

Villano v St. Charles Rehabilitation Hosp.

2011 NY Slip Op 30197(U)

January 20, 2011

Supreme Court, Suffolk County

Docket Number: 02-22723

Judge: Thomas F. Whelan

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1-21-11

SHORT FORM ORDER

COPY

INDEX No. 02-22723
CAL. No. 10-00649MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9-10-10
ADJ. DATE 11-1-10
Mot. Seq. # 012 - MG

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DIANE VILLANO and DEBRA STIKLICKAS :
as Co-Executrix of the Estate of Delia Marchitelli, :
deceased, and DIANE VILLANO and DEBRA :
STIKLICKAS, Individually, :

Plaintiffs,

- against -

ST. CHARLES REHABILITATION HOSPITAL, :
NORTH SHORE UNIVERSITY HOSPITAL, :
ROBERT G. ROTH, M.D., HARITON H. :
KOUSOUROU, M.D., MICHAEL HALL, M.D., :
BRUCE HIRSCH, M.D., and BRUCE FARBER, :
M.D., :

Defendants.

-----X

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Upon the following papers numbered 1 to 11 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6 - 8; Replying Affidavits and supporting papers 9 - 11; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (012) by defendant Robert G. Roth, M.D., for summary judgment dismissing the action and all cross claims as asserted against him is granted.

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In this medical malpractice action, plaintiffs Diane Villano and Debra Stiklickas, as co-executrices of the estate of Delia Marchitelli, deceased, and individually, seek damages for alleged departures in medical practice by defendants in the care and treatment of Mrs. Marchitelli ("the patient"). In the bill of particulars, plaintiffs allege that defendant Roth departed from accepted medical practice by failing to properly treat the patient on May 25, 2000 when she was discharged from defendant St. Charles Rehabilitation Hospital ("St. Charles"). In addition, plaintiffs allege that defendant Roth failed to properly examine, test, and treat the patient; failed to use due care, caution and testing; prematurely discharged the patient from the hospital; failed to take adequate steps to properly determine the patient's condition; and failed to properly treat the patient, instead allowing her to be infected.

Initially, the Court notes that plaintiffs discontinued the action as against St. Charles pursuant to a stipulation dated March 3, 2010 and filed with the Clerk of the Court on March 9, 2010. In addition, plaintiffs discontinued the action as against North Shore University Hospital, Michael Hall, M.D., Bruce Hirsch, M.D. and Bruce Farber, M.D. pursuant to a stipulation dated May 12, 2010 and filed with the Clerk of the Court on May 25, 2010.

The record reveals that patient was transferred from Mather Memorial Hospital to St. Charles on April 10, 2000. The discharge summary stated that the patient was a 71-year old known diabetic, weighing 230 pounds, admitted with aggressive back pain and unable to stand and walk due to the pain. The patient was admitted to Mather for treatment and evaluation and had a history of cardiomegaly, hypertension, edema and diabetes. An MRI was performed and showed a herniated disc at L4/5 with disc material extending. The patient was treated conservatively with pain medication. During her stay at Mather, she received heparin injections every twelve hours beginning on April 3, 2000 until the date of discharge. She refused surgery and was transferred to St. Charles for inpatient rehabilitation therapy.

Upon her admission to St. Charles, the heparin injections continued every twelve hours until April 14, 2000. On that day, the patient was observed in physical therapy to be light headed and confused with normal vital signs. All pain medications and heparin were ordered to be held. A brain scan was performed with negative results. On April 15, 2000, lab results revealed a low serum potassium, and intravenous fluids were given. On April 16, 2000, the patient became confused and agitated. On April 17, 2000, the patient developed high blood pressure and increased respiratory rate. Lab tests and a lung scan showed that she had sustained a pulmonary embolus in the right lung. She was transferred to the intensive care unit for heparin therapy and other treatment.

The record further reveals that on April 21, 2000, the patient was transferred back to the rehabilitation unit with the heparin infusion. The admission note reveals that the patient did well in the intensive care unit and had no complications from the pulmonary embolus. In addition, it indicates that she was adequately coumadinized and heparin would be discontinued. A nursing note reveals that the heparin was discontinued on April 22, 2000. On April 30, 2000, the patient developed a temperature and it was confirmed by x-rays that she had pneumonia. On May 1, 2000, the patient was transferred back to the intensive care unit at the hospital and she was treated with antibiotics. The discharge note reveals that a repeat lung scan revealed that she did not develop another pulmonary embolus, and that the pulmonary specialist did not feel the patient required a Greenfield filter. In addition, a sonogram of the lower extremities was negative for deep venous thrombosis. Although intravenous heparin was initially

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ordered, at this time the patient was switched over from intravenous heparin to coumadin. It was also noted by echocardiogram that the patient's ejection fraction was depressed at 28 -30% with a severely calcified mitral valve. The patient was transferred back to the rehabilitation unit on May 9, 2000. From that time until her discharge, the patient continued physical therapy, walking and learned a home exercise program. However, she complained of back pain. A TENS unit was ordered for the patient. On May 25, 2000, the patient was discharged to home with her daughter by defendant Roth. Inasmuch as the patient refused surgery, it was felt by her doctors that she had received the maximum benefit from her treatment. Discharge instructions regarding the administration of coumadin were provided, as well as other instructions.

Plaintiffs allege that on May 26, 2000, the patient fell while walking with the assistance of a walker outside her home on the grass. She was admitted to North Shore University Hospital ("North Shore") and she underwent a double bypass surgery and repair of a heart defect on June 10, 2000. On June 27, 2000, she was discharged to St. James Health Care Facility for rehabilitation. The following day, she was brought to St. Catherine of Siena for wheezing and increased blood pressure. On July 5, 2000, the patient was transferred to North Shore with a diagnosis of septic shock, postoperative wound infection, respiratory failure and diabetes mellitus. She was discharged to her family in stable condition on March 8, 2001. The patient died on March 15, 2001.

Defendant Roth now moves for summary judgment dismissing the action on the ground that he did not deviate from accepted medical practice in treating the patient at St. Charles on May 25, 2000.

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, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). 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]). 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 (*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 (*Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

In support of his motion, defendant submits, among other things, the pleadings, the bill of particulars, the patient's St. Charles medical record, and an affirmation by Jay Michael Weiss, M.D. Dr. Weiss affirms that he is a physician duly licensed to practice medicine in the State of New York and is

certified by the American Board of Physical Medicine and Rehabilitation. It is his opinion to a reasonable degree of medical certainty that defendant Roth did not depart from the good and accepted medical practice and that his conduct was not a proximate cause of any injuries allegedly sustained by the patient. He notes that plaintiffs do not allege malpractice by defendant Roth from April 1, 2000 to April 10, 2000, when the patient was admitted to Mather Memorial Hospital for complaints of back pain. He states that from April 10, 2000 to April 17, 2000 the proper and appropriate treatment was rendered to the patient at St. Charles for lower back pain including physical therapy.

Dr. Weiss states that on April 17, 2000, defendant noted that the patient became confused and was transferred to the hospital's medical service. He states that defendant Roth's rapid diagnosis and assessment of the patient's signs and symptoms resulted in the patient being immediately transferred to the medical service at St. Charles and appropriate treatment was provided for a pulmonary embolism. From April 21 to April 30, 2000, the proper and appropriate treatment was rendered to the patient including physical therapy. On May 1, 2000, the patient was readmitted to the medical service at St. Charles for a pulmonary infection, which was treated. On May 9, 2000, the patient was transferred back to rehabilitation. From May 9 to May 25, 2000, the patient underwent physical therapy and rehabilitation. During her treatment, she was able to ambulate with a rolling walker. The patient refused surgery for her back and refused a further MRI of her spine. Prior to May 25, 2000, the plaintiffs do not allege any malpractice by defendant Roth in the bill of particulars. On May 25, 2000, defendant discharged the patient with no acute medical or physical problems. Defendant Roth wrote in the discharge note that the patient was treated with conservative therapy without much benefit and treatment was interrupted once for a pulmonary embolus and once for a pulmonary infection. The discharge diagnosis was "lumbar stenosis/disc with radicular pain causing gait disorder and azotemia." The patient was discharged and went home with her daughter. On May 26, 2000, she fell while walking at home. The bill of particulars does not allege any injury resulting from the fall. Thereafter, the patient had a long course of treatment and passed away from cardiopulmonary arrest, renal failure and multi-organ system failure on March 15, 2001, over nine months after her discharge from St. Charles.

Dr. Weiss disputes plaintiffs' allegation that defendant Roth treated the patient while at St. Charles for acute treatment of a pulmonary embolism. On May 25, 2000, the patient was discharged with no active medical problems and after reaching a plateau of progress in her physical therapy. The patient was discharged in accordance with good and accepted practices of medicine and was not discharged prematurely. In addition, there is no evidence in the records of any medical provider that the patient had a pulmonary embolism on May 25, 2000. Therefore, Dr. Weiss states with a reasonable degree of medical certainty that the care rendered to the patient by defendant Roth was in accord with good and accepted standards of medical care and did not cause any injury alleged by the plaintiffs.

Defendant Roth established his entitlement to judgment as a matter of law (*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 plaintiffs 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]).

In opposition, plaintiffs submit, among other things, portions of defendant Roth's deposition and

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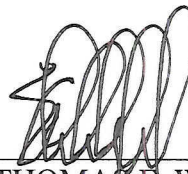
an affidavit by Salim Albert Khoury, M.D. Dr. Khoury avers that he is duly licensed to practice medicine in the State of New York and that he is board certified in nephrology and is licensed to practice podiatry. Dr. Khoury opines that defendant Roth deviated from accepted medical standards when the patient developed multiple emboli. He asserts that in spite of the patient's diminished condition, defendant continued the patient's rigorous regimen of physical therapy thereby increasing the likelihood of permanent pulmonary damage. In addition, Dr. Khoury states that he was alarmed to see that defendant failed to ensure that the patient was properly anticoagulated with heparin while coumadin was administered. Dr. Khoury concludes that defendant's medical treatment rendered to plaintiff during the April 20, 2000 hospital visit is what caused her subsequent visit to North Shore Hospital on May 26, 2000 and ensuing coronary bypass surgery.

The Court finds that this opinion fails to raise an issue of fact inasmuch as plaintiffs do not allege that defendant Roth departed from accepted standards of medical care prior to May 25, 2000. In addition, although conflicting opinions may raise a question of fact, neither the affirmation of plaintiffs' expert nor any other evidence in the record before this court supplies the requisite nexus between the malpractice allegedly committed by defendant Roth and the demise of plaintiffs' decedent (*Davenport v County of Nassau*, 279 AD2d 497, 719 NYS2d 126 [2d Dept 2001]; *see also, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

Accordingly, the motion by defendant Roth for summary judgment dismissing the action and all cross claims asserted against him is granted. Plaintiffs' claims against defendant Roth, dismissed herein, are severed and plaintiffs' remaining claims shall continue.

Dated: _____

1/20/11



THOMAS F. WHELAN, J.S.C.