

Sweeney v Maiorino

2009 NY Slip Op 31531(U)

June 26, 2009

Supreme Court, Suffolk County

Docket Number: 3272/2005

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Patricia Sweeney,

Index No.: 3272/2005

Plaintiff,

Motion Sequence No.: 003; MGMotion Date: 10/7/08Submitted: 2/4/09

-against-

William Maiorino, M.D., Lynne E. Macco, M.D.,
South Bay OB/GYN, P.C., Manal Hegazy, M.D.,
Island Surgical & Vascular Group, P.C. and Good
Samaritan Hospital Medical Center,Motion Sequence No.: 004; MGMotion Date: 10/7/08Submitted: 2/4/09

Defendants.

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 32 read on these motions for summary judgment: Notice of Motion and supporting papers, 1 - 18; 19 - 30; Answering Affidavits and supporting papers, 31 - 32.

The instant action seeks to recover damages for medical malpractice arising from the defendants' failure to diagnose and properly treat the plaintiff's appendix cancer for a period from April of 2001 through June of 2004. During that time period the plaintiff received gynecological treatment from the defendants South Bay OB/GYN, P.C. (hereinafter South Bay), Dr. William Maiorino and Dr. Lynne E. Macco. Specifically, she received treatment from Dr. Maiorino at South Bay on April 11, 2001, June 19, 2001, July 2, 2001, December 12, 2001, March 24, 2003, April 15, 2003, May 5, 2003, and May 13, 2004. She received treatment from Dr. Macco at South Bay on June 6, 2003. Over the course of these treatments the plaintiff was diagnosed with, and treated for, cysts on her ovaries. During the course of this treatment, on June 5, 2001, Dr. Maiorino admitted the plaintiff to the defendant Good Samaritan Hospital Medical Center (hereinafter Good Samaritan) where he and Dr. Macco performed gynecological procedures on the plaintiff with respect to treatment of her ovarian cysts.

Sweeney v. Maiorino, et al.

Index No.: 3272/2005

Page No. 2

The plaintiff also received treatment from the defendant Good Samaritan Hospital during the period from April of 2001 through June of 2004. In this regard, on June 6, 2003 she presented to the emergency room at Good Samaritan for treatment complaining of pain. After running several tests, the plaintiff was diagnosed with a blockage of the intestines, was prescribed pain medication and was discharged. Thereafter, on June 13, 2004, the plaintiff presented to the emergency room at Good Samaritan complaining of abdominal pain on her lower right side and was admitted. She reported having such pain and right flank discomfort for two days. The initial impression of the plaintiff's condition was that she was suffering from kidney stones. On June 14, 2004 a urology consultation was performed. The urologist ordered tests on the plaintiff's kidneys, bladder, ureters and uretha, but concluded that the plaintiff's pain was likely caused by a ruptured ovarian cyst and recommended a gynecological consultation. On June 14, 2004, a gynecology consultation was performed. The gynecologist recommended that the plaintiff be seen by her treating gynecologist, Dr. Maiorino, for possible exploratory surgery and removal of an ovary. Dr. Maiorino examined the plaintiff and performed surgery on June 15, 2004. Examination of the plaintiff's ovary during the surgery revealed extensive fibrous bands of scar tissue formed between the ovary, fallopian tube, appendix and bowel. Dr. Maiorino documented a diagnosis of a "walled-off appendiceal abscess" and called for an intraoperative surgical consultation with the defendant surgeon Dr. Manal Hegazy of the defendant Island Surgical and Vascular Group, P.C. (hereinafter Island Surgical). Upon examination of the plaintiff's appendix, Dr. Hegazy diagnosed the plaintiff with acute appendicitis, or inflammation of the appendix. Dr. Hegazy isolated and removed the plaintiff's appendix. The plaintiff's appendix was sent to pathology where it was determined to present with acute appendicitis and appendiceal cancer.

The plaintiff alleges that South Bay, Dr. Maiorino, Dr. Macco, Dr. Hegazy, Island Surgical, and Good Samaritan committed malpractice in her treatment and that, as a result, there was a delay in the diagnosis of her appendiceal cancer and her appendix was caused to perforate. The bill of particulars alleges that as a result of the defendants' malpractice the plaintiff sustained injuries including a delay in diagnosis of her appendix cancer, a delay in and failure to receive proper care and treatment with respect to her appendix cancer, a rupture in her appendix, surgery, the potential for the cancer "to seed and spread," a shortened life expectancy and severe emotional distress.

The defendants Dr. Maiorino, Dr. Macco, and South Bay now move for summary judgment dismissing the complaint insofar as asserted against them (#003) on the ground that the medical treatment and care they provided to the plaintiff comported with good and accepted medical practice and was not, and could not, be a proximate cause of the injuries alleged. By separate motion, the defendants Dr. Hegazy and Island Surgical move for summary judgment dismissing the complaint insofar as asserted against them on the same grounds. The plaintiff does not oppose these motions.

Sweeney v. Maiorino, et al.

Index No.: 3272/2005

Page No. 3

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 demonstrate the absence of any material issues of fact (see Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In a medical malpractice action, a plaintiff must prove that there was a deviation or a departure from good and accepted practice and that such departure or deviation was a proximate cause of injury or damage (see, Biggs v. Mary Immaculate Hosp., 303 AD2d 702 [2nd Dept., 2003]; Roseingrave v. Massapequa Gen. Hosp., 298 AD2d 377 [2nd Dept., 2002]; Holbrook v. United Hosp. Med. Ctr., 248 AD2d 358 [2nd Dept., 1998]). On a motion for summary judgment dismissing the complaint, a defendant physician has the burden of establishing the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see, Shahid v. New York City Health & Hosps. Corp., 47 AD3d 800 [2nd Dept., 2008]; Rebozo v. Wilen, 41 AD3d 457 [2nd Dept., 2007]; Williams v. Sahay, 12 AD3d 366 [2nd Dept., 2004]). In order to successfully oppose a prima facie entitlement to judgment as a matter of law, a plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries (see, Rebozo v. Wilen, 41 AD3d 457 [2nd Dept., 2007]; Echeverri v. Flushing Hospital & Medical Center, 123 AD2d 818 [2nd Dept., 1986]).

In support of the motion for summary judgment brought by the defendants South Bay, Dr. Maiorino and Dr. Macco (#003), the defendants submitted, *inter alia*, the expert affirmation of Edgar Mandeville, M.D., the plaintiff's medical and hospital records and the deposition testimony of Dr. Macco, Dr. Maiorino and Dr. Hegazy. This evidence, particularly the expert affidavit of Dr. Mandeville, established the defendants' prima facie entitlement to summary judgment dismissing the complaint on the grounds that the medical treatment and care they provided to the plaintiff comported with good and accepted medical practice and was not, and could not be, a proximate cause of the injuries alleged (see, Murray v. Hirsch, 58 AD3d 701 [2nd Dept., 2009]). In rendering his expert opinion, Dr. Mandeville reviewed all of the plaintiff's medical records and all relevant deposition testimony. Dr. Mandeville's affirmation includes his expert opinion that (1) there are no symptoms of appendiceal cancer and that the only way it is diagnosed is upon pathological examination of the appendix, (2) that in order for any patient to be diagnosed with appendiceal cancer there needs to be a reason for a physician to remove the patient's appendix such that it would be submitted for pathological examination, (3) that to a reasonable degree of medical certainty the plaintiff displayed no signs or symptoms of

Sweeney v. Maiorino, et al.

Index No.: 3272/2005

Page No. 4

appendicitis or a perforated appendix during her care and treatment with the defendants between 2001 and June 2004 indicating removal of all or part of her appendix was appropriate, and (4) that to a reasonable degree of medical certainty the plaintiff first displayed signs or symptoms of appendicitis or perforation of the appendix on June 12, 2004 or June 13, 2004, at which time she was appropriately diagnosed and treated. Moreover, Dr. Mandeville's affidavit details the defendants' treatment of the plaintiff and opines, to a reasonable degree of medical certainty, that the treatment rendered by South Bay, Dr. Maiorino and Dr. Macco did not depart from good and accepted medical practice and was not a proximate cause of the injuries alleged (see, Bellino v. Spatz, 233 AD2d 355 [2nd Dept., 1996]).

Therefore, the defendants South Bay, Dr. Maiorino and Dr. Macco established their entitlement to summary judgment dismissing the complaint insofar as asserted against them and the plaintiff did not oppose their motion. Accordingly, their motion (#003) is granted.

The motion brought by the defendants Dr. Hegazy and Island Surgical for summary judgment dismissing the complaint insofar as asserted against them (#004) is also granted. In support of their motion for summary judgment, Dr. Hegazy and Island Surgical submit, *inter alia*, the plaintiff's hospital records, the deposition testimony Dr. Maiorino, the deposition testimony of Dr. Hegazy, the deposition testimony of Dr. Pratima Savargoankar and the affidavit of Dr. Peter Geller. This evidence established their prima facie entitlement to judgment, as a matter of law, on the grounds that the medical treatment and care they provided to the plaintiff comported with good and accepted medical practice and was not, and could not be, a proximate cause of the injuries alleged. In this regard, the expert affidavit of surgeon Peter Geller provides detailed analysis of Dr. Hegazy's treatment of the plaintiff and concludes that, to a reasonable degree of medical certainty, the care rendered by Dr. Hegazy conformed to accepted surgical standards and was not a proximate cause of the injuries alleged. Such expert further concludes that Dr. Hegazy's treatment of the plaintiff was appropriate, warranted and performed in accordance with good and accepted surgical practice (see Murray v. Hirsch, 58 AD3d 701 [2nd Dept., 2009]; Bellino v. Spatz, 233 AD2d 355 [2nd Dept., 1996]).

Therefore, the defendants Dr. Hegazy and Island Surgical established their entitlement to summary judgment dismissing the complaint insofar as asserted against them and the plaintiff did not oppose their motion. Accordingly, their motion (#004) is also granted.

The claims dismissed herein are severed and the plaintiff's remaining claim, as against the remaining defendant Good Samaritan Hospital Center, shall continue.

Accordingly, it is

ORDERED that these motions are consolidated for the purpose of determination; and it is further,

Sweeney v. Maiorino, et al.

Index No.: 3272/2005

Page No. 5

ORDERED that the motion by the defendants William Maiorino, M.D., Lynne E. Macco, M.D., and South Bay OB/GYN, P.C. for summary judgment dismissing the complaint insofar as asserted against them (#003) is granted; and it is further,

ORDERED that the motion by the defendants Manal Hegazy, M.D. and Island Surgical & Vascular Group, P.C. for summary judgment dismissing the complaint insofar as asserted against them (#004) is granted.

Dated: June 26, 2009


HON. WILLIAM B. REBOLINI, J.S.C.

RIDER

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