

Lucia v Kelly

2008 NY Slip Op 33531(U)

November 25, 2008

Supreme Court, Suffolk County

Docket Number: 04-21649

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 8/28/08
ADJ. DATE 9/18/08
Mot. Seq. # 003 - MD

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10 - 11; Replying Affidavits and supporting papers 12 - 13; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Max April, M.D. for summary judgment dismissing all claims against him and amending the caption to reflect that he is not a party herein, is denied.

This is an action to recover damages for the alleged malpractice of the defendants in rendering medical treatment to the plaintiff who appears to have had a Chiari malformation with a nasopharyngeal sinus tract. The complaint alleges that from October 12, 1995 until May 27, 1997, the defendants negligently rendered medical care causing the plaintiff to suffer severe and irreparable injuries. The complaint also alleges that the plaintiff was never advised of the possible risks and dangers or the possibility of permanent damage resulting from the care being rendered, and that had she been fully informed, she would not have consented to such treatment. Specifically, as to defendant Dr. April, the plaintiff's bill of particulars alleges, *inter alia*, that: he failed to timely and properly recognize the significance of, determine the etiology of, and act upon the plaintiff's complaints of nausea, weight loss, and vomiting; he failed to timely refer her to a neurologist; he failed to timely and properly formulate an appropriate differential diagnosis; he mis-diagnosed the plaintiff's true condition; he failed to timely and properly order appropriate blood testing, CT scans, MRIs, and x-rays; he performed transpalatal sinus repair surgery in a negligent manner; he negligently severed a nerve in the plaintiff's palate; he failed to timely diagnose the presence of a cerebrospinal fluid leak; and he failed to render appropriate preoperative, operative, and postoperative care and treatment.

Defendant Dr. April now moves for summary judgment dismissing all claims against him. In support thereof, he submits his own affidavit, his attorney's affidavit, a copy of the pleadings and verified bill of particulars, and two operative reports from University Hospital at Stony Brook. Dr. April provides the court with his educational background and medical experience, and states that he became a Diplomate of the American Board of Otolaryngology¹ on October 2, 1990, and thus offers his opinion as an expert in this field. To prepare his affidavit, Dr. April alleges that he reviewed the two operative reports, one dictated by Michael Egnor, M.D., a neurosurgeon, and one prepared by John Kelly, M.D., a surgeon, which concern the plaintiff's surgeries on February 19, 1996. Dr. April states that he was asked by Dr. Egnor to perform an endoscopy on the plaintiff prior to the surgeries which Dr. Egnor and Dr. Kelly intended to perform. Dr. April further explains that the plaintiff presented with a Chiari malformation, which is a congenital malformation characterized by a small or misshapen posterior fossa (a compartment in the back of the skull), a reduction in cerebrospinal fluid pathways, and a protrusion of the cerebellar tonsils through the bottom of the skull into the spinal canal. He alleges that the plaintiff had recurrent meningitis episodes. In addition, alleges Dr. April, the plaintiff had a suspected nasopharyngeal sinus tract, which is the condition he was asked to evaluate endoscopically, to see if there was an internal opening with cerebrospinal fluid leakage, and which he alleges, he did. Dr. April asserts that his sole function, which was done at the request of Dr. Egnor, was to preoperatively, by way of an endoscope, localize the orifice of the sinus tract, so that the surgical teams could better treat this patient. Dr. April claims that he did this and he left the operating room. He maintains that he was not involved with the plaintiff's care again until she came to see him at his office on two occasions.

¹Dr. April explains that otolaryngology is the branch of medicine that specializes in the diagnosis and treatment of ear, nose, throat, and head and neck disorders.

Dr. April continues that the plaintiff was subsequently seen by him on August 6, 1996, six months after the two procedures were done on February 19, 1996, by Dr. Egnor and Dr. Kelly. He alleges that he obtained a history of what happened since the repair of the "CSF" leak, i.e., a brain abscess, posterior fusion and a possible re-leak. He also alleges that he noted the plaintiff was just starting "PT" and he discussed speech therapy with her. Dr. April claims that on physical examination: her ears were absolutely normal; there was no fluid seen leaking in the oral cavity or in her Eustachian tube; and the palate did not move well. Dr. April states that he recommended aggressive speech therapy.

Additionally, Dr. April alleges that the plaintiff was seen once again by him on August 12, 1998, two years later. He alleges that the plaintiff came to him for a second opinion concerning palatal repair. Dr. April states that significant findings included hypernasality and a cleft in her palate, which had some mobility. He alleges that since he does not perform palatoplasties, he could not give the plaintiff an opinion in that regard.

Dr. April concludes that his performance of the endoscopy, at the request of the surgeon, was appropriate and it was done correctly to localize the orifice of the sinus tract. He alleges to the effect that, such action was the only thing that was requested of him during the plaintiff's hospitalization. He maintains that, in short, he was asked to perform an endoscopy, which he did. He argues that his involvement in the plaintiff's care was limited to that task, and he did that task correctly. Dr. April alleges that although the plaintiff may claim that discovery has not been completed, such excuse is unavailing, because all the plaintiff needs is the hospital record at issue, which she has presumably obtained. Dr. April requests that, therefore, the complaint against him be dismissed and his name be deleted from the caption.

The plaintiff opposes Dr. April's motion. She argues that the conclusory and less than enlightening affidavit of Dr. April and the two operative reports are unquestionably insufficient to meet the defendant's burden. She contends that Dr. April has not addressed all of the allegations set forth in her bill of particulars, and that he has not addressed the issues of damages and causation. The plaintiff claims that even if Dr. April's assertion that he only performed an endoscopy were assumed as true, Dr. April has not submitted anything that documents what his findings were at the endoscopy, or anything that documents the facts and circumstances surrounding how the procedure was done. The plaintiff contends that other than saying he performed an endoscopy and left the room, Dr. April is silent on the facts and circumstances surrounding his involvement, observations, and opinions.

Additionally, the plaintiff maintains that the operative report dictated by Dr. Egnor lists Dr. April as one of the operating physicians. She claims that although this report does identify Dr. April as the individual who performed an endoscopy prior to the procedure, it does not report that Dr. April's involvement ended at that point. The plaintiff argues that this report raises questions of fact as to Dr. April's involvement and calls into question whether Dr. April simply preformed a preoperative endoscopy. The plaintiff asserts that, similarly, the operative report of Dr. Kelly raises questions. The plaintiff points to the sentence in Dr. Kelly's report which states, "The patient is brought to the operating room for repair of this sinus tract by the ENT and neurosurgical teams." She claims that this sentence obviously refers to Dr. April, the only ENT referred to in the operative reports, and it raises questions as to the extent of Dr. April's involvement.

As to the plaintiff's subsequent office visits to Dr. April, the plaintiff alleges that Dr. April's affidavit does nothing more than selectively summarize certain facts about his findings and then fails to address the significance of any of this information. With respect to these postoperative visits, plaintiff alleges to the effect that Dr. April does not explain how, why, or even if, he comported these visits with a proper standard of care.

Lastly, the plaintiff argues that Dr. April's motion is premature given that discovery in this case is at the earliest stages. The plaintiff alleges that no depositions have been conducted. She contends that she should have the opportunity to explore the care and treatment rendered by Dr. April and his relationship with the other defendants.

The elements of proof in an action to recover damages for medical malpractice are deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [1998], *lv denied* 92 NY2d 814). To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2002]). With regard to a defendant physician submitting his own affidavit in support of a summary judgment motion, "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assocs. P.C.*, 280 AD2d 754, 755, 720 NYS2d 229, 231 [2001] [citations omitted]; *see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 690 NYS2d 762 [1999]).

In this case, Dr. April's affidavit is wholly conclusory and he has failed to meet his initial burden of showing an absence of medical malpractice (*Santiago v Filstein*, 35 AD3d 184, 826 NYS2d 216 [2006]; *see also, Cicolello v Limb*, 216 AD2d 434, 628 NYS2d 369 [1995]). Dr. April simply asserts that the only thing he did was an endoscopy and that he did it correctly. Initially, the court notes that there is nothing definitive in either operative report that limits Dr. April's involvement to an endoscopy. However, even assuming *arguendo* that he only performed an endoscopy on February 19, 1996, Dr. April gives absolutely no details or specifics as to how the endoscopy was performed, what he found, what his assessments were, what he communicated to the other physicians in the operating room, how the plaintiff's care was handed over to the other physicians, or what the plaintiff's condition was when he left the operating room. Moreover, Dr. April's affidavit fails to address the specific allegations of malpractice set forth in the plaintiff's verified bill of particulars (*see, Johnson v Ladin*, 18 AD3d 439, 794 NYS2d 441 [2005]; *Berkey v Emma*, 291 AD2d 517, 738 NYS2d 250 [2002]). Nor does Dr. April's affidavit address the plaintiff's allegations of lack of informed consent (*see, Canosa v Abadir*, 165 AD2d 823, 560 NYS2d 198 [1990]). Furthermore, as to the plaintiff's office visit on August 6, 1996, Dr. April provides no explanation as to why the plaintiff came to see him, what her complaints or symptoms were, and why he recommended aggressive speech therapy. There has, therefore, been no prima facie showing by Dr. April that he did not depart from good and accepted medical practice in his treatment of

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the plaintiff or that any alleged departure was not the proximate cause of the plaintiff's injuries (*see, Rosenman v Shrestha*, 48 AD3d 781, 852 NYS2d 378 [2008]). Finally, since the deposition of Dr. April has not yet taken place, this motion for summary judgment is premature (*Viti v Franklin General Hospital*, 190 AD2d 790, 593 NYS2d 840 [1993]).

Accordingly, this motion for summary judgment is denied.

Dated: 11/25/08
Riverhead, NY

Emily Pines
EMILY PINES, P.C.