

Baron v Brown

2011 NY Slip Op 31617(U)

June 13, 2011

Sup Ct, Suffolk County

Docket Number: 07-15756

Judge: Denise F. Molia

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INDEX No. 07-15756

CAL No. 10-00975MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 9-27-10 (#012)
MOTION DATE 10-8-10 (#013 & #014)
MOTION DATE 10-1-10 (#015)
ADJ. DATE 1-7-11
Mot. Seq. # 012 - MD # 014 - XMD
013 - MG/CASEDISP # 015 - MD

----- X
KATHLEEN BARON, as Administratrix of the :
Estate of AMY RYAN BARON, Deceased, :
 :
Plaintiff, :
 :
- against - :
 :
HOWARD BROWN, D.O., ERIC CRUZEN, M.D., :
JANICE MCCORMACK, M.D., FRANCES :
ZAPPALLA, D.O., JOHN MURATORI, M.D., :
EDMUND ROSS, M.D., ROBERT MACCONE, :
M.D., GOOD SAMARITAN HOSPITAL MEDICAL :
CENTER, SOUTHSIDE HOSPITAL and SOUTH :
BAY CARDIOVASCULAR ASSOCIATES, P.C., :
 :
Defendants. :
----- X

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Upon the following papers numbered 1 to 40 read on these motions and cross motion for summary judgment, and for a "so-ordered" stipulation; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 8, 9 - 12, 13 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 19, 20 - 22, 23 - 25, 26 - 27, 28 - 30; Replying Affidavits and supporting papers 31 - 32, 33 - 35, 36 - 38, 39 - 40; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions and cross motion are consolidated for the purpose of this determination; and it is further

ORDERED that upon the consent of all parties, the order dated March 1, 2011 of the undersigned in

the above captioned action is recalled and the motions filed under motion sequence numbers 012, 013, 014, and 015 are restored to the calendar for decision based upon the submissions of the parties and all pleadings contained in the County Clerk file; and it is further

ORDERED that the motion (012) by defendants Good Samaritan Hospital Medical Center and Frances Zappalla seeking an order pursuant to CPLR 3217 (b) for a so-ordered stipulation of discontinuance is denied as moot; and it is further

ORDERED that the motion (013) by defendants Edmund Ross, M.D., s/h/a Edmond Ross, M.D., John Muratori, M.D., and Robert Maccone, M.D. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross motion (014) by defendants Howard Brown, D.O., Eric Cruzen, M.D., and Southside Hospital for summary judgment dismissing the complaint is denied as moot; and it is further

ORDERED that the motion (015) by defendants Janice McCormack and South Bay Cardiovascular Associates, P.C. for summary judgment dismissing the complaint is denied as moot; and it is further

In this action, plaintiff Kathleen Baron, as Administratrix of the Estate of Amy Ryan Baron, decedent, alleges that defendants departed from accepted medical practice in decedent's care and seeks damages for her wrongful death on June 9, 2005. Plaintiff alleges in the bill of particulars that from December 16, 2000 through June 3, 2005, defendants collectively departed from accepted medical practice by, *inter alia*, failing to diagnose a cardiac condition, diagnose an arrhythmia, perform Holter monitoring, perform an echocardiogram, investigate the presence of congenital cardiomyopathy, perform a full and complete cardiac work up in response to decedent's episodes of syncope and/or near syncope, interpret electrocardiogram and echocardiogram studies, and in negligently allowing decedent's condition to go untreated. Plaintiff alleges that as a result of defendants' departures, decedent sustained cardiomyopathy, pulmonary congestion, difficulty breathing, syncopal episodes, rapid beating of the heart, fear of death, and death. An autopsy was performed on June 10, 2005, which revealed that the cause of death was cardiomyopathy with focal myocarditis and that the manner of death was natural.

Procedurally, by order dated March 13, 2008, this Court granted the applications by defendants Frances Zappalla, D.O. and Good Samaritan Hospital Medical Center, Howard Brown, D.O., Eric Cruzen, M.D., and Southside Hospital, John Muratori, M.D., Edmond Ross, M.D., and Robert Maccone, M.D., and Janice McCormack, M.D. and South Bay Cardiovascular Associates, P.C., pursuant to CPLR 3211 (a) (5), dismissing the first cause of action alleging medical malpractice as time barred as against all defendants, inasmuch as the action was commenced by filing on May 24, 2007. The Court also noted that "the claims for wrongful death appeared to have been timely commenced."

By order dated June 30, 2008, this Court granted plaintiff's motion for leave to reargue the prior cross motion to dismiss by defendants Muratori, Ross and Maccone and determined that "any claims of medical malpractice alleged to have been committed by the cross moving defendants from November 24, 2004 up to the date of decedent's death are deemed timely."

As a result of the order dated March 13, 2008, the complaint was dismissed as against defendants

Zappalla and Good Samaritan Hospital Medical Center, Howard Brown, D.O., Eric Cruzen, M.D. and Southside Hospital, and Janice McCormack, M.D. and South Bay Cardiovascular Associates, P.C., inasmuch as the wrongful death cause of action was also time barred. Where as here, the statute of limitations on the underlying medical malpractice action had run during the decedent's lifetime, the wrongful death claim must be dismissed (*see, Bevinetto v Steven Plotnick, M.D., P.C.*, 51 AD3d 612, 857 NYS2d 694 [2d Dept 2008]; *Helgans v Plurad*, 255 AD2d 554, 557, 680 NYS2d 648 [2d Dept 1998]). Accordingly, the instant motions by these defendants are denied as moot. However, inasmuch as the first cause of action asserted against defendants Ross, Muratori and Maccone, alleging medical malpractice from November 24, 2004 up to the date of decedent's death, was deemed timely, the wrongful death claims as asserted were also timely from November 24, 2004 up to the date of decedent's death.

Defendants Edmund Ross, M.D., s/h/a Edmond Ross, M.D., John Muratori, M.D., and Robert Maccone, M.D. ("the Ross defendants") now move for summary judgment dismissing the complaint as asserted against them.

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 (*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988], *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]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating decedent so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, ___ AD3d ___, 918 NYS2d 176 [2d Dept 2011]). 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 decedent'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]).

In support of their motion, defendants submit, *inter alia*, the pleadings, the bill of particulars, decedent's office medical record, the deposition testimony of defendants Muratori, Maccone, Ross, and non-party Janet LaViolette, F.N.P. (Family Nurse Practitioner), and the affirmation of John J. Gill, M.D.

Maccone testified that the first time that he saw decedent in the office was April 2, 2001, and that the last time he saw her was July 25, 2002. Muratori testified that the first time that he saw decedent in the office was December 26, 2001, and the last time that he saw her in the office was July 10, 2003. Ross testified that the first time that he saw decedent in the office was April 29, 2002 and the last time that he saw her in the office was May 24, 2004. The office medical record reveals that on the relevant dates of

December 18, 2004, February 4, 2005 and June 3, 2005, decedent was seen in the office by the nurse practitioner, LaViolette.

LaViolette testified that she was working as a nurse practitioner for Ross, Maccone and Muratori during the time that decedent was their patient. She stated that she had treated decedent in the office frequently. On December 18, 2004, she stated that she assisted decedent in completing a medical clearance to withdraw from her college fall semester. On February 4, 2005, the office medical record reveals that decedent presented to the office with complaints related to a upper respiratory infection. She was seen by LaViolette, who took a throat culture and prescribed antibiotics. LaViolette testified that on June 3, 2005, decedent presented to the office with flu-like symptoms. LaViolette stated that she examined decedent and that the ears, nose and throat were normal, the heart rate was regular. Upon auscultation of the chest, she stated that the lungs were clear, and that there were no heart murmurs. LaViolette stated that she took a throat culture and prescribed an antibiotic. The office medical record reveals that the throat culture results were negative.

Dr. Gil avers that he is a physician duly licensed to practice medicine in the State of New York and is a family practitioner. He states, within a reasonable degree of medical certainty, that there has been no departure or deviation from good and accepted practice by anyone associated with the practice maintained by defendants Muratori, Ross and Maccone. According to Dr. Gil, the care received by decedent from these doctors and from the nurse practitioner, Janet LaViolette, was at all times appropriate and did not deviate from the standard of care, that decedent was evaluated appropriately in every instance, and that she was appropriately referred to specialists for care in excess of her repetitive sore throats. Dr. Gil further states that at no time at any office visit to defendants Maccone, Ross and Muratori did the patient ever exhibit any palpitations, chest pain or shortness of breath which would have been suggestive of any heart problems. Therefore, there was no reason to refer decedent to a cardiologist. In addition, at the last visit to the practice on June 3, 2005, she presented with flu-like symptoms and demonstrated no warning signs or symptoms of any cardiac problems. A full examination was performed by the nurse practitioner who noted that the heart rate was regular and there were no murmurs at auscultation. Dr. Gil concludes that the practice acted appropriately in evaluating the patient on all occasions, as decedent never presented with symptoms that were indicative of heart disease and she did not present at any of the relevant times with palpitations, shortness of breath, or chest pain that would indicate otherwise. It is Dr. Gil's opinion, within a reasonable degree of medical certainty, that none of the symptoms or alleged conditions experienced by the patient or the ultimate demise of the patient were in any way causally related to the proper, timely care and treatment afforded by the defendants.

Defendants Ross, Maccone and Muratori established their entitlement to judgment as a matter of law by demonstrating that they did not depart from accepted medical practice in their treatment of decedent (*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]).

In opposition, plaintiff's counsel affirms that plaintiff does not oppose the applications by Ross and Muratori for summary judgment in their favor. In opposition to the application by Maccone, plaintiff submits, *inter alia*, the plaintiff's deposition testimony, and the redacted affirmations of two medical

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experts. The Court notes that the submission by plaintiff of affirmations from two unidentified experts is permissible with the proviso that the Court may require submission of unredacted copies of the affirmations for an in camera inspection (*see, Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]).

Plaintiff testified that she learned from the medical examiner that decedent died of hypertrophic cardiomyopathy, also known as an enlarged heart. She stated that decedent had never been diagnosed with this condition.

The first expert states that he/she is a physician duly licensed to practice medicine in the State of New York and is board certified in internal medicine. The Court rejects all references the expert makes to care provided by defendants to decedent prior to November 24, 2004, as time barred. The expert did not address the care provided after that date. The expert relies upon the second expert's opinion that decedent died from a chronic cardiac process.

The second expert avers that he/she is a physician duly licensed to practice medicine in the State of New York and is board certified in anatomic and clinical pathology and forensic pathology. The expert opines, within a reasonable degree of medical certainty, that decedent more likely than not died of longstanding cardiomyopathy with disease of the small vessels in the heart, and that such condition more likely than not caused her to die from an undiagnosed chronic arrhythmia, which remained undiagnosed and untreated throughout her life. The expert bases this opinion on the autopsy report which revealed the existence of siderophages in the decedent's lungs and liver which more likely than not suggests that her cardiac condition was chronic.

Although conflicting opinions may raise a question of fact, neither the affirmations of plaintiff's experts nor any other evidence in the record before this court supplies the requisite nexus between the malpractice allegedly committed by defendant Maccone and the demise of plaintiff's decedent (*Zuckerman v New York, supra; Davenport v County of Nassau*, 279 AD2d 497, 719 NYS2d 126 [2d Dept 2001]). Thus, the first cause of action alleging medical malpractice is dismissed. In addition, for the reasons stated above, the second cause of action alleging wrongful death is dismissed. Accordingly, the application by defendants Ross, Muratori and Maccone for summary judgment dismissing the complaint is granted.

Dated: 6-13-2011

Hon. Denise F. Motta

 J.S.C.

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