

Verger v Memorial Sloan-Kettering

2009 NY Slip Op 30571(U)

March 11, 2009

Supreme Court, Suffolk County

Docket Number: 06-24691

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

P R E S E N T :

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 10-27-08
ADJ. DATE 1-21-09
Mot. Seq. # 001 - MD

-----X		
CHRISTINA VERGER, as Administrator of the	:	RICONDA & GARNETT, LLP
Estate of MARCELLO VERGER, her husband,	:	Attorneys for Plaintiff
and CRISTINA VERGER, individually,	:	753 West Merrick Road
	:	Valley Stream, New York 11580
	:	
Plaintiff,	:	
- against -	:	KOPFF, NARDELLI & DOPF, LLP
	:	Attorneys for Defendants
MEMORIAL SLOAN-KETTERING, CANCER	:	440 Ninth Avenue
CENTER and LESLIE H. BLUMGART, M.D.,	:	New York, New York 10001-1688
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 13 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-24 ; Replying Affidavits and supporting papers 25-26 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by the defendant Leslie H. Blumgart, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is denied.

The complaint of this action sets forth a cause of action sounding in medical malpractice for the pain and suffering and wrongful death of Marcello Verger, decedent, with a derivative cause of action for loss of services asserted on behalf of Christina Verger, decedent's spouse. It is claimed that on November 29, 2005, at memorial Sloan-Kettering Hospital, the defendant Leslie Blumgart performed surgery on Marcello Verger consisting of a cholecystectomy, left hepatic lobectomy and caudate lobectomy. Mr. Verger suffered a pulmonary embolism postoperatively and died on December 4, 2005. The plaintiff asserts that the defendants failed to prevent, diagnose and treat the pulmonary embolism, resulting in the plaintiff's decedent's death.

The moving defendant, Leslie Blumgart, M.D., seeks an order granting summary judgment dismissing the complaint asserted against him on the basis that he did not depart from good and accepted medical practice during his care and treatment of the plaintiff.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage, Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [1998], *app denied*, 92 NY2d 818. To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury, *see*, Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [1996]. Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury, *see*, Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516 [1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [1994].

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [1979] and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [1981]. Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

In support of this application, the moving defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; defendant's answer; plaintiffs' bill of particulars; partial medical records; copies of the transcripts of the examination before trial of Kristen O'Hagan, and Leslie Blumgart; and the affidavit of Leslie Blumgart, M.D.

In his examination before trial, Dr. Blumgart testified that he explained in detail to his patient that the risks associated with surgery were clearly post-operative complications. After surgery was performed, Mr. Verger was a bit restless in the recovery room, but was doing well, remained there overnight and the next day was placed on the ward, ambulating and breathing, and doing extremely well. On the second or third day, he was not quite as well as he had been. Dr. Blumgart stated they were a little bit concerned and tried to find out what was going on. He considered a bleed, and he wondered about the possibility of a heart attack due to the pain. He thought of pulmonary embolism, but it was very low on his list of diagnoses. Dr. Blumgart testified that the day before Mr. Verger died that he received a phone call telling him that Mr. Verger collapsed and went into cardiorespiratory arrest on Sunday, December 4th. Thereafter, he called the hospital to make sure Mr. Verger was being cared for,

but advised Mrs. Verger that he was fully informed and didn't think he could contribute anything. Mr. Verger died later that day.

On December 2, 2005, there was a progress note written by the nurse practitioner O'Hagen, and a note written by A. Morse indicating (s)he was called to see Mr. Verger due to hypotension and increased somnolence, systolic blood pressure in the 80's with tachycardia up to 130 at times. Dr. Blumgart testified he did not express to the resident that there was a possibility of pulmonary embolism because it was very low on his list. On the 4th at 2:20 a.m., a G.I. consult was done wherein the examining physician set forth he didn't find a reasonable cause for the bleeding that was noticed, and described the bleeding as a "little bit of coffee ground material."

Dr. Blumgart also testified that the resident Dr. Cherif Boutros ordered Tinzaparin Sodium, 4,5000 units by injection subcutaneously daily, but it was discontinued by Ms. O'Hagen on November 30, 2005 because he does not employ anticoagulants in patients at this stage with a hepatic resection.

Kristen o'Hagan testified that she first saw Mr. Verger during his surgical procedure and then saw him again on November 30, 2005 with the fellow and the resident, Dr. Boutros, who ordered the Tinzaparin suggested by Mr. Verger's attending medical doctor. However, she stated, she discontinued the Tinzaparin before Mr. Verger received a dose. She testified that she discontinued the medication because it is the normal practice for Dr. Blumgart's post operative liver section patients not to be placed on blood thinners. She stated she did not discuss discontinuing the Tinzaparin with Dr. Blumgart or Dr. Boutros. On December 1, 2005, Dr. Vincenzino ordered DVT therapy and sub q Tinzaparin 4500 U daily when bleeding risk is not prohibitive. She ordered an EKG and blood work for clotting consisting of a PT and PTT as Mr. Verger had a pulse rate of 110 on that date. She testified that she never became aware that Mr. Verger had discoloration of his left leg postoperatively or shortness of breath.

Dr. Blumgart avers in his supporting affidavit that he did not depart from good and accepted medical practice and that his care of Mr. Verger conformed with good and accepted medical practice. He states Mr. Verger presented with a poorly differentiated liver carcinoma at North Shore University Hospital in November 2005, and presented to him on November 23, 2005 with no known cardiac history or active pulmonary disease, but he smoked and drank wine. Dr. Blumgart states he performed surgery upon Mr. Verger on November 29, 2005 consisting of a cholecystectomy, left hepatic lobectomy, and caudate lobectomy and that the surgery was uneventful.

Dr. Blumgart states that it is not his policy or protocol to prescribe pre-operative, intra-operative or post-operative prophylactic anticoagulation in patients in which a major resection of the liver will be undertaken, as he states, it is too dangerous because of the extent of surgery. He also stated that anticoagulation use was contraindicated for Mr. Verger as his bilirubin was 1.3, he had a history of being jaundiced and jaundice interferes with the absorption of Vitamin K from the intestine and results in a coagulation defect. He states he felt Mr. Verger was predisposed to bleeding after the surgery.

Dr. Blumgart states that on December 1, 2005, a nurse's note at 4:30 a.m. indicates that the drain output was 400 cc's of bloody fluid and anticoagulation was not indicated given the bloody drainage. He states that he would not order post-operative anticoagulation absent pulmonary embolism or deep

vein thrombosis. He continued that Mr. Verger used compression boots in bed and was walking for a couple days, at which time his boots were removed. He states that while it was possible that Mr. Verger was developing a pulmonary embolism, the possibility was low on his (Dr. Blumgart's) list. He continued that Mr. Verger's prothrombin times and INR times were elevated post-operatively, at 28.5 and 1.36 respectively, the normal being 12.2-14.9 and 0.91 to 1-1.2. He states that on December 1, 2005, it spiked to 2.48 prior to his death.

The moving defendant has not provided a copy of the admission record from which he partially based his affidavit in support of this motion. The outpatient progress record dated November 25, 2005, provided with his moving papers, reveals that Mr. Verger is a 67 year old man with a history of colangiocarcinoma, and denies any known history of cardiac disease, including coronary artery disease, myocardial infarction, congestive heart failure, arrhythmia or valvular disease, and denies any known active pulmonary disease such as asthma or emphysema, and stopped smoking a year before and stopped drinking wine about a month ago. He has a history of hyperlipidemia and hypertension. The note also reveals that recently he was experiencing hand and lower extremity cramping, but could not specify whether the lower extremity cramping was related to ambulation. It was noted that he might have possible mild jaundice. The plan set forth by the writer of the note, the attending physician Dr. Adrienne Vincenzo, M.D., was for that of deep vein thrombosis prophylaxis and subcutaneous Tinzaparin 4,500 units daily postoperatively when the bleeding risk is not prohibitive. Incentive spirometry and early mobilization was recommended postoperatively.

Based upon the foregoing, it is determined that Dr. Blumgart has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint in that the evidence submitted on his behalf raises factual issues regarding the use of anticoagulants for deep vein thrombosis prophylaxis with post-operative subcutaneous Tinzaparin administration when the bleeding risk is not prohibitive. Dr. Blumgart set forth in his affidavit that it is not his practice to administer prophylactic anticoagulation therapy pre-operatively and post-operatively, whereas Mr. Verger's attending physician, Dr. Vincenzo, recommended deep vein thrombosis prophylaxis therapy when the bleeding risk is not prohibitive. Nor does Dr. Blumgart opine as to when Mr. Verger began exhibiting signs of pulmonary embolism and the treatment administered relative thereto.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff, *see*, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [1997]. Here, the defendant Dr. Blumgart failed to establish prima facie entitlement to summary judgment. The plaintiff has, however, submitted opposition to the defendant's motion and has raised factual issues which preclude summary judgment as well.

Plaintiff's expert, Dr. George Quaye, M.D. has submitted an affidavit wherein he states he is a physician duly licensed to practice medicine in the State of New York and sets forth that Mr. Verger was admitted to Memorial Hospital for the treatment of liver cancer eventually identified as a poorly

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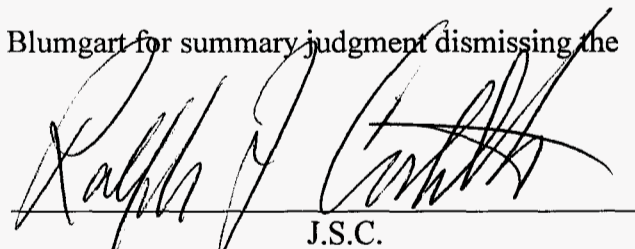
differentiated hepatocellular carcinoma, was operated on by Dr. Blumgart on November 29, 2005 and died on December 4, 2005. Dr. Quay bases his opinion that Mr. Verger died from a pulmonary embolism based upon a letter sent by Dr. Blumgart to Mr. Verger's widow.

Dr. Quay sets forth that a pulmonary embolism is not uncommon in post-operative patients, especially those who have cancer, but that it is treatable as well as preventable. He continues that Dr. Blumgart fails to mention or account for in his affidavit the numerous warning signs presented by Mr. Verger as he was developing a pulmonary embolism and needed treatment for it. He states that Dr. Blumgart does acknowledge that Tinzaparin is appropriate when there is a danger of pulmonary embolism. Dr. Quay set forth that Dr. Blumgart's objection to the use of anticoagulation therapy is his discrete defense to the claim in this action, but the very issue is why were Mr. Verger's signs and symptoms of an impending potentially fatal event ignored. Dr. Quay states that preventative action by Dr. Blumgart could have included various common diagnostic testing and procedures, such as a ventilation perfusion scan, a CT pulmonary angiogram, or a venous doppler of the lower extremities. It is Dr. Quay's opinion based upon a reasonable degree of medical certainty that had the physical findings of an impending and/or evolving pulmonary embolism been heeded, that Mr. Verger should have been saved and may well have prospered. It is his further opinion based upon a reasonable degree of medical certainty, that is was a departure from good and accepted medical practice not to perform these procedures on Mr. Verger.

Dr. Quay states he bases his opinions on the medical records wherein Mr. Verger was out of bed and doing well, quickly recuperating after surgery, and on December 2, 2005, a marked, negative change occurred wherein he developed chest pain and shortness of breath, and a mottled discoloration of his left calf, which changes were reported to the nursing staff and the house staff at once. However, he states, no preventive action was taken and by December 3, 2005, Mr. Verger had become more lethargic and very short of breath, his blood pressure became unstable, but still no preventive action was taken. Later that evening, Mr. Verger collapsed in the bathroom and died several hours later. Dr. Quay states that altered mental status (lethargy), chest pain, shortness of breath, unstable blood pressure and mottled discoloration of the calf, especially one calf, are all warning signs of an impending pulmonary embolism, especially in a post-operative patient with a known malignancy such as the deceased herein had. It is Dr. Quay's opinion that the failure to not diagnose a pulmonary embolism presenting with the signs and symptoms displayed by Mr. Verger constitute a departure from good and acceptable medical practice, and not treating Mr. Verger for those signs and symptoms constituted a departure from good and accepted medical practice. Dr. Quay also sets forth that the negligently rendered care by Dr. Blumgart, who was in charge of Mr. Verger's care and treatment, was the proximate cause of Mr. Verger's untimely demise.

Accordingly, motion (001) by the defendant Dr. Blumgart for summary judgment dismissing the complaint against him is denied.

Dated: March 11, 2009


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION