

Amato v Silich

2008 NY Slip Op 32736(U)

September 26, 2008

Supreme Court, Richmond County

Docket Number: 104757/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.104757/07
Motion No.:002,003**

ROCHELLE AMATO,

Plaintiff

against

**ROBERT J. SILICH, M.D.,
ROBERT J. SILICH, M.D., P.C.,
DIANE SILICH, R.N., and
STATEN ISLAND UNIVERSITY HOSPITAL,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3
Replying Affidavits	4,5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants' motions to dismiss are granted to the extent that they seek to dismiss the plaintiff's fourth cause of action against Robert J. Silich, M.D. ("Dr. Silich"), Robert J. Silich, M.D., P.C., ("the P.C.") and Diane Silich, R.N. ("Nurse Silich").

Facts

The underlying action concerns claims of medical malpractice by the plaintiff against the defendants. In sum and substance, the plaintiff alleges that Dr. Silich engaged in a course of treatment designed not with her best interest in mind, but rather the most lucrative for himself. Among other things, the plaintiff alleges that Dr. Silich knowingly disregarded the plaintiff's medical history of being prone to the production of large amounts of serous fluid after surgery. The plaintiff alleges that Dr. Silich knowingly chose a course of post-operative care that involved repeated office visits for aspirations rather than inserting a drain thereby exposing her to a greater

risk of infection. With respect to the defendant Nurse Silich the plaintiff alleges that she, deliberately falsified entries into the plaintiff's medical chart. Additionally, the plaintiff alleges that Staten Island University Hospital ("SIUH") failed to properly vet Dr. Silich's credentials prior to appointing him to positions within the hospital or otherwise supervise him in the treatment of patients.

The defendants move for an order dismissing the plaintiff's complaint in as much as it seeks punitive damages. Robert J. Silich, M.D. as well as Robert J. Silich, M.D., P.C. also move to strike the plaintiff's fourth cause of action alleged in her complaint. The defendants make their motion prior to any discovery being conducted in this action.

Discussion

Plaintiff's claim of abandonment

The plaintiff raises a claim for abandonment against Dr. Silich, the P.C. and Nurse Silich. Counsel for Dr. Silich and the P.C. argue that the plaintiff failed to establish a prima facie case of abandonment; and in the alternative that the a cause of action for abandonment is barred by the statute of limitations.

The Appellate Division, First Department confronted a similar issue where a plaintiff brought a case alleging acts of medical malpractice along with abandonment found that the abandonment claim is subsumed into the malpractice claim. The court held:

[i]t is well established that a doctor who undertakes to examine and treat a patient (thus creating a doctor-patient relationship) and then abandons the patient may be held liable for medical malpractice. . .

(internal citations omitted)¹

Here the plaintiff's allegation of abandonment is within the context of an overall claim of medical malpractice. As such, this court dismisses the plaintiff's fourth cause of action against Dr. Silich and the P.C. as duplicative of her medical malpractice claim.

Plaintiff's claims for punitive damages

Dr. Silich, the P.C. and SIUH move this court for an order dismissing the plaintiff's claims for punitive damages prior to the parties engaging in any discovery. Instead, the moving defendants rely on case law that indicate that it is very rare for a court to sustain a finding of punitive damages in a malpractice action. The moving defendant each cite cases that hold that punitive damages are available in a narrow set of circumstances where the actions of the defendants are beyond mere negligence and will vindicate a public right.²

Where a defendant brings a motion to dismiss a complaint, or portions of a complaint for failure to state a cause of action, the non-moving party is entitled to every favorable inference.³ In support of their motions, the defendants cite various cases where courts struck the plaintiff's demand for punitive damages. While the defendants are correct that the courts in the cases they cited either, did not sustain a finding of punitive damages, or struck a demand for punitive damages a substantial record existed to ground the court's decision.⁴

¹ *Lewis v. Capalbo*, 280 AD2d 257 [1st Dep't 2001].

² *See, McDougald v. Garber*, 73 NY2d 246, (1989); *Spinosa v. Weinstein*, 168 AD2d 32 (2d Dep't 1991).

³ *See, Villarín v. Onobanjo*, 276 AD2d 479 [2d Dep't, 2000]. To determine a motion to dismiss a complaint for failure to state a cause of action, the court must accept the allegations therein as true, and must give them the benefit of every favorable inference. The motion is not dependent on the resolution of factual determinations to be made by a jury.

⁴ *See, Sultan v. Kings Highway Hosp. Ctr.*, 167 AD2d 534 [2d Dep't 1990] (The Appellate Division, upheld a trial court's holding that based on allegations and deposition

In light of the fact that neither defendant came forward with any evidence to rebut the presumption that the plaintiff is entitled to on a motion to dismiss. As such the court cannot conclude that punitive damages are improper as a matter of law. The parties would be well served to submit to the discovery process to flesh out this issue.

Conclusion

Based on the scant record before the court the defendants motions to strike the plaintiff's demand for punitive damages are denied. However, this court agrees with counsel for Dr. Silich and the P.C. that the fourth cause of action is duplicative of the plaintiff's claim for medical malpractice. As such, the plaintiff's fourth cause of action against Dr. Silich and the P.C. is struck.

Accordingly, it is hereby:

ORDERED, that the branch of defendants Dr. Silich and the P.C.'s motion seeking to strike the plaintiff's fourth cause of action contained in her complaint against them is granted and said cause of action is hereby struck as to those defendants; it is further

ORDERED, that the portion of the defendants' motion seeking to strike the plaintiff's demand for punitive damages is denied; and it further

testimony issues of fact existed as to punitive damages); *See, Luby v. St. John's Episcopal Hosp.*, 220 AD2d 390 [2d Dep't 1995](The Appellate Division, examined the record to conclude that the defendants actions did not warrant an award of punitive damages.); *See, Jones v. Hospital for Joint Diseases & Med. Ctr.*, 96 AD2d 498 [1st Dep't 1983], (The Appellate Division, overturned a finding of punitive damages after a review of the trial record revealed that such a finding was not warranted.).

ORDERED, that the parties are to return to DCM Part 3 on Tuesday, October 14, 2008 at 9:30 A.M. for a Preliminary Conference.

ENTER,

DATED: September 26, 2008

Joseph J. Maltese
Justice of the Supreme Court