

Leavy v Merriam

2011 NY Slip Op 31988(U)

July 13, 2011

Supreme Court, Suffolk County

Docket Number: 06-34465

Judge: Denise F. Molia

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INDEX No. 06-34465
CAL No. 10-02397MM

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

P R E S E N T :

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 3-18-11 (#002 & #003)
MOTION DATE 5-13-11 (#004 - #009)
ADJ. DATE 5-13-11
Mot. Seq. # 002 - MD # 006 - MD
 # 003 - MD # 007 - MD
 # 004 - MD # 008 - MD
 # 005 - MD # 009 - MD

-----X
DEBORAH LEAVY, as Administratrix of the
Estate of THOMAS LEAVY, deceased, and
DEBORAH LEAVY, Individually,

Plaintiffs,

- against -

LOUIS THAYER MERRIAM, M.D., DANIEL
BARAM, M.D., ALICE GREENE, M.D., IRA
RAMPIL, M.D., JENNIFER WHITTEMORE,
D.O., KRISTINE O'HARA, M.D., PAUL
RICHMAN, M.D., MOHAMMAD ZARRABI,
M.D., XIUSHENG QIN, M.D., PH.D., and
STONY BROOK SURGICAL ASSOCIATES,
P.C.,

Defendants.
-----X

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Upon the following papers numbered 1 to 127 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-25; Notice of Cross Motion and supporting papers (003) 26-37; (004) 38-51; (005) 52-65; (006) 66-79; (007) 80-91; (008) 92-102; (009) 93-101; Answering Affidavits and supporting papers 102-106; Replying Affidavits and supporting papers 107-108; 109-113; 114-116; 117-118; Other 119; 120-121; 122; 123-124; 125; 126; 127; (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that these motions (002) through (009) are consolidated for determination; and it is further

ORDERED that motion (002) by the defendant Daniel Baram, M.D. pursuant to CPLR 3212 for

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summary judgment dismissing the complaint and all cross claims asserted against him is denied; and it is further

ORDERED that motion (003) by the defendants Jennifer Whittemore, D.O. and Xiusheng Qin, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is denied; and it is further

ORDERED that motion (004) by the defendant Mohammad Zarrabi, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against him is denied; and it is further

ORDERED that motion (005) by the defendant Paul Richman, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against him is denied; and it is further

ORDERED that motion (006) by the defendant Ira J. Rampil, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against him is denied; and it is further

ORDERED that motion (007) by the defendants Louis Thayer Merriam, M.D. and Stony Brook Surgical Associates, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is denied; and it is further

ORDERED that motion (008) by the defendant Alice Greene, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against her is denied; and it is further

ORDERED that motion (009) by the defendant Kristine O'Hara, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against her is denied.

Deborah Leavy was appointed the Administratrix of the Estate of Thomas Leavy by order dated April 24, 2006 (Czygier, J.). Thomas Leavy died on December 27, 2004, at fifty years of age, while a patient at Stony Brook University Hospital, where he was admitted on November 17, 2004 for complaints of abdominal pain and vomiting. On November 19, 2004, the decedent underwent surgical removal of his gall bladder. In the ensuing days while he remained hospitalized and under the care of the defendants herein, the plaintiff's decedent developed congestive heart failure, had repeated heart attacks, and died. In this action, the complaint sets forth causes of action for medical malpractice premised upon the defendants' alleged negligence, lack of informed consent, decedent's conscious pain and suffering, and the wrongful death of the decedent, as well as a derivative claim asserted on behalf of the plaintiff's spouse, Deborah Leavy.

The law office of Harris Beach, PLLC represents the defendants, Louis Thayer Merriam, M.D., Daniel Baram, M.D., Alice Greene, M.D., Paul Richman, M.D., Mohammad Zarrabi, M.D., Ira J. Rampil, M.D. and Stony Brook Surgical Associates, and has submitted motion (002) on behalf of Daniel Barnum, M.D., and motions (004) through (008) on behalf of Mohammad Zarrabi, M.D., Paul Richman, M.D., Ira J. Rampil, M.D., Louis Thayer Merriam, M.D. and Stony Brook Surgical Associates, PC, and Alice Greene, M.D. for summary judgment dismissing the complaint and all cross claims asserted against them on the bases that each of the defendants did not depart from the accepted standards of care in their care and treatment of the plaintiff's decedent, and did not proximately cause the decedent's injuries or death.

Eric T. Schneiderman, Attorney General of the State of New York, represents Jennifer Whittimore, D.O. and Xiusheng Qin, M.D. in motion (003), and Kristine O'Hara in motion (009). The defendants in motion (003) seek summary judgment dismissing the complaint and cross claims asserted against them on the bases that they were resident physicians at the time they rendered care and treatment to the plaintiff's decedent, and did not make any independent medical decisions concerning the decedent's care and treatment. In motion (009), Kristine O'Hara, M.D. seeks summary judgment dismissing the complaint and cross claims asserted against her on the bases that she was a surgical resident at the time she rendered care and treatment to the plaintiff's decedent, and that she did not depart from good and accepted standards of care which proximately caused the decedent's injuries or death.

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 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]; *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, Derdarian 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]). Also see,

Leavy v Merriam
Index No. 06-34465
Page No. 4

(*Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]).

MOTION (002)

In motion (002), Daniel Baram M.D. has submitted an attorney's affirmation; copies of the answers served by Daniel Baram, M.D., Louis Thayer Merriam, M.D., Alice Greene, M.D., Paul Richman, M.D., Mohammad Zarrabi, M.D., Ira J. Rampil, M.D., and Stony Brook Surgical Associates; the plaintiff's verified and further verified bills of particulars; an uncertified copy of the decedent's hospital/medical records; copies of the unsigned transcripts of the examinations before trial of Deborah Leavy dated July 10, 2008, Louis Thayer Merriam, M.D., Daniel Baram, M.D. dated September 18, 2008, Alice Greene, M.D. dated October 24, 2008, Ira Jay Rampil, M.D. dated November 18, 2008, Kristine O'Hara dated June 4, 2009, Paul Richman, M.D. dated September 16, 2009, Mohammad Zarrabi, M.D. dated December 9, 2009, Jennifer Whittemore, D.O. dated February 3, 2009, and Xiusheng Qin, M.D. dated June 25, 2010; a copy of an unsigned letter from Dr. Baram dated March 15, 2005; and the expert affirmation of Alan Multz, M.D. 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. The moving defendant offers no explanation for his own deposition transcript not being signed, however, it is adopted as accurate (see, *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [Second Dept. 2008]). The records and materials relied upon by the defendant's expert are to be provided in admissible form in support of the motion (*Friends of Animals v Associated Fur Mfrs.*, *supra*; see also, *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tompkins County 2002]). Here, the copy of the decedent's hospital record is not certified and is therefore is not in admissible form to support the experts' opinions. Additionally, the moving defendant has not submitted a copy of the summons and complaint or the answers served by co-defendants Kristine O'Hara, M.D., Jennifer Whittemore, D.O and Xiusheng Qin, M.D., whose cross claims he seeks to dismiss, and thus the motion fails to comport with the requirements of CPLR 3212. Thus, the motion is deemed insufficient as a matter of law.

Accordingly, motion (002) is denied.

MOTION (003)

In support of motion (003), Jennifer Whittemore, D.O. and Xiusheng Qin, M.D. have incorporated by reference those exhibits submitted in support of motion (002), and have further submitted, inter alia, an attorney's affirmation; the expert affidavit of Philip Lebowitz, M.D., M.B.A. submitted on behalf of Jennifer Whittemore, M.D.; the expert affidavit of Jacob Rand, M.D. submitted on behalf of Xiusheng Qin, M.D.; a copy of the summons and complaint, the answer served by Jennifer Whittemore, D.O., plaintiff's verified bills of particulars as to Jennifer Whittemore, D.O. and Xiusheng Qin, M.D.; and several unsigned pages from the decedent's hospital/medical record which are not certified, are not in admissible form, and do not represent the entire record. The moving defendants have failed to submit a copy of the answer served by Xiusheng Qin, M.D. That the transcripts of Jennifer Whitmore and Xiusheng Qin, M.D. are unsigned and uncertified is incidental, as

Leavy v Merriam
Index No. 06-34465
Page No. 5

this court may adopt them as accurate as submitted by them (*see, Ashif v Won Ok Lee, supra*). Based upon the foregoing, however, the motion fails to comport with CPLR 3212 as the motion is not supported with the answer of defendant Qin or evidence in admissible form, such as a certified copy of the hospital record and other materials upon which their experts have relied (*Friends of Animals v Associated Fur Mfrs., supra; see also, Hornbrook v Peak Resorts, Inc., supra*).

Accordingly, motion (003) for summary judgment is denied as to defendants Jennifer Whittemore, M.D and Xiusheng Qin, M.D.

MOTION (004)

In support of motion (004), Mohammad Zarrabi, M.D. has submitted, *inter alia*, an attorney's affirmation; a copy of a CD; plaintiff's verified and further verified bills of particulars as to defendant Zarrabi; several uncertified pages from the decedent's hospital/medical record; the expert affirmation of Babette B. Weksler, M.D.; and has made reference to exhibits A-P submitted with motion (002). The deposition transcript of Zarrabi submitted in support of motion (002) is unsigned. While it may be adopted as accurate as submitted by the moving party (*see, Ashif v Won Ok Lee, supra*), the uncertified, partial copy of the decedent's medical record do not comport with the requirements of CPLR 3212 to support the experts' opinion (*Friends of Animals v Associated Fur Mfrs., supra; see also, Hornbrook v Peak Resorts, Inc., supra*). Here the moving defendant has failed to submit a certified hospital record or other evidentiary submissions in admissible form. Thus, the motion is deemed insufficient as a matter of law. Additionally, the copy of the CD submitted by Zarrabi fails to comport with the requirements of 22 NYCRR §202.5 and §202.8 which provide that papers be submitted.

Accordingly, motion (004) by Mohammad Zarrabi, M.D. is denied.

MOTION (005)

In support of motion (005), Paul Richman, M.D. has submitted an attorney's affirmation with a copy of a CD; plaintiff's verified and verified further bills of particulars as to defendant Richman, M.D.; uncertified copies of pages from the plaintiff's decedent's hospital/medical record; the expert affirmation of Alan Multz, M.D.; the expert affirmation of Jane Salmon, M.D.; and has incorporated by reference exhibits A-P submitted with motion (002). It is determined that the motion is not supported by evidence in admissible form. The records and materials reviewed by the defendant's experts have not been submitted with the motion in admissible form in support of the expert's opinion (*Friends of Animals v Associated Fur Mfrs., supra; see also, Hornbrook v Peak Resorts, Inc., supra*). Additionally, Richman has failed to submit a signed copy of his deposition transcript. While it may be adopted as accurate as submitted by the moving party (*see, Ashif v Won Ok Lee, supra*), Richman has failed to support his expert's opinions with a certified hospital record and evidentiary submissions in admissible form. Thus, the motion is deemed insufficient as a matter of law. Additionally, the copy of the CD submitted by Richman fails to comport with the requirements of 22 NYCRR § 202.5 and §202.8 which provide that papers be submitted.

Accordingly, motion (005) for summary judgment by Paul Richman, M.D. is denied.

Leavy v Merriam
Index No. 06-34465
Page No. 6

MOTION (006)

In support of motion (006), Ira Rampil, M.D. has submitted an attorney's affirmation with a copy of a CD; a copy of the plaintiff's verified and further verified bills of particulars as to defendant Rampil; uncertified copies of several pages of the decedent's hospital/medical record; the expert affirmation of David L. Reich, M.D.; and the affirmation of Jane E. Salmon, M.D.; and has incorporated by reference exhibits A-P submitted with motion (002). Here, defendant Rampil has failed to submit a certified hospital record, and signed copies of the deposition transcripts, as required pursuant to CPLR 3212. While Rampil's deposition transcript may be adopted as accurate (*see, Ashif v Won Ok Lee, supra*) here, the motion is not supported by admissible evidence, such as a certified copy of the hospital record, or other submissions in admissible form to support the experts' opinions. Thus, the motion is deemed insufficient as a matter of law. Additionally, the copy of the CD submitted by Rampil fails to comport with the requirements of 22 NYCRR § 202.5 and § 202.8 which provide that papers be submitted.

Accordingly, motion (006) for summary judgment by Ira Rampil, M.D. is denied.

MOTION (007)

In support of motion (007), Louis Thayer Merriam, M.D. and Stony Brook Surgical Associates, P.C. have submitted an attorney's affirmation with a copy of a CD; copies of the plaintiff's verified and further bills of particulars; uncertified copies of several pages of the decedent's hospital records; the expert affirmation of Thomas Gouge, M.D; the expert affirmation of Jane Salmon, M.D; and has incorporated by reference exhibits A-P contained in motion (002). While Merriam's deposition transcript may be adopted as accurate (*see, Ashif v Won Ok Lee, supra*), here, the motion is not supported by admissible evidence, such as a certified copy of the hospital record, to support the experts' opinions (*Friends of Animals v Associated Fur Mfrs., supra; see also, Hornbrook v Peak Resorts, Inc., supra*). Thus, the motion is deemed insufficient as a matter of law. Additionally, the copy of the CD submitted by the defendants fails to comport with the requirements of 22 NYCRR § 202.5 and § 202.8 which provide that papers be submitted.

Accordingly, motion (007) for summary judgment by Louis Thayer Merriam, M.D. and Stony Brook Surgical Associates, P.C. is denied.

MOTION (008)

In support of motion (008), Alice Greene, M.D. has submitted an attorney's affirmation with a copy of a CD; copies of the plaintiff's verified and further verified bills of particulars; uncertified copies of several pages of the decedent's hospital records; the expert affirmations of Howard J. Eisen, M.D. and Jane Salmon, M.D.; and has incorporated by reference exhibits A-P submitted with motion (002). The motion has not been supported by admissible evidence in compliance with CPLR 3212. The copies of the partial medical record are not certified (*Friends of Animals v Associated Fur Mfrs., supra; see also, Hornbrook v Peak Resorts, Inc. supra*), and thus the expert's opinions are not supported by admissible evidence to support the experts' opinions. Greene's deposition transcript may be adopted as accurate (*see, Ashif v Won Ok Lee, supra*), however, the motion, unsupported by admissible evidentiary submissions, is deemed insufficient as a matter of

Leavy v Merriam
 Index No. 06-34465
 Page No. 7

law. Additionally, the copy of the CD submitted by Greene fails to comport with the requirements of 22 NYCRR § 202.5 and § 202.8 which provide that papers be submitted.

Accordingly, motion (008) for summary judgment by Alice Greene, M.D. is denied.


MOTION (009)

In support of motion (009), Kristine O'Hara has submitted an attorney's affirmation; the expert affidavit of Philip Lebowitz, M.D., M.B.A., a copy of the summons and complaint, her answer, the plaintiff's verified bill of particulars as to defendant O'Hara; and an uncertified page from the decedent's hospital record which is not in admissible form. Defendant O'Hara has also submitted a copy of the signature page from a deposition transcript without a copy of the transcript. This cross motion is deemed untimely. The note of issue was filed in this action on November 15, 2010. CPLR 3212 (a) provides in pertinent part that a motion for summary judgment shall be made within 120 days of the filing of the Note of Issue except with leave of the court on good cause shown. The last day for serving this cross motion was March 15, 2011. Motion (009) was served on April 8, 2011, beyond the statutory 120 days. Counsel has not demonstrated good cause for the delay in making late application beyond the 120 days, and in fact, has not set forth any cause for the delay (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Thus, cross motion (009) is deemed untimely as a matter of law.

Accordingly, motion (009) is denied.

Dated:

July 13, 2011


 Hon. Dennis F. McKeown
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION