

Litz v Brisman
2011 NY Slip Op 32129(U)
July 25, 2011
Sup Ct, Nassau County
Docket Number: 015673/06
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 21
JON LITZ, as Executor of the Estate of LISA LITZ,
deceased and JON LITZ, Individually,

Plaintiff,

- against -

Index No. 015673/06

Mot. Seq. # 4,5,6,7,8,11

Mot. Date 12-13-10

Submit Date 7-6-11

XXX

MICHAEL H. BRISMAN, M.D., MICHAEL BRISMAN,
M.D., P.C., NEUROLOGICAL SURGERY, P.C.,
ANDREW S. WEBER, M.D., DARYL A. PERLMAN,
M.D., DARYL PERLMAN PHYSICIAN, P.C.,
DARYL A. PERLMAN, D.O., LLC., DAVID S.
GROSSMAN, M.D., LOUIS FILIPPONE, M.D.,
SCOTT SPRINGER, M.D., MARK A. MITTLER,
M.D., DAVID J. CHALIF, M.D., LONG ISLAND
NEUROLOGICAL ASSOCIATES, P.C., "JOHN/JANE
DOE" (i.e. the individual who authored the note of
9/19/04, following a timed note of 15:15); NORTH
SHORE UNIVERSITY HOSPITAL AT PLAINVIEW
and NORTH SHORE UNIVERSITY HOSPITAL AT
MANHASSET,

Defendants.

-----X
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The following papers were read on these motions:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	X

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Defendants move by notice of motion (Motion Sequence # 4,5,6,7,8,11) for the following relief: an order pursuant to CPLR 3211 and 3212 granting summary judgment and dismissing the action with prejudice. There is no opposition to the instant applications despite all necessary parties being properly served.

To establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury (see, *Berger v. Becker*, 272 A.D.2d 565). To succeed on a summary judgment motion in a medical malpractice action, the moving party must make a *prima facie* showing of the absence of a triable issue of fact as to whether the defendant physician was negligent (see, *Taylor v. Nyack Hospital*, 18 A.D.3d 537). Thus, a moving defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (see, *Williams v. Sahay*, 12 A.D.3d 366).

A moving defendant must address the allegations set forth in the complaint and the bill of particulars (see, *Terranova v. Finklea*, 45 A.D.3d 572). Bare allegations that do not refute the specific factual allegations of the case are insufficient to establish entitlement to judgment as a matter of law (see, *Grant v. Hudson Valley Hosp. Center*, 55 A.D.3d 874).

If the moving party meets their burden, in opposition, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury." *Domaradzki v. Glen Cove Ob/Gyn Assocs.*, 242 A.D.2d 282 (2nd Dept. 1997). Plaintiff has not submitted any opposition to the instant applications.

Motion Sequence #4

Defendant Robert Linden, MD moves pursuant to CPLR 3211 and 3212 to dismiss the action. Based on his deposition testimony and decedent's medical records, Dr. Linden has made a *prima facie* showing of the absence of a triable issue of fact as to whether he was negligent. (see, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320) He makes clear that he had no duty of care to decedent as he was not involved in the issues which form the basis of plaintiff's claim. As the moving defendant has met his burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application to dismiss with prejudice, is **GRANTED** in its entirety.

Motion Sequence #5

Defendants Mark A. Mittler, MD, David J. Chalif, MD and Lina, PC s/h/a Long Island Neurological Associates, PC, move, *inter alia*, for the following relief: pursuant to CPLR 3211 (a)(7), dismissing the plaintiff's cause of action for lack of informed consent, as the plaintiff has failed to plead a viable cause of action pursuant to Public Health Law 2805-d; and pursuant to CPLR 3212, dismissing plaintiff's claims for medical malpractice, wrongful death, and informed consent.

Based upon an expert affidavit of Dr. Alan G. Segal, defendants have made a *prima facie* showing of entitlement of summary judgment. As the moving defendants have met their burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application to dismiss with prejudice, is **GRANTED** in its entirety.

Motion Sequence #6

Defendants Michael H. Brisman, MD, Michael H. Brisman, MC, PC, s/h/a Michael Brisman MD, PC, Neurological Surgery, PC, and David Grossman MD, move for summary judgment pursuant to CPLR 3212 (a)(b) and (e).

Based on the expert affidavits of Dr. Douglas Cohen, MD, and David Tarkoff, MD, defendants have made a *prima facie* showing of entitlement to summary judgment. As the moving defendants have met their burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application for summary judgment, is **GRANTED** with prejudice in its entirety.

Motion Sequence #7

Defendants Daryl Perman, DO, s/h/a Daryl A. Perlman, MD, Daryl Perlman Physician, PC and Daryl Perlman, DO, LLC s/h/a Daryl A. Perlman DO, LLC, move for summary judgment pursuant to CPLR 3212.

Based upon an expert affidavit of Howard D. Kolodny, MD, defendants have made a *prima facie* showing of entitlement to summary judgment. As the moving defendants have met their burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application for summary judgment, is **GRANTED** with prejudice in its entirety.

Motion Sequence #8

Defendants North Shore University Hospital at Plainview, (hereinafter "Plainview") North Shore University Hospital at Manhasset (hereinafter "Manhasset") and Andrew S. Weber, MD, move for summary judgment pursuant to CPLR 3212.

Defendants Plainview and Manhasset rely on the expert affidavits submitted by co-defendant doctors to establish their *prima facie* entitlement to summary judgment since the decedent's care was rendered by these physicians during her admissions to Plainview and Manhasset. As the moving defendants have met their burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application for summary judgment is **GRANTED** with prejudice in its entirety.

Based on his deposition testimony and decedent's medical records, Dr. Weber, a pulmonologist, has made a *prima facie* showing of the absence of a triable issue of fact as to whether he was negligent (*see, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320) He makes clear that he had no duty of care to decedent as he was not involved in the issues which form the basis of plaintiff's claim. As the moving defendant has met his burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the plaintiff to establish the existence of a material issue of fact. Since plaintiff failed to submit a physician's affidavit of merit attesting to a departure from accepted practice and that such departure or omission was the proximate cause of decedent's injury, the application for summary judgment is **GRANTED** with prejudice in its entirety.

Motion Sequence #11

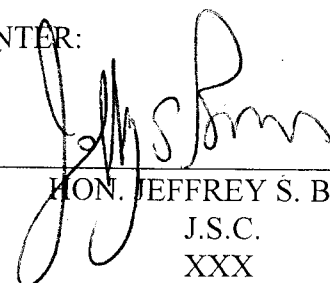
Defendants Mark A. Mittler, MD, David J. Chalif, MD and Lina, PC s/h/a Long Island Neurological Associates, PC, move for an order dismissing plaintiff's complaint and any and all cross-claims with prejudice unless plaintiff obtains new counsel, and/or resumes prosecution of this case within thirty days.

The application is **DENIED** as moot in light of the decision relating to Motion Sequence #5.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 25, 2011

ENTER:


HON. JEFFREY S. BROWN
J.S.C.
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ENTERED

JUL 27 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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