

Hakanson v Hantverk

2008 NY Slip Op 32480(U)

August 28, 2008

Supreme Court, Nassau County

Docket Number: 2906-06/

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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DONNA HAKANSON, as Administratrix of
the Estate of EDWARD HAKANSON, Deceased, and
DONNA HAKANSON, Individually

Plaintiffs,

-against-

JED HANTVERK, M.D., TOUFIC SAFA, M.D., ANA
KALASH, M.D., DAVID GERBER, D.O., NORTH
SHORE UNIVERSITY HOSPITAL AT SYOSSET, and
SALISBURY MEDICAL PRACTICE, P.C.

Defendants.
-----x

TRIAL PART: 21

NASSAU COUNTY

INDEX NO: 2906/06

MOTION SEQ. NO:
11,12,13

SUBMIT DATE: 7/22/08

The following papers having been read on this motion:

Notice of Motions 1,2,3
Opposition 4
Reply..... 5,6,7

The motion by defendants Joel Hantverk, M.D. ("Dr. Hantverk"), David Gerber ("Dr. Gerber") and Salisbury Medical Practice ("Salisbury") and the cross-motion by co-defendant Ana Kalash, M.D. ("Dr. Kalash") and North American Partners in Anesthesia, LLP ("North American") and the cross-motion of Toufic Safa, M.D. ("Dr. Safa") and North Shore University Hospital at Syosset ("North Shore") are decided as hereinafter indicated.

Plaintiff commenced this action for medical malpractice on February 17, 2006. Plaintiff contends the various defendants failed to properly diagnose and test for myocardial sarcoidosis. Decedent, at age 52, died of sudden cardiac arrest on April 16, 2004.

Decedent first visited defendant Dr. Hartverk for treatment of varicose veins on June 3,

2002. Decedent returned to see Dr. Hantverk on January 13, 2004 complaining of profuse bleeding of his varicose veins. On February 9, 2004, decedent saw Dr. Safa for a consult on decedent's varicose vein issue only. Decedent did not see Dr. Safa again.

On March 8, 2004, decedent saw Dr. Hantverk to obtain a medical clearance for a hernia repair operation. Dr. Hantverk performed an EEG that showed a right bundle branch block and sinus arrhythmia or a slight fluctuation of the heart rhythm, i.e., an irregular heart beat (characterized as slight by Dr. Hantverk). Dr. Hantverk told decedent to obtain an echocardiogram but decedent never obtained one.

Decedent saw Dr. Kalash, an anesthesiologist, in March, 2004, as part of his hernia operation team. Decedent saw Dr. Gerber (as a member of the Salisbury Medical Practice) on April 8, 2004 to obtain relief of flu-like symptoms. Dr. Gerber treated the flu symptoms with antibiotics and told decedent to obtain an echocardiogram. Decedent did not do so. Decedent, age 52 years, died on April 16, 2004, of myocardial sarcoidosis.

Plaintiff's expert contends that Dr. Hantverk mis-diagnosed decedent's condition from the first visit on June 3, 2002, approximately three and one half years before this action was commenced, and that Dr. Hantverk failed to work up decedent's symptoms thereby deviating from accepted medical practice.

Defendants allege that decedent's condition, myocardial sarcoidosis, is a condition that is very difficult to diagnose and it is usually diagnosed at an autopsy of the sufferer. Their experts allege that the care of the defendant doctors was within the good and accepted standards of medical care for the decedent at every step of their medical care of the decedent.

Here, the expert affidavits submitted by defendants in support of their motions and cross-motions for summary judgment established a *prima facie* case that their respective treatment of the decedent was not negligent (Hantverk/Gerber/Salisbury Notice of Motion, Affidavit of Dr. Monty Budenheimer; Kalash/North American Notice of Motion, Exhibit B; Safa/North Shore Notice of Motion, Exhibit H).

The submissions by defendants of medical affidavits in support of their motions and cross motions satisfied the requirement that they make a *prima facie* showing sufficient to warrant judgment in their favor as a matter of law. The burden then shifted to the plaintiff to lay bare their proof and demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d

320; *Winegrad v New York University Medical Center*, 64 NY2d 851).

The plaintiffs have met this burden by submitting an affidavit from their medical expert which raised questions of fact with respect to the defendants' alleged failure to properly diagnose decedent's condition. Plaintiff has submitted a 36-page expert affidavit (Plaintiff's affirmation in opposition, Exhibit K) stating that all the defendants departed from acceptable standards of medical care to the decedent. Contrary to the defendants' contention, the affidavit of the plaintiffs' expert did not contain mere general allegations, but stated specific findings and conditions tending to establish the essential elements of medical malpractice (*Alvarez v Prospect Hospital, supra; Fileccia v Massapequa General Hospital*, 63 NY2d 639; *Roca v Perel*, 51 AD3d 757).

Where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered; such familiarization may be had by relevant literature in the area under discussion (*see Mustello v Berg*, 44 AD3d 1018). Here, the plaintiff's expert affidavit (Affidavit In Opposition, Exhibit K) demonstrates the plaintiff's expert has the requisite knowledge to render a reliable opinion (*see Postlethwaite v United Health Services Hospitals*, 5 AD3d 892), i.e., the plaintiff's expert can raise viable issues of fact as to the treatment of the decedent by the various defendants herein.

As to the first visit to Dr. Hantverk in June, 2002, the record herein indicates decedent was treated for a separate and distinct condition—varicose veins—and there is no indication that decedent complained of or was treated for any symptoms related to the condition in the plaintiff's complaint of myocardial sarcoidosis. (*Boyle v Fox, supra; see also Young v New York City Health & Hospitals Corp.*, 91 NY2d 291). Since the first visit was on June 3, 2002, decedent's next visit was January 13, 2004 and this proceeding was commenced on February 17, 2006, the action as it regards the June 3, 2002 visit must be stricken since there is no indication of continuous treatment by the medical history set forth herein.

Under the continuous treatment doctrine, the time in which to bring a medical malpractice action (two and a half years under CPLR 215-a) is stayed where the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint (*Boyle v Fox*, 51 AD3d 1243). While the continuous treatment doctrine which tolls the statute of limitations for a medical malpractice action includes a timely return visit initiated by the patient to complain about and seek treatment for a matter related to the initial treatment,

neither a general physician/patient relationship, routine examinations nor visits concerning matters unrelated to the condition giving rise to the malpractice claim are sufficient to invoke the benefit of the doctrine (*see Boyle v Fox, supra*).

Summary judgment is not appropriate in a medical malpractice action in which the parties address conflicting medical expert opinions; such credibility issues can only be resolved by a trier of the facts (*Roca v Perel, supra*).

The credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which should be rejected, the truthfulness and accuracy of testimony, whether contradictory or not, are issues for the trier of fact (*Lelekakis v Kamamis*, 41 AD3d 662).

The status of North Shore University Hospital at Syosset as an employer of the various defendant physicians, especially Dr. Safa, is not clear. A hospital may not be held vicariously liable for the acts of a doctor who is affiliated with, or granted admitting privileges by, the hospital and maintains a private practice (*see Woodard v LaGuardia Hospital*, 282 AD2d 529) in the absence of an employment relationship or other circumstances demonstrating a relationship of control over the doctor by the hospital (*see Raschel v Rish*, 69 NY2d 694). Dr. Safa apparently is employed by North Shore University Hospital at Manhasset, a non-party, and not by North Shore University Hospital at Syosset, a party herein (Safa/North Shore's Affirmation in Reply, Exhibit B,). However, the relationship between North Shore University at Manhasset and North Shore University at Syosset as to whether or not they are one and the same entity is an issue of fact herein preventing North Shore University at Syosset from being dismissed from the action.

As to the cause of action against Dr. Safa and North Shore for their alleged failure to obtain the decedent's informed consent, their request to dismiss same is granted as unopposed by plaintiff. Also, as noted by Dr. Safa and North Shore, it is not disputed that Dr. Safa only did a consultation with decedent, not an invasive procedure. Thus, Dr. Safa did not violate decedent's "physical integrity" as defined under Public Health Law § 2805-d and there was no "informed consent" needed.

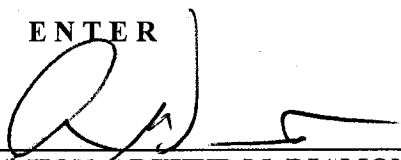
Accordingly, the summary judgment motion pursuant to CPLR §3212 to dismiss any and all claims pertaining to decedent's visit to the office of Salisbury Medical Practice on June 3, 2002 is

granted. The remaining summary judgment motion pursuant to CPLR §3212 and motion to dismiss pursuant to CPLR §3211 by Drs. Hantverk and Gerber and Salisbury and the cross-motion for summary judgment by Dr. Kalash and North American are denied. The cross-motion for summary judgment by Dr. Safa and North Shore is granted only to the extent that the cause of action for failure to obtain decedent's informed consent is dismissed as indicated above. The cross-motion is denied in all other respects.

This constitutes the decision and order of this Court.

DATED: August 28, 2008

ENTER


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