

Gillespie v Riordan

2011 NY Slip Op 30247(U)

January 27, 2011

Supreme Court, Suffolk County

Docket Number: 4627/2005

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Adeline Gillespie, as Executrix of the Estate of
Michael Gillespie, deceased and Adeline Gillespie,
Individually,

Plaintiff,

-against-

Elizabeth Riordan, M.D. and Huntington Hospital,

Defendants.

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Motion Sequence No.: 005; MG

Motion Date: 8/4/10

Submitted: 11/24/10

Motion Sequence No.: 006; MG
CDISPO

Motion Date: 8/18/10

Submitted: 11/24/10

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Clerk of the Court

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Upon the following papers numbered 1 to 22 read on this motion and cross-motion for summary judgment and pursuant to CPLR §3217(b); Notice of Motion and supporting papers, (005) 1 - 14; Notice of Cross Motion and supporting papers, (006) 15 - 21; Other, 22.

The complaint of this action sets forth causes of action for the conscious pain and suffering of the plaintiff's decedent, Michael Gillespie, due to the defendants' alleged medical malpractice, lack of informed consent and for pecuniary loss suffered by Adeline Gillespie resulting from the plaintiff's decedent's death on August 9, 2004, and a derivative claim for loss of services and society of the decedent. The plaintiff's decedent came under the care of the defendants, Elizabeth Riordan, M.D. and Huntington Hospital, from about August 19, 2002 through August 28, 2002. It is claimed that the defendants negligently administered care and treatment to the decedent, resulting in his pain and suffering and wrongful death. The bill of particulars set forth that the plaintiff's decedent was 78 years old at the time of his death. It is claimed that the plaintiff's decedent's bile duct was severed during the course of a laproscopic cholecystectomy (removal of the gallbladder) performed on August 22, 2002 by Dr. Riordan at Huntington Hospital, resulting in the decedent developing sepsis, requiring the need for stent placement, causing the decedent's medical condition to deteriorate and the decedent to sustain cardiopulmonary arrest and respiratory failure and to die.

In motion (005), the defendant Elizabeth Riordan, M.D. seeks summary judgment dismissing the complaint on the basis that she did not depart from accepted standards of medical care and treatment during the decedent's hospitalization and that the cause of the decedent's death on August 9, 2004 was unrelated to the care and treatment rendered in and about August 2002.

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 (see, Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]; Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). 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 (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989]), 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 (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment

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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 (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]).

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 (see, Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept 1998], *app denied* 92 NY2d 818 [1999]). 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, 224 AD2d 674 [2nd 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 [1985]; Lyons v. McCauley, 252 AD2d 516 [2nd Dept., 1998], *app denied* 92 NY2d 814 [1998]; Bloom v. City of New York, 202 AD2d 465 [2nd Dept 1994]).

To rebut a *prima facie* showing of entitlement to an order granting summary judgment by defendants, 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 [2nd Dept 2004]; Domaradzki v. Glen Cove OB/GYN Assocs., 242 AD2d 282 [2nd Dept 1997]). As noted in Feinberg v. Feit, 23 AD3d 517, 519 (2nd Dept 2005), "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury."

In support of this motion, the defendant Dr. Riordan has submitted, *inter alia*, an attorney's affirmation; summons and complaint and answer, plaintiff's verified bill of particulars; decedent's medical records; unsigned transcript of the examination before trial of Adeline Gillespie October 5, 2006; and the affirmation of Lawrence A. Gordon, M.D.

The unsigned transcript of the examination before trial of Adeline Gillespie is not in admissible form pursuant to CPLR §3212 nor are they accompanied by affidavits pursuant to CPLR §3116 and are therefore not considered in this motion (see, Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2nd Dept 2008]; McDonald v. Maus, 38 AD3d 727 [2nd Dept 2007]; Pina v. Flik Intl. Corp., 25 AD3d 772 [2nd Dept 2006]).

Lawrence A. Gordon, M.D., Dr. Riordan's medical expert, states he is a physician duly licensed to practice medicine in the State of New York and is board certified in general surgery. He

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sets forth the records he has reviewed in preparing this affirmation, including the medical records provided with this motion. It is Dr. Gordon's opinion within a reasonable degree of medical certainty that the care and treatment provided to Michael Gillespie by Dr. Elizabeth Riordan was entirely in accord with good and accepted medical practice and that there was no act or failure to act that either caused or contributed in any way to Mr. Gillespie's death.

Dr. Gordon states that when Mr. Gillespie presented to the emergency department at Huntington Hospital on the morning of August 19, 2002, his history was significant for chronic obstructive pulmonary disease, polyarthritis, peripheral vascular disease, anemia, prostatectomy, hernia repair, colon cancer with resection, spina bifida and subtotal gastrectomy with Billroth gastro jejunostomy. Upon arrival to the emergency department, he offered complaints of dry heaves, upper gastric pain and back pain. A consultation was conducted on August 19, 2002 by Dr. Marc Weinberg who suspected Mr. Gillespie was suffering acute cholecystitis. Dr. Riordan was called in on consult on August 20, 2002. A subsequent HIDA scan revealed a non-visualized gallbladder compatible with either an acute cholecystitis or advanced chronic cholecystitis. By August 22, 2002, Mr. Gillespie's ileus and lower abdominal pain resolved but he continued to complain of persistent right upper quadrant abdominal discomfort in the area of the gallbladder. Dr. Riordan therefore performed a laparoscopic cholecystectomy after an extensive discussion with Mr. Gillespie about the risks of the procedure, including the possibility of having to convert the surgery to an open procedure given expected adhesions from the multiple prior surgical procedures he had, as well as the possibility of "bowel injury" and "ductal injury." The cholecystectomy was performed by laparoscopy but the surgery involved a "difficult dissection." Postoperatively, Mr. Gillespie developed an infection and was treated with antibiotics and it was noted that his Jackson Pratt drain was draining large amounts of fluid and bile. On August 25, 2002, Dr. Martin, who was covering for Dr. Riordan, suggested an ERCP. On August 28, 2002, Mr. Gillespie was scheduled for transfer to Long Island Jewish Medical Center (LIJMC) for an ERCP and stent. It was noted by Dr. Stark at LIJMC during the diagnostic ERCP that the cholangiogram revealed a transected/clipped common bile duct. Consults were obtained for interventional radiology and surgery and on September 4, 2002 Mr. Gillespie successfully underwent a combined ERCP/interventional radiology reconstruction of his common bile duct via stent placement, and was discharged on September 6, 2002 in stable condition.

Dr. Gordon states that although Mr. Gillespie had subsequent admissions to Huntington Hospital on several occasions from May 2003 through June 2004, his admissions were unrelated to his bile duct injury and included treatment for congestive heart failure, COPD, pneumonia and dehydration. On August 6, 2004, Mr. Gillespie was admitted to St. Johnland Nursing Center where a DNR (Do Not Resuscitate) order was entered. He died on August 9, 2004, with his cause of death listed as respiratory failure, COPD and recurrent aspiration.

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It is Dr. Gordon's opinion that Dr. Riordan at all times acted within the accepted standards of care for a surgeon, that the care rendered by Dr. Riordan did not, either by act of omission or commission, cause, contribute to, aggravate, or exacerbate Mr. Gillespie's death or any of his injuries. The laparoscopic cholecystectomy was indicated and Dr. Riordan utilized appropriate surgical technique in the performance of the procedure. Informed consent was within the proper standard of care with a consent form executed by Mr. Gillespie. The number of clips used during the procedure is a judgment call and the number used was within good and accepted medical/surgical practice. Use of the Jackson Pratt drain was within the standard of care due to the anticipated drainage following the procedure, which drainage was not unusual. Waiting to see if the drainage would resolve on its own was appropriate. Conversion to a laparotomy was not indicated as there were no specific difficulties in identifying the surgical anatomy. Intraoperative cholangiogram is a judgment call. Dr. Gordon further opines that a clipped common bile duct is a recognized risk of the procedure, whether the surgery is via laparoscopy or laparotomy and it occurs in the absence of malpractice.

Based upon the foregoing, it is determined that Dr. Riordan has demonstrated *prima facie* entitlement to summary judgment dismissing the complaint. The plaintiff has not opposed this motion for summary judgment and has failed to raise a factual issue to preclude summary judgment.

The defendant Huntington Hospital has made application for this Court to So Order the Stipulation of Discontinuance with prejudice as to Huntington Hospital pursuant to CPLR §3217(b). However, the stipulation, although signed by counsel for the plaintiff and counsel for Huntington Hospital, has not been signed by defendant Elizabeth Riordan, M.D.

CPLR §3217(b) provides "[e]xcept as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action." In the instant action the Stipulation of Discontinuance has not been filed with the Clerk (see generally, Matter of Michael T., 188AD2d 1090 [4th Dept 1992]; Noble v. O'Leary, 165 Misc2d 231 [Sup. Ct., New York County 1995]), and it is not signed by all parties as required by CPLR §3217(b) (see, C.W. Brown v. HCE, Inc., 8 AD3d 520 [2nd Dept 2004]) in that counsel for the defendant Riordan has not signed it. However, the motion for summary judgment or final disposition of the action pending now before this court has been resolved in favor of defendant Riordan and the complaint has been dismissed against her. Therefore, there is no prohibition imposed upon this court against discontinuing the action against the defendant Huntington Hospital (see, Farkas v. Farkas, 47 Misc2d 827 [Sup. Ct., New York County 1965]). Neither the plaintiff nor defendant Riordan have opposed this motion.

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Based on the forgoing, it is

ORDERED that this motion (005) by the defendant, Elizabeth Riordan, M.D., for an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint is granted and the complaint as asserted against Elizabeth Riordan, M.D. is dismissed with prejudice; and it is further

ORDERED that this motion (006) by the defendant, Huntington Hospital, pursuant to CPLR §3217(b) for this Court to so order the Stipulation of Discontinuance with Prejudice as to Huntington Hospital is granted, the Stipulation is deemed so ordered and the complaint is dismissed with prejudice as against Huntington Hospital.

Dated: January 27, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION