

Thompson v Frankin Hosp. Med. Ctr.

2010 NY Slip Op 31559(U)

June 14, 2010

Sup Ct, Nassau County

Docket Number: 017742/07

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

_____X
KIAN THOMPSON,

Plaintiff,

Index No.: 017742/07
Motion Sequence...03
Motion Date...03/30/10

-against-

FRANKLIN HOSPITAL MEDICAL CENTER,
DAVID A. COHEN, BASSEM S. ZIEDAN,
JOHN ROHE, PARVIZ BEHFARIN, DAVID
B. MARSHAL, ANTHONY L. COLANTONIO
and RATHINDRA BANIK,

Defendants.

_____X
Papers Submitted:
Notice of Motion.....X
Affirmation in Partial Opposition.....X
Affirmation in Partial Opposition.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion, pursuant to CPLR 3212, by the Defendants, FRANKLIN HOSPITAL MEDICAL CENTER, JOHN ROHE, PARVIZ BEHFARIN, DAVID B. MARSHAL and RATHINDRA BANIK, for summary judgment, seeking to dismiss the complaint and all cross claims asserted against said Defendants, are decided as hereinafter provided.

The Plaintiff, KIAN THOMPSON, initially presented to the emergency room

at Franklin Hospital Medical Center at 12:30 p.m. on March 20, 2004 complaining of abdominal pain, nausea and vomiting, whereupon he was seen by the Defendant, Dr. Rathindra Banik, an employee of the hospital (*see* Lane Affirmation in Support at Exhibit F at pp. 13,15). The Plaintiff underwent blood work and a CAT scan of the abdomen, the latter of which was ordered by Dr. Banik, due to the abdominal pain and an elevated amylase level, which can be indicative of gallbladder, liver or intestinal problems (*id.* at Exhibit F at pp. 15, 17, 53). The CAT scan was read by the Defendant, Dr. Parviz Behfarin, who opined that the scan revealed a “fatty liver” and “minimal pelvic fluid” (*id.* at Exhibit H; *see also* Exhibit C at p. 105).

The Plaintiff was ultimately admitted to the hospital on March 20, 2004 by Dr. Bassem Zeidan who, upon request of Dr. Banik, performed a surgical consult (*id.* at Exhibit F at pp. 25, 27). Dr. Zeidan rendered a differential diagnosis of gastroenteritis and pancreatitis and determined that the Plaintiff required inpatient care (*id.* at Exhibit F at p. 37; *see also* Exhibit C at pp. 15, 24, 32, 34). During the hospital stay, the Plaintiff underwent a barium enema to evaluate “the suspicion of stricture at the sigmoid colon” (*id.* at Exhibit C at p. 95; *see also* Exhibit H). This procedure was performed by the Defendant, Dr. David Marshal, who also interpreted the results which indicated the presence of a “1.5 CM FOCAL FILLING DEFECT” which possibly represented a “SMALL POLYP” (*id.* at Exhibit H). On March 24, 2004, the Plaintiff was discharged with a diagnosis of acute gastroenteritis and was advised to follow up with Dr. Zeiden within one week of his discharge, which the

Plaintiff failed to do (*id.* at Exhibit H; *see also* Exhibit C at pp. 108, 112, 113).

On October 5, 2004, the Plaintiff again presented the emergency room at Franklin Hospital Medical Center with complaints of nausea and severe stomach pains, at which time he reported a weight loss of 25 pounds, which had occurred over the previous two months (*see* Lane Affirmation in Support at Exhibit E at p. 58; *see also* Exhibit H). The Plaintiff was again seen by Dr. Banik, who ordered a CAT scan, the results of which were interpreted by the Defendant, Dr. Behfarin, and indicated a longitudinal 9 centimeter mass in the liver (*id.* at Exhibit E at pp. 60, 61, 64, 65, 70; *see also* Exhibit H). The Plaintiff's blood work revealed elevated liver enzymes, as well as elevated levels of alkaline phosphatase (*id.* at p. 67, 68; *see also* Finkin Affirmation in Support at Exhibit A at ¶4). Dr. Banik requested a surgical consult, which was allegedly performed by the Defendant, Dr. Colantonio (*see* Lane Affirmation in Support at Exhibit E at pp. 74, 80, 93, 94, 104). The Plaintiff was discharged on the same day and was given a prescription for Pepsid and was instructed to follow up with Dr. Colantonio within two days (*id.* at Exhibit E at pp. 87, 88, 96, 102; *see also* Exhibit H).

On December 17, 2004, the Plaintiff once again presented to the emergency room at Franklin Hospital Medical Center with complaints of right upper quadrant abdominal swelling and a lump on the liver, for which he was treated and released with a diagnosis of questionable abdominal hernia (*id.* at Exhibit H). The Plaintiff was again instructed to follow up with Dr. Colantonio (*id.*; *see also* Finkin Affirmation in Opposition at Exhibit A at ¶5).

On December 25, 2004, the Plaintiff presented to the emergency room of Jamaica Hospital Medical Center complaining of abdominal pain, nausea and vomiting (*id.* at ¶6). A CAT scan of the abdomen and pelvis was performed, the results of which indicated a “15 x 10 x 8 cm [centimeters] heterogeneous mass . . . arising from the left lobe of the liver” (*id.* at Exhibit A at ¶ 6). Thereafter, on January 31, 2005 at New York Presbyterian Hospital, the Plaintiff underwent a removal of the left lobe of the liver and the complete removal of his gallbladder (*id.* at ¶ 7; Exhibit C; *see also* Finkin Affirmation in Opposition at ¶ 7). The results of the operative and pathology reports indicated a malignant liver mass and metastasis to the portal vein (*see* Finkin Affirmation in Opposition at ¶ 7).

The underlying action was thereafter commenced by the Plaintiff seeking damages resulting from the Defendants’ failure to diagnose and treat liver cancer (*see* Lane Affirmation in Support at Exhibit A).

In support of the within application, counsel for the moving Defendants argues that with respect to the Defendant, John Rohe, the within action must be dismissed as the evidence herein demonstrates that said Defendant never rendered any treatment to the Plaintiff and thus he could not have engaged in any medical departures which proximately caused the Plaintiff’s injuries (*id.* at ¶¶ 37, 38). Counsel asserts that Dr. Rohe’s name appears on the relevant medical reports solely as a result of his position as head of the Emergency Department of Franklin Hospital Medical Center (*id.* at ¶ 37).

As to the Defendants, Parviz Behfarin and David Marshall, counsel posits that

both Defendants acted within the accepted standards of medical practice and that the care provided was not the proximate cause of the Plaintiff's injuries therefore warranting dismissal of the Plaintiff's complaint (*id.* at ¶¶ 40, 44, 46, 50). Defendants' counsel provides the affirmation of Dr. Richard P. Gold, a board certified radiologist, who reviewed the medical records, deposition transcripts and pleadings relevant to the within action (*id.* at Exhibit J at ¶ 3).

With particular regard to the Defendant, Parviz Behfarin, Dr. Gold avers "within a reasonable degree of medical certainty that Dr. Behfarin did not depart from accepted standards of care in his interpretation of the CT scan films of Mr. Thompson's abdomen and pelvis in March 2004" and that "Dr. Behfarin properly read the films" which indicated that "there were no liver masses present" at that time (*id.* at ¶ 9). Dr. Gold further opines that "Dr. Behfarin did not depart from accepted medical standards in his care and treatment of Mr. Thompson on October 5, 2004" and that "Dr. Behfarin properly read the CT scan films showing a large mass . . . on the left lobe of the liver" (*id.* at ¶ 13). Dr. Gold additionally posits that "as a radiologist, it was not Dr. Behfarin's duty to formulate a treatment plan for cancer . . ." and that Dr. Behfarin "had no duty to treat and investigate the cause of the liver mass" (*id.*).

With respect to the Defendant, David Marshall, Dr. Gold states that based upon his review of the relevant medical reports, pleadings and depositions, "Dr. Marshal did not depart from accepted medical standards of care in his interpretation of the barium enema test

performed on March 24, 2004” and “properly recommended further evaluation with a colonoscopy in response to the presence of the focal filling defect and did not depart from accepted standards of care in his recommendation” (*id.* at ¶ 10). Further, and as to both of these Defendants, Dr. Gold opines that “the evaluations and recommendations made by Dr. Behfarin and Dr. Marshal were made in accordance with good and accepted medical practice” and that “the injuries or damages alleged by Mr. Thompson cannot be causally related to any of the alleged acts and/or omissions” of said defendants (*id.* at ¶ 16).

With regard to the Defendant, Rathindra Banik, counsel provides the expert affirmation of Dr. Lori Ann Attivissimo, who is board certified in “Internal Medicine, Hematology, Oncology and Hospice and Palliative Care Medicine” (*id.* at Exhibit I at ¶ 1). Dr. Attivissimo conducted a review of the relevant medical records, pleadings and deposition transcripts, and upon such review opines “within a reasonable degree of medical certainty that Dr. Banik did not depart from accepted standards of care in his treatment of Mr. Thompson in March of 2004” (*id.* at ¶¶ 2, 3, 11). Dr. Attivissimo states that Dr. Banik ordered the proper tests and duly requested a surgical consult and that as “the CT scans did not show any masses, Dr. Banik properly concluded that liver cancer was not present in March 2004” (*id.* at ¶ 11). Dr. Attivissimo asserts that “Dr. Banik properly relied upon Dr. Behfarin’s interpretation of the CT scan, which did not show any masses, and thus a diagnosis of liver cancer could not have possibly been made in March 2004” (*id.* at ¶ 13).

As to the Plaintiff’s October 5, 2004 visit to the emergency room, Dr.

Attivissimo opines that Dr. Banik, in his capacity as the emergency room attending physician, “properly worked up Mr. Thompson by ordering blood work, lab tests, and a CT scan” (*id.* at ¶ 16). The expert states that “the fact that Mr. Thompson was not admitted to Franklin Hospital Medical Center on October 5, 2004” was not a departure from accepted medical standards inasmuch as his condition did not qualify as “an emergent situation where he needed immediate treatment” but rather was a condition which warranted “an outpatient workup” (*id.* at ¶¶ 16, 21). Dr. Attivissimo concludes that “within a reasonable degree of medical certainty that Dr. Banik did not depart whatsoever from accepted standards of care in his workup of Mr. Thompson on October 5, 2004” and “given the type of liver cancer that Mr. Thompson has, surgical intervention would still have been necessary had the cancer been diagnosed or treated in October 2004” and “post-operatively the treatment offered would have been the same” (*id.* at ¶¶ 16, 18).

Finally, with respect to the Defendant, Franklin Hospital Medical Center, the Defendants’ counsel argues that as none of the moving Defendants herein have committed any departures of accepted standards of medical practice, the action as asserted against Franklin Hospital Medical Center must be dismissed (*see* Lane Affirmation in Support at ¶ 51).

In response to the within application, the Plaintiff’s counsel states that the Plaintiff has no opposition to the motion for summary judgment with respect to the

Defendants, Cohen¹, Rohe, Behfarin and Marshal and only opposes those portions of the within application interposed by the Defendants, Banik and Franklin Hospital Medical Center (*see* Finkin Affirmation in Opposition at ¶ 1).

In opposing those branches of the within application interposed by Franklin Hospital Medical Center and Rathindra Banik, Plaintiff's counsel provides an expert affidavit wherein it is averred that "a comparison of the March 20, 2004 abdominal scan and the October 5, 2004 abdominal scan demonstrates that the patient had a rapidly growing liver mass" and that the failure of the Defendant, Banik, as well as Franklin Medical Center, to admit the Plaintiff on October 5, 2004, was a departure of good and accepted standards of medical care (*id.* at Exhibit A at ¶ 8). The expert further opines that the Defendants' departures "were substantial factors contributing to the liver mass growth from nine centimeters on October 5, 2004 to 15 centimeters on December 17, 2005 as documented in the abdominal CT scan report of Jamaica Hospital dated December 25, 2005" (*id.* at ¶ 9). The expert states that "Mr. Thompson's diagnosed liver cancer metastasized to a periportal lymph node measuring 3.2 x 1.7 x 1.0 centimeters and into a section of the portal vein due to defendants' departure from accepted standards of medical care on October 5, 2004" and the Plaintiff's "liver mass enlargement, with . . . metastasis to periportal lymph nodes and portal vein has increased Mr. Thompson's present risk of cancer" (*id.* at ¶ 9).

In addition to the foregoing, the Defendants' within application is partially

¹ The Court notes that no application for summary judgment has been submitted by the Defendant, David Cohen.

opposed by Co-Defendant, Anthony Colantonio (*see* Lindenbaum Affirmation in Partial Opposition at ¶ 4). While not opposing the application on substantive grounds, counsel for the Defendant argues that in the event summary judgment is granted, this Court, consonant with General Obligations Law §15-108, should issue an order protecting the rights of Dr. Colantonio to receive a reduction of any damages assessed against him, equal to the equitable share of damages of the moving defendants, as well as Dr. Zeidan² (*id.*; *see also* Exhibits A, B).

The Court initially addresses the request by Dr. Colantonio. “In tort actions involving multiple defendants, where a plaintiff settles with one or more defendants before trial, General Obligations Law §15-108 (a) permits non-settling defendants a monetary offset against the amount of a verdict. The permitted reduction is the greatest of three items: (a) the amount stipulated as consideration for the release; (b) the amount actually paid for the release; or (c) the settling tortfeasor’s equitable share of plaintiff’s damages” (*Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288,292 [1998] [internal citations omitted]). “[A]s an affirmative defense, General Obligations Law § 15-108(a) must be plead by a tortfeasor seeking its protection” (*id.* at 293).

Initially, the Court notes that there is no formal application currently pending with respect to the order requested by Dr. Colantonio (CPLR § 2215). Further, the Defendant has not provided a copy of the Answer to determine whether or not a defense

² It appears that a Stipulation of Discontinuance, with prejudice, was executed by the Plaintiff in favor of Dr. Bassem S. Zeidan (*see* Lindenbaum Affirmation in Partial Opposition at Exhibit B).

under General Obligations Law § 15-108 was properly plead in the answer (*Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288,292 [1998], *supra* at 293). Thus, this Court declines to issue such an order at this time and counsel for Dr. Colantonio is directed to reiterate such request before the trial court.

The Court now turns to the applications interposed by the Defendants, Franklin Hospital Medical Center, John Rohe, Parviz Behfarin, David B. Marshall s/h/a David B. Marshal and Rathindra Banik.

The essential elements of a medical malpractice action are comprised of the following: [1] a deviation or departure from accepted medical practice and [2] evidence that such departure was a proximate cause of the plaintiff's injury (*Williams v. Sahay*, 12 A.D.3d 366 [2d Dept. 2004]; *DiMitri v. Monsouri*, 302 A.D.2d 420 [2d Dept. 2003]; *Holbrook v. United Hosp. Med. Ctr.*, 248 A.D.2d 358 [2d Dept. 1998]). Thus, on an application seeking summary judgment dismissing a plaintiff's complaint sounding in medical malpractice, the defendant doctor bears the initial burden of demonstrating the absence of any departures from accepted standards of medical practice or that the plaintiff was not injured as a result thereof (*Williams v. Sahay*, 12 A.D.3d 366 [2d Dept. 2004], *supra*; *DiGiaro v. Agrawal*, 41 A.D.3d 764 [2d Dept. 2007]; *Chance v. Felder*, 33 A.D.3d 645 [2d Dept. 2006]).

As to the moving Defendant, Dr. John Rohe, having reviewed the record, the Court finds that said Defendant has demonstrated his entitlement to judgment as a matter of law (*id*; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). The evidence adduced

herein demonstrates that Dr. Rohe did not render any care or treatment to the Plaintiff. In opposition to the Defendant's *prima facie* showing, the Plaintiff has proffered no opposition thereto.

As to Drs. Behfarin and Marshal, here again each of these defendants has demonstrated their respective entitlement to judgment as a matter of law (*id.*). As noted above, Dr. Gold opined that neither Dr. Behfarin, in reading the CAT scans performed in March and October 2004, nor Dr. Marshal, in conducting and reading the results of the Barium Enema done in March 2004, engaged in any departures from accepted medical standards (*DiGiario v. Agrawal*, 41 A.D.3d 764 [2d Dept. 2007], *supra*). In response to the Defendants' *prima facie* showing, the Plaintiff again has offered no opposition.

Finally, with regard to the Defendant, Dr. Banik, the Court has carefully studied the record and finds that said Defendant has failed to demonstrate entitlement to judgment as a matter of law (*Williams v. Sahay*, 12 A.D.3d 366 [2d Dept. 2004], *supra*; *Chance v. Felder*, 33 A.D.3d 645 [2d Dept. 2006], *supra*). In the instant matter, Dr. Banik testified that he did not possess the authority to discharge a patient and that said responsibility was within the discretion of the surgical consultant on call (*see* Lane Affirmation in Support at Exhibit F at p.79). Dr. Banik further testified that the custom of Franklin Hospital Medical Center was that a patient would neither be admitted to the hospital nor discharged from the emergency room without a surgical consultation first having been completed (*id.* at pp. 64, 78, 79, 80, 84). With particular respect to the Plaintiff's visit to the

emergency room on October 5, 2004, Dr. Banik testified that the Plaintiff would not have been discharged, unless Dr. Colantonio had performed a physical examination of the Plaintiff on said date (*id.* at pp.27,28,79). However, a review of Dr. Colantonio's deposition transcript reveals that he testified that he did not see the Plaintiff on October 5, 2004 and did not author the consultant's report contained in the hospital medical records, but rather signed off thereon "probably months later" (*id.* Exhibit E at pp. 35, 44, 47, 86, 87).

Thus, on this record, there plainly exist questions of fact as to whether Dr. Colantonio actually saw and examined the Plaintiff on October 5, 2004, as well as whether the Plaintiff was properly discharged from the hospital on said date, given the presence of a 9 centimeter mass on his liver (*DiGiario v. Agrawal*, 41 A.D.3d 764 [2d Dept. 2007], *supra*; *Chance v. Felder*, 33 A.D.3d 645 [2d Dept. 2006], *supra*).

Based upon the foregoing, it is hereby

ORDERED, that those branches of the within motion for summary judgment seeking dismissal of the Plaintiff's complaint against the Defendants, **JOHN ROHE, PARVIZ BEHFARIN AND DAVID B. MARSHALL S/H/A DAVIS B. MARSHAL** are hereby **GRANTED**; and it is further,

ORDERED, that the branch of the within application which seeks an order granting summary judgment dismissing the Plaintiff's complaint against the Defendant, **RATHINDRA BANIK** is hereby **DENIED**; and that branch of the within application interposed by Franklin Hospital Medical Center seeking summary judgment is similarly

DENIED given said defendant's status as Dr. Banik's employer and the potential liability which may arise therefrom (*Bing v. Thunig*, 2 N.Y.2d 656 [1957]).

All applications not specifically addressed herein are **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
June 14, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED

JUN 17 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**