

Carlin v Naidoo

2011 NY Slip Op 31619(U)

March 24, 2011

Sup Ct, Suffolk County

Docket Number: 30581-08

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 10-5-10 (#004)
MOTION DATE 10-5-10 (#005)
ADJ. DATE 3-3-11
Mot. Seq. # 004 - MD
005 - MD

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DANIEL CARLIN and JEANNE CARLIN,

Plaintiffs,

- against -

RAJENDRAN NAIDOO, M.D. , BARBARA ROSE,
L.P.N., and HUNTINGTON HOSPITAL
ASSOCIATION,

Defendants.

: DUFFY & DUFFY, ESQS.
: Attorney for Plaintiffs
: 1370 Rex Corp. Plaza
: Uniondale, New York 11556
:
: SHAUB, AHMUTY, CITRIN & SPRATT
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: Lake Success, New York 11042
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:

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Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-14; Notice of Cross Motion and supporting papers (005) 15-29; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by defendant Rajendran Naidoo, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this motion (005) by defendant Huntington Hospital s/h/a Huntington Hospital Association for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied.

This medical malpractice action is premised upon the alleged negligence of defendants, lack of informed consent, negligent hiring by the defendant Huntington Hospital, and a derivative claim on behalf of the

plaintiff's spouse relating to the care and treatment rendered to the plaintiff, Daniel Carlin, beginning on or about November 17, 2006 through about November 30, 2006. It is claimed that the defendants negligently performed knee surgery, failed to properly treat a hematoma, and otherwise departed from accepted standards of care causing the plaintiff to sustain permanent injury.

The defendant Rajendran Naidoo, M.D. seeks summary judgment dismissing the complaint on the bases that he fully complied with the standard of care during his treatment of Daniel Carlin and that his care and treatment did not cause or contribute to the plaintiff's injuries.

The defendants Huntington Hospital and Barbara Rose seek summary judgment dismissing the complaint on the bases that they bear no liability in this action in that Ms. Rose did not depart from the standard of care in carrying out the verbal order of the physician; that although Ms. Rose lifted the plaintiff's leg without the immobilizer in place, it was not a departure from the standard of care and did not cause or contribute to any injury to the plaintiff; that because a private physician managed the plaintiff's care and treatment, the hospital was not responsible for providing informed consent to the plaintiff; that no cause of action is stated with regard to the physical therapist and Ms. Rose for whom the plaintiff claims the hospital is vicariously liable; and that the plaintiff has failed to establish any evidence to support a claim against the hospital with regard to Dr. Naidoo's privileges.

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). 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; *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 support of motion (004), the defendant Naidoo has submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, his answer and the plaintiff's verified bill of particulars; plaintiff's medical records; the affirmation of the defendant's expert Dr. Bruce Seideman; and the unsigned transcripts of the examinations before trial of Daniel Carlin dated September 16, 2009 and Jeanne Carlin dated October 7, 2009. The 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]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion.

Bruce Seideman, M.D. set forth in his supporting affidavit that he is licensed to practice medicine in the State of New York, is certified in orthopedic surgery and is familiar with the standard of care applicable to orthopedic surgeons in the evaluation, diagnosis and treatment of patients such as Daniel Carlin. He set forth the materials he reviewed in forming his opinions and asserts those opinions with a reasonable degree of medical certainty. He states that on October 17, 2006, Mr. Carlin had a three phase bone scan at Huntington Hospital which revealed a diffuse pattern of increased tracer uptake around the left knee prosthesis consistent with inflammatory changes or loosening of the left knee prosthesis. On November 17, 2006, Mr. Carlin was admitted to Huntington Hospital by Dr. Naidoo for a left total knee replacement revision. He states that Dr. Naidoo's note indicates that Mr. Carlin had complaints of left posterior knee pain with locking and discomfort, he had neurologic symptoms from a large Baker's cyst which had previously been aspirated, and he was found to be negative for infection.

Dr. Seideman states that upon completion of surgery, Dr. Naidoo documented in his operative report that there was extensive metallosis and synovitis throughout the entire knee, loose polyethylene around the knee, and the patella was loose, delaminated and fractured. Cement disease was found extensively within the knee, the medial aspect of the polyethylene insert was fractured through, and there was "a brace of polishing affect" by the femur on the tibia. He states that the nurse's note of November 21, 2006 indicates Mr. Carlin was complaining of pain in his knee. A neurology consult was ordered and conducted that day, with an impression formed of possible peroneal neuropathy involving the common peroneal nerve secondary to accumulation of a small hematoma and/or fluid in the Baker's cyst. At 2:00 p.m. that day, Dr. Naidoo returned Mr. Carlin to the operating room with a pre-operative diagnosis of left knee hematoma with compression of the peroneal nerve. Post-operatively, Dr. Seideman continues, Dr. Naidoo's note indicates that there was no arterial bleeding but venous oozing was found. There was no evidence of malrotation of the foot and ankle and the peroneal muscles were working well with strong dorsiflexion and plantar flexion of the ankle and great toes.

Dr. Seideman continues that on November 24, 2006, Dr. Naidoo noted that Mr. Carlin complained of severe pain following forcible manipulation of his knee by a nurse's aide at which time Mr. Carlin felt like something was pulled out from under his leg, there was a snap which he could hear, and then there was a horrifying pain. He states that consequently, Mr. Carlin was returned to the operating room by Dr. Naidoo for a closed reduction under anesthesia due to a posterior dislocation and internal tibial rotation of his knee status "post a traumatic rupture of the lateral collateral ligament and dislocation of the tibia or femur." On November 26, 2006, it was noted that Mr. Carlin demonstrated left knee instability with subluxation. On November 27, 2006, Mr. Carlin was again returned to the operating room by Dr. Naidoo at which time a left total knee revision with a rotating hinged prosthesis was placed. He was discharged on November 30, 2006 to St. Johnland Nursing Home for rehabilitation.

The defendant's expert further states that on July 13, 2007, Mr. Carlin was admitted to the Hospital for Special Surgery for a left total hip arthroplasty by Dr. Mayman due to arthritis of the hip and that pre-operative clearance indicated that there were no focal motor deficits of the lower extremities upon neurological examination. On post-operative visit with Dr. Mayman, it was noted that Mr. Carlin's distal neurological and vascular examinations were normal and that he ambulated with a normal gait.

It is Dr. Seideman's opinion that Dr. Naidoo rendered care and treatment to Mr. Carlin in accord with appropriate standards of care and did not cause or contribute to Mr. Carlin's injuries. Dr. Seideman opines that the left total knee arthroplasty was indicated as supported by the bone scan results and the Baker's cyst. Based upon review of the radiological films, he opines that Dr. Naidoo utilized appropriate and accepted surgical technique during Mr. Carlin's surgery of November 17, 2006, by properly inserting the left femoral component, the stemmed tibial component, the poly patella and the taper stem plug, and by properly cementing the prosthesis. He opines that Mr. Carlin's hematoma was timely and properly diagnosed and treated on November 21, 2006 and it was in accord with good and accepted medical practice to return Mr. Carlin to the operating room to evacuate the hematoma which is a known complication of the revision surgery, and that post-operatively, the knee appeared stable. Dr. Seideman states that based upon the hospital records and the plaintiff's testimony that someone other than Dr. Naidoo manipulated Mr. Carlin's knee causing it to dislocate, and that Dr. Naidoo timely and appropriately repaired the dislocated knee that same day, November 24, 2006, using appropriate surgical technique that did not deviate from the standard of care. It is Dr. Seideman's opinion that Mr. Carlin's unstable knee following his November 24, 2006 surgery was timely and properly diagnosed and treated on November 27, 2006 by Dr. Naidoo who utilized appropriate surgical technique that did not deviate from the standard of care.

The defendant's expert does not set forth why Mr. Carlin's knee was unstable after the November 24, 2006 surgery to repair his dislocated knee and why further surgery on November 27, 2006 was necessary to stabilize the knee. By failing to address this issue, the court is left to speculate as to why there was instability of the knee after the November 24, 2006 surgery which instability had to be corrected with further surgery on November 27, 2006, thus precluding summary judgment to Dr. Naidoo. Although Dr. Seideman states that proper informed consent was given pre-operatively to Mr. Carlin, he has not set forth what information would be appropriate to constitute proper informed consent and what information was actually given to Mr. Carlin. This opinion is conclusory and is unsupported with the proper information to establish informed consent was given to Mr. Carlin. Therefore, the defendant Dr. Naidoo has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

Accordingly, motion (004) is denied.

In motion (005), Huntington Hospital and Barbara Rose seek summary judgment dismissing the complaint against them. In support of the motion, they have submitted, inter alia, an attorney's affirmation; the moving defendants' answers, plaintiff's verified bill of particulars and supplemental bill of particulars; an uncertified copy of the plaintiff's hospital record; the affidavit of Barbara Rose; and the affirmation of Philip A. Robbins, M.D.

Barbara Rose has set forth in her affidavit dated September 9, 2010 that she is a certified nursing assistant employed at Huntington Hospital. She states that on the morning of November 24, 2006 she was asked by the orthopedic resident to place a pillow under Mr. Carlin's left leg, and that she did so by placing her hand under his ankle, gently raising his ankle and positioning a pillow so that Mr. Carlin's heel was resting on the pillow. She further states that it is common to keep post-operative knee patients positioned in bed with the operative leg elevated on a pillow as she had done on numerous patients prior to her care of Mr. Carlin.

It is noted, however, Ms. Rose does not set forth the accepted procedure for raising a patient's knee postoperatively after the knee surgery to place it on a pillow, whether or not she followed the proper protocol, and whether she properly supported the joints of the extremity she was lifting, thus creating a factual issue in her affidavit which issue is not resolved by the affirmation of Philip A. Robbins, M.D.

Philip A. Robbins, M.D. sets forth in his affirmation that he is board certified in orthopedic surgery. Although he does not set forth that he is a physician licensed to practice medicine in the State of New York, he does indicate that he completed medical school, internship and residency in New York and is a clinical instructor in the State of New York. He sets forth his opinions with a reasonable degree of medical certainty. He sets forth the plaintiff's status during his admission to Huntington Hospital and notes that on November 19, 2006, an order was placed for an immobilizer which was to be applied to Mr. Carlin's left leg. On November 20, 2006, when the neurology consult was called, the neurologist's impression was that Mr. Carlin had a proximal peroneal palsy with inability to dorsiflex toes 2 to 5. Dr. Naidoo, he states, further noted in a subsequent note that there was an expanding hematoma with possible peroneal nerve compression for which he planned an incision and drainage which was performed later that day at which time a "massive hematoma" was found. Postoperatively, Mr. Carlin was permitted full weight bearing with the immobilizer in place, and he was to have a pillow under his ankle and ice to his knee.

Dr. Robbins states that on November 22, 2006, a vena cava filter was placed, physical therapy and Heparin were to be held until the next day and Mr. Carlin's heels were to be kept off the bed. The neurology consultation note indicates "probable left peroneal neuropraxia" with weakness mostly in ankle dorsiflexion. On November 23, 2006, Mr. Carlin was seen by the physical therapist who noted that weight bearing could be resumed as tolerated with the immobilizer, however, it was noted that Mr. Carlin was having "great difficulty" advancing his right lower extremity and maintaining an erect posture. The physician was contacted regarding resuming range of motion and CPM, and on November 23, 2006 Dr. Naidoo saw Mr. Carlin, held the CPM and permitted weight bearing with the immobilizer.

Dr. Robbins states that on November 24, 2006, Dr. Naidoo wrote in his note that Mr. Carlin was complaining of severe pain and reported that a nurse's aide "forcibly manipulated" his knee, resulting in sharp pain and deformity. Dr. Naidoo's initial impression included a rupture of the lateral collateral ligament and dislocation of the tibia or the fibula for which he thereafter performed a closed reduction under anesthesia reducing the dislocation. Post-operatively, he noted that there was extreme instability to posterior stress and also in the posterior capsule. Therefore, states Dr. Robbins, Dr. Naidoo performed a further left total knee revision and used a rotating hinged prosthesis. He states Dr. Naidoo's operative report indicates extreme

instability of the knee in the anteroposterior plane.

Dr. Robins opines that Huntington Hospital and Ms. Rose did not depart from accepted standards of care in that the doctor's orders only required the immobilizer with weight bearing and there was no order requiring that the immobilizer be kept in place at all times. Dr. Robins continues that the orthopedic resident did not deviate from the standard of care in ordering the placement of the pillow under Mr. Carlin's leg, heel or ankle as it is routine practice for patients who have undergone knee surgery. Dr. Robins further states that Ms. Rose appropriately lifted Mr. Carlin's leg and properly followed the resident's instruction to place the foot on a pillow.

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (*Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]). In the instant action, Ms. Rose's alleged actions were performed by her as an employee of the defendant hospital. Therefore, Huntington Hospital would be liable for the act of its employee, if liability is found. Turning to the issue of liability, Dr. Robins' opinion that Ms. Rose properly lifted Mr. Carlin's leg is conclusory as he does not set forth the proper procedure or protocol for lifting a leg after knee surgery. Likewise, no hospital procedure or policy has been submitted, leaving it to this court to speculate as to the proper procedure to be followed and the basis for Dr. Robins' opinion. Thus, his affirmation does not resolve this factual issue. Additionally, there has been no expert testimony submitted by any of the defendants advising that Ms. Rose's actions did not proximately cause the injury. Neither is there proof as to whether the instability in the knee referred to by Dr. Seideman and by Dr. Naidoo contributed to the dislocation of the plaintiff's knee when Ms. Rose lifted Mr. Carlin's leg to place the pillow. Accordingly, movants have failed to set forth the cause of the plaintiff's knee dislocation sufficient to establish that the defendants did not proximately cause the injury.

Based upon the foregoing, it is determined that Huntington Hospital and Ms. Rose have not established prima facie entitlement to summary judgment dismissing the complaint against them.

Accordingly, motion (005) is denied.

Dated: 5/24/11

[Signature] P JSC

 FINAL DISPOSITION X NON-FINAL DISPOSITION