

Florio v Komisar

2009 NY Slip Op 33042(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 105178/07

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: Hon Joan B. Carey
Justice

PART 29

Index Number : 105178/2007

FLORIO, DOMINIC

VS.

KOMISAR, ARNOLD

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for Summary judgment

PAPERS NUMBERED

1-12

13-45

46

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied as per the attached decision

All parties are to appear for a pretrial conference on 1/28/10 @ 9:30 a.m.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

DEC 24 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/22/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

-----X
DOMINIC FLORIO AND RONA FLORIO,

Plaintiffs,

-against-

Index No.: 105178/07

ARNOLD KOMISAR, NORMAN A. PETTI,
DAVID A. PETTI, NORMAN A. PETTI, D.D.S., P.C.,
DAVID A. PETTI, D.D.S., P.C., AND PETTI & PETTI
D.D.S., P.C.,

Defendants.

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
JOAN B. CAREY, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

On March 24, 2005, nine days after the completion of dental implant oral surgery, injured plaintiff, Dominic Florio (Florio), was admitted to Lenox Hill Hospital (LLH) and diagnosed with bacteremia and presumptive endocarditis. Defendant Norman Petti performed the dental implantation, and Norman Petti and David Petti (hereinafter Norman Petti and David Petti when referred to collectively will be referred to as "the Pettis") examined and treated Florio after the implantation procedure. Defendant Dr. Arnold Komisar, an ear, nose and throat doctor and head and neck surgeon (ENT), also examined and treated Florio three days after the implantation procedure. The Pettis and Dr. Komisar move, pursuant to CPLR 3212, for summary judgment, dismissing the complaint.

Norman Petti performed the implant procedure on March 15, 2005. Florio, complaining of jaw pain and swelling, and the inability to eat, was also examined by Norman Petti two days following the surgery, on March 17, 2005. Thereafter on Friday March 18, 2005, Florio was

examined by Dr. Komisar, after being referred to the doctor by his primary care physician, Dr. Alan Yanoff. Dr. Komisar's records reflect that Florio represented that he was taking an antibiotic, amoxicillin when he presented to his office (Komisar Mov. Aff., Exh. Q), although at his deposition, Florio testified that he had taken the last pill that morning (Pl. Op. Aff., Exh. 4, at 150). Dr. Komisar examined Florio and prescribed Celebrex to reduce swelling.

According to Dr. Yanoff's records, by March 20, 2005, Florio's symptoms had subsided (Komisar Mov. Aff., Exh. O, at 142). Notwithstanding, overnight on March 21-22, 2005, Florio experienced fever and chills. Florio was seen by Dr. Yanoff on March 22, 2005, at which time Dr. Yanoff recorded a temperature of 100.9, sent out blood cultures, and prescribed the antibiotic Augmentin. The same day, Florio, complaining of swelling on the floor of his mouth was examined by David Petti who administered clindamycin, another antibiotic. Florio presented to David Petti with a temperature of 101.7 on March 22, 2005. On March 24, 2005, Florio, complaining of pain, saw David Petti again. The treatment notes for that visit state that Florio was much improved and had no fever. The treatment notes do not indicate any additional treatment was rendered to Florio by the Pettis (*see* Pl. Op. Aff., Exh. 10). That same day, the blood cultures ordered by Dr. Yanoff returned positive for bacterial infection, specifically a streptococcal organism. As a result, Dr. Yanoff admitted Florio to LHH, where he was treated with intravenous (IV) antibiotics. While a patient at LHH, Florio's implants were extracted and he underwent a procedure to insert a catheter for IV antibiotic administration. On March 31, 2005, Florio was discharged to home care services, and received IV antibiotic treatment for weeks thereafter.

Plaintiffs contend that Norman Petti acted carelessly in performing the implantation procedure in that he perforated Florio's jawbone, failed to properly administer prophylactic

antibiotics and conducted the surgery in a non-sterile environment, including not wearing surgical gloves or a mask when he drilled into Florio's mouth. Plaintiffs claim that all of the defendants were thereafter negligent in failing to appreciate that his symptoms indicated infection, and failing to adequately treat him by, among other things, neither ordering x-rays and blood cultures, nor referring him to an infectious diseases specialist.

“[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue ... or where the issue is even arguable ... since it serves to deprive a party of his day in court” (*Byrnes v Scott*, 175 AD2d 786, 786 [1st Dept 1991] [citation and internal quotation marks omitted]). Initially, “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to do so requires the denial of summary judgment, “regardless of the sufficiency of the opposing papers” (*id.*). Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The Pettis argue that there is no evidence establishing that they deviated from the applicable standard of care during their treatment of Florio. In support of their motion, they submit the affidavit of a New York licensed oral and maxillofacial surgeon, who opines to a reasonable degree of medical certainty that the care and treatment provided by the Pettis complied with the applicable standard of care in performing the procedures, properly medicating Florio to prevent infection, and in examining and providing follow-up care.

The Pettis' expert sets forth in the affidavit submitted in support of their motion for summary judgment that the onset of the symptoms associated with a streptococcal organism would be inconsistent with the care and treatment provided by the Pettis in March 2005, due to the close proximity of the onset of symptoms, and because Florio did not present with any signs or symptoms of infection upon examination. The expert states that David Petti noted that Florio's symptoms were diminishing as of March 24, 2005, and opines that all of Florio's post-operative symptoms were consistent with surgical edema, and not oral infection. The expert notes that Florio sought the care of several health care providers, none of whom believed that he was exhibiting signs of an infection.

The Pettis' expert further opines that since Florio was being simultaneously treated by his primary care physician, Dr. Yanoff, it was not incumbent on the Pettis to refer him to an infectious disease specialist. Additionally, according to this expert, Norman Petti did not drill through the bottom of Florio's mandible, and, that, at all times, gloves were worn and proper sterilization used by all persons involved. The Pettis' expert also states that the endocarditis diagnosis Florio received at Lenox Hill Hospital was merely a presumptive diagnosis that does not prove that he, in fact, had endocarditis, and that there exists no evidence to correlate any of the alleged injuries to the care and treatment provided by the Pettis.

In opposition, plaintiffs submit, among other things, the affidavit of a New York doctor who specializes in internal medicine and infectious diseases.¹ Plaintiffs' expert opines that Norman Petti departed from accepted standards of medical care in failing to administer pre-operative antibiotics

¹Plaintiffs also submit the affidavit of a dentist, setting forth opinions with respect to the care provided by defendants to Florio. The opinions of the expert dentist are essentially the same as those set forth in the affidavit of the internist/infectious diseases specialist.

in a timely manner, so as to allow the medication sufficient time to reach the bloodstream and become dispersed throughout Florio's body. Plaintiffs' expert further opines that Norman Petti deviated from the standard of care by using surgical implants that were removed from packaging that had been compromised, *i.e.*, previously opened or damaged, and implanting them without wearing surgical gloves. According to this expert, Norman Petti also deviated from accepted medical practice by not placing Florio on post-operative antibiotics for at least seven to ten days.

Plaintiffs' expert sets forth in this affidavit that the aforementioned deviations from the standard of care were producing causes of Florio's severe blood infection and other injuries. The expert notes that the type of bacteria which infected his blood stream is a well-known cause of endocarditis, and that the failure to wear gloves while performing oral surgery greatly increases the risk of infection by either introducing bacteria directly from the surgeon's hands into the patient's mouth, or from the surgeon's hands by way of the implant. In addition, plaintiffs' expert states that, based upon a treating periodontist's impression that Florio's lingual plate was perforated, Norman Petti exposed Florio to an increased risk of infection by providing an avenue for bacteria to enter the bloodstream which, in combination with Norman Pettis' alleged failure to properly administer and prescribe antibiotic therapy, exposed Florio to a dangerously high risk of infection.

Regarding the Pettis' care of Florio after the implantation, plaintiffs' expert notes that the signs and symptoms of infection include presence of fever, chills, pus, or exudate, as well as pain accompanied by swelling in the vicinity of a recent operative site. In the opinion of this expert where a patient presents in Florio's condition, with his recent surgical history, the standard of care mandates infection to be included in the differential diagnosis, and that Florio's temperature should have been taken, his white blood cell count tested and blood and urine cultures ordered. Also

required, according to plaintiffs' expert, was an x-ray to rule out edema and/or abscess, as Florio complained of difficulty swallowing, and a referral to an infectious diseases specialist. Plaintiffs' expert opines that these departures from accepted medical standards of care during Florio's post-surgical care were producing causes of Florio's severe blood infection and other injuries. According to this expert an earlier diagnosis of Florio's infection would have minimized the risk of systemic infection, and its sequella.

Based upon the conflicting expert opinions set forth above, it appears that triable issues of fact exist with respect to whether the Pettis departed from good and accepted medical practice, and whether any such departures were a proximate cause of his injuries (*see Smith v Cattani*, 2 AD3d 259 [1st Dept 2005]; *Clemons v Glicksman*, 1 AD3d 286 [1st Dept 2003]). Triable fact issues remain with respect to, among other things, whether Florio's post-surgical complaints of swelling and pain were indicative of infection and whether further testing and additional, or different, antibiotic treatment were required under the particular circumstances of this case; as well as whether Norman Petti departed pre-operatively and intra-operatively in failing to administer pre-operative antibiotics in a timely manner, in using compromised implants, and placing the implants without wearing surgical gloves.² Whether Florio suffered from endocarditis is also a fact issue for trial, but in any event, the Pettis have not demonstrated, as a matter of law, that Florio did not suffer an injury, such as bacteremia.

² Florio testified that Norman did not wear surgical gloves or a mask when he drilled into his mouth (Pl. Op. Aff., Exh. 4, at 125). As such, whether Norman wore surgical gloves and a mask is a disputed issue of fact that cannot be answered by the experts, who lack personal knowledge of the events of this case.

In moving for summary judgment, defendant Dr. Komisar submits the affidavit of an ENT who opines that Dr. Komisar was engaged as a consultant with his role limited to ruling out the possibility of the danger of blockage to Florio's airway. As plaintiffs do not allege that Dr. Komisar was negligent in evaluating Florio for airway blockage, Dr. Komisar argues, and his expert opines, that Dr. Komisar fulfilled his duty to Florio by properly assessing him for airway blockage and treating swelling, and had no legal duty to work Florio up or treat him for infection. Dr. Komisar argues that case law provides that where a consulting physician's role is discreet, his or her duty should not be expanded beyond that role.

Generally, whether a duty of care is owed to a plaintiff is a legal question (*see Koepfel v Park*, 228 AD2d 288 [1st Dept 1996]). Defendant cites to cases where the courts have found, under the particular factual situations in those cases, that the duty owed was defined or circumscribed by the health care provider's discreet or limited role in the patient's care (*see e.g. Huffman v Linkow Inst. for Advanced Implantology, Reconstructive & Aesthetic Maxillo-Facial Surgery*, 35 AD3d 214 [1st Dept 2006] [role of health care provider who did not participate in surgical aspects of the case would not be expanded to that of surgeon]; *Lipton v Kaye*, 214 AD2d 319 [1st Dept 1995]). The record does not permit a finding, as a matter of law, that Dr. Komisar's role in Florio's care was limited in the manner that he and his expert contend, *i.e.*, solely to assess his airway on Friday, March 18, 2005, to ensure no weekend emergency.

Dr. Komisar's deposition testimony, that Dr. Yanoff was referring Florio because he wanted to make sure that nothing acute was going on over the weekend and did not tell Dr. Komisar that he had concerns other than the swelling (*see Komisar, Mov. Aff., Exh. J, at 23-24*), cannot, as a matter of law, be interpreted as a referral only concerning the ruling out of airway blockage, but is subject

to interpretation through inferences properly made by the trier of fact. Evidence submitted in connection with this motion includes a letter Dr. Komisar wrote to Dr. Yanoff suggesting that there was no apparent “life-threatening infection” and stating that he would keep Dr. Yanoff informed as to Florio’s progress (*id.*, Exh. Q), as well as Dr. Yanoff’s note that Dr. Komisar saw Florio for an “ENT evaluation” and agreed that Florio’s symptoms were due to bleeding (*id.*, Exh. O, at 142). The foregoing raises issues of fact with respect to the role Dr. Komisar played in treating Florio. In addition, Dr. Komisar’s expert states that Dr. Komisar examined Florio’s mouth and Dr. Komisar’s treatment note appears to indicate that his treatment plan included observing Florio. All of this evidence raises fact issues as to whether Dr. Komisar’s role was limited to a one-time assessment of Florio’s airway, or whether Dr. Komisar took on a broader role than to simply assess him for airway blockage.

With respect to the adequacy of the care provided by Dr. Komisar, his expert opines that Florio did not present to Dr. Komisar with the signs and symptoms of infection on March 18, 2008, and, thus, did not require him to provide any care with respect to an infection. Notwithstanding, plaintiffs’ experts opines that Florio was exhibiting signs and symptoms of infection at that time, such as pain accompanied by swelling in the vicinity of a recent operative site. Based upon these conflicting expert affidavits, issues of fact and credibility exist that cannot be resolved on this motion for summary judgment. *See Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]. Accordingly, Dr. Komisar’s motion for summary judgment is denied. It is noted that Dr. Komisar challenges plaintiffs’ expert’s wording of his opinion, and discusses the danger of over-prescribing antibiotics and antibiotic resistance. The Court, however, is not making a determination as to whether signs and symptoms of infection were present, antibiotic therapy was appropriate, or

any other medical aspect of this case, as it is well established that on summary judgment courts do not engage in issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The conflicting expert affidavits and evidence submitted in connection with Dr. Komisar's motion also raise an issue of fact as to whether the standard of care required only that Dr. Komisar send Florio back to the oral surgeon, as defendant argues, as well as whether Florio, in fact, suffered from endocarditis. Finally, Dr. Komisar's argument, that plaintiffs' experts' affidavits are not probative as to the standard of care involving an ENT, is unpersuasive as he has not shown that the plaintiffs' experts are not "possessed of the requisite skill, training, education, knowledge or experiences from which it can be assumed that the opinion rendered is reliable" concerning the appropriate diagnosis and treatment of a post-surgical infection (*Behar v Coren*, 21 AD3d 1045, 1047 [2d Dept 2005] [citation omitted]).

Accordingly, it is

ORDERED that the defendants' motions for summary judgment are denied.

Dated: 12-22-2009

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J.C.

FILED
DEC 24 2009
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