

DeSimone v Accettola
2009 NY Slip Op 30530(U)
March 2, 2009
Supreme Court, Richmond County
Docket Number: 100240/07
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 100240/07
Motion No.:001,002**

**THERESA DESIMONE, and
ANIELLO DESIMONE,**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**DR. ALBERT B. ACCETTOLA, JR., M.D., and
STATEN ISLAND UNIVERSITY HOSPITAL,**

Defendants

The following items were considered in the review of these motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	4, 6
Replying Affidavits	5, 7
Affirmation in Reply to Plaintiff's Further Affirmation In Opposition	8
Exhibits	Attached to Papers
Memorandum of Law	3

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

The defendant, Staten Island Hospital ("SIUH"), moves pursuant to CPLR § 3212 for an order granting summary judgment in its favor dismissing the plaintiff's complaint. The defendant, Albert B. Accettola, JR., M.D. ("Dr. Accettola") cross-moves for similar relief. The plaintiff opposes both motions. SIUH's motion is granted in its entirety, while Dr. Accettola's motion is denied as being untimely.

Facts

Theresa DeSimone brought this action for personal injuries sustained allegedly through the defendant's medical malpractice. Her husband, Aniello DeSimone brings a derivative action

for loss of services against the same defendants.

On March 18, 2005 Theresa DeSimone sustained injuries after falling from a curb. The FDNY responded for a call for help and took her to SIUH where she was examined in the Emergency Department. Upon presenting to the Emergency Department Theresa DeSimon hospital staff sent her for an x-rays fo her right hip and a frontal x-ray of the pelvis. The x-ray of the right hip revealed a subtrochanteric fracture of the proximal right femor. The frontal x-ray of the pelvis revealed an acute complete fracture involving the right femoral proximal diaphysis and a subacute, incomplete, fracture involving the lateral cortex of the proximal left femoral diaphysis.

During her deposition, Theresa DeSimone testified as follows:

Q. Who told you that you needed surgery?

A. The doctors told me I needed an orthopedic doctor, do I have one?

Q. What did you say?

A. I said, "Yes, I would like Dr. Accettola."

Q. How did you know Dr. Accettola at that time?

A. My son-in-law's mother or sister had dealt with Dr. Accettola and that's how I got his name.¹

On March 21, 2005 Dr. Accettola saw Theresa DeSimone for the first time. During his deposition Dr. Accettola read his notes from that visit into the record.

Q. Read your note.

A. "Patient with bilateral femoral fracture, subtrochanteric. Left is incomplete. Stress fracture. Has had bilateral leg pain since December. Reviewed treatment options. When preop evaluation is done, would plan with gamma nails both femurs if possible bilaterally. Left could be done first with little trauma to have a right tibial pin, simon pin, inserted for traction. Plan internal

¹ DeSimone, Theresa, Transcript page 57.

reduction internal fixation for Wednesday,” and then I signed it.²

In her complaint the plaintiff alleges that the treatment she received from Dr. Accettola was not in accordance with the proper practice generally recommended in this community; and that he failed to disclose alternatives to his proposed treatments.

The plaintiffs filed their note of issue on October 6, 2008. On December 5, 2008 SIUH moved this court for an order granting it summary judgment made returnable on January 9, 2009. Dr. Accettola cross-moved on December 29, 2008 for summary judgment in his favor also returnable on January 9, 2009. The plaintiff filed an affirmation in opposition to SIUH’s motion for summary judgment on December 31, 2009. The plaintiff sought an adjournment of the return date from January 9, 2009 to February 6, 2009 to oppose Dr. Accettola’s cross-motion. The parties consented and this court permitted the motion to be adjourned to February 6, 2009. On February 3, 2009 the plaintiff filed an affirmation in opposition to Dr. Accettola’s cross-motion and included further opposition to SIUH’s motion. As this amounted to an unauthorized sur-reply to SIUH’s affirmation in reply, the court permitted SIUH additional time to respond to the plaintiff’s affirmation in further opposition.

Discussion

Time Period for Summary Judgment Motions in Richmond County

According to the Preliminary Conference Order, all dispositive motions, including those made pursuant to CPLR § 3212, must be made within sixty days of the plaintiffs filing their Note of Issue. In this case, SIUH filed its summary judgment motion on December 5, 2008 the sixtieth day after the plaintiff filed its note of issue. Co-defendant, Dr. Accettola filed his cross-motion for summary judgment on December 29, 2008, thereby exceeding Richmond County’s sixty day

² Accettola, Albert B., Transcript at 16.

filing rule.

The Court of Appeals addressed the issue concerning the late filing of a motion for summary judgment in *Brill v. City of New York*.³ The Court considered whether defendant's motions for summary judgment should be decided on the merits despite the fact that the defendant's motion was untimely. The Court held that the trial court should not have considered the merits of the motion since the motion was filed late and "good cause" was not shown as to why the motion was untimely. Furthermore, the Court held that the trial court may set a date after which no summary judgment motion may be made provided it is more than thirty days after the filing of the Note of Issue.

The court turns its attention first to the summary judgment motion brought by the defendant SIUH. The plaintiff argues that this motion is not timely. In so arguing the plaintiff directs the court's attention to Webster's Third New International Dictionary Unabridged for the definition of "within." The plaintiff states that 'within' is defined as "on the inside or on the inner side." For the purposes of the interpreting this county's Preliminary Conference Order, this court finds that the term "within" is defined to include the sixtieth day after the filing of the note of issue. In Richmond County a summary judgment motion will not be entertained if it is filed beyond the sixtieth day after the filing of the note of issue. Here, SIUH filed its motion in a timely manner.

However, it is clear that Dr. Accettola filed his motion substantially after the expiration of the county rule. Dr. Accettola's counsel argues that the filing date for a cross-motion for summary judgment relates back to the timely motion for summary judgment filed by SIUH. Dr. Accettola's counsel argues that the Appellate Division, Second Department's decision in *Joyner-Pack v. Sykes* should apply to this case.⁴ In that case the Appellate Division, Second Department

³ 2 NY3d 638, [2004].

⁴ *Joyner-Pack v. Sykes*, 54 AD3d 727, [2d Dep't, 2008].

reviewed a decision of the trial court in a medical malpractice case where the plaintiff sued three separate doctors, but only one moved within the appropriate time frame for summary judgment. However, the trial court still considered the summary judgment motions filed late by the remaining defendants. In affirming the trial court's decision to consider the late motions, Appellate Division, Second Department held that it is a proper use of the court's discretion to consider a late motion for summary judgment where on is " . . . still pending and 'made on nearly identical grounds.'"⁵

This case is distinguishable from *Joyner-Pack*. First, the case before this court involves a doctor and a hospital, in contrast *Joyner-Pack* involved three individual doctors involved in the treatment of " . . . a rare and serious condition . . ."⁶ Secondly, in *Joyner-Pack* each doctor brought a summary judgment arguing that they care they individually provided to the plaintiff did not depart from good and accepted medical practices.

In this case, unlike that in *Joyner-Pack* the basis of SIUH's motion for summary judgment is based on the fact that Dr. Accettola operated within its hospital as a treating physician and not an employee of the hospital. Based on that line of argument, SIUH argues that it cannot be liable for any negligent acts committed on the part of Dr. Accettola. However, Dr. Accettola, argues that he is entitled to summary judgment based on the fact that he did not deviate from good and accepted medical practices in his treatment of Theresa DeSimone. As such, this court cannot find that the motion brought by Dr. Accettola is on nearly identical grounds as that brought by SIUH. Even assuming that this court found that the cross-motion brought by Dr. Accettola was on nearly identical grounds as the summary judgment motion brought by SIUH; his cross-motion must still be denied as no reasonable excuse was offered for

⁵ *Id.*

⁶ *Id.*

the lateness of its filing.⁷

For the aforementioned reasons, the summary judgment motion brought by SIUH is deemed timely, while Dr. Accettola's motion is denied as untimely.

SIUH's Motion for Summary Judgment

This court reserved judgment with respect to considering the plaintiff's affirmation in further opposition of SIUH's motion for summary judgment. After examination of the record, this court finds that the action taken on the part of the plaintiff constitutes an unauthorized sur-reply. Therefore, the court will not consider those sections of the plaintiff's affirmation in opposition dated February 3, 2009 directed toward SIUH's motion for summary judgment. The court will instead rely on plaintiff's affirmation in opposition dated December 31, 2008.

Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."⁸ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁹ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.¹⁰ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the

⁷ *Milano v. George*, 17 AD3d 644, [2d Dept 2005]. (The late movant must offer an excuse of "good cause" for the untimeliness of the motion); See also, *First Union Auto Finance, Inc. v. Donat*, 16 AD3d 372, [2d Dept 2005].

⁸ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

⁹ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

¹⁰ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

party opposing the motion.¹¹

A movant for summary judgment must demonstrate entitlement to judgment as a matter of law by tendering, sufficient evidence to eliminate any material issues of fact.¹² In *Orgovan v. Bloom*, the Appellate Division, Second Department held that a the general rule is a hospital is not vicariously liable for the malpractice of a private physician that is not its employee, except where a patient enters the emergency room seeking treatment from the hospital and not a particular physician.¹³ In this case, SIUH proffered evidence that demonstrates that Dr. Accettola was a treating physician and not an employee of the hospital. The record clearly indicates that Theresa DeSimone sought to be treated by her own orthopedist—Dr. Accettola. As such, SIUH would not be vicariously liable to Theresa DeSimone if Dr. Accettola committed any act of malpractice.

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.¹⁴ The plaintiff's opposition fails to address the merits of the SIUH's argument, and instead focuses on the fact that SIUH submitted its summary judgment motion on the sixtieth day after the filing of the note of issue. Absent a proffering of evidence that establishes an issue of fact, this court must grant summary judgment in favor of the defendant—SIUH.

Assuming, that this court considered the plaintiff's affirmation in further opposition to SIUH's motion dated February 3, 2009 and its annexed expert affidavit, it fails to provide any evidence to rebut a finding that Dr. Accettola was a private physician and not an employee of SIUH.

¹¹ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

¹² *Washington v. Community Mutual Savings Bank*, 308 AD2d 444, [2d Dep't, 2003].

¹³ *Orgovan v. Bloom*, 7 AD3d 770, [2d Dep't, 2004].

¹⁴ *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

Accordingly, it is hereby:

ORDERED, that Staten Island University Hospital's motion for summary judgment dismissing the plaintiff's complaint is granted in its entirety, the complaint is hereby severed and dismissed as against defendant Brian Francis Quinn, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that Dr. Accettola's motion for summary judgment is denied as being filed untimely; and it is further

ORDERED, that the remaining parties return to DCM Part 3 for a pre-trial conference on **Thursday, April 23, 2009 at 9:30 A.M.**

ENTER,

DATED: March 2, 2009

Joseph J. Maltese
Justice of the Supreme Court