

**Boucher v Hito**

2009 NY Slip Op 32542(U)

October 1, 2009

Supreme Court, Suffolk County

Docket Number: 06-12290

Judge: Joseph C. Pastorella

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**COPY**

SHORT FORM ORDER

RC

INDEX No. 06-12290  
CAL. No. 08-02627-MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Supreme Court

Mot. Seq. # 001 - MG

-----X	
SUZANNE BOUCHER and JOHN BOUCHER,	:
	:
	:
	:
	:
	:
	:
Plaintiff,	:
	:
	:
	:
- against -	:
	:
	:
	:
HASSAN HITO, M.D., NORTH SHORE	:
UNIVERSITY HOSPITAL AT SYOSSET, and	:
DAVID MAYER, M.D.	:
	:
	:
	:
Defendant.	:
-----X	

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

**ORDERED** that this motion by the defendant Hassan Hito, M.D. for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is granted.

This is a medical malpractice action to recover damages, personally and derivatively, for injuries allegedly sustained by the then 39 year old plaintiff Suzanne Boucher as a result of the defendants' negligence in treating her during her admission to North Shore University Hospital at

Boucher v Hito  
Index No. 06-12290  
Page No. 2

Syosset between October 3, 2005 and October 7, 2005 where the plaintiff underwent a near total total bilateral thyroidectomy. The plaintiffs allege that as a result of said negligence, following the subject surgery the plaintiff sustained post-surgical infection, fever, erythema, hypothyroidism, myxedema coma, quadriplegia, inability to walk, global neurological depression, myopathy, adrenal insufficiency, nausea, vomiting and muscle spasms. By their complaint, the plaintiffs allege a first cause of action on behalf of the plaintiff Suzanne Boucher for medical malpractice based on negligence; a second cause of action on behalf of the plaintiff Suzanne Boucher for medical malpractice based on lack of informed consent; and a third cause of action on behalf of the plaintiff John Boucher, the plaintiff's husband, for loss of services.

With respect to the plaintiff's treating endocrinologist, the defendant Hassan Hito, M.D. (Dr. Hito), the plaintiffs allege in their bill of particulars that Dr. Hito was negligent and departed from accepted standards of medical practice in, among other things, failing to timely and properly prescribe and institute a proper course of hormone replacement therapy; allowing the plaintiff to go for an unreasonably long period of time post-thyroidectomy without proper hormone replacement therapy; failing to timely and appropriately consult with the plaintiff's surgeon, the defendant David Mayer, M.D. (Dr. Mayer), as to the plaintiff's condition and hormone replacement needs; failing to apprise the plaintiff, Dr. Mayer and North Shore University Hospital at Syosset of the plaintiff's need for aggressive and immediate hormone therapy; failing to prevent the plaintiff's discharge from North Shore University Hospital at Syosset prior to the commencement of the required therapies; and failing to follow up with the plaintiff to ensure that she was receiving proper endocrinological treatment. The plaintiffs further allege that Dr. Hito's negligence caused and/or failed to prevent the worsening of the plaintiff's condition.

The defendant Dr. Hito now moves for summary judgment dismissing the complaint as against him on the grounds that he cannot be held liable for the acts or omissions alleged against him inasmuch as he was never informed by anyone of the plaintiff's scheduled surgery prior to its occurrence; he was never requested by anyone to see the plaintiff either pre-operatively or immediately post-operatively; he did not see or treat the plaintiff during her admission to North Shore University Hospital at Syosset between October 3, 2005 and October 7, 2005; and in any event, he could not have treated the plaintiff during her admission to North Shore University Hospital at Syosset between October 3, 2005 and October 7, 2005 because he was not an attending physician at North Shore University Hospital at Syosset and had no privileges at North Shore University Hospital at Syosset.

The plaintiffs and the co-defendants Dr. Mayer and North Shore University Hospital at Syosset have not submitted any opposition to the subject motion for summary judgment and the attached affidavit of service indicates that they were served with said motion.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital or physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient (**Mendez v City of New York**, 295 AD2d 487). To rebut a prima facie showing by the defendant hospital or physician, a 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 defendant's acts or omissions were a competent-producing cause of the injuries and subsequent death of the patient (see, **Thompson v Orner**, 36 AD3d 791, 792; **Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.**, 7 AD3d 759; **Domaradzki v Glen Cove OB/GYN Assocs.**, 242 AD2d 282).

The plaintiff testified at her deposition on April 23, 2007 that prior to her surgery her thyroid was extremely overactive and she had a lot of energy; that her primary care physician referred her to Dr. Hito; and that the plaintiff needed to be seen by an endocrinologist because radiological tests indicated nodules on her thyroid. In addition, the plaintiff testified that she was unsure what time period prior to the subject surgery she actually saw Dr. Hito and that when she did see Dr. Hito he told her that she needed to have a biopsy of the nodules and referred her to Good Samaritan Hospital for the biopsy. The plaintiff also testified that she went for the biopsy up to one week later and that Dr. Hito told her the results of the biopsy, that the nodules were pre-cancerous and had to be removed. According to the plaintiff, she had to see a surgeon and she went to see the defendant Dr. Mayer at his office in Huntington one week later; she did not know who referred her to him and believed that she found his name in a book that her primary care physician had given her. The plaintiff further testified that Dr. Mayer told her that her neck was swollen and that she needed surgery because the nodules would turn into cancer; that she saw Dr. Mayer one more time and then scheduled the surgery; and that she believed that she received pre-operative medical clearance at a different hospital such as Long Island Jewish Hospital.

At her deposition, the plaintiff stated that her surgery occurred on October 3, 2005 at North Shore University Hospital at Syosset and that she remained there for one week rather than two days due to an infection. In addition, the plaintiff stated that Dr. Hito did not see her at any time during her admission and that she did not speak to him on the phone during this time. The plaintiff also stated that she was informed by both Dr. Hito and Dr. Mayer prior to the surgery that she would need to take medication, "a supplement," permanently for the rest of her life. The plaintiff further stated that the discharging physician at North Shore University Hospital at Syosset told the plaintiff that she would need "a supplement," and to go to see her endocrinologist when she got home. The plaintiff's testimony reveals that she did not see any endocrinologist after her return home from North Shore University Hospital at Syosset and that one to two weeks after the surgery, while visiting a neighbor across the street, she fainted and was taken by ambulance and admitted to the intensive care unit of Good Samaritan Hospital.

The plaintiff testified at her deposition that while at the intensive care unit of Good Samaritan Hospital she could not move her arms or legs and remembers seeing Dr. Hito who asked how she was doing and told her "we'll found out what's wrong" and that she was subsequently transferred to Huntington Hospital where she was under the care of another endocrinologist who told her that she had said symptoms because she did not take hormone replacement therapy, Synthroid, when she should have a week and a half to two weeks after surgery. The plaintiff stated that while at Huntington Hospital, she did not talk to Dr. Hito and that she was talking to a new endocrinologist. According to the plaintiff, she was taking Synthroid and another medication, Cytomil, for her parathyroid, which had not been surgically removed but was discovered not to be working. In addition, the plaintiff testified that she was discharged from Huntington Hospital by Dr. Mayer, who wanted the plaintiff to undergo physical therapy at Southside Hospital; that Dr. Hito came to see her at Southside Hospital two or three times and

discussed with the plaintiff her Synthroid dosage, which Dr. Hito was prescribing. The plaintiff also testified that in approximately three and a half weeks she regained the ability to move her arms and legs and was discharged from South Side Hospital. The plaintiff explained that she stopped treating with Dr. Hito right after the subject surgery and just never went back to his office after said surgery and that she requested that her records be transferred to her new endocrinologist, Dr. Lingal. The plaintiff further testified that no medical provider had criticized the care and treatment of Dr. Hito.

At his deposition on October 17, 2007, Dr. Hito testified that he never made a referral to a surgeon for the plaintiff; that he did not refer the plaintiff to Dr. Mayer; and that in his usual practice, a patient would be scheduled to return to see him in a month and he would receive a call about the planned surgery, when and where it would be performed, so that he could see the patient and follow up through the surgery but that in the case of the plaintiff, he received no call or information about the plaintiff's surgery. Dr. Hito pointed out that even if he had known that the subject surgery was scheduled at North Shore University Hospital at Syosset, he could not have done anything inasmuch as he was not an attending physician at said hospital and had no privileges there. In addition, Dr. Hito testified that in 2005 he had attending privileges at Good Samaritan Hospital in West Islip and at Southside Hospital in Bay Shore. He emphasized that he was never contacted by the plaintiff or her primary care physician or any other medical provider with respect to the plaintiff between her office visit of September 14, 2005 and October 3, 2005 when the plaintiff was admitted to North Shore University Hospital at Syosset for the subject surgery and that the only information Dr. Hito received was a consultation report dated September 20, 2005, which was sent to him and to the plaintiff's treating physician, reflecting a consultation between the plaintiff and Dr. Mayer in which Dr. Mayer recommended a subtotal thyroidectomy.

By his affidavit dated March 17, 2009, Dr. Hito explains that he has maintained a private practice in internal medicine and endocrinology for many years and that he first saw the plaintiff at his office on December 17, 2004 upon referral by the plaintiff's primary care physician who had found a thyroid nodule during a check up. Dr. Hito states that his impression following an examination of the plaintiff and discussion was multiple nodular goiter, thyroid nodule, rule out cancer and Hashimoto thyroiditis and that his treatment plan was that the plaintiff undergo a sonographic-guided thyroid needle biopsy and return in two weeks. According to Dr. Hito, the plaintiff was provided with a prescription for the biopsy but the plaintiff did not undergo the biopsy and did not return to his office in two weeks as instructed. Dr. Hito states that instead, the plaintiff returned to his office eight months later, on August 4, 2005, at which time Dr. Hito's treatment plan was for the plaintiff to undergo a thyroid sonogram. Dr. Hito describes the results of the report of said sonogram, which he received on August 12, 2005, as indicating left lower lobe nodule with cystic degeneration, right lower lobe with two small nodules and a complex mass measuring 2.5 centimeters by 1.3 centimeters by 1.5 centimeters. He explains that on August 18, 2005, he wrote a prescription for a sonogram-guided thyroid needle biopsy and that on September 19, 2005 he documented in his office chart, "thyroid needle biopsy: atypical cell. A surgical consult as per patient's private medical doctor." Dr. Hito further explains that he did not refer the plaintiff to a surgeon since he expected that the plaintiff's primary care physician would do so.

In addition, Dr. Hito states in his affidavit that on September 20, 2005, he received a consultation report from the defendant Dr. Mayer, who had been consulted by the plaintiff with respect to surgery,

and that the report indicated Dr. Mayer's recommendation for subtotal thyroid surgery. Dr. Hito emphasizes that he did not know Dr. Mayer and did not speak with him; that said report did not indicate where or when the plaintiff was scheduled for surgery; and that Dr. Mayer did not request that Dr. Hito see the plaintiff for a medical clearance or perform any other role in her care or treatment. Dr. Hito also points out that the plaintiff did not contact him to inform him that she was scheduled for the subject surgery.

According to Dr. Hito, he did not see or speak to the plaintiff until October 12, 2005 when he received a call from a physician informing him that the plaintiff was in the intensive care unit of Good Samaritan Hospital. Dr. Hito states that he saw the plaintiff since he had privileges at Good Samaritan Hospital and that it was then that he learned that the plaintiff had undergone surgery on October 3, 2005 at North Shore University Hospital at Syosset. Dr. Hito points out that he did not maintain privileges at North Shore University Hospital at Syosset and that he was never requested by either the plaintiff or Dr. Mayer to see the plaintiff following the subject surgery. He informs that he has maintained hospital privileges at Southside Hospital and Good Samaritan Hospital from 1980 to the present but has never had privileges at North Shore University Hospital at Syosset. Dr. Hito's consultation report for October 12, 2005 indicated that the plaintiff had been admitted with mental status changes post-surgical thyroidectomy and that the plaintiff had a history of anorexia and urinary tract infections. At the time, Dr. Hito's differential diagnosis included hypothyroidism, ruling out hypoadrenalism, ruling out overdose and ruling out neurological problems. On said date, Dr. Hito raised the plaintiff's dosage of Synthroid, which the plaintiff had started taking upon her admission to Good Samaritan Hospital, to 150 mcgs. The plaintiff was transferred on October 13, 2005 from Good Samaritan Hospital to Huntington Hospital for treatment by Dr. Mayer and Dr. Hito states that he did not see the plaintiff while she was there. Dr. Hito further states that he last saw the plaintiff in his office on November 15, 2005 at which time the plaintiff was still taking Synthroid, 150 mcgs, for hypothyroidism and that he received a requested copy of the plaintiff's operative report by fax on November 16, 2005.

In conclusion, Dr. Hito opines within a reasonable degree of medical certainty that there was no departure from good and accepted standards of care in his treatment of the plaintiff. In response to the plaintiffs' claims that the plaintiff should have been placed on hormone replacement therapy following her surgery, Dr. Hito emphasizes that he was never notified that the plaintiff was having surgery or where or when she was having surgery; he was not consulted or requested by anyone that he consult with the plaintiff after the surgery; and he did not have privileges at North Shore University Hospital at Syosset such that he could not have participated in the plaintiff's post-operative care. He further opines that based on the above, there was no negligent act or omission on his part which caused or contributed to the plaintiff's alleged injuries.

The office records of Dr. Hito concerning the plaintiff, submitted herein, included the consultation report dated September 20, 2005 of Dr. Mayer from "Minimally Invasive Surgery Center." Said report begins with "[t]hrough the courtesy of Dr. Hassan Hito, it was my pleasure to see Suzanne Boucher in surgical consultation" and provides testing and physical examination results, recommends a subtotal thyroidectomy, informs that a pre-operative pulmonary consultation was pending, ends with the statement that "[w]e will keep you apprise [sic] of her progress" and is addressed to both Dr. Hito and the plaintiff's primary care physician. A review of the proffered office records of Dr. Hito reveals no

Boucher v Hito  
 Index No. 05-12290  
 Page No. 6

further documentation from Dr. Mayer until the date of November 16, 2005, when records concerning the plaintiff's surgery were faxed from his office to Dr. Hito. The plaintiff's records from her admission to North Shore University Hospital at Syosset, also submitted herein, contain no indication that Dr. Hito was notified of the plaintiff's admission or condition during said period. The Court notes that the Patient Discharge Instruction Sheet in the plaintiff's records from North Shore University Hospital at Syosset provides, "See your Doctor on/or about (Call for Appointment) Next week" and "Additional instructions Follow up with Dr. Mayer and private doctor for thyroid function studies."

Here, the defendant Dr. Hito met his prima facie burden of establishing his entitlement to judgment as a matter of law by submitting his own affidavit, his office records concerning the plaintiff and the plaintiff's records from North Shore University Hospital at Syosset which demonstrated that he did not depart from good and accepted medical practice in his treatment of the plaintiff and in his lack of treatment of the plaintiff during her admission to North Shore University Hospital at Syosset and upon her discharge from said hospital (see, **Tuorto v Jadali**, 62 AD3d 784, 878 NYS2d 457; **Koepfel v Park**, 228 AD2d 288).

Thus, the proffered proof of the defendant Dr. Hito was sufficient to shift the burden to the plaintiffs to come forward with material in evidentiary form sufficient to raise a triable issue of fact as to his liability and the plaintiffs did not oppose the motion (see, **Groeger v Col-Les Orthopedic Associates, P.C.**, 149 AD2d 973). Therefore, the first and second causes of action for medical malpractice based on negligence and lack of informed consent are dismissed as against the defendant Dr. Hito (see generally, **Luu v Paskowski**, 57 AD3d 856; **Deadwyler v North Shore University Hosp. at Plainview**, 55 AD3d 780).

Inasmuch as the causes of action seeking damages on behalf of the injured plaintiff must be dismissed, the third, derivative, cause of action on behalf of the injured plaintiff's husband must also be dismissed as against the defendant Dr. Hito (see, **Cabri v Park**, 260 AD2d 525).

Accordingly, the instant motion is granted and the complaint is dismissed as against the defendant Dr. Hito. The action is severed and continued as against the remaining defendants.

Dated October 1, 2009



HON. JOSEPH C. PASTORESSA

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION