

**Reilly v Forester**

2009 NY Slip Op 32802(U)

November 24, 2009

Supreme Court, Suffolk County

Docket Number: 05-17145

Judge: Arthur G. Pitts

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**ORDERED** that the motion (009) by defendant, Paul Lee, M.D., for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing plaintiff's complaint and all cross claims is granted, and it is further

**ORDERED** that the motion (010) by defendant, Donald Forester, M.D., for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing plaintiff's complaint and all cross claims is granted; and it is further

**ORDERED** that the motion (011) by defendants, Morey Klein, M.D. and South Bay Cardiovascular Associates, P.C., for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint and all cross claims is granted.

In this medical malpractice action, plaintiff, Edward P. Reilly, as Executor of the Estate of Rosemary Reilly, Deceased, seeks to recover damages for alleged departures in medical treatment rendered by defendants from January 9, 2004 through January 12, 2004. By way of the bill of particulars, plaintiff alleges that Lee, *inter alia*, failed to properly clear decedent for surgery, failed to appreciate the decedent's underlying lupus condition and family history of cardiac problems, failed to prescribe nicotine products to prevent withdrawal, failed to communicate with decedent's orthopedic surgeon and other providers, failed to followup with cardiac clearance, failed to properly review decedent's chart, and failed to properly treat the tachycardia causing the myocardial infarction.

The record reveals that decedent was admitted to defendant Good Samaritan Hospital Medical Center (hereinafter referred to as "the hospital") on January 9, 2004 after falling from a chair and injuring her leg at work. Upon arrival at the emergency room at the hospital, she was informed that an x-ray revealed that she fractured her right tibial plateau and would require surgery. Decedent was admitted to the hospital by defendant Brian M. Mehling, M.D., an orthopedic surgeon, and defendant Abu M. Haque, M.D., decedent's internist. Defendant Morey Klein, M.D. of defendant South Bay Cardiovascular Associates, P.C. was called to perform a cardiology consultation and to provide surgical clearance. Decedent was to undergo surgery on Monday, January 12, 2004. However, on January 11, 2004, she complained of chest pressure while using a bed pan and became unresponsive shortly thereafter. Decedent was treated for a cardiac arrest and was subsequently intubated and transferred to the cardiac care unit. Defendant Paul Lee, M.D. was called to assess the decedent after cardiac resuscitation. At 3:48 a.m., decedent arrested a second time. On January 12 at 12:09 p.m., decedent sustained another cardiac arrest and expired at 12:15 p.m.

The elements of proof in an action to recover damages for medical malpractice are deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (*Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]). To prove a prima facie case of medical malpractice, a plaintiff must establish that the defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]).

Defendant Craig L. Shalmi, M.D. moves for an order pursuant to CPLR 3217 to so-order a stipulation of discontinuance. Defendant Paul Lee, M.D. moves for summary judgment dismissing the action and all cross claims asserted against him. Defendant Donald Forrester, M.D. moves for summary judgment dismissing the action and all cross claims asserted against him. Defendants Morey Klein, M.D. and South Bay Cardiovascular Associates, P.C. (hereinafter referred to as “the South Bay defendants”) move for summary judgment dismissing the action and all cross claims asserted against them.

With regard to defendant Shalmi’s motion, CPLR 3217 (b), relating to voluntary discontinuance by order of the court, provides that “... an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.”

Although CPLR 3217 (b) authorizes a voluntary discontinuance by court order on motion of “a party asserting a claim,” this provision may not be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion (*see*, CPLR 3217 [b]; *Shamley v ITT Corp.*, 67 NY2d 910, 501 NYS2d 810 [1986]). Here, inasmuch as the plaintiff executed said stipulation and the remaining defendants did not oppose this motion, the Court concludes that all parties consent to the discontinuance, with prejudice, of any claims against Dr. Shalmi. The Court, therefore, deems Dr. Shalmi’s motion as one for an order dismissing, with prejudice, this action as against him, and grants the motion.

Turning to the motion by defendant Lee, in support, defendant submits, *inter alia*, the pleadings, the bill of particulars, the decedent’s hospital medical record, and the affirmation of M. Joseph Anto, M.D. Dr. Anto avers that he is duly licensed to practice medicine in the State of New York and is board certified in internal medicine with a sub-specialty in cardiovascular disease. It is his opinion that the care and treatment rendered by Lee did not deviate from accepted standards of medical care. Defendant Lee saw decedent for the first time while on call for his partners with defendant South Bay Cardiovascular Associates, on January 11, 2004 at 1:30 a.m. after decedent had received cardiac resuscitation and was intubated. Lee spoke with decedent’s husband at approximately 2:21 a.m. and hospital staff who had cared for decedent. Lee spent approximately 90 minutes assessing decedent and stated in his deposition that he felt that the cardiac arrest was caused by her underlying coronary artery disease. Lee requested a cardiac catheterization which was never performed due to a second cardiac arrest at 3:48 a.m. Lee inserted an intra aortic balloon pump at the bedside to stabilize the heart.

Dr. Anto further states that a subsequent cardiogram was performed at 6:30 a.m. which showed elevated ST segments and ventricular fibrillation, demonstrating that decedent had sustained an acute inferior wall myocardial infarction. He also noted that decedent was in cardiogenic shock with a poor prognosis. Lee’s on-call period ended and did not see decedent after that time. Dr. Anto opines that the above treatment was appropriately rendered to decedent by defendant Lee and that the actions taken by Lee did not proximately cause decedent’s injuries and death. Based on the above submissions, defendant Lee has made a *prima facie* showing sufficient to warrant judgment in his favor as a matter of

law by establishing that he did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]). Here, plaintiff has failed to oppose the motion. Accordingly, defendant Lee's motion for summary judgment dismissing the action and all cross claims is granted.

Turning to the motion by defendant Forester, defendant submits, *inter alia*, the affirmation of John Conrad Rohe, M.D. Dr. Rohe avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in emergency medicine. He opines that defendant Forester did not deviate from accepted standards of care and that the treatment that he rendered to decedent did not cause or contribute to her alleged injuries including death. Upon her arrival at the hospital emergency room, and during the four hours that decedent was under defendant Forester's care, decedent was in stable condition, and was hemodynamically sound with normal vital signs, no evidence of tachycardia and no signs or symptoms of an acute or impending myocardial infarction or thrombosis. Defendant appropriately evaluated decedent within a reasonable time after her presentation to the emergency room at the hospital on January 9, 2004. He reviewed and appreciated her relevant history, appropriately performed a focused exam and directed his treatment to address the decedent's acute right lower extremity condition, as was his role as an emergency room physician. Her internist, defendant Abu M. Haque, M.D., was also present and examined decedent while in the emergency room and documented a normal cardiopulmonary examination, normal vital signs, and negative complaints of dizziness or chest pain.

Dr. Rohe further states that about 7:35 p.m. decedent was admitted to the hospital by the orthopedic surgeon, defendant Brian M. Mehling, M.D. At that time defendant Forester effectively transferred the care of the decedent to her attending physicians defendants Mehling and Haque. In sum, Dr. Rohe opines that defendant Forester met his obligations to this patient. He made the correct diagnosis of fractured right knee, stabilized the patient with IV fluids, ice packs, pain medications, and timely referred her to appropriate specialists for admission and further management. Based on the above submission, defendant Forester has made a *prima facie* showing sufficient to warrant judgment in his favor as a matter of law by establishing that he did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge, supra*). Here, plaintiff has failed to oppose the motion. Accordingly, defendant Forester's motion for summary judgment dismissing the action and all cross claims is granted.

The Court now turns to the motion by the South Bay defendants, who submit, *inter alia*, the affirmation of Guy L. Mintz, M.D. Dr. Mintz avers that he is duly licensed to practice medicine in the State of New York and is board certified in Internal Medicine and sub-certified in Cardiovascular Diseases. He opines that defendant Klein, in his cardiac consultation and cardiac clearance note, written while decedent was in the emergency room, found no overt cardiac contraindications to surgery and recommended that medications be resumed post-operatively.

Dr. Mintz stated that defendant Klein was aware that decedent was a patient with the South Bay defendants for at least ten years prior to the instant admission and referred to the decedent's office record during the consultation. Defendant Klein also noted decedent's past medical history and that the decedent denied recent episodes of chest pain, shortness of breath, palpitations, lightheadedness or

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syncope. He also compared decedent's electrocardiograms prior to admission and those performed in the emergency room, which showed no acute changes. Dr. Mintz concurs with defendant Klein's evaluation of decedent that she was hemodynamically stable and that there were no cardiac contraindications to the surgery.

Dr. Mintz further states that defendant Klein was not contacted again during decedent's admission until January 12, after the decedent had sustained multiple cardiac arrests, was in multi-organ system failure, and had developed a coagulopathy. It is therefore Dr. Mintz' opinion that defendant Klein's cardiac clearance of decedent on January 9, 2004, in the emergency room was performed in accord with good and accepted standards of medical care which did not proximately cause decedent's injuries and death. Based on the above submission, the South Bay defendants have made a *prima facie* showing sufficient to warrant judgment in their favor as a matter of law by establishing that they did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge, supra*). Here, plaintiff has failed to oppose the motion. Accordingly, the South Bay defendants' motion for summary judgment dismissing the action and all cross claims is granted.

The Court notes that defendant Mehling opposed all the above motions on the limited basis of preserving his Article 16 rights. CPLR Article 16 provides for several liability for non-economic loss, when the liability of a joint tortfeasor is found to be fifty percent or less of the total liability assigned to all persons liable, subject to specified exceptions (*see, Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]; CPLR 1601). Here, defendant Mehling is not entitled to Article 16 rights as against the moving defendants inasmuch as he failed to submit admissible evidence in opposition to their motions. However, he is not foreclosed from asserting any Article 16 defenses as against any remaining co-defendants, potential defendants, or non-parties to the action at trial.

Accordingly, the motions by defendants Shalmi, Lee, Forester and the South Bay defendants are granted. The plaintiff's claims against defendants Shalmi, Lee, Forester and the South Bay defendants, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: November 24, 2009

  
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 J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION

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