

Polizzi v Burke

2010 NY Slip Op 30071(U)

January 4, 2010

Supreme Court, Nassau County

Docket Number: 5131/06

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ROSALIA POLIZZI and ANTONIO POLIZZI,

Plaintiffs,

- against -

JOSEPH BURKE, D.P.M.,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 5131/06

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves for summary judgment. The plaintiffs oppose the motion.

The underlying medical malpractice action alleges the defendant removed an ingrown toenail on the plaintiff's big toe, while using a needle for the procedure, the tip of it broke off into the plaintiff's big toe causing great pain and suffering. This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion.

The defense attorney states, in a supporting affirmation dated September 3, 2009, the care and treatment provided by the defendant was in full accord with the standards of

the health care community without any deviation from those standards. The defense attorney states the defendant rendered care and treatment to the plaintiff during four visits, to wit on May 26, 2005, June 16 and 23, 2005, and July 7, 2005, but the defendant did not proximately cause any injuries to the plaintiff. The defense attorney points, in support of the defense contentions, to the verified bill of particulars amplifying the verified complaint to allege the thrust of the plaintiff's claims is an ingrown toenail procedure performed on the right great toe was not properly performed, that is the defendant allegedly caused a foreign object, to wit a broken metal pin or broken tip of a needle to be left behind inside the plaintiff's big toe on her right foot. The defense attorney submits the defendant's records, the May 7, 2007 deposition testimony by the defendant, the initial x-ray film taken on May 26, 2005, prior to any procedure demonstrate the presence of a foreign object in the plaintiff's big toe on her right foot.

The defense attorney also points to the affidavit dated September 2, 2009, by Arden Smith, D.P.M., a board certified podiatrist who opines, within a reasonable degree of podiatric certainty, the treatment provided by the defendant was given in accord with good and accepted podiatric practice, performed in a timely and appropriate manner, and that treatment did not result in, nor proximately cause, any injury to the plaintiff. Dr. Smith observes an x-ray was taken at the first visit by the plaintiff, and a review of that May 26, 2005 x-ray by this doctor reflects the presence of a foreign body situated in the plaintiff's right great toe. Dr. Smith states the foreign body complained of by the plaintiff

existed prior to the time of the plaintiff's first contact with the defendant. Moreover, Dr. Smith states x-rays of that right foot taken on June 23, 2005 and July 7, 2005 show similar findings, most notably again the presence of the foreign body which remained in a fixed position without any migration from its position noted in the May 26, 2005 x-ray. Dr. Smith asserts the plaintiff's complaint on May 26, 2005 reflected discomfort with the dorsal, or top aspect of the plaintiff's foot which, in Dr. Smith opinion, was not causing any symptomology or danger, so the foreign body during the course of the treatment by the defendant, in Dr. Smith's opinion, was not an issue, and it did not require removal. Dr. Smith averred the defendant performed a procedure on the plaintiff on June 16, 2005, where the ingrown toenail was treated by phenol onychoplasty for permanent removal of the ingrown toenail, and Dr. Smith opined that procedure was proper, and in no way contributed to nor caused any of the injuries complained of by the plaintiff. Dr. Smith noted subsequent x-rays of that right foot taken on June 23, 2005 and July 7, 2005 demonstrate there was no introduction of any secondary foreign body. Dr. Smith maintains improvement is noted on July 7, 2005, and there was no sign of a stress fracture, so the plaintiff was appropriately advised by the defendant to return to normal shoe gear, and return in two weeks for a final evaluation. Dr. Smith reports the records reflect another physician saw the plaintiff on August 15, 2005, at which time a follow up for an MRI was undertaken as the plaintiff complained about pain.

The plaintiff's attorney states, in an opposing affirmation dated October 28, 2009,

the defendant deviated in several aspects from the good and accepted community standards of medical care. The plaintiff's attorney points to the defendant's deposition testimony, and states the defendant made no mention of a metallic foreign object in the plaintiff's right foot, and a possible stress fracture appeared on the May 26, 2005 x-ray. The plaintiff's attorney points at the affidavit dated November 2, 2009, by Stewart Kamen, D.P.M., a board certified podiatrist, who states, based upon his review of this matter, the defendant deviated from accepted medical standards while treating the plaintiff which resulted in pain and discomfort to her. Dr. Kamen explains the deviation commenced on June 16, 2005, and it is apparent, from the medical records, the plaintiff's affidavit and the defendant's deposition testimony, the defendant, while attempting to remove an ingrown toe nail, broke a needle off into the plaintiff. Dr. Kamen opines an October 13, 2005 pathology report of a finding and removal of a rusted metallic material, to wit a broken needle tip confirms his findings. Dr. Kamen maintains he was shocked to see the defendant claimed he learned of this foreign object while reviewing the May 26, 2005 x-ray since the defendant never noted that finding anywhere in the plaintiff's file, and failed to treat the plaintiff for that condition or addressed it in any manner. Dr. Kamen takes issue with the sworn statement of the defense expert regarding the initial discovery of that object since the sole purpose for the plaintiff's medical treatment after June 16, 2005, was due to pain in her right big toe. Dr. Kamen opines, within a reasonable degree of podiatric certainty, the defendant broke off the needing during the

June 16, 2005 procedure to remove the ingrown nail on the plaintiff's right big toe, and went to great lengths to conceal his negligence. Dr. Kamen concludes, within a reasonable degree of podiatric certainty, the treatment provided by the defendant was not given in accord with good and accepted podiatric practice, and that deviation resulted in injury to the plaintiff.

The defense attorney states, in a reply affirmation dated November 9, 2009, Dr. Kamen's November 2, 2009 affidavit is deficient on its face because it does not provide specificity to support his bare and conclusory statements. The defense attorney asserts it is clear Dr. Kamen did not review the May 26, 2005 x-ray taken by the defendant, so the defense attorney submits Dr. Kamen is in no position to formulate an opinion within a reasonable degree of podiatric certainty. The defense attorney points out Dr. Smith stated the foreign body was unequivocally present on May 26, 2005, at the plaintiff's first visit with the defendant, and prior to any procedure performed by the defendant. The defense attorney avers the plaintiff's affidavit submitted with the opposition papers is without merit since the plaintiff is not a podiatrist nor physician. The defense attorney reiterates the plaintiff's contentions regarding Dr. Smith's opinion, and states subsequent x-rays do not demonstrate a second foreign object nor the presence of the foreign object resulting from the interaction between the plaintiff and the defendant. The defense attorney states, while the plaintiff presents a copy of the pathology report there was a foreign body, the defense never refuted it, but states that pathology report does not specify when the

presence of that foreign body occurred.

“Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination” (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated”

(*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). This Court finds the defendant has established a prima facie entitlement to summary judgment as a matter of law. In opposition, the plaintiffs have presented there is a triable issue of fact regarding whether the treatment provided by the defendant was given in accord with good and accepted podiatric practice, and whether that deviation resulted in injury to the plaintiff.

Accordingly, the motion is denied.

So ordered.

Dated: **January 4, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
 JAN 07 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE