pleadings, amended pleadings, answer, amended answer, verified bill of particulars and amended verified bill of particulars; copies of the transcripts of the examinations before trial of Barbara Stukas, Michael Streiter, M.D. and Robert Stukas; and copies of various medical records and reports. In opposing this motion, plaintiff has submitted an attorney's affirmation and a redacted copy of the affirmation of plaintiff's expert radiologist, with an unredacted copy under separate cover.

Dr. Solomon Spector, M.D., defendants' expert, avers he is a physician licensed to practice medicine in the State of New York and is board-certified in radiology and nuclear medicine. He states that based upon his review of the records set forth in his affidavit, it is his opinion within a reasonable degree of medical certainty that Dr. Streiter and the staff at Huntington Hospital complied with good and accepted standards of radiological medicine and did not depart from good and accepted standards of radiological medicine in the care and treatment of Barbara Stukas. It is Dr. Spector's further opinion that Dr. Streiter's interpretation of plaintiff's January 15, 2000 CT scan of the chest was proper and not the proximate cause of plaintiff's injuries.

Dr. Spector sets forth that Dr. Hearney gave Ms. Stukas a referral slip which reflected she had a history of mitral valve repair, an axillary lymph node and increased LDH, and which requested that the radiologist rule out lymph nodes at the aorta. He states that based upon the information provided in Dr. Hearney's referral slip, Dr. Streiter reviewed the films, noting special reference to lymph nodes adjacent to the aorta within the mediastinum, thus guiding the attending physician for further diagnostic work up.

It is Dr. Spector's opinion that the CT scan of the chest interpreted by Dr. Streiter was properly read and the settings (window widths and levels) and views depicted on these films were also appropriate. He further opines there is no evidence of breast cancer or any cancer on these films. He further states that the appropriate test for detecting breast cancer is not a CT scan of the chest, but rather mammography, which plaintiff coincidentally underwent two weeks later at North Shore Medical Group on February 1, 2000, and which films were read by a non-party radiologist as negative for malignancy. Dr. Spector further states that Dr. Streiter appropriately noted both positive and negative findings on the CT scans of January 15, 2000 and noted that there were no significantly enlarged mediastinal lymph nodes and that there were small nodes measuring 1 cm or less; that there were "non-specific" small lymph nodes identified in the right axilla, all measuring less than 1 cm in diameter. He further states that the term "non-specific" means the radiologist cannot determine from the films the precise etiology, if any, that could be ascribed to nodes depicted in the films. Dr. Spector further states that the findings of non-specific lymph nodes in the right axilla confirms the findings of the attending physician as evidenced by the information Dr. Hearney indicated on his referral slip, and that the impression of a negative CT scan of the chest, which was a correct reading of these films, did not merit further

radiological recommendations at that time, and accordingly, the attending physician had been correctly and appropriately advised that there was radiographic confirmation of his physical exam. It is also Dr. Spector's opinion within a reasonable degree of medical certainty that the field of view reflected in plaintiff's January 15, 2000 CT scan of the chest was adequate and appropriate as plaintiff's entire lung fields and right and left axillae are noted in these films, and that the findings were timely conveyed to Dr. Hearney.

Based upon the foregoing, it is determined that defendants Dr. Streiter and Huntington Hospital have demonstrated *prima facie* entitlement to summary judgment.

To rebut a *prima facie* showing of entitlement to summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat the summary judgment motion made by defendant physician (*Fileccia v Massapequa Gen. Hosp.* 63 NY2d 639, 479 NYS2d 520 [1978]); *Alvarez v Prospect Hosp.* 68 NY2d 320, 508 NYS2d 923 [1986]); *Bustamonte v Koval*, 98 AD2d 739, 469 NYS2d 441 [2nd Dept 1983]).

In opposing this motion, plaintiff has submitted the affirmation of their expert who is licensed to practice medicine in the State of New York and who is a board certified radiologist.<sup>1</sup> Based upon review of plaintiff's expert radiologist's report, it is determined that there are factual issues raised by plaintiff which preclude summary judgment to defendants.

Plaintiff's expert states that it is his opinion within a reasonable degree of medical certainty that defendant Dr. Streiter departed from good and accepted standards of radiological practice and that these departures are the proximate cause and direct cause of the delay in the diagnosis of Barbara Stukas's breast cancer. Plaintiff's expert supports this premise by stating he reviewed the CT scan performed on January 15, 2000, and the report authored by Dr. Streiter and transcribed January 17, 2000, reporting the results of the scan as a negative scan of the chest, and that Dr. Streiter's findings are incorrect. Plaintiff's expert states that a review and correct reading of the films should have included the finding of a noticeably larger than one centimeter node on images #18 and #19. Plaintiff's expert states that a lymph node greater than one centimeter is significant and must be reported by the radiologist. He further states that most importantly there is a mass on images #37 and #38, and that this mass appears different in character than the other breast tissue and does not correlate with symmetrical findings on the other side.

Plaintiff's expert opines that a patient who presents for a CT scan of the chest with a history of axillary lymph nodes must have his or her film evaluated for the possibility of breast tissue masses. He

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<sup>1</sup>The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

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states that Dr. Streiter's report mistakenly states that all of the nodes measured less than one centimeter and there is no evidence of a mass. Plaintiff's expert further states with a reasonable degree of medical certainty that defendant Michael Streiter departed from good and accepted radiological practice when he incorrectly reported that the January 15, 2000 chest CT scan of Barbara Stukas did not find any masses, did not find any nodes greater than one centimeter and that it was a negative CT scan of the chest.

Based upon the foregoing, plaintiff has demonstrated factual issues which preclude summary judgment on the issue of whether defendants departed from good and accepted standards of radiological care in interpreting the CT scan films of January 15, 2000. In eight of the foregoing factual issues, the court does not reach the issue of proximate cause.

Accordingly, the motion (004) by Dr. Streiter and Huntington Hospital for summary judgment dismissing the complaint is denied.

Dated: March 19, 2008

HON. PAUL J. RAISLEY, JR.  
J.S.C.

         FINAL DISPOSITION   X   NON-FINAL DISPOSITION