

Forte v Sisters of Charity Med. Ctr.

2008 NY Slip Op 33202(U)

December 1, 2008

Supreme Court, Richmond County

Docket Number: 10989/2003

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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**VICTOR FORTE, an infant by his Mother and Natural
Guardian, JEAN FORTE and JEAN FORTE, Individually,**

DCM PART 5

Plaintiff(s),

**Present:
HON. JUDITH N. McMAHON**

- against-

DECISION AND ORDER

**SISTERS OF CHARITY MEDICAL CENTER, ST.
VINCENT’S CAMPUS, BURTON BANNER, M.D.,
JAMES Y. CHO, M.D., LIEZL VILLA VERDE, M.D.,
PATRICK DERESPINAS, M.D., REGINA DeCARLO,
M.D., ALAN MASIZ, M.D., ROBERT LEGGIADRO,
M.D., MIRIAM MANDELL, M.D., TIMOTHY FOSTER
M.D., and ZAHRA MARINA, M.D.,**

**Index No. 10989/2003
Motions Nos.
005, 006, 007, 008, 009**

Defendant(s).

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The following papers numbered 1 to 13 were used on this motion this 21st day of October, 2008.

[005]Notice of Motion [Dr. Villa Verde] (Affirmation in Support) -----	1
[006]Notice of Motion [Dr. DeCarlo] (Affirmation in Support) -----	2
[007]Notice of Motion [Dr. DeRespinas](Affirmation in Support) -----	3
[008]Notice of Motion [Sisters of Charity](Affirmation in Support) -----	4
[009]Notice of Motion [Dr. Banner](Affirmation in Support) -----	5
Affirmation in Opposition to Dr. Villa Verde [Plaintiff] -----	6
Affirmation in Opposition to Dr. DeCarlo [Plaintiff] -----	7
Affirmation in Opposition to Sister of Charity [Plaintiff] -----	8
Affirmation in Opposition to Dr. Banner [Plaintiff] -----	9
Reply Affirmation [Dr. Villa Verde] -----	10
Reply Affirmation [Dr. DeCarlo] -----	11
Reply Affirmation [Sisters of Charity] -----	12
Reply Affirmation [Dr. Banner] -----	13

This action for medical malpractice was commenced on or about September 30, 2002.

The plaintiff alleges that the defendant’s failed to timely treat and diagnose plaintiff’s condition which caused plaintiff to suffer pain and a temporary loss of vision.

It is undisputed that during the summer of 2000 the plaintiff began to experience upper respiratory symptoms and was admitted to St. Vincent’s hospital several times and diagnosed with borderline pneumonia. Defendant Dr. Burton Banner treated the plaintiff as his private

pediatrician since 1990. After seeing the infant plaintiff in June 2000, with respiratory complaints, Dr. Banner directed him to St. Vincents Hospital. Dr. Banner then requested an evaluation by Dr. Regina DeCarlo, the private attending pediatric neurologist. Several tests, including CT Scans, chest x-rays and blood work were performed and plaintiff was diagnosed with meningitis and treated with antibiotics. The plaintiff was subsequently released and readmitted with similar complaints and diagnosed by Drs. Banner, DeCarlo and Dr. Robert Leggiadro, a specialist in infectious diseases, with viral meningitis. Dr. Marina, as an employee of St. Vincent's, only was involved in plaintiff's care as a pediatric resident under the supervision of Dr. Banner. Dr. Marina prepared a consultation sheet for the plaintiff and was limited in her care rendered to the infant plaintiff.

The plaintiff was then released and began treating with a new pediatrician Dr. Liezl Villa Verde. Dr. Villa Verde first saw the plaintiff on July 18, 2000, with complaints of headaches, photophobia and neck rigidity. Dr. Villa Verde recommended admission to St. Vincents but the infant plaintiff's mother allegedly refused. The plaintiff then went to Dr. DeCarlo's office the next day. The infant plaintiff was readmitted to St. Vincents, was diagnosed with acute disseminated encephalomyelitis (ADEM) and treated with steroids. The patient began to improve and was discharged on or about August 4, 2000.

The plaintiff required readmission, a fourth time, to St. Vincents on August 8, 2000, when he exhibited symptoms such as dehydration, pain behind his left eye, and an ear infection. Dr. Villa Verde conferred with Dr. Leggiandro and Dr. DeRespinas, who performed an ophthalmologic exam on August 10, 2000, to address plaintiff's complaint of pain behind his left eye. The plaintiff was ultimately diagnosed with ADEM and Devic Syndrome and was

treated accordingly. The infant plaintiff's MRI eight months after the treatment showed marked improvement and almost complete resolution of the symptoms.

The plaintiff thereafter commenced this action on or about September 30, 2002, and issue was joined thereafter. At present, discovery is complete and defendants Dr. Villa Verde, Dr. DeCarlo, Dr. DeRespinas¹, and Dr. Banner are all separately moving for summary judgment on the ground that they did not deviate from accepted medical practice in their treatment rendered to the plaintiff. Additionally, Sisters of Charity Medical Center, St. Vincent's Campus [hereinafter "St. Vincents"] and Dr. Zahra Marina are also moving for summary judgment on the ground that they are not liable for the acts of private attending physicians and did not deviate from accepted medical practice.

It is well settled that a "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 demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and "must deny the motion if there is even arguably any doubt as to the existence of a triable issue" (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting

¹The Court notes that the plaintiff does not oppose Dr. DeRespinas' motion for summary judgment and as such, Dr. DeRespinas' motion will be granted.

Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

Further, in a medical malpractice action, “[o]n a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby” (Rebozo v. Wilen, 41 AD3d 457, 458-59 [2d Dept., 2007]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]; Geller v. Walbaum, 33 AD3d 855, 855-56 [2d Dept., 2006]). “In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury” (Rebozo v. Wilen, 41 AD3d at 458-59; Rosenman v. Shrestha, 48 AD3d 781, 783 [2d Dept., 2008]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]).

Here, all the defendants who moved for summary judgment successfully established their prima facie entitlement to summary judgment by adducing expert opinion that they did not deviate from good and accepted medical practice in their treatment rendered to the infant plaintiff (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 325 [1986]; Rebozo v. Wilen, 41 AD3d 457, 458-59 [2d Dept., 2007]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]; Geller v. Walbaum, 33 AD3d 855, 855-56 [2d Dept., 2006]). Drs. Villa Verde, DeCarlo, Marina and St. Vincent's provided the expert affirmation of Dr. Yitzchak Frank who opined that the doctors and hospital did not deviate in their respective treatment rendered to the infant plaintiff. Further, Dr. Banner provided the expert affirmation of Dr. Michael S. Helter who also opined that Dr. Banner did not deviate from accepted medical

practice in his treatment rendered to the plaintiff. Both experts opined that all defendant doctors and the hospital completed extensive evaluations of the infant plaintiffs symptoms and rendered treatment accordingly.

In opposition, the plaintiff has failed to raise a triable issue of fact (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The plaintiff has failed to offer any expert affirmation regarding the alleged causation or deviations by the defendant doctors/hospital and the offering of the plaintiff's attorneys affirmation is insufficient to rebut medical expert testimony and is only conclusory assertions and mere speculation (Collins v. Jamaica Hospital, 195 AD2d 534, 534 [2d Dept., 1993][finding "plaintiff's submission of only her attorney's affirmation was insufficient to rebut the appellants' showing and to demonstrate the existence of a triable issue of fact"]; Dodes v. North Shore Univer. Hosp., 149 AD2d 455, 455 [2d Dept., 1989]; Micciola v. Sacchi, 36 AD3d 869, 871 [2d Dept. 2007][finding that conclusory or unsupported expert opinions are insufficient to raise triable issues of fact]). Therefore, the motions by defendant doctors and hospital for summary judgment must be granted.

Accordingly, it is,

ORDERED that the defendant Dr. Liezl Villa Verde's motion for summary judgment is hereby granted, and it is further,

ORDERED that the defendant Dr. Regina DeCarlo's motion for summary judgment is hereby granted, and it is further

ORDERED that the defendant Dr. Patrick DeRespinas' motion for summary judgment is hereby granted, and it is further

ORDERED that the defendant Sisters of Charity Medical Center, St. Vincent's Campus and Dr. Zahra Marina's motion for summary judgment is hereby granted, and it is further

ORDERED that the defendant Dr. Burton Banner's motion for summary judgment is hereby granted, and it is further

ORDERED that the complaint is dismissed against defendants Dr. Villa Verde, Dr. DeCarlo, Dr. DeRespinas, Sisters of Charity Medical Center, ST. Vincent's Campus, Dr. Marina and Dr. Banner **ONLY**, and it is further

ORDERED that the Clerk enter judgment accordingly

THIS IS THE DECISION AND ORDER OF THE COURT.

E N T E R,

Dated: December 1, 2008

**Hon. Judith N. McMahon
Justice of the Supreme Court**