

Shipman v Mazzola

2010 NY Slip Op 33163(U)

October 18, 2010

Supreme Court, Suffolk County

Docket Number: 05-13480

Judge: Ralph T. Gazzillo

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bill of particulars as to the claim of vicarious liability, or, in the alternative providing duly noticed discovery, and compelling plaintiff to provide an amended bill of particulars as to vicarious liability is denied as academic; and it is further

ORDERED that the motion (003) by defendant Frank Mazzola, M.D. for an order dismissing plaintiff's allegations of medical malpractice as time barred pursuant to CPLR 214-a for injuries occurring prior to January 5, 2003 is granted to the extent that allegations of medical malpractice from November 16, 2001 through May 28, 2002 are dismissed as time-barred; and it is further

ORDERED that the branch of the motion (004) by defendants North Suffolk Cardiology Associates, P.C. for partial summary judgment on the ground that the plaintiff's allegations of medical malpractice are time barred pursuant to CPLR 214-a for injuries occurring prior to January 5, 2003 is granted to the extent that allegations of medical malpractice from November 16, 2001 through May 28, 2002 are dismissed as time-barred; and the branch of the motion by for defendants Rocco Donato Grella, M.D., Ravina Balchandani, M.D. and Thomas Stavola, M.D. for summary judgment dismissing the action as asserted against them is granted; and it is further

ORDERED that the cross motion (005) by defendant Nancy Anne Wichtendahl, N.P. for summary judgment dismissing the action as asserted against her is denied as untimely.

In this medical malpractice action, plaintiff Nicole Ellen Shipman seeks damages for alleged departures in accepted medical care by defendants from November 16, 2001 through April 12, 2004, after being diagnosed with a condition called long Q-T Syndrome, which causes sudden death if not treated with an internal defibrillator. The record reveals that a device (automatic internal cardiac defibrillator, or "AICD") was surgically implanted in plaintiff's chest under the left pectoral muscle near the left axilla on September 22, 2000, by nonparty Joseph Dell'Orfano, M.D. Plaintiff was referred to defendant Frank Mazzola, M.D. after Dr. Dell'Orfano moved to another city in 2001. Defendant Mazzola followed plaintiff on a regular basis, monitoring the AICD and surgical site.

Plaintiff required four surgical revisions of the AICD over the next three years. Defendant Mazzola performed three of the revisions on May 29, 2002, September 12, 2002, and January 8, 2004. Nonparty Adam Saltman, M.D. also performed a revision on June 19, 2002. Plaintiff alleges that defendants departed from accepted medical practice in her care and treatment resulting from the revisions and subsequent alleged complications thereafter. Plaintiff alleges the following departures were committed by each and every defendant: failure to perform a physical exam, properly and timely recognize an AICD pocket infection, perform blood cultures, administer antibiotic therapy, perform appropriate diagnostic studies, refer plaintiff to a surgeon, refer plaintiff to an infectious disease specialist, negligently placed plaintiff at risk for lymphedema, and endocarditis, negligently inserted a chest tube, and placed a PICC line in the left upper extremity. As a result, plaintiff alleges that she sustained the following injuries: bacterial endocarditis, infected heart device, infection of AICD pocket, lymphedema, obliteration of lymphatic channels, pneumothorax, pulmonic valve insufficiency, mitral valve regurgitation, paresthesias of the left arm and hand, cellulitis of the left arm, scarring of the left axillary region, loss of bilateral shoulder strength, dependency on pain medications, urinary tract infections, kidney infection, and emotional distress.

Defendants North Suffolk Cardiology Associates, P.C. ("North Suffolk"), Rocco Donato Grella, M.D., Ravina Balchandani, M.D. and Thomas Stavola, M.D. now move for an order to strike plaintiff's bill

of particulars as to the claim of vicarious liability, or, in the alternative, to provide duly noticed discovery, and to compel plaintiff to provide an amended bill of particulars as to vicarious liability. Defendant Frank Mazzola, M.D. moves, and defendant North Suffolk moves separately, for partial summary judgment dismissing plaintiff's allegations of medical malpractice as time-barred, pursuant to CPLR 214-a, for injuries occurring prior to January 5, 2003. Defendants Rocco Donato Grella, M.D., Ravina Balchandani, M.D. and Thomas Stavola, M.D. move for summary judgment dismissing the action as asserted against them. Finally, defendant Nancy Anne Wichtendahl, N.P. cross-moves for summary judgment dismissing the action as asserted against her.

Initially, the cross motion by defendant Wichtendahl was made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]; *see also, Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). Accordingly, the cross motion is denied as untimely.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). 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 demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). To prove a prima facie case of medical malpractice, a plaintiff must establish that the defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [2d Dept 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, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

Turning to that branch of the motion by defendants Grella, Balchandani and Stavola ("the Grella defendants") for summary judgment dismissing the action as asserted against them, defendants submit, *inter alia*, the pleadings, the bill of particulars, affidavits by David Tarkoff, M.D., defendant Grella, defendant Balchandani, and defendant Stavola. Dr. Tarkoff avers that he is board certified in internal medicine and cardiovascular disease. It is his opinion within a reasonable degree of medical certainty that the Grella defendants complied with good and accepted standards of medical care and the did not depart from the standard of medical care in their treatment of the plaintiff. Furthermore, their care and treatment of the plaintiff was not a proximate cause of plaintiff's alleged injuries.

Dr. Tarkoff states that during each admission from January 8, 2004 through April 8, 2004, the Grella defendants saw the plaintiff in Stony Brook University Hospital as covering physicians for defendant Mazzola. The Grella defendants correctly appreciated plaintiff's medical history, course of

treatment, and diagnostic tests ordered by other physicians. Defendants also acknowledged the plaintiff's care by her thoracic surgeon, pain management team and infectious disease specialists. They correctly noted her telemetry readings. They also appropriately monitored her progress with dressing changes and antibiotics. Dr. Tarkoff further opines that there is no evidence that the Grella defendants participated in any of plaintiff's medical procedures and AICD pocket revisions, nor were they consulted with respect to same at any time. They had a limited role in plaintiff's care as covering physicians for defendant Mazzola while the plaintiff was a patient at Stony Brook University Hospital ("Stony Brook") and did not see plaintiff in the offices of North Suffolk. Defendants correctly relied on the infectious disease team to manage plaintiff's infectious process, and upon the pain management team regarding plaintiff's complaints of pain during her admissions to Stony Brook.

Dr. Tarkoff further states that there is also no evidence that defendants' care and treatment placed plaintiff at an increased risk for additional surgical procedures, risk of migration of the AICD, risk for developing infection or lymphedema. It is Dr. Tarkoff's opinion within a reasonable degree of medical certainty that the Grella defendants at all times acted appropriately and in accordance with good and accepted medical practice in their professional involvement with plaintiff, which in no way caused or exacerbated any of the injuries claimed by her in this lawsuit. The affidavits by each of the Grella defendants support Dr. Tarkoff's opinions.

The Grella defendants established their entitlement to judgment as a matter of law by establishing that they did not depart from accepted medical practice (*see, Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; *Whalen v Victory Memorial Hosp.*, 187 AD2d 503, 589 NYS2d 590 [2d Dept 1992]). Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]). However, plaintiff's attorney affirmed that there would be no opposition to this motion. Therefore, plaintiff failed to raise an issue of fact. Accordingly, the branch of the motion by the Grella defendants for summary judgment is granted.

Turning to the motion by the Grella defendants and North Suffolk for an order compelling plaintiff to serve an amended bill of particulars regarding her claims of vicarious liability by North Suffolk, the motion is denied as academic as to the Grella defendants. As to the remaining movant, North Suffolk, the motion is denied. The record reveals that the parties stipulated on January 9, 2008, that plaintiff would "amend and/or supplement the bill of particulars as to vicarious liability within thirty days after EBTs were completed." Plaintiff subsequently served a further bill on October 14, 2009, which alleged the persons for which North Suffolk was vicariously liable. The Court finds that the plaintiff has complied with the stipulation and inasmuch as there is no outstanding demand to supplement the bill of particulars, the motion is denied.

Turning to the motions by defendants Mazzola and North Suffolk to dismiss the allegations of medical malpractice which occurred prior to January 5, 2003, defendants contend that the allegations relating to alleged departures that occurred more than two and one half years before the action was commenced are time barred pursuant to CPLR 214-a. A medical malpractice claim generally accrues on the date of the alleged wrongful act or omission and is governed by a 2 1/2-year Statute of Limitations (*Davis v City of New York*, 38 NY2d 257, 259, 379 NYS2d 721[1975]; CPLR 214-a). Under the continuous treatment doctrine exception, however, the 2 1/2-year period does not begin to run until the end of the course of treatment "when the course of treatment which includes the wrongful acts or omissions

has run continuously and is related to the same original condition or complaint” (*McDermott v Torre*, 56 NY2d 399, 405, 452 NYS2d 351 [1982], quoting *Borgia v City of New York*, 12 NY2d 151, 155, 237 NYS2d 319 [1962]). Section 214-a speaks to computing the limitation period in terms of “the act, omission or failure complained of,” not of the entire course of treatment (*McDermott v Torre*, *supra*). Thus, routine examinations meant to monitor a patient’s physical condition may not serve as a pretext for suspending the running of the applicable period of limitations (*see, Ganess v City of New York*, 207 AD2d 765, 616 NYS2d 510 [2d Dept 1994]).

Defendants contend that plaintiff alleges in the bill of particulars that defendants Mazzola and North Suffolk negligently performed AICD revision surgery on May 29, 2001, and other departures thereafter. Their efforts from November, 2001, consisted of monitoring the AICD, performing stress tests and diagnostic cardiac tests, and providing cardiac rehabilitation for her underlying condition of long Q-T syndrome. Defendants contend that such regular treatments and routine examinations are not sufficient to invoke the doctrine of continuous treatment. In addition, defendants assert that the actual conditions giving rise to the instant action are an alleged staph infection, endocarditis, lymphedema and alleged dependency on pain-relieving medications. The record reveals that none of these conditions were present at examinations performed prior to January 5, 2003. Although plaintiff was diagnosed with an infection in 2002, it was treated with an oral antibiotic and was resolved. In a letter to Dr. Archer, dated November 11, 2002, defendant Mazzola wrote that there was a well-healed scar without evidence of infection or irritation. In addition, when plaintiff was diagnosed with lymphedema in October, 2003, defendant Mazzola referred her to specialists outside the North Suffolk office for treatment, for which defendants would not be liable. The record reveals that the remaining alleged injuries were diagnosed during plaintiff’s January 2004 admission to Stony Brook and thereafter. Thus, defendants have demonstrated that the treatment provided prior to January 5, 2003 was not the course of treatment established with respect to the condition that gave rise to the lawsuit (*Duran v Mendez*, 277 AD2d 348; 716 NYS2d 595 [2d Dept 2000]).

In opposition, plaintiff is required to produce competent evidence that some medical treatment was in fact administered during this time (*Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223 [1991]; *Rizk v Cohen*, 73 NY2d 98, 538 NYS2d 229 [1989]). Plaintiff claims that she was continuously treated by the moving defendants from November 16, 2001, and submits an affirmation by an expert whose name has been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994).¹ The original unredacted affidavit has been submitted to the court for inspection under separate cover. The expert affirms, *inter alia*, that as of the first office visit on or about November 16, 2001, defendants Mazzola and North Suffolk began a continuing course of medical treatment dealing with plaintiff’s AICD. In addition, beginning on May 29, 2001, Mazzola’s alleged failure to insert the AICD into a prepectoral pocket, as opposed to the existing subpectoral pocket, was a substantial factor in causing subsequent complications.

The Court finds that plaintiff’s expert failed to aver evidentiary facts establishing that the allegations of medical malpractice between November 16, 2001 and May 28, 2002, fall within an exception to the Statute of Limitations, inasmuch as they represent routine examinations meant to monitor plaintiff’s

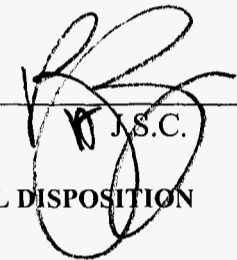
¹ The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff’s opposition papers with the exception of the redacted expert’s name.

condition (*Ganess v City of New York, supra*). However, issues of fact exist regarding whether the treatment provided by defendants from May 29, 2002 through January 5, 2003 was continuous (CPLR 214-a; *Kletnieks v Hertz*, 54 AD3d 660, 863 NYS2d 487 [2d Dept 2008]). Therefore, based upon the record presented in this case, the issue of whether or not the continuous treatment doctrine may be applied remains a question of fact for a jury's resolution with regard to treatment rendered between May 29, 2002 and January 5, 2003 (*see, Bartolo v Monaco*, 202 AD2d 535, 609 NYS2d 275 [2d Dept 1994]). Accordingly, the defendants' motions for partial summary judgment to dismiss the allegations of medical malpractice which occurred prior to January 5, 2003 is granted to the extent that the allegations of medical malpractice from November 16, 2001 through May 28, 2002 are dismissed as time-barred.

In sum, the motion by defendants North Suffolk, Grella, Balchandani, and Stavola to, *inter alia*, compel plaintiff to serve an amended bill of particulars on the issue of vicarious liability is denied as academic; the motions by defendant Frank Mazzola, M.D. and North Suffolk for partial summary judgment dismissing plaintiff's allegations of medical malpractice as time barred pursuant to CPLR 214-a for injuries occurring prior to January 5, 2003 is granted to the extent that allegations of medical malpractice from November 16, 2001 through May 28, 2002 are dismissed as time-barred; the motion by defendants Grella, Balchandani and Stavola for summary judgment dismissing the action as asserted against them is granted; and the cross motion by defendant Nancy Anne Wichtendahl, N.P. for summary judgment dismissing the action as asserted against her is denied as untimely.

The plaintiff's claims against defendants Grella, Balchandani, and Stavola, and plaintiff's allegations of medical malpractice from November 16, 2001 through May 28, 2002, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: 10/18/10



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION