

Caliendo v St. Catherine of Siena Med. Ctr.

2011 NY Slip Op 30443(U)

February 4, 2011

Sup Ct, Suffolk County

Docket Number: 08-42014

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-16-10
ADJ. DATE 1-13-11
Mot. Seq. # 002-MD

COPY

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MICHELLE CALIENDO, :
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 Plaintiffs, :
 :
 - against - :
 :
 ST. CATHERINE OF SIENA MEDICAL CENTER: :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 19 read on this motion and cross motions for summary judgment by Notice of Motion/Order to Show Cause and supporting papers (002) 1 - 14 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-17; Replying Affidavits and supporting papers 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion by the defendant, St. Catherine of Siena Medical Center ("St. Catherine"), pursuant to CPLR 3212, for summary judgment dismissing the complaint of this action is denied.

This action for medical malpractice and lack of informed consent arises out of the alleged failure of the employees of St. Catherine to properly diagnose and treat the plaintiff, Michelle Caliendo, when she presented to the emergency department at the hospital for care and treatment of a dog bite on November 22, 2007 and November 23, 2007. It is claimed that the defendant hospital failed to x-ray the plaintiff's right fifth finger and thus failed to diagnose and properly treat a fracture of the middle phalanx resulting in a nonunion of the bones causing the need for additional surgery, deformity of the finger, limitation of use and function of the finger, and pain and suffering.

St. Catherine now seeks summary judgment on liability and proximate cause dismissing the complaint on the basis that the hospital personnel/employees did not depart from good and accepted standards of medical care in treating the plaintiff when she presented to the emergency department for treatment of a dog bite. Although no x-ray of the plaintiff's fifth finger was taken on either date she presented to St. Catherine's emergency room, St. Catherine claims that the plaintiff's fifth finger was visible on the x-ray of the right arm and that there was no distinct acute fracture present in any bone visible on the x-ray.

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, 165 NYS2d 498 [1957]). The movant has

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the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 538 NYS2d 843 [2d 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 (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 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, 416 NYS2d 790 [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 (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [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, 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, 517, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d 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 defendant’s 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, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In support of this application, St. Catherine has submitted an attorney’s affirmation; the affirmation of its expert Allen P. Schlein, M. D.; copies of the summons and complaint, St. Catherine’s answer and plaintiff’s verified bill of particulars; copies of the transcripts of the examinations before trial of Michelle Caliendo dated August 25, 2009, David Kennedy P.A. dated October 27, 2009, and the unsigned copy of the transcript of Ronni Lynn Sollazzo, M.D. dated October 27, 2009; and an uncertified copy of the plaintiff’s medical records.

The unsigned copy of the deposition transcript of Ronni Lynn Sollazzo, M.D. is not in admissible form pursuant to CPLR3212 and is not accompanied by an affidavit pursuant to CPLR 3116 and therefore is not considered (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). The medical records are not certified copies of the original and are not in admissible form as required pursuant to CPLR 3212. The physician’s affirmation by Dr. Schlein prepared in Bridgeport, Connecticut, is not in admissible form pursuant to CPLR 2106 and 2309 (c), and lacks a certificate of conformity as required by N.Y. Real. Prop. Law. § 299-a (1) (*see Ford Motor Credit Company v Prestige*

Gown Cleaning Service, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct, Queens County 2002], wherein it was provided that “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation”). Therefore, such affirmation cannot be considered in this motion for summary judgment.

It is determined, however, that even if St. Catherine’s physician’s expert affirmation was in admissible form, that St. Catherine has not established *prima facie* entitlement to summary judgment as there are factual issues in the moving papers which preclude dismissal of the complaint.

Michelle Caliendo (a/k/a Mills) testified at her examination before trial to the effect that on November 22, 2007, she had two pit bull dogs who began fighting. As she tried to break up the fight, she was bitten on her right arm, right hand and right pinky finger. She had three puncture holes on her right arm between the wrist and elbow and one puncture wound on her right pinky. Her mother drove her to St. Catherine’s emergency room for treatment about one hour later to see if she needed stitches as she had bleeding from the wounds, her finger was swollen, and she was having pain. She was unable to move her right fifth finger. After being seen by the triage nurse, she was seen by a male physician’s assistant who ordered an x-ray of her right arm and sutured her wounds, except for the wound on her pinky. She had advised him that her right pinky hurt and was not bending. He examined it and advised her it did not move due to the puncture. She asked him to x-ray the finger and he advised her she did not need it as the pain was from the puncture wound and he believed it was not broken. He also advised her to return the following day so he could check her wounds and see if the finger was getting infected. She did return the following day, November 23, 2007; however, after waiting an hour to be seen, she was told that her wait would be longer, so she advised the triage nurse that she would follow up with her own doctor. Her finger was still swollen and she could not move it. She followed up with her doctor, Dr. Assalone, on November 29, 2007, to have the stitches removed. Dr. Assalone referred her to an orthopedist as she could not move her finger and it was still bent upwards like V at a 40 degree angle. She followed up with Dr. Ritter from Brookhaven Orthopedics, having gotten an appointment for December 17, 2007, at which time her finger was x-rayed and she was advised that her finger was broken in half. She was then referred to the hand specialist, Dr. Schwarzbard, by whom she was seen about a week later. Her finger was still bent and swollen and she was advised that she would need surgery to re-break the bone to straighten the finger as it had already begun healing. Surgery was performed on January 1 or 2, 2008 under general anesthesia. When she awoke, her finger had a pin in it and it was bandaged. The pin was removed after about six weeks, and on her wedding day on February 17, 2008, she was wearing a splint on her finger and wore it for three weeks thereafter. She is now unable to bend her pinky at the top joint and there is no feeling in the tip of her finger.

David Kennedy testified at his examination before trial that on November 22, 2007, he was employed by St. Catherine as a certified physician’s assistant in the emergency department and was also employed by Island Medical, P.C. After he received a subpoena to testify, he went to the hospital to view the digital image of the films taken of plaintiff when she was treated for the dog bite. He spoke with Dr. Sallazzo and they reviewed the films together on a computer at the hospital. There were two films, and he did not see any evidence of “an acute fracture of that bone,” later clarified as the middle phalanx of the fifth finger, but he could not recall if he reviewed the report by the radiologist. He testified that plaintiff did not have an injury which required a dedicated view of any of her fingers. He had some independent recollection of treating her in the emergency department for the dog bite with lacerations to her forearm, and stated that she had a small abrasion/laceration at the head of the fifth metacarpal bone on the skin overlying the bone, but it was not a puncture wound and he did

not consider it a positive finding of an injury to the finger as the wound was to the base of her fifth finger. He ordered an x-ray of her arm but he did not discuss with the plaintiff or Dr. Sollazzo, the emergency room physician, concerning whether there should be an x-ray of the right fifth finger. He did not specifically remember the plaintiff requesting an x-ray of the finger or her advising him that she had pain in that finger. He testified that he recalls having a discussion with her about that finger in that there was strong suspicion that the finger had been injured remotely in the past and he showed her the x-ray which he states reveals a sclerotic line in the mid phalanx. He testified that Dr. Sollazzo reviewed the x-rays but he did not document their discussion about the plaintiff's finger or arm, and when he examined the plaintiff, he found there was full range of motion on flexion and extension of the fifth finger, with a one half centimeter laceration to the base of the finger. He did not know if Dr. Sollazzo saw the plaintiff. In reading his note, he states that a metal and foam splint was applied to her right fifth finger from below the wrist to the tip of the finger and bandaged, but he did not state why. She was instructed to return the following day for a wound check.

It is noted that the x-ray report dated November 22, 2007, relating to "two views of the right arm," for the diagnosis of "pain arm" submitted by the defendants, reports a finding of "[m]ild soft tissue swelling is present. No distinct acute fracture is identified." It is noted that no mention of the findings for the wrist and subject finger have been made.

Defendant's expert, Allen P. Schlein, M.D. sets forth in his physician affirmation that he is a physician licensed to practice medicine in the State of Connecticut, however, he has not established his qualifications as an expert and does not indicate that he is board certified in any area. He sets forth that when plaintiff presented to the emergency room at St. Catherine that the P.A., David Kennedy, found that her right fifth finger had full range of motion for flexion and extension and had intact sensation distally. An x-ray of the forearm was ordered due to arm pain, and he states that upon a review of the x-ray, he can see the mid-phalanx of the right fifth finger in the upper portion of one of the films-an anteroposterior view. It is his opinion with a reasonable degree of medical certainty that there are no acute fractures present in any bone visible on either of the films and therefore, plaintiff did not have any acute fractures at the time she left St. Catherine on November 22, 2007. However, he states, the A-P view does contain evidence of a pre-existing injury to the mid-phalanx by virtue of a sclerotic line indicating an old fracture, and that the x-ray films taken on December 18, 2007 and December 27, 2007 reveal an acute transverse fracture of the mid-diaphysis of the right small finger middle phalanx. He does indicate that a splint was applied to plaintiff's right fifth finger on November 22, 2007, but does not indicate the reason why. He therefore opines that the hospital staff did not depart from good and accepted standards of care, but does not set forth the specific standard of care under the circumstances when one view reveals a "sclerotic line."

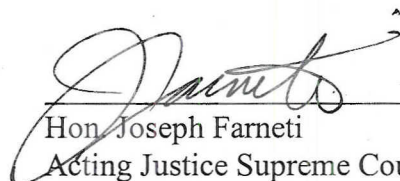
Aside from St. Catherine's affirmation being legally insufficient in support of this application, there are factual issues presented in St. Catherine's moving papers which preclude summary judgment. The plaintiff has testified to swelling, pain, and a laceration/puncture wound to her right fifth finger and states that she apprised P.A. Kennedy of the same in the emergency room. P.A. Kennedy has testified that he found full range of motion in flexion and extension and that the x-ray did not reveal an acute fracture in the fifth finger, but he applied a splint and pressure dressing thereto without explanation. St. Catherine's expert does not explain why the splint was applied and did not opine as to whether the standard of care required that further x-ray be taken of the injured finger after the abnormal finding was found on the x-ray of the arm. Nor does he opine that an A-P view would visualize the type of overriding fracture of the middle phalanx which the plaintiff claims was not diagnosed.

The plaintiff's expert has submitted a notarized affidavit indicating the expert is licensed to practice medicine in the State of New York with board certification in emergency medicine. It is the plaintiff's expert's opinion that St. Catherine departed from accepted standards of medical care and treatment. There was no official documentation that the fifth digit was visualized on the x-ray study of the right arm and there is no mention of any sclerotic line in the mid-phalanx or the existence of any signs of an old fracture of the right fifth digit. On December 17, 2007, Dr. Ritter found a deformity of the finger with a fixed flexion contracture and focal tenderness over the middle phalanx and the plaintiff was advised there was a displaced fracture of the middle phalanx with significant overriding of the fracture fragments. Delay in treatment made closed reduction no longer possible. Thereafter, surgical correction was necessitated and effectuated for repair of a malunion of the right fifth finger. It is the plaintiff's expert's opinion that the ability to passively flex and extend the joints of the finger does not exclude the possibility of an underlying fracture and, therefore, there are factual issues concerning whether the initial emergency room examination was adequate for patients who present with potential injury to fingers due to penetrating dog bites. In such cases, according to the plaintiff's expert, there is an obligation for x-ray studies directed at the joint, and failure to obtain the x-ray is a departure from the standard of care, and incidental inclusion of the potentially injured fingers on an x-ray to visualize the forearm is insufficient as it does not provide the physician with adequate detail or adequate views of the bones of the finger. When a finger is viewed in one dimension on an x-ray, a fracture invisible on one view is grossly obvious in another view. Therefore, asserts the plaintiff's expert, a single incidental view is inadequate to rule out a fracture and diagnose the underlying overlapping fragment of the fracture in the mid phalanx, leading to delay in treatment, inability to perform a closed reduction, a less invasive procedure than an open reduction which the plaintiff required. St. Catherine's opinion that there was an old injury is not in concert with the clinical presentation and scenario, in that plaintiff presented with a penetrating injury directly overlying the area where the fracture was ultimately found. There was no prior history given of an old injury to the finger.

Based upon the foregoing, St. Catherine has not demonstrated *prima facie* entitlement to summary judgment dismissing the complaint on the basis of liability and proximate cause on the basis that its medical staff did not depart from accepted standards of care during the care and treatment of the plaintiff. The plaintiff's expert has additionally raised factual issues with regard to St. Catherine's departures proximately causing the injuries complained of by the plaintiff, thus precluding summary judgment even if St. Catherine's expert affirmation was in admissible form.

Accordingly, this motion for summary judgment is denied.

Dated: February 4, 2011


 Hon. Joseph Farneti
 Acting Justice Supreme Court

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