

Tapogna v Tan

2010 NY Slip Op 31818(U)

July 15, 2010

Sup Ct, Suffolk County

Docket Number: 04-12526

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY



PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 1-26-10
ADJ. DATE 6-22-10
Mot. Seq. # 001 - MotD
002 - XMD

-----X
PAUL TAPOGNA and KATHLEEN TAPOGNA, :
: :
Plaintiffs, :
: :
- against - :
: :
HENKIE P. TAN, M.D., EDWARD NORD, M.D., :
COLLIN BRATHWAITE, M.D., and STRONG :
MEMORIAL HOSPITAL, :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 43 read on this motion and cross motion for summary judgment and protective order; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 24; Notice of Cross Motion and supporting papers (002) 25-31; Answering Affidavits and supporting papers 32-38; Replying Affidavits and supporting papers 39-40; 41-42; Other 43-Plt'ff's M/L; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by the defendants, Edward Nord, M.D. and Collin Brathwaite, M.D., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted as to Edward Nord, M.D. and the complaint is dismissed with prejudice as asserted against Dr. Nord, and denied as to Dr. Brathwaite; and for further order dismissing the complaint against Edward Nord, M.D. as barred by the statute of limitations has been rendered academic in light of the dismissal of the complaint as asserted against him; and it is further

ORDERED that this cross-motion (002) by the defendants, Henkie P. Tan M.D. and Strong Memorial Hospital, for an order preserving their rights to assert Article 16 at the time of trial against co-defendants Edward Nord, M.D. and Collin Brathwaite, M.D. if this court should grant summary judgment dismissing the complaint against Nord and Brathwaite, is denied with prejudice as to Edward Nord, M.D., and has been rendered academic in light of the denial of summary judgment as to Collin Brathwaite, M.D. and is denied as moot as to Dr. Brathwaite.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of

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informed consent on behalf of the plaintiff Paul Tapogna, with a derivative cause of action for loss of services asserted on behalf of Kathleen Tapogna, plaintiff's spouse. The plaintiff alleges that on or about November 29, 2001 through December 13, 2001 he came under the medical care and treatment of Dr. Henkie P. Tan, a physician specializing in the field of transplant surgery. On or about May 2001 through June 13, 2002, the plaintiff came under the care of Edward Nord, M.D., a physician specializing in the field of internal medicine. He also came under the care of the defendant Collin Brathwaite, M.D. who holds himself out as a physician specializing in surgery. From about November 28, 2001 through December 13, 2001, the plaintiff came under the care of Strong Memorial Hospital located in Rochester, New York where he had his kidney donor surgery performed. The plaintiff claims, inter alia, that the defendants were negligent in his care and treatment in failing to properly perform a laparoscopic donor nephrectomy; prematurely discharging him after the surgery with a retroperitoneal hematoma; causing the pancreas injury and failure; causing an inflammatory nidus and pancreatic pseudocyst; in causing a pancreaticocolenic fistula; causing the plaintiff to undergo exploratory laparotomy and drainage of a large intra abdominal abscess and closure of a colonic fistula, and causing the plaintiff to undergo a colostomy and colostomy take-down surgical procedure to the pancreas.

Edward Nord, M.D. (Nord) seeks an order granting summary judgment dismissing the complaint asserted against him on the basis that he did not depart from good and accepted medical practice during his care and treatment of the plaintiff and that the action is time barred as although the plaintiff saw Nord on four occasions following his surgery, all Nord did was order laboratory tests and CT scans and then refer the plaintiff for surgical management. Nord claims his last involvement with the plaintiff was on January 2002 and the action was not commenced until September 2004.

Collin Brathwaite, M.D. (Brathwaite), who is represented by the same attorneys as Nord, seeks summary judgment dismissing the complaint on the basis that there were no departures by him that proximately caused the plaintiff's injuries.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [1979] and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [1981]. Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

In support of motion (001), the defendants Nord and Brathwaite have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and amended complaint; defendants' answers

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and amended answers; plaintiffs' bill of particulars and supplemental bill of particulars as to each defendant; medical records from Strong Memorial Hospital and Stony Brook Hospital; office records of Dr. Nord; copies of the transcripts of the examinations before trial of Paul Tapogna dated May 26, 2005 and December 17, 2008, Edward Nord dated February 8, 2006, Collin Brathwaite dated March 24, 2006, Henkie Tan, M.D. dated January 13, 2006, and Kathleen Tapogna dated May 26, 2005; and the expert affirmation of Mark A. Reiner, M.D. submitted on behalf of defendants Nord and Brathwaite.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage, Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [1998], *app denied*, 92 NY2d 818. To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury, *see* Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [1996]. Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury, *see* Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516 [1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [1994].

Dr. Mark A. Reiner has set forth in his affirmation that he is a board certified surgeon since 1980 and upon review of the records from Strong Memorial hospital and Stony Brook University Medical Center, and the clinical records maintained by Dr. Nord and Dr. Brathwaite, that with a reasonable degree of medical certainty, there were no departures on behalf of either Dr. Nord or Dr. Brathwaite which proximately caused the plaintiff's injuries.

Dr. Reiner states that his specialty is surgery and he does not practice nephrology and does not wish to comment on treatment by Dr. Nord that focused on treatment of the kidney. Dr. Nord's care prior to his kidney transplant at Strong Memorial was related to the field of nephrology, but there are no allegations related to the pre-surgical care. Subsequent to the surgery, Dr. Nord timely and appropriately referred the plaintiff for surgical management. On December 14, and 17, 2001, Dr. Nord ordered blood tests. On December 19, 2001, he ordered a CT scan of the plaintiff's abdomen. On December 20, 2001, the plaintiff was admitted to Stony Brook under the service of Dr. Wayne Waltzer. There was no further involvement by Dr. Nord with the plaintiff until January 15, 2002 when the plaintiff contacted Dr. Nord's office for an appointment and Dr. Nord ordered blood testing which was performed on January 16, 2002. On 17, 2002, Dr. Nord saw the plaintiff and ordered additional blood work and a CT scan which was performed on January 18, 2002. Dr. Brathwaite then saw the plaintiff on January 24, 2002 and admitted him to Stony Brook on January 27, 2002. On June 13, 2002, Dr. Nord saw the plaintiff and again on October 17, 2002 for a one year post-nephrectomy follow up. Dr. Reiner then states in light of the lack of any actual treatment of the plaintiff for his post-nephrology complications, there were no departures by Dr. Nord that proximately caused the plaintiff's injuries.

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff, *see*, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [1997]. While Dr. Reiner's opinion is somewhat conclusory, here the

plaintiff sets forth that he does not oppose the motion with regard to Dr. Nord, and has submitted no expert affidavit of merit attesting to any deviations or departures from accepted practice by Dr. Nord that were a competent-producing cause of the injuries claimed by the plaintiff. Therefore, the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment dismissing the complaint as asserted against Dr. Nord.

Accordingly, that part of motion (001) by the defendant Dr. Edward Nord is granted and the complaint of this action as asserted against him is dismissed with prejudice.

Continuing with Dr. Brathwaite, Dr. Reiner states that on November 27, 2001, the plaintiff underwent a laproscopic donor nephrectomy removing his left kidney at Strong Memorial, and he was discharged on December 4, 2001. He was readmitted to Strong Memorial on December 7, 2001 with a diagnosis of post-operative acute pancreatitis with bacteremia and a post-operative retroperitoneal hematoma for which he was treated with antibiotics and discharged on December 13, 2001, returning to Long Island on December 14, 2001. Dr. Nord received the results of the plaintiff's blood work and ordered a CT scan on December 19, 2001 which revealed a large left fluid collection. The plaintiff was admitted to Stony Brook on December 20, 2001 to the service of Dr. Waltzer and a CT guided aspiration was performed and a drainage catheter placed.

Dr. Reiner states that Dr. Brathwaite's first involvement with the plaintiff was on December 21, 2001 as a general surgeon on consult for the evaluation of the plaintiff's pancreas. The resident wrote a note, which Dr. Brathwaite signed, indicating the plaintiff had a pancreatic injury status post-laparoscopic nephrectomy with concurrent mild pancreatitis. Urology service discharged the plaintiff on December 22, 2001, to follow up with Dr. Brathwaite on December 27, 2001 with a diagnosis of pancreatitis and left renal bed abscess. A repeat CT scan was ordered and on December 28, 2001, Dr. Brathwaite readmitted the plaintiff to Stony Brook until December 29, 2001 for the purpose of insertion of a larger drain by interventional radiology. On January 3, 2002, Dr. Brathwaite felt the plaintiff was doing well. Dr. Nord ordered a SC scan which was done on January 18, 2020 and Dr. Brathwaite saw the plaintiff on January 24, 2002 and was admitted to Stony Brook Hospital for the third time on January 27, 2001. Dr. Brathwaite performed surgery on January 28, 2002 for urgent drainage of an infected pseudocyst and pancreatic abscess. A colostomy was also performed. Dr. Brathwaite next saw the plaintiff on February 14, 2002 and determined the colostomy was functioning well. An endoscopy was performed by Dr. Birk on February 15, 2002 with no evidence of pancreatic disruption and follow up with Dr. Brathwaite. A CT scan was performed on February 27, 2002 revealing some drainage still and the plaintiff complained of pain from the sutures around the drainage tube. He was started on Keflex and Tylenol for pain, and the sutures were removed from the drain. Dr. Brathwaite's nurse practitioner saw Mr. Tapogna on March 7, 2002, removed the sump drainage tube, ordered blood work, a CT scan and a barium enema prior to reversing the colostomy. A barium enema was performed on March 13, 2002 along with a CT scan and on March 18, 2002, the plaintiff was admitted to Stony Brook for fourth time to Dr. Brathwaite's service for closure of the colostomy and was discharged on March 29, 2002. Dr. Brathwaite saw the plaintiff on April 5, 2002 and for the last visit on April 25, 2002. A final CT scan was performed on May 15, 2002 and the plaintiff did not return to Dr. Brathwaite thereafter. Dr. Reiner sets forth that the initial pancreatic injury to the plaintiff resulted in the subsequent complications requiring the surgical drainage and there were no departures by Dr. Brathwaite which proximately caused the plaintiff's injuries. Dr. Reiner has not rendered an expert opinion on the issue of informed consent. Based upon the foregoing, Dr. Brathwaite has

established prima facie entitlement to summary judgment dismissing the complaint on the issue of negligence, and consequently on the issue of informed consent as well.

In opposing this motion by Dr. Brathwaite, the plaintiff has submitted the affidavit of his expert, a physician licensed to practice medicine in New York and board certified in general and thoracic surgery. The plaintiff's expert sets forth that the injuries which are the subject of this case have their origin in a laparoscopic donor nephrectomy performed by Dr. Henkie Tan on November 28, 2001 at Strong Memorial Hospital in Rochester, New York where Mr. Tapogna donated a kidney to his cousin who was in end stage renal failure. The claims asserted against Dr. Nord and Dr. Brathwaite are separate claims and concern, inter alia, the post-operative treatment they rendered to Mr. Tapogna upon his return to Long Island after he had been discharged from the care of Dr. Tan and Strong Memorial Hospital. The plaintiff's expert opines that the evidence indicates that Dr. Nord did not take an active role in the post-operative surgical treatment and that Dr. Nord appropriately ordered blood work and other testing and did not depart from the accepted standards of care.

It is the plaintiff's expert's opinion, however, that Dr. Brathwaite departed on a number of occasions from accepted medical practice which departures were a proximate cause or substantial contributing factor of injury and/or exacerbation of injuries sustained by Mr. Tapogna. The plaintiff's expert states Dr. Reiner does not specifically address or comment upon the treatment rendered on the several occasions the patient presented to Dr. Brathwaite wherein Dr. Brathwaite failed to properly and timely treat and address the infection, internal collection of fluid and absence of complete drainage of fluid from which Mr. Tapogna was suffering. It is the plaintiff's expert opinion with a reasonable degree of medical certainty that the failure to adequately drain and treat the plaintiff's retroperitoneal fluid constituted a departure from good and acceptable customs and standards of medical practice causing consequential injuries to the plaintiff. The plaintiff's expert further opines that Dr. Brathwaite prematurely discharged the plaintiff from Stony Brook Hospital at the time of his first admission to Stony Brook Hospital as the CT scan of December 21, 2001 clearly indicates that Dr. Brathwaite did not adequately assess whether the catheter placed during the guided CT scan procedure was in fact working and effective as there was still a sizable collection of fluid remaining in the plaintiff's abdomen. Prescribing antibiotics is ineffectual and cannot treat the infection as the antibiotics are not able to reach the retroperitoneal area which is walled off from circulation, and the catheter drain should have been repositioned to allow for fluid drainage. The plaintiff's expert opines that it is common knowledge in the medical community that when fluid, or an abdominal collection, does not drain completely, serious sequelae will occur as a result of the development and increase of necrotic tissue bacteria and the release of pancreatic enzymes. The December 29, 2001 CT reveals Mr. Tapogna still had a collection of undrained fluid when he was discharged to go home on that date.

On January 3, 2002, the drain was removed on an outpatient visit. It is opined by the plaintiff's expert that it was a departure to remove the drain without first assessing whether the drain was properly functioning and determining if any fluid remained in the plaintiff's abdomen by obtaining a CT scan, yet this was not done and constitutes a clear departure from good and acceptable medical practice. At this time, the blood work revealed an abnormal and high lipase level which indicated that the fluid was not draining. That the drain was prematurely removed is evidenced by the CT scan of January 18, 2002 indicating a large collection of fluid within the left renal bed. It was thereafter thought by Dr. Nord that there may have been a hematoma or pseudocyst in that Mr. Tapogna's hematocrit was normal, so the plaintiff was referred back to Dr. Brathwaite whom he saw on January 24, 2002. It is the plaintiff's expert's opinion with a reasonable degree of medical certainty that the plaintiff's symptoms and findings clearly indicate that Dr. Brathwaite

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departed from accepted medical custom and practice causing the formation of fibrous tissue and the walling off of fluid so that it was unable to drain. On January 27, 2002, the plaintiff was urgently readmitted to Stony Brook Hospital and exploratory surgery was performed on January 28th with the preoperative diagnosis of infected pancreatic pseudo-cyst, pancreatic abscess, which was then drained as it contained foul material, mal-odor, and stool. There was necrotic pancreatic tissue which was removed. It is the plaintiff's expert's opinion that Dr. Brathwaite delayed in admitting Mr. Tapogna and performing surgery caused and permitted the collection of undrained fluid containing pancreatic enzymes which auto-digested or ate away at the surrounding tissue, and the pressure resulting from the build up of fluid caused a fistula or hole in the bowel at the spinal flexure for which a colostomy was performed. On March 25, 2002, Mr. Tapogna was again admitted to Stony Brook for reversal of the colostomy. Subsequently, on August 13, 2007, Mr. Tapogna was again admitted to Stony Brook by Dr. Melman for drainage of an abscess which had developed at the site of the incision of the pseudocyst performed January 28, 2001 by Dr. Brathwaite. It is the plaintiff's expert's opinion that Dr. Brathwaite's delays in treating Mr. Tapogna's fluid collection had a negative impact as a result of the undrained fluid collecting in his body caused a fistula to develop necessitating a colostomy, which departures, the plaintiff's expert states, are not addressed by Dr. Reiner.

Based upon the foregoing, it is determined that there are factual issues raised by the plaintiff's expert on the issue of negligence which preclude the granting of summary judgment dismissing the complaint against Dr. Brathwaite. In that Dr. Reiner did not comment on the issue of informed consent, the burden did not shift to the plaintiff to raise a factual issue as to lack of informed consent.

Accordingly, that part of motion (001) for dismissal of the complaint as asserted against Collin Brathwaite, M.D. is denied as to the causes of action premised upon negligence and informed consent.

Turning to motion (002) the defendants, Henkie P. Tan, M.D. and Strong Memorial Hospital, seek to preserve their right under Article 16 as against Edward Nord, M.D. and Collin Brathwaite, M.D. at the time of trial in the event that this Court should grant Nord and Brathwaite summary judgment dismissing the complaint against them.

It is determined that in light of the motion for summary judgment having been denied and the complaint was not dismissed as asserted against Collin Brathwaite, M.D., that part of the moving defendants' application has been rendered academic and is denied as moot.

Turning to that part of the motion by defendants Tan and Strong Memorial, it is determined that the moving defendants have not demonstrated entitlement to the relief requested. Article 16 of the CPLR 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*, CPLR 1601; Maria E. v West Associates, 188 Misc 2d 119 [Sup Ct, Bronx County, 2001]). In Yanatos v Pogo et al, (Spinola, J.) (Sup Ct Nassau, April 25, 2006), the court set forth that since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented, citing Drooker v South Nassau Communities Hospital, 175 Misc2d 181 [NY Sup. Ct. 1998]). In Drooker, supra, following the granting of summary judgment in favor of a physician in a medical malpractice case, the remaining defendants who failed to oppose said physician's prima facie showing of entitlement to summary judgment and failed to make any evidentiary showing regarding that physician's responsibility for plaintiff's injury,


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thereby forfeited their opportunity to limit their liability with respect to that physician's acts or omissions under Article 16 of the CPLR.

There is no requirement in Article 16 that defendants disclose prior to trial the persons whose joint liability will be invoked, Rodi v Landau, 170 Misc.2d 180 [NY Sup Ct 1996]). Application (001) for summary judgment, however, is the procedural equivalent of a trial. It therefore follows that any defendant intending to obtain the limited liability benefits of Article 16 of the CPLR must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented. In that Tan and Strong Memorial have not come forward opposing motion (001) by submitting admissible proof against Dr. Nord who has demonstrated entitlement to, and has been granted summary judgment dismissing the complaint as asserted against him, it is determined that the co-defendants Tan and Strong Memorial have failed to satisfy this evidentiary burden that shifted upon the movant's prima facie showing of entitlement to an order granting summary judgment, and have forfeited the opportunity to limit their liability with respect to the acts or omissions of Edward Nord, M.D. However, in that the complaint has not been dismissed as asserted against Collin Brathwaite, M.D. that part of motion (002) to preserve the rights afforded by Article 16 to defendants Tan and Strong Memorial at the time of trial as to Collin Brathwaite, M.D. has been rendered academic.

Accordingly, motion (002) is denied as to Dr. Nord.

Dated: July 15, 2010



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION