Graziano v Cooling
2009 NY Slip Op 32183(U)
September 18, 2009
Supreme Court, Suffolk County
Docket Number: 2113/2007
Judge: Paul J. Baisley
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Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

---X
WILLIAM GRAZIANO,

Plaintiff,

-against-

DAVID S. COOLING, M.D. and STONY BROOK EMERGENCY PHYSICIANS, UNIVERSITY FACULTY PRACTICE CORPORATION,

Defendants.
---X

INDEX NO.: 2113/2007
CALENDAR NO.: 200802040MM
MOTION DATE: 5/4/2009
MOTION NO.: 001 MD

PLAINTIFF'S ATTORNEY:
JEFFREY J. SHAPIRO & ASSOCIATES, LLC
448 East Old Post Road
Bedford, New York 10506

DEFENDANTS' ATTORNEY:
KELLY, RODE & KELLY
330 Old Country Rd., Suite 305
Mineola, New York 1150

Upon the following papers numbered 1 to 23 read on this motion and cross-motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers 17-21 ; Answering Affidavits and supporting papers 22-23 ; ~~Replying Affidavits and supporting papers~~ _____; ~~Other~~___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendants David S. Cooling, M.D. and Stony Brook Emergency Physicians, University Faculty Practice Corporation, for an order pursuant to CPLR R. 3212 granting summary judgment and dismissing the complaint as asserted against them is denied.

The complaint of plaintiff William Graziano sets forth causes of action sounding in medical malpractice and lack of informed consent for the failure of the defendants to diagnose the plaintiff's condition as that of meningococcal meningitis, discharging him without proper care and treatment, causing him to sustain damage to his brain and other vital organs, and causing hearing loss, impaired vision, and impaired cognitive ability, among other sequella to be determined. Defendant David S. Cooling, M.D. ("Dr. Cooling") is an emergency department physician who examined plaintiff at Stony Brook Hospital on September 28, 2004, and discharged the plaintiff after his examination. The following day, plaintiff, after having been seen by his private physician, was admitted to Winthrop-University Hospital, diagnosed with meningococcal meningitis, and treated for the same.

The defendants, Dr. Cooling and Stony Brook Emergency Physicians, University Faculty Practice Corporation (Stony Brook Emergency Physicians) seek an order granting them summary judgment on the ground that they were not negligent in their 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, 678 NYS2d 503 [1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious,* 221 AD2d 674, 638 NYS2d 700 [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, 489 NYS2d 47 [1985]; *Lyons v McCauley,* 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York,* 202 AD2d 465, 465, 609 NYS2d 45 [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, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 538 NYS2d 843 [2nd Dept 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, 435 NYS2d 340 [2nd Dept 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, 416 NYS2d 790 [1979]).

In support of this application, the defendants have submitted, *inter alia*, an attorney's affirmation; the affidavit of Dr. Cooling; the affirmation of defendants' expert Thomas Kwiatkowski, M.D.; copies of the pleadings and verified bill of particulars; copies of the transcripts of the depositions of plaintiff dated October 5, 2007 taken in this action and that of Dr. Cooling dated September 18, 2006 taken in connection with plaintiff's related action in the Court of Claims; and uncertified copies of the following medical records: Stony Brook Hospital Emergency Department record, physicians' records and a medical record, presumably of the Winthrop-University Hospital admission.

Plaintiff's deposition testimony reflects that the day before his admission to the Stony Brook Hospital Emergency Department on September 28, 2004, he began to feel ill, with a headache and sleepiness. His symptoms worsened during the night, and in addition to the headache and sleepiness he began to experience severe ear pain, a burning sore throat, pressure in his head, achiness, nausea and vomiting, and developed a slight fever. He was then taken to Stony Brook Hospital Emergency Department around 4:00 p.m. Plaintiff testified that he began sweating heavily enroute to the hospital and that when he arrived he was having a hard time

walking, his whole body was hurting and he had to be put in a wheelchair. He testified that he was checked by the triage nurse and thereafter was seen by two physicians. Plaintiff testified that he told them that his head was "killing him," his ears and throat were burning every time he swallowed, that he was having pains in his chest and back, had been vomiting and was very sleepy. Thereafter, he was examined by another doctor, after which he was discharged home. Plaintiff testified that upon arriving home, he felt nauseated and vomited, and that he experienced diarrhea during the night. He testified that his mother called his doctor in the morning because plaintiff "was not making sense." Plaintiff was thereafter admitted to Winthrop-University Hospital.

Dr. Cooling's affidavit reflects that he is a physician duly licensed to practice medicine in the State of New York and is board-certified in internal medicine. Dr. Cooling states therein that on September 28, 2004, he took a history of plaintiff and examined him at about 6:15 p.m. Dr. Cooling reported that the only positive findings were a slight pulse elevation of 117, rhinorrhea in the nasopharynx, and injected throat without exudate. Dr. Cooling noted that plaintiff had clear respirations, was alert and oriented x 3, was hydrated, and had an O_2 saturation of 99%, normal neck lymphatics and a negative gastrointestinal examination. He diagnosed plaintiff with an upper respiratory infection and viral syndrome. Plaintiff was discharged at 6:25 p.m. with instructions to continue with Ibuprofen as needed, and to follow up with his own doctor if his symptoms were not resolved in one week, or to come to the emergency department or contact his primary care physician if his condition becomes worse. Dr. Cooling sets forth his conclusory opinion that he did not depart from good and accepted standards of medical care in his treatment of plaintiff and there was nothing that he did or failed to do that was a proximate cause of any injury to plaintiff.

At his deposition in the related Court of Claims action, Dr. Cooling testified that he had no independent recollection of having seen plaintiff in the Stony Brook Hospital Emergency Department and that he did not know what differential diagnostic impressions he had considered. Upon reviewing plaintiff's emergency department record, Dr. Cooling testified that he did not order any diagnostic tests to be performed on plaintiff and that he did not feel there were any other tests that were necessary or that would provide further information that would be useful at the time.

The affirmation of Thomas Kwiatkowski, M.D., defendants' medical expert, reflects that he is a physician licensed to practice medicine in the State of New York and is board-certified in emergency medicine. Dr. Kwiatkowski's review of the emergency room record indicates that plaintiff's chief complaints upon admission were bilateral ear pain, sore throat with fever, diaphoresis and vomiting. Initially, plaintiff was seen by a third-year medical student whose notes indicated that plaintiff had pain in both eyes on a scale of 3/10, bilateral ear pain, and nasal drip without shortness of breath or blurred vision. Examination revealed a normal cardiovascular status, bilateral erythema in the ear canal, positive tympanic membrane that was erythematous and injected, pharyngeal erythema without exudate, double uvula, positive cervical lymphadenopathy, right upper lobe inspiratory rales, no extremity tenderness, and no rashes. Plaintiff was awake and oriented x 3, and noted to be sweating and in distress.

One hour later plaintiff was examined by Dr. Cooling, whose notes reflect a history of acute respiratory infection one to two weeks previously, and complaints of nasal congestion, nonproductive cough, sore throat, nausea and vomiting, with sinus discomfort of a few days' duration. Dr. Cooling notes reflect that plaintiff was hydrated and not in acute distress. The notes further reflect that the primary discharge diagnosis was upper respiratory infection, viral syndrome and that discharge instructions were given as set forth by Dr. Cooling. Dr. Kwiatkowski opines with a reasonable degree of medical certainty that Dr. Cooling exercised appropriate medical judgment and did not deviate from good and accepted standards of medical care during his care and treatment rendered to plaintiff in that he performed a focused history, noted the triage nurse's report of plaintiff's vital signs and pulse oximetry, performed a physical examination, and evaluated plaintiff by visual palpation and auscultation.

Dr. Kwiatkowski further opines that none of the signs and symptoms that plaintiff demonstrated at the time of his examination by Dr. Cooling were consistent with any of the cardinal signs of meningococcal meningitis, which include confusion, photophobia, fever, meningismus, stiff neck or change in mental status. He states that although plaintiff did have a slight headache, that symptom is consistent with viral illness, including upper respiratory infection and viral syndrome. He further stated that, therefore, Dr. Cooling did not need to conduct further testing, including a white blood cell count or a spinal tap. Dr. Kwiatkowski further notes that when plaintiff was admitted to Winthrop-University Hospital the following day, a spinal tap demonstrated that he was then in the early states of meningococcal meningitis, with a glucose of 27 and a white blood cell count only 0.9 percent above normal limits. At that time plaintiff's symptoms included confusion and photophobia and he was extremely weak and ill -- far more so than when examined by Dr. Cooling. Dr. Kwiatkowski opines that when Dr. Cooling examined plaintiff, he was in a prodromal stage of meningitis which is indistinguishable from the flu and other viral illnesses. Dr. Kwiatkowski concludes that it was not a deviation from accepted standards of care for Dr. Cooling to diagnose plaintiff with an upper respiratory infection and discharge him from the hospital.

Based upon the foregoing, the defendants have demonstrated *prima facie* entitlement to summary judgment dismissing plaintiff's complaint.

The plaintiff has opposed this motion for summary judgment with an attorney's affirmation, the plaintiff's affidavit, the affirmation of the plaintiff's expert, Michael Gindi, M.D., and a copy of the health care practitioner note of the plaintiff's emergency department record.

To rebut a *prima facie* showing of entitlement to an order granting summary judgment by defendants, 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, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.,* 242 AD2d 282, 660 NYS2d 739 [1997]). Dr. Gindi's affirmation reflects that he is a physician duly licensed to practice medicine in the State of New York and is board-certified in emergency medicine. Dr. Gindi states therein that Dr. Cooling acknowledged that he made no notations regarding the erythema,

[* 5]

enlarged lymph nodes or lung rales reported by the medical student who examined plaintiff initially, and did not note that plaintiff was sweating or in distress or that his condition had worsened, that Dr. Cooling made no notation as to the degree of pain experienced by plaintiff, and that he did not take a history from plaintiff concerning the medications he had taken prior to presenting to the emergency room.

Dr. Gindi further sets forth his opinion with a reasonable degree of medical certainty that Dr. Cooling departed from accepted standards of medical care in his treatment of plaintiff, and that the departures were the proximate cause of injury to the plaintiff, based on the following: that plaintiff's vital signs upon admission to the emergency department were abnormal as his pulse was 117 and for a man his age (plaintiff was then 34 years old) should have been less than 100 beats per minute; Dr. Cooling failed to repeat taking the vital signs and failed to determine the cause of the elevated pulse rate. No rectal temperature was taken although Dr. Cooling ordered the same to be done, and Dr. Cooling did not ensure that his order was complied with. Dr. Cooling either ignored or failed to note the medical student's findings of erythematous tympanic membranes, enlarged lymph nodes, sweating, distress and headache. Dr. Gindi opines that when a patient presents to the emergency room with headache, the standard of care requires that an evaluation as to the source of the headache must be performed, and it is the obligation of the emergency room physician to rule out two possibilities: subarachnoid hemorrhage or meningitis. He states the burden is on the examiner and if a CAT scan or lumbar puncture is indicated, these tests must be performed. Dr. Gindi further states that had plaintiff been kept in the hospital for an appropriate period of observation, his condition would have deteriorated within that time frame and treatment with antibiotics could have been rendered earlier, and that by improperly discharging the plaintiff with an incorrect diagnosis, Dr. Cooling effectively delayed the start of proper treatment of the plaintiff's meningitis which resulted in permanent injury to the plaintiff.

Based upon the foregoing, the plaintiff's expert has raised factual issues as to the existence of alleged departures by Dr. Cooling and whether these alleged departures were the competent producing cause of the plaintiff's alleged injuries, thus precluding summary judgment.

Although counsel for the defendants argues in the reply that Dr. Gindi's allegations were not previously mentioned in the plaintiff's bill of particulars and that new theories of liability asserted for the first time in opposition to summary judgment must be rejected, the function of a bill of particulars is to amplify the pleadings and not to afford evidentiary material and expert opinion which was produced by the experts in this motion (*see*, *Bouton v County of Suffolk et al,* 125 AD2d 620, 509 NYS2d 846 [2d Dept 1986]; *Rockefeller v Hwang*, 106 AD2d 817, 484 NYS2d 206 [3d Dept 1984]).

Accordingly, the motion of defendants for an order granting summary judgment dismissing the complaint is denied.

Dated: September 18, 2009

PAUL J. BAISLEY, JR.
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**