

Klein v Breuer

2009 NY Slip Op 30292(U)

January 27, 2009

Supreme Court, Nassau County

Docket Number: 17974/06

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**WILLIAM KLEIN and MARILYN KLEIN,

Plaintiffs,**

**Motion Sequence #2, #3
Submitted November 24, 2008**

-against-

INDEX NO: 17974/06

**FRANK UWE BREUER, M.D., NORTH SHORE
UNIVERSITY HOSPITAL, JAMES D. SULLIVAN,
M.D. and MORDECAI DICKER, M.D.,**

Defendants.

The following papers were read on this motion:

DICKER Notice of Motion (#2).....	1
SULLIVAN Notice of Motion (#3).....	2
Memorandum of Law in Support.....	3

Requested Relief

Defendant, MORDECAI DICKER, M.D. (hereinafter referred to as "Dr. DICKER"), moves for an order, pursuant to CPLR §3217(d), "so ordering" a stipulation discontinuing the action against Dr. DICKER, or, in the alternative, pursuant to CPLR §3212, granting summary judgment in favor of Dr. DICKER dismissing the plaintiff's complaint on the ground that there exists no triable issue of fact as to said defendant. In a companion motion, defendant, JAMES D. SULLIVAN, M.D. (hereinafter referred to as "Dr. SULLIVAN"), moves for an order, pursuant to CPLR §3212(a), granting summary

judgment in favor of Dr. SULLIVAN dismissing the plaintiff's complaint on the ground that there exists no triable issue of fact as to said defendant. Affidavits of Service reflect that all parties were served with the instant motions and supporting papers, on October 28, 2008, but no papers are submitted in opposition to the motions, which are determined as follows:

Background

This is an action for medical malpractice. The complaint alleges, in essence, that defendants were negligent in rendering medical care, treatment and/or diagnostic services to plaintiff, WILLIAM KLEIN (hereinafter referred to as "plaintiff"), an eighty-three (83) year old, by failing to properly diagnose the plaintiff's ectopic pancreatic mass and, by instead diagnosing adenocarcinoma, causing plaintiff to undergo unnecessary surgery and to suffer the related sequella that followed. Plaintiff, MARILYN KLEIN, has interposed an derivative action for loss of consortium.

The chronology of events set forth by moving defendants reflects that plaintiff presented at the emergency room of NORTH SHORE UNIVERSITY HOSPITAL (hereinafter referred to as "NSUH"), on October 22, 2005, because he was having difficulty speaking, and was admitted to the hospital after being diagnosed as having had a stroke. The record reflects that plaintiff had a medical history of significant Parkinson's disease and stroke eleven (11) years prior with a pacemaker in place. After being examined by Dr. DICKER, a gastroenterologist, it was determined that plaintiff required a feeding tube and, after signing an informed consent form, Dr. DICKER performed an endoscopy and PEG placement on October 27, 2005. It appears that during the procedure, Dr. DICKER identified a polyp in plaintiff's stomach and took a biopsy sample that was forwarded for

pathology analysis. As plaintiff tolerated the procedures, he was discharged to rehabilitation on October 28, 2005.

Thereafter, on November 2, 2005, pathology of the biopsy was conducted by defendant, FRANK-UWE BREUER (hereinafter referred to as "Dr. BREUER") at NSUH, which allegedly revealed "Oxyntic mucosa showing well differentiated adenocarcinoma". The record reflects that plaintiff's wife was advised of the finding by Dr. DICKER, and that MARILYN KLEIN determined to wait until her husband had completed his rehabilitation, before dealing with the cancer diagnosis. In January 2006, plaintiff saw his new internist, who referred him to an oncologist, who advised that surgery was the best course of action. Dr. SULLIVAN was the recommended surgeon who first saw plaintiff in February 2006 and, upon consent of plaintiff, scheduled a partial gastrectomy for March 17, 2006. Dr. SULLIVAN testified at his deposition that, prior to surgery, he reviewed Dr. BREUER's pathology report and, based on Dr. BREUER's findings and the information he received from other treating doctors, he proceeded with the partial gastrectomy. During the surgery, the tumor was removed and specimens were sent to the pathology lab for review and analysis and, thereafter, Dr. Ellen Klein, an attending pathologist, generated a report which found that plaintiff never had an adenocarcinoma, but rather had a GIST tumor.

Moving defendants assert that the treatment rendered to WILLIAM KLEIN was in all ways appropriate and moving counsel provide affidavits from experts in their field that their actions did not depart from good practice and were necessary and appropriate. Indeed, both moving counsel point out that the plaintiffs and Drs. DICKER and SULLIVAN have all signed a Stipulation of Discontinuance as to said defendants, but that counsel for defendants, Dr. BREUER and NSUH, have refused to sign the Stipulation claiming that is

the firm's policy. Moving counsel point out that the necessity of a feeding tube was evident and that the removal of the tumor was the proper treatment, and that there are no issues of fact concerning Dr. DICKER and Dr. SULLIVAN as to causation, because plaintiff has not suffered injuries from their actions but rather from the improper diagnosis of Dr. BREUER.

The Law

To establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove 1) the standard of care in the locality where the treatment occurred, 2) that defendant breached that standard of care and 3) that the breach of the standard was the proximate cause of the injury. (*Texter v Middletown Dialysis Center, Inc.*, 22 AD3d 831, 803 NYS2d 687 [2nd Dept. 2005]; *DiMitre v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2nd Dept. 2003]). On 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. (*Gargiulo v Geiss*, 40 AD3d 811, 836 NYS2d 276 [2nd Dept. 2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2nd Dept. 2004]). In opposition, 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 457, 838 NYS2d 121 [2nd Dept. 2007]).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, "[e]ven

the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

Discussion

After a careful reading of the submissions herein, the Court finds that a *prima facie* showing has been made for the granting of summary judgment in favor of Dr. DICKER and Dr. SULLIVAN. There being no opposition, it is hereby

ORDERED, that Dr. DICKER's motion for summary judgment is granted and the action against him is dismissed; and it is further

ORDERED, that Dr. SULLIVAN's motion for summary judgment is granted and the action against him is dismissed; and it is further

ORDERED, that the action is severed and continued against co-defendants, Dr. BREUER and NSUH, and the caption shall henceforth read as follows:

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

WILLIAM KLEIN and MARILYN KLEIN,

Plaintiffs,

-against-

INDEX NO: 17974/06

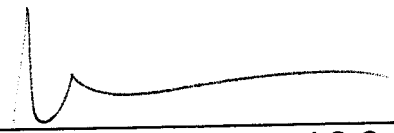
**FRANK UWE BREUER, M.D. and NORTH SHORE
UNIVERSITY HOSPITAL,**

Defendants.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 27, 2009


WILLIAM R. LaMARCA, J.S.C.

TO: Joshua A. Schulman, LLC
Attorneys for Plaintiffs
80 Wall Street, Suite 1214
New York, NY 10005

Geisler & Gabriele, LLP
Attorneys for Defendant Mordecai Dicker, MD
100 Quentin Roosevelt Boulevard
Garden City, NY 11530

Martin Clearwater & Bell, LLP
Attorneys for Defendant James D. Sullivan, MD
220 East 42nd Street
New York, NY 10017

Aaronson, Rappaport, Feinstein & Deutsch, LLP
Attorneys for Defendants Frank Uwe Breuer, MD and North Shore University Hospital
757 Third Avenue
New York, NY 10017

ENTERED

FEB 04 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**