

Diaz v Ralph

2011 NY Slip Op 31696(U)

June 23, 2011

Supreme Court, Suffolk County

Docket Number: 00962/2007

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

Marcos Diaz and Elsie Diaz,

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Plaintiffs,

Attorneys [See Rider Annexed]

-against-

Stephen Ralph, M.D., Jennifer Elizabeth Bryant,
M.D., John T. Mather Memorial Hospital of Port
Jefferson, New York, Inc., Scott Alan McWilliams,
M.D., Sound Neurology of Port Jefferson, LLP,
Dan Robert Cimponeriu, M.D., Dan R. Cimponeriu
Physician, P.C., Greater New York
Gastroenterology, LLP, Peter David Constantino,
M.D. and Head & Neck Surgical Group, LLC,Motion Sequence No.: 004; MG
Motion Date: 12/30/10
Submitted: 3/17/11Motion Sequence No.: 005; MG
Motion Date: 12/29/10
Submitted: 3/17/11Defendants.

Upon the following papers numbered 1 to 41 read upon these unopposed motions for summary judgment: Notice of Motion and supporting papers, 1 - 17; 18 - 41.

This is an action to recover damages, personally and derivatively, for the defendants' alleged negligent diagnosis and treatment of the plaintiff Marcos Diaz from August 13, 2003 through July 21, 2005, that resulted in his sustaining an ischemic stroke in the left side of his brain on August 20, 2005 and associated injuries. During the relevant period, the plaintiff had been receiving primary care treatment from the defendants Dan Robert Cimponeriu, M.D., Dan R. Cimponeriu Physician, P.C. and Greater New York Gastroenterology, LLP (the Cimponeriu defendants) and had been receiving treatment for his squamous cell carcinoma of the tongue from the defendant Peter David Constantino, M.D. (Dr. Constantino). On August 18, 2003 the plaintiff had undergone surgical excision of the tongue cancer and removal of lymph nodes on the right side of his neck by Dr. Constantino. From October, 2003 until December, 2003 the plaintiff had received radiation therapy to both sides of his neck from his radiation oncologist, non-party Dr. Jack Dalton.

The plaintiff's complaint alleges a cause of action for medical malpractice based on negligence, a cause of action for medical malpractice based on lack of informed consent and a cause of action for loss of services. By their bills of particulars the plaintiffs allege, among other things, that the Cimponeriu defendants and Dr. Constantino were negligent in failing to diagnose and treat the plaintiff's radiation-induced occlusive vasculopathy of his left carotid arteries and in failing to timely and properly recognize the plaintiff's risk factors for carotid stenosis and/or ischemic stroke including, radiation therapy for oral carcinoma, hyperlipidemia and smoking. In addition, the plaintiffs allege that the defendants were negligent in failing to prevent the evolving ischemic stroke and in failing to properly and timely order tests including, serial MRI studies, CT scans, CT angiography and Doppler duplex studies, to evaluate the possibility of carotid artery occlusion. The plaintiffs also allege that the defendants were negligent in failing to timely and properly refer the plaintiff for appropriate consultations including, interventional radiologist and vascular surgeon consultations.

The Cimponeriu defendants now move for summary judgment dismissing the complaint as against the defendants Dan Robert Cimponeriu, M.D. and Dan R. Cimponeriu Physician, P.C. on the ground that the action against them is time barred pursuant to CPLR §214-a and against all the Cimponeriu defendants on the ground that their treatment of the plaintiff comported with good and accepted medical practice and was not a proximate cause of any injury or damages sustained by the plaintiff. In support of their motion, the Cimponeriu defendants submit, among other things, the pleadings, the plaintiffs' bills of particulars, the deposition transcript of Dr. Cimponeriu, the plaintiff's medical records, the expert affirmation of Peter Pasley, M.D. and an affidavit of Dr. Cimponeriu.

The defendant Dr. Constantino moves for summary judgment dismissing the complaint as against him on the grounds that he, as a head and neck surgeon, had no duty to advise the plaintiff of the risks or benefits of radiation therapy as this was not within his scope of treatment and the plaintiff did not present with any signs or symptoms of radiation induced occlusive vasculopathy of the left carotid artery or any other symptoms indicating a problem with the carotid arteries that would have required further monitoring, diagnostic testing or treatment. Dr. Constantino notes that the plaintiff's stroke occurred due to a blood clot that developed in the left carotid artery but that his cancer was located on the right side of his tongue and that he received more radiation to the right side of his neck than the left side of his neck. He asserts that his care and treatment of the plaintiff was in accordance with acceptable standards of care for a head and neck surgeon and that his treatment did not proximately cause the plaintiff's injuries. The submissions of Dr. Constantino in support of his motion include the pleadings, the plaintiffs' bills of particulars, his own deposition transcript, the expert affirmation of Kenneth Schneider, M.D. and the plaintiff's medical records.

The affidavits of service of the motions indicate that the plaintiffs were served with the motion papers. Plaintiffs have submitted no opposition to either motion. By letter dated March 22, 2011, plaintiffs' counsel advised the Court that plaintiffs are not opposing the within motions.

In a medical malpractice action, a plaintiff must prove that there was a deviation or a departure from good and accepted practice and that such departure or deviation was a proximate cause of injury or damage (see, Myers v. Ferrara, 56 AD3d 78[2nd Dept., 2008]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see, Luu v. Paskowski, 57 AD3d 856 [2nd Dept., 2008]; Mendez v. City of New York, 295 AD2d 487 [2nd Dept., 2002]). In opposition, a plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries (see, Luu v. Paskowski, 57 AD3d 856 [2nd Dept., 2008]).

Dr. Cimponeriu testified at his deposition on January 25, 2010 that he is board certified in internal medicine and gastroenterology and that his practice includes internal medicine, gastroenterology and hepatology. In his affidavit dated December 1, 2010, Dr. Cimponeriu stated that he has been the sole officer and shareholder of the defendant Dan R. Cimponeriu Physician, P.C. since its inception and that defendant Dan R. Cimponeriu Physician, P.C. has never had any employees. In addition, he testified that he first saw the plaintiff on December 29, 1997, then February 16, 1998, July 15, 1998, August 13, 2002, July 10, 2003, September 18, 2003 and the last time on August 3, 2004. According to Dr. Cimponeriu, the risk factors for carotid stenosis include diabetes, old age, hypertension, hypercholesterolemia and hypercoagulable states and that ordering a screening carotid duplex Doppler would not be indicated for a 50 year old patient with diabetes, hypertension and elevated cholesterol unless perhaps he heard a bruit, a noise heard when the neck is auscultated. He stated that listening for bruits would not be part of the physical examination of the patient unless the patient had a prior stroke or had signs or symptoms that would warrant listening for bruits. He also stated that if he had auscultated the plaintiff's neck during an examination, it would be noted in the chart. In 2003 and 2004 Dr. Cimponeriu was unaware of whether patients who receive head and neck radiation are at an increased risk of carotid artery stenosis but he was aware that radiation therapy has an impact on every structure that it radiates. Dr. Cimponeriu also testified that he noted during the plaintiff's September 18, 2003 visit that his cholesterol was high but that he told the plaintiff that its treatment could wait since the plaintiff was to undergo radiation therapy for his squamous cell carcinoma of the tongue. He also testified that he next saw the plaintiff on August 3, 2004, post radiation therapy and that he noted the plaintiff's hypercholesterolemia and ordered a fasting lipid profile. It was his understanding that the plaintiff's other physicians were following up on his tongue cancer. He stated that he did not know Dr. Constantino and that he never had any discussions or received any radiation oncology summary or correspondence from the plaintiff's radiation oncologist Dr. Dalton. Dr. Cimponeriu further testified that his partner, Dr. Klingenstein, next saw the plaintiff on March 30, 2005.

By his expert affirmation dated November 18, 2010, Peter Pasley, M.D., board certified in internal medicine, indicates that he has reviewed the pleadings and bills of particulars, the plaintiff's medical records and the parties' deposition transcripts and he opines within a reasonable degree of

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medical certainty that it was not a departure from good and accepted medical practice that the plaintiff's carotid arteries were not palpated or auscultated by the Cimponeriu defendants and that the plaintiff was not referred for an ultrasound, CT scan, CT angiography or MR angiography of the carotid arteries during the plaintiff's three visits to the office on September 18, 2003, August 3, 2004 and March 30, 2005. He notes that patients in their early 30's, like the plaintiff, are at a low risk of experiencing an ischemic stroke and that plaintiff never had any neurological complaints, signs or symptoms on his visits to the Cimponeriu defendants or any diseases that could increase the risk of occlusion or stenosis of the carotid arteries such as diabetes mellitus or certain hematological disorders. Dr. Pasley opines that from 2003 through 2005 it was not the standard of care for a physician board certified in internal medicine to palpate or auscultate the carotid arteries of a patient with the plaintiff's medical history and that there was no indication for the defendants to order or refer the plaintiff for the aforementioned tests despite the plaintiff having a history of being a former smoker, having hyperlipidemia and undergoing radiation therapy. In addition, he opines within a reasonable degree of medical certainty that from 2003 through 2005 assessment of the carotid arteries by palpation and auscultation were not reliable methods of assessing stenosis or occlusion of the carotid arteries and that there is no evidence that the plaintiff had any carotid artery disease, stenosis or occlusion while treating with the Cimponeriu defendants. Dr. Pasley also notes that on August 3, 2004, Dr. Cimponeriu ordered a fasting lipid profile test to evaluate the plaintiff's history of hypercholesterolemia and that the plaintiff never underwent said test and never returned to the defendants. He opines within a reasonable degree of medical certainty that said failure by the plaintiff to undergo the test rendered the defendants unable to evaluate and potentially treat the plaintiff's hyperlipidemia prior to his ischemic stroke. Dr. Pasley concludes by opining within a reasonable degree of medical certainty that the medical treatment provided to the plaintiff by the Cimponeriu defendants was at all times within good and accepted medical practice and did not proximately cause the plaintiff's alleged injuries.

The defendant Dr. Constantino testified at his deposition on March 12, 2009 that he is board certified in otolaryngology and head and neck surgery, that he is a surgical oncologist and that he is an employee of non-party St. Luke's-Roosevelt Hospital Center and is affiliated with the defendant Head & Neck Surgical Group, LLC. In addition, he testified that he first saw the plaintiff on August 13, 2003 for evaluation and potential treatment of the plaintiff's tongue malignancy and that he was familiar with the term radiation-induced occlusive vasculopathy. His understanding of radiation's negative impact on microvasculature was that it caused ectasia, which is the enlargement of some of the capillaries and venules so that oxygen does not get effectively delivered to the tissues. His belief was that the negative impact was not atherosclerotic. Dr. Constantino also testified that the plaintiff's surgery involved a partial glossectomy with primary closure and a discontinuous modified neck dissection on the ipsilateral side. He explained that in the plaintiff's case the surgery demonstrated that the tumor had spread to the nodes of his neck so Dr. Constantino sent the plaintiff back to the radiation therapist for consideration of radiation therapy to determine whether the increased potential for a cure justified the potential downside of radiation therapy, which was the radiation therapist's responsibility to determine. Dr. Constantino also explained that it was his practice that once he referred a patient for radiation therapy he tended not to see the patient again

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unless surgical issues arose during radiation therapy and that he would request to see the patient one to two months after the end of radiation therapy to begin his extended post-surgical follow-up to monitor the patient for post-surgical malignancy. Dr. Constantino further testified that the follow-up intervals for young patients like the plaintiff tended to be shorter and that the scan protocol was usually a PET scan alternating with an MRI scan of the head and neck in three month intervals. His deposition testimony reveals that the plaintiff was not vigilant with Dr. Constantino's follow-up recommendations and that Dr. Constantino's office had great difficulty getting the plaintiff to come in to the office to have his exams. Dr. Constantino testified that he saw the plaintiff on September 7, 2004 and told him to come back in one month rather than two months. The office records indicate that the plaintiff did not show up for scheduled appointments in November, 2004, January, 2005 and April, 2005. Dr. Constantino stated that a carotid evaluation was not part of the standard head and neck examination for recurrent cancer but that he would methodically feel the entire neck and that if the plaintiff had an actual abnormality in that area he would have considered a carotid study, most likely a Doppler. He emphasized that based on all of the normal history and physical and medical workup for a head and neck malignancy, the plaintiff's carotid stenosis and stroke was entirely unanticipated. He also emphasized that there was nothing in the report of the plaintiff's PET/CT scan of July 21, 2005 suggesting a problem with his carotid system.

Kenneth Schneider, M.D. indicates in his expert affirmation dated November 18, 2010, that he is board certified in otolaryngology and completed a fellowship in head and neck surgery. He also indicates that his opinions are based on a review of the plaintiff's medical records, the plaintiffs' bills of particulars, expert disclosure, the parties' deposition transcripts and his own experience in head and neck surgery and otolaryngology. He opines within a reasonable degree of medical certainty that the standard of care of a head and neck surgeon such as Dr. Constantino does not include administering or obtaining consent for radiation therapy and that a radiation oncologist is responsible for post-radiation monitoring for any adverse effects including, any damage to tissues or structures that were radiated. In addition, Dr. Schneider opines that the standard of care of a head and neck surgeon such as Dr. Constantino does not require the performance of a carotid ultrasound, regardless of risk factors, absent symptoms of carotid insufficiency and that the plaintiff presented with no such symptoms while he was being treated by Dr. Constantino. According to Dr. Schneider, the duties of a head and neck surgeon with respect to post-radiation monitoring would include observing for signs and symptoms of recurring cancer. He notes that the plaintiff underwent a PET scan of the head and neck on July 20, 2005 which revealed no abnormalities of the head and neck and that the plaintiff did not complain or present with any signs or symptoms of stroke or occlusive vasculopathy. Dr. Schneider concludes by opining that Dr. Constantino's treatment from August 13, 2003 through July 21, 2005 was in accordance with the accepted standards of medical practice and that nothing that he did or failed to do contributed to the plaintiff's injuries.

The action against the Cimponeriu defendants was commenced on April 20, 2007 and the plaintiff's last visit with Dr. Cimponeriu occurred on August 3, 2004. All causes of action to recover damages for malpractice arising from acts or omissions occurring prior to October 20, 2004 are barred by the 2 1/2-year statute of limitations of CPLR §214-a (see, CPLR §214-a; Udell v. Naghavi,

82 AD3d 960, 962 [2nd Dept., 2011]). Therefore, the Cimponeriu defendants are granted summary judgment dismissing the complaint insofar as it alleges acts or omissions of malpractice occurring prior to October 20, 2004 (*see id.*). In addition, the Cimponeriu defendants and the defendant Dr. Constantino made a *prima facie* showing of entitlement to judgment as a matter of law regarding the cause of action for medical malpractice based on negligence through the submission of their experts' affirmations, their own deposition transcripts and the plaintiff's medical records, which established that the Cimponeriu defendants and the defendant Dr. Constantino did not deviate from accepted medical practice (*see*, Bumbaca v. Bonanno, 39 AD3d 577, 578 [2nd Dept., 2007]; *see also*, Heller v. Weinberg, 77 AD3d 622 [2nd Dept., 2010], *lv denied* 16 NY3d 707 [2011]; Gargiulo v. Geiss, 40 AD3d 811 [2nd Dept., 2007]). Inasmuch as the plaintiffs failed to oppose the motion, the Cimponeriu defendants and the defendant Dr. Constantino are granted summary judgment dismissing the cause of action for medical malpractice based on negligence as against them (*see*, Groeger v. Col-Les Orthopedic Assoc., 149 AD2d 973, 973-974 [4th Dept., 1989]).

Moreover, the Cimponeriu defendants and the defendant Dr. Constantino made a *prima facie* showing of entitlement to judgment as a matter of law with respect to the cause of action for medical malpractice based on lack of informed consent inasmuch as the plaintiffs are not alleging that the plaintiff's injuries resulted from an affirmative violation of his physical integrity in the absence of informed consent (*see*, Brady v. Westchester County Healthcare Corp., 78 AD3d 1097, 1099 [2nd Dept., 2010]; Schel v. Roth, 242 AD2d 697, 698 [2nd Dept., 1997]; Public Health Law §2805-d). In opposition, the plaintiffs failed to raise a triable issue of fact since they did not oppose the motion (*see*, Brady v. Westchester County Healthcare Corp., 78 AD3d 1097 [2nd Dept., 2010] at 1099). Therefore, the Cimponeriu defendants and the defendant Dr. Constantino are granted summary judgment dismissing the cause of action for medical malpractice based on lack of informed consent as against them. Inasmuch as the claims on behalf of the plaintiff Marcos Diaz must be dismissed as against the moving defendants, the derivative cause of action on behalf of the plaintiff Elsie Diaz must also be dismissed as against them (*see*, Cabri v. Park, 260 AD2d 525 [2nd Dept., 1999]).

Accordingly, it is

ORDERED that the motion (#004) by the defendants Dan Robert Cimponeriu, M.D., Dan R. Cimponeriu Physician, P.C. and Greater New York Gastroenterology, LLP for summary judgment and the motion (#005) by the defendant Peter David Constantino, M.D. for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#004) by the defendants Dan Robert Cimponeriu, M.D., Dan R. Cimponeriu Physician, P.C. and Greater New York Gastroenterology, LLP for summary judgment dismissing the complaint as against them is granted; and it is further

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ORDERED that the motion (#005) by the defendant Peter David Constantino, M.D. for summary judgment dismissing the complaint as against him is granted.

Dated: June 23, 2011


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

 FINAL DISPOSITION X NON-FINAL DISPOSITION

RIDER

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