

Palmieri v Sathi

2011 NY Slip Op 30505(U)

February 23, 2011

Sup Ct, Suffolk County

Docket Number: 07-33733

Judge: Arthur G. Pitts

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This medical malpractice action is premised upon the alleged negligence of the defendants in their care and treatment of the plaintiff Madeline Palmieri with a derivative claim asserted on behalf of her spouse Frank Palmieri. It is claimed that Madeline Palmieri came under the care and treatment of the defendant Sumeer Sathi, M.D. (Dr. Sathi) on or about July 22, 2005 through April 21, 2006 for medical and surgical care and treatment relative to a spinal fusion. It is claimed that she came under the care and treatment of Hebbalmath M. Thippeswamy, M.D. (Dr. Thippeswamy) on or about August 5, 2005 for pre-surgical testing and clearance for the surgery which was performed at defendant Brookhaven Memorial Medical Center. The plaintiff further alleges that due to the negligence of the defendants in departing from good and accepted medical care and treatment, she was caused to suffer post-surgery bilateral deep vein thrombosis in her legs, allegedly due to the failure of the defendants to advise her to discontinue taking the medications, Premarin and Evista, at least 72 hours prior to surgery. It is claimed that due to the development of the deep vein thrombosis, it was necessitated that she undergo further surgical procedure for insertion of a greenfield filter and inferior vena cava filter.

In their respective motions, the moving defendants seek summary judgment dismissing the complaint as asserted against each of them on the bases they each did not depart from the appropriate standards of care and did not proximately cause her claimed injuries.

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 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 [2nd Dept 1979]) 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 [2nd 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 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1998]). 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*, 221 AD2d 674, 638 NYS2d 700 [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, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the 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 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). "Summary 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" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]). In the instant action, summary judgment is precluded in that the plaintiff and the moving defendants have submitted affirmations which contain conflicting medical opinions.

In support of motion (003) Brookhaven Memorial Hospital Medical Center has submitted, inter alia, an attorney's affirmation; the affirmation of its expert Melvin Holden, M.D.; copies of the supplemental summons and complaint, answers, and the plaintiffs' verified bills of particulars; uncertified copies of the plaintiff's medical records which are not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212; and unsigned copies of the transcripts of the examinations before trial of Madeline Palmieri dated January 27, 2009, Frank Palmieri dated August 18, 2009, Sumeer Sathi, M.D. dated December 16, 2009, Jean McElwee dated March 1, 2010, Hebbalmath Thippeswamy dated May 5, 2010, which unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

In support of cross motion (004), Hebbalmath M. Thippeswamy, M.D. has submitted, inter alia, an attorney's affirmation; the affirmation of its expert Melvin Holden, M.D.; copies of the supplemental summons and complaint, answers, and the plaintiffs' verified bills of particulars; uncertified copies of the plaintiff's medical records which are not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212; and unsigned copies of the transcripts of the examinations before trial of Sumeer Sathi, M.D. dated December 16, 2009, and Hebbalmath Thippeswamy dated May 5, 2010, which unsigned copies of the transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, *supra*; *McDonald v Maus*, *supra*; *Pina v Flik Intl. Corp.*, *supra*), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

In support of cross motion (005), Sumeer Sathi, M.D. has submitted, inter alia, an attorney's affirmation; the affirmation of its expert Melvin Holden, M.D.; copies of the supplemental summons and complaint, Sathi's answer and combined discovery demands, and the plaintiffs' verified bills of particulars; and an uncertified copy of the plaintiff's medical records which are not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212; and an unsigned copy of the transcript of the examination before trial of Sumeer Sathi, M.D. dated December 16, 2009, which unsigned transcript is not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, *supra*; *McDonald v Maus*, *supra*; *Pina v Flik Intl. Corp.*, *supra*), nor is it accompanied by an affidavit pursuant to CPLR 3116, and, therefore, is not considered on this motion.

Melvin Holden, M.D. states in his expert affirmation submitted on behalf of the defendants that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine and pulmonary disease. He sets forth the materials he reviewed upon which he bases his opinions, and sets forth his

opinions with a reasonable degree of medical certainty. It is Dr. Holden's expert opinion that, at all times, the personnel at Brookhaven Memorial Medical Center conformed to accepted standards of medical and nursing care, did not depart from any appropriate standards of care, and did not cause or contribute to the plaintiff's injury.

Dr. Holden sets forth that Dr. Sathi recommended surgery for Ms. Palmieri due to a large synovial cyst which was compressing a nerve and causing sciatica making her high risk for developing neurological deficits. Her primary care physician from whom she received medical clearance for the surgery was Dr. Thippeswamy, whom she saw on August 8, 2005. Dr. Holden states that Dr. Thippeswamy completed the pre-surgical clearance form which listed the medications and faxed them back to the pre-surgical clearance department at Brookhaven Hospital. Dr. Holden states that Dr. Thippeswamy testified that he told the plaintiff to continue taking the blood pressure medication with a sip of water the night before and/or the morning of the surgery, but he did not recall giving her any instructions or advice regarding any other medications. Dr. Holden continues that patients are instructed to have nothing by mouth after midnight before surgery and that medications for blood pressure or cardiac problems are to be taken the morning of surgery with a sip of water. All other medications are to be held that morning unless a physician orders differently.

The pre-operative testing was done at Brookhaven Memorial and Ms. Palmieri was instructed to stop all anticoagulation and anti-inflammatory medications and aspirin prior to surgery. Blood work was ordered. Nurse McElwee saw Ms. Palmieri in the pre-testing service and obtained her past medical and surgical history, and ascertained allergies to medications and the medications she was currently taking. Dr. Holden states that pursuant to anesthesia guidelines, patients are instructed not to take Coumadin or blood thinners or Plavix, but Nurse McElwee testified that she defers to the patient's physician as to other medications. Dr. Holden states that Nurse McElwee conformed with the accepted standards of care in that she followed the anesthesia guidelines, reinforced the previous instructions by Dr. Sathi, and gave appropriate pre-operative instructions. He continues that although a physician can override any hospital guidelines, it is not for the nurse or anesthesiologist to make a determination concerning a patient's longstanding medications. Prescribing or discontinuing a drug that is not part of the anesthesia protocol is strictly up to the attending physicians caring for the patient.

It is Dr. Holden's further opinion that the thrombophlebitis which developed approximately eleven days post-operatively was not related to the medications Premarin and Evista. He opines that the risks of blood clots post-surgery are related to inactivity and would be expected to occur within a three to four day time frame post-operatively. Here, he states, the plaintiff developed the blood clots approximately eleven days post-surgery and after her discharge from the hospital at which time she was fully ambulatory. He states there was no evidence of blood clots at the time of her discharge or when she was seen by Dr. Sathi in his office for her first post-operative visit. Additionally, Dr. Holden states, Ms. Palmieri's blood platelet level was normal when she was in the hospital.

Based upon the foregoing, it is determined that Brookhaven Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint on the bases that there were no departures from accepted standards of medical practice, and that there was nothing that the staff at Brookhaven Hospital did or did not do which proximately caused the plaintiff to develop thrombophlebitis eleven days after surgery. With respect to Dr. Sathi and Dr. Thippeswamy, it has been demonstrated that they did not proximately cause the injuries claimed by the plaintiff on the basis that such thrombophlebitis developed too remote in time from the surgery.

In opposing these motions, the plaintiff has submitted, inter alia, an attorney's affirmation; the affirmation of plaintiffs' expert physician; a uncertified copy of the medication protocol from Brookhaven Hospital; a copy of the plaintiffs' response to the defendants' demand for expert exchange; and a copy of the unsigned transcript of the examination before trial of Jean McElwee.

The plaintiff's expert is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine. The plaintiff's expert sets forth the records and materials reviewed and states opinions with a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that the care and treatment rendered to the plaintiff at Brookhaven Memorial Hospital Medical Center and by Dr. Sathi and Dr. Thippeswamy departed from good and accepted standards of medical practice, and that those departures caused Ms. Palmieri to develop deep vein thrombosis requiring surgical intervention and Coumadin therapy. The plaintiff's expert states that none of the defendants communicated with each other or with Ms. Palmieri regarding whether or not she should continue taking Premarin and Evista prior to her surgical procedure, and, thus, caused her to suffer an adverse drug event, deep vein thrombosis, which should have been prevented.


The plaintiff's expert states that while Brookhaven's medication protocol for out-patient day ambulatory surgery sets forth the medications that are recommended that a patient take prior to surgery, and those recommended to be taken not prior to surgery, that the drugs Premarin and Evista are not included on the list. The expert opines that, therefore, the nurse is to call an anesthesiologist for direction as needed. The plaintiff's expert states that when Nurse McElwee deferred to the plaintiff's physician with respect to any medication not contained in the guidelines, that this was directly contrary to the protocol as she should have called anesthesiology.

With regard to Dr. Sathi and Dr. Thippeswamy, and to Brookhaven Hospital, the plaintiff's expert disagrees with Dr. Holden's opinion that the thrombophlebitis that Ms. Palmieri developed eleven days post-operatively was not related to the Evista and Premarin which the plaintiff claims should have been discontinued pre-operatively. The plaintiff's expert opines that the risk of blood clots for a patient who has been hospitalized and has been inactive extends thirty days from discharge from that hospitalization, and medications such as Premarin and Evista exacerbate this heightened risk for developing deep vein thrombosis. Therefore, opines the plaintiff's expert, the risk for the plaintiff to develop blood clots was severely exacerbated by the fact that none of the defendants instructed the plaintiff not to take the Premarin and Evista, that the plaintiff developed the blood clots within the known and accepted range of post-operative days for developing deep venous thrombois, and that she developed the thrombophlebitis because she was taking these medications at the time of surgery. The expert opines that the Premarin and the Evista were a competent producing cause of Ms. Palmieri's injuries.

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues to preclude summary judgment and the experts have adduced conflicting medical opinions which are to be resolved by the trier of fact.

Accordingly, motion (003), and cross motions (004) and (005) are denied.

Dated: February 23, 2011



J.S.C.