

Corello v Visiting Nurse Assn. of Staten Is., Inc.

2010 NY Slip Op 33140(U)

October 28, 2010

Supreme Court, Richmond County

Docket Number: 102765/08

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:102765/08
Motion No.:003,004

JAMES CORELLO and
ROSEANN CORELLO,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

VISITING NURSE ASSOCIATION OF
STATEN ISLAND, INC.,
LORIANN PIGOTT PARISI, L.P.N., and
ADEYANJU OLUDAYO LIJIRIN, R.N.,

Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiffs seek for an order granting them summary judgment on liability. The defendants have cross-moved for summary judgment dismissing the plaintiffs' complaint. The motion and cross motion are denied in their entirety.

Facts

This is a case alleging that the defendants committed acts of medical malpractice while caring for the plaintiff, James Corello who was diagnosed with multiple sclerosis (MS) in 1987. At the time of the alleged malpractice Mr. Corello's MS progressed to a point where he was confined to a wheel chair. Additionally, Mr. Corello requires the use of a continuous indwelling catheter. Plaintiff alleged that two employees of the, defendant Visiting Nurse Association of Staten Island ("VNA"), committed two separate acts of malpractice on two different days when changing Mr. Corello's catheter.

The VNA sets forth its procedure for male urinary catheterization in Policy No: FM-F2 which was submitted as an exhibit to the plaintiffs' motion. In pertinent part, the VNA policy instructs its nurses not to force the catheter if resistance is felt. It further directs the treating nurse as follows: "[o]nce the urine begins to flow, advance the catheter another 4-5 inches to prevent inflating the balloon in the urethra." In this case, the plaintiffs allege that on two occasions, September 6, 2007 and April 22, 2008, the two nurses from VNA inflated the the Foley balloon within Mr. Corello's urethra.

With respect to the incident that occurred on September 6, 2007 there is conflicting testimony as to whether Nurse Pigott Parisi obtained a urine flow prior to inflating the balloon within Mr. Corello. According to Mrs. Corello testified that she told Nurse Parisi not to inflate the balloon because she did not observe any urine flow. This is in stark contrast to Nurse Parisi's testimony that she did observe urine flow prior to inflating the balloon. In any event Mr. Corello was taken to the hospital by ambulance. The discharge summary prepared by Staten Island University Hospital states "[t]he patient had a Foley catheter removed in the Emergency room and they found that the balloon was in the prostate, per the Emergency room exam." Mr. Corello was hospitalized for several days in the intensive care unit with a diagnosis of hematuria status post foley trauma and sepsis until his discharge on September 14, 2007.

After this first incident the VNA continued to perform monthly Foley changes at home for Mr. Corello. However, a second incident several months later occurred on April 22, 2008, where it is alleged that Nurse Adeyanju Oludayo Lijirin incorrectly replaced Mr. Corello's catheter. Once again Mrs. Corello testified that as she observed the catheter replacement and that she indicated to Nurse Lijirin that she did not see any urine flow. Mrs. Corello states that she asked Nurse Lijirin to refrain from inflating the balloon. But Nurse Lijirin moved the catheter around to assure her that it was within her husband's bladder. Even after the catheter was moved Mrs. Corello testified that she did not observe any urine flow. Despite the lack of urine flow, Mrs. Corello testified that Nurse Lijirin inflated the balloon at which point Mr. Corello began to complain of pain. After the complaints of pain Mrs. Corello testified that Nurse Lijirin deflated the balloon and removed the catheter. At that time Mrs. Corello testified "[that] he was urinating clots and blood through his penis." Mr. Corello was again taken to the emergency room at Staten Island University hospital and admitted for trauma.

Nurse Lijirin's deposition testimony sets forth a different series of events from Mrs. Corello. According to Nurse Lijirin, Mr. Corello spontaneously voided approximately 100 cc's of clear amber urine. Nurse Lijirin further testified that in accord with the policies of the VNA after obtaining urine flow she advanced the catheter another 4 to 5 inches prior to inflating the balloon.

In support of their motion for summary judgment the plaintiffs submit the expert affidavit of Margaret Mary Raftery, F.N.P., a licensed family nurse practitioner. Nurse Raftery states that the accepted procedure for male catheterization is as follows:

The procedure is done with aseptic technique. The entire pubic area is cleansed and disinfected, usually with a povidine-iodine solution (commonly known as Betadine). After lubricating the catheter, the balloon end is inserted into the urethra along the anterior wall by lifting the penis perpendicular to the body. The catheter is then advanced until urine flows. The catheter should not be forced, but rather advanced with gentle steady pressure. If

resistance is felt, the nurse should slightly increase traction pressure on the penis. Once the urine begins to flow the catheter is advanced another 4-5 inches to prevent inflating the balloon in the urethra. After the catheter is correctly advanced into the bladder, the appropriate amount of sterile water is injected into the external port to inflate the balloon end. The catheter is then attached to a drain bag.

Nurse Raftery opines that based on the medical records and the testimony of the plaintiffs that the foley catheter insertion on September 6, 2007 and April 22, 2008 were done negligently and were a deviation from the standards of good and accepted nursing practice. In particular, Nurse Raftery relies on the hospital discharge summaries, which find trauma to the plaintiff's urethra as evidence that the balloon was inflated within the plaintiff's urethra, rather than in his bladder.

In opposition and in support of their cross-motion, the defendants submit the expert affidavit of Dr. Alec M. Schwartz a physician board certified in urology. While Dr. Schwartz repeatedly states that he is "fully familiar with good and accepted standards of practice regarding indications for the use of indwelling Foley catheter, as well as the technique for an insertion of an indwelling Foley catheter, and the risks and complications associated with the use of intermittent and indwelling Foley catheters." However, Dr. Schwartz never sets forth that standard. Instead, Dr. Schwartz asserts that trauma may occur to a patient even where a catheter is inserted without any negligence.

Discussion

Contrary to the plaintiffs' assertions the court will consider the cross-motion made by the defendants in this case. "A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that

sought by the cross motion.”¹ In this case the defendants’ cross-motion for summary judgment relates to the same causes of action that the plaintiffs’ timely motion for summary judgment relates to. In this case whether the defendants made a cross-motion for summary judgment this court would have had the authority to search the record and award summary judgment to the non-moving party. As such there is no prejudice in considering the defendants’ cross-motion for summary judgment.

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.² It is well established that summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.³

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.⁴ If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant’s motion should be denied without regard to the sufficiency of the opposition papers.

In this case the plaintiffs have come forward with the expert affidavit of Nurse Raftery

¹ *Filannino v. Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, [1st Dept 2006].

² *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

³ *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

⁴ *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

that established that the defendants departed from good and accepted medical practice and as a result Mr. Corello was injured. Having met their burden going forward the burden shifts to the defendants to establish an issue of fact.

In opposition to the plaintiffs' motion the defendants cross-move for summary judgment in their favor. To support their motion the defendants submit the expert affidavit of Dr. Alec M. Schwartz. However, Dr. Schwartz's affidavit fails to state with clarity the accepted procedure for male catheterization. Instead, he repeatedly states that he is familiar with such procedure. For this reason the defendant's fail to meet their burden to demonstrate an entitlement to judgment as a matter of law.

However, Dr. Schwartz's affidavit more than adequately describes situations where even a non-negligently inserted catheter could cause injuries similar to those sustained by the plaintiff. Additionally, Nurses Pigott-Parisi and Lijirin's version of the facts surrounding the two insertions of the catheter differ completely from that of Mrs. Corello, thereby creating an issue of fact to be determined by a jury.

Conclusion

On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁶ As such, the motion and cross-motion must be denied as there are issues of fact and as well as competing expert opinions.

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁶ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by James Corello and Roseann Corello is denied in its entirety; and it is further

ORDERED, that the cross-motion for summary judgment made by Visiting Nurse Association of Staten Island, Loriann Pigott Parisi, L.P.N., and Adeyanju Oludayo Lijirin, R.N. is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3 on **Monday, December 13, 2010 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: October 28, 2010

Joseph J. Maltese
Justice of the Supreme Court