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| Bongiorno v Greenstein |
| 2009 NY Slip Op 33120(U) |
| December 23, 2009 |
| Supreme Court, New York County |
| Docket Number: 112024/2004 |
| Judge: Debra A. James |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ANTHONY BONGIORNO and THERESA FOGLIANO,
Plaintiffs,

Index No.: 112024/2004

- v -

Motion Date: 10/06/09

ADRIAN GREENSTEIN, M.D., DR. LUBLIN, DR.
DECKER (MSMS), MOUNT SINAI MEDICAL CENTER
and SURGICAL ASSOCIATES, P.C.,

Motion Seq. No.: 004

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion to set aside the verdict.

PAPERS NUMBERED

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

1

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves to set aside the jury verdict as against the weight of the credible evidence and for a new trial pursuant to CPLR 4404 in this medical malpractice action.

Plaintiff Anthony Bongiorno alleges that defendant Dr. Adrian Greenstein committed malpractice in the course of post-surgical care and treatment. He claims that such negligence occurred after Dr. Greenstein performed a hernia repair operation on him at the defendant Mount Sinai Medical Center (Mt. Sinai) on April 11, 2002. In June 2002, plaintiff Bongiorno was re-

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

admitted to the Mount Sinai for incision, drainage and debridement of his surgical wound at which time the culture was positive for a Methicillin-resistant Staphylococcus aureus (MRSA) bacterial infection. Plaintiff alleges that such injury and consequent additional surgery and pain and suffering arose because in providing medical services to plaintiff, Dr. Greenstein departed from good and accepted standard of care in several respects.

After both sides rested, this court granted the motion of defendant Mt. Sinai to direct a verdict, as a matter of law, in its favor and dismissed the complaint against the hospital.

As to the remaining defendant Dr. Greenstein, the trial ended in a jury verdict in his favor. The jury unanimously answered "No" to the questions whether defendant Greenstein departed from good and accepted medical practice (1) in failing to use gloves when he examined plaintiff post-operatively; (2) in failing to ensure that the Jackson-Pratt drains were removed in a timely manner; (3) in discharging the plaintiff Bongiorno on April 16, 2002 without having cultured the drains; and (4) in failing to re-culture the plaintiff Bongiorno's wound after discontinuing the Cipro medication prior to mid June 2002. The jury answered "No", with one juror dissenting, to the question whether defendant Greenstein departed from good and accepted medical practice in discharging plaintiff Bongiorno from the

hospital on April 16, 2002 without performing lab work to evaluate the plaintiff Bongiorno.

Plaintiff argues that this court committed error in failing to put the case against defendant Mt. Sinai to the jury. He urges that there was evidence that defendant Mt. Sinai was negligent in that its residents failed to remove the Jackson-Pratt drains when ordered by defendant Greenstein. He posits that the court committed error when, in the face of such evidence, it directed a verdict in favor of the defendant Mt. Sinai, as a matter of law. He contends that such ruling was contrary to Collins v. New York Hospital, 49 NY2d 965 (1980), where the Court of Appeals stated that the failure of a hospital to carry out its responsibility to follow a physician's order can be found to be malpractice, citing Toth v. Community Hospital at Glen Cove, 22 NY2d 255 (1979).

In Toth, the Court of Appeals ruled that the primary responsibility of a hospital's nursing staff is to follow physician's orders. On that basis, the Toth court held that since the plaintiffs made out a prima facie case that the nurses had not conformed to the pediatrician's orders, the trial court erred in not submitting the case against the hospital to the jury. 22 NY2d 255, 264-265.

This court disagrees with plaintiff that it misapplied the law with respect to Mt. Sinai's liability. First, in Collins,

the Court of Appeals modified the appellate court's order to the extent that it vacated the judgment against the hospital. In doing so, the Court of Appeals rejected the court's reasoning that the hospital could not be cast in damages for failing to carry out a certain test because the doctor's discharge of infant plaintiff from the hospital constituted a revocation of order to perform such test. Holding that the question of the hospital's negligence should have been determined by the jury, the Court of Appeals reasoned that there was evidence in the record that rather than a revocation of its order, the doctor's failure to perform the test arose because other improper actions taken by the hospital made its performance more risky to the patient.

Here, even assuming that Dr. Greenstein's forbearance in removing the drains did not constitute a revocation of his order to remove the drains, plaintiff alleges no separate conduct on the part of the hospital that impeded the removal of the drains.

Toth is also distinguishable from the facts of this case. In Toth, the court found that plaintiffs had introduced substantial evidence that the nurses had not conformed to the pediatrician's order. Introduced at that trial were "written orders that the infants should receive oxygen at the rate of 6 liters per minute for the first 12 hours, and thereafter at the rate of 4 liters per minute" (Toth v. Community Hospital, 22 NY2d 255, 258, supra). There was also documentary evidence that tended to prove that the

nurses never carried out that part of the order that directed a reduction in the amount of oxygen administered to the infants.

Here, while Dr. Greenstein testified that he wrote an order for the residents to remove the drains several days before they were ultimately removed and that the residents should follow the physician's order, there is also evidence, which is not contested, that over the course of days, Dr. Greenstein himself had the opportunity to see the drains and ensure their removal. Such is unlike the task delegated to the nurses in Toth, where the entries of the amount of oxygen that the nurses recorded in the chart raised a question of fact as to how much oxygen was administered.

It is interesting to note that the jury found that there was no departure on the part of defendant Greenstein in failing to ensure that the Jackson-Pratt drains were removed in a timely manner. Such finding belies any claim that any hospital resident, whom Dr. Greenspan supervised, was negligent in failing to do so. In any event, as there is no evidence that the hospital failed in its handling of the drains, separate and apart from Dr. Greenstein's failure, a directed verdict in favor of the hospital was properly granted.

The court has considered plaintiff's other arguments with respect to defense counsel's conduct during the trial and Dr.

Greenstein's participation and find that such complaints provide no basis to upset the jury award.

Accordingly, it is

ORDERED and ADJUDGED that the plaintiffs' motion is DENIED in its entirety.

This is the decision and order of the court.

Dated: December 23, 2009

ENTER:

Debra A. James J.S.C.

DEBRA A. JAMES

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).