

Lopez v Montalbano

2011 NY Slip Op 33338(U)

August 22, 2011

Supreme Court, Richmond County

Docket Number: 103130/08

Judge: John A. Fusco

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
ANIBEL LOPEZ, an infant by his mother and natural
guardian ELOY LOPEZ and ELOY LOPEZ Individually,

Plaintiffs,

-against-

GREGORY MONTALBANO, M.D., SRINIVA SVI
BHUPATHI, M.D., BARBARA APPLGATE-OLINSKY,
UNIVERSITY MEDICAL CENTER, and ST. VINCENT'S
CATHOLIC MEDICAL CENTER.

Defendants,
-----X

DCM Part 4

Present:
Hon. John A. Fusco

DECISION AND ORDER

Index No: 103130/08
Motion No: 003
005

The following papers numbered 1 to 4 were marked fully submitted on this 13th day of May, 2011:

Papers	Numbered
Notice of Motion for Summary Judgment by Defendant with supporting Exhibits (dated February 22, 2011)	1
Affidavit in Partial Opposition to Summary Judgment Motion of Dr. Montalbano by Defendants P.A. Anthony Stoffo and Richmond University Medical Center (dated March 8, 2011)	2
Notice of Cross Motion by Plaintiffs (dated April 28, 2011)	3
Affirmation in Reply by Defendant (dated May 11, 2011)	4

Upon the foregoing papers, defendant's motion for summary judgment and plaintiffs' cross-motion for Notice to Admit are denied.

Plaintiffs commenced a medical malpractice action on or about July 21, 2008 for injuries sustained from alleged medical malpractice by failing to properly treat the infant-plaintiff for a fractured and/or dislocated elbow, which resulted in an improperly healed Monteggia fracture requiring three subsequent surgeries. Defendant Gregory Montalbano moves pursuant to CPLR §3212 for an order of summary judgment and plaintiffs' cross-moves to compel defendant's compliance with its Notice to Admit.

The proponent of a summary judgment motion must make a prima facie case tendering sufficient evidence to eliminate any material issues of fact. *Winegard v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1985). Once this has been made, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial.

In support of his motion, movant has established a prima facie case for summary judgment by submitting deposition transcripts, an expert affirmation of Dr. Lon Weiner, Bills of Particulars/Supplemental Bills of Particulars, medical records, and RUMC Orthopedic Emergency Manual. Movant testified that he was the orthopedic surgeon “on-call” the evening of February 16, 2007. That evening, co-defendant P.A. Stoffo advised him over the telephone that the infant-plaintiff had a non-displaced fracture of the radial head and that everything else was otherwise normal. Movant admits he could not recall whether co-defendant informed him if it was a non-displaced fracture of the ulna or of the radial head, however, he does recall being told it was a non-displaced fracture, and that all fingers were movable, and neurovascular status was intact. Movant instructed a splint be placed on the arm and to refer the patient to be seen in the Orthopedic clinic. Movant did not have any form of contact with infant-plaintiff until a clinic visit on April 10, 2007.

Under 10 NYCRR §94.29(a) a registered physician’s assistant “... may perform medical services but only when under the supervision of a physician. Such supervision shall be continuous but shall not necessarily require the physical presence of the supervising physician at the time and place where the services are performed.” Co-defendant P.A. Stoffo testified that he was a registered physician assistant in the State of New York, was hired for surgical subspecialties by St. Vincent’s around 2003-2004, which later became Richmond University. Furthermore, co-defendant P.A. Stoffo testified that by February 2007 he was trained to read and interpret x-rays of the hand, wrist, and elbow. Movant testified he followed the protocol as to what the “on-call” attending should do

when working for the RUMC Emergency Department.

In addition, movant submitted an expert affirmation by Lon Weiner, M.D., a board certified Orthopedic Surgeon licensed to practice medicine in the State of New York, with a practice focused on pediatric orthopedics. The expert submitted an opinion to a reasonable degree of medical certainty that movant's involvement in the care and treatment of infant-plaintiff was within the accepted standard of care. Dr. Weiner opined that within a reasonable degree of medical certainty movant's interaction with P.A. Stoffo and his reliance on P.A. Stoffo's examination and description of the injury was fully in accordance with the standard of care. Also, that it was reasonable and appropriate for movant to have relied on P.A. Stoffo's interpretation for the purpose of determining if he needed to personally see infant-plaintiff in the Emergency Department. It was the expert's further opinion, that movant appropriately determined how to treat the injury, and had no duty to personally monitor infant-plaintiffs' progress after discharge and referring him to the orthopedic clinic. Movant asserts that he followed the RUMC Emergency Department Manual and did not deviate from any accepted standards of care. Given that, movant established its prima facie case, the burden shifts to the plaintiffs to submit evidentiary facts or materials to rebut the prima facie demonstrating the existence of a triable issue of fact.

Here, plaintiffs have carried that burden. Although plaintiffs had attached an expert affirmation, it is not persuasive, and quite conclusory. Plaintiffs have presented this court with the Emergency Room Policies and Procedures, which states that a dislocation of the elbow required the Attending Orthopedic to assume care (Plaintiffs' Motion Exhibit "B"). The movant's testimony established that he was aware the fracture was of the infant's elbow and at that point, he was responsible to investigate further, and did not.

Plaintiffs also allege that there is a question of fact as to whether movant properly supervised P.A. Stoffo. This theory however, has not been pleaded before. Accordingly, "a new theory of liability presented for the first time in opposition to the motion for summary judgment, will not serve to bar the granting of summary judgment where otherwise appropriate." *Alvarez v. Lindsay Parking*

House Corp., 175 A.D.2d 225, 226 (2nd Dept. 1991). In their Complaint, Bill of Particulars, and Supplemental Bill of Particulars, plaintiffs never alleged that movant failed to properly supervise co-defendant. For this reason, this portion of the motion shall be converted as a request to amend *sua sponte*, and plaintiffs will have twenty (20) days from service of this entered order in which to amend their pleadings to address this claim under 10 NYCRR §94.29(f) and NY Education Law § 6542(1).

Plaintiffs having carried their burden, the motion of movant is denied, and plaintiffs are awarded an additional twenty (20) days after service of this order with notice of entry to amend to plead negligent supervision of P.A. Stoffo.

As to plaintiffs' cross-motion to strike movant's objections and compel a further response to plaintiffs' Notice to Admit, this motion is denied.

Plaintiffs submitted a Notice to Admit on February 9, 2011 requesting movant admit that the policies and procedures of the Emergency Room Department of Richmond University Hospital for orthopedic injuries, evaluation, treatment and consults were the policies and procedures in effect from February 16, 2007 through April 11, 2007. Movant responded within the twenty days as stated in CPLR §3123, however stated objections that it was improper and that the notice sought admissions as to material issues that may be subject to litigation, as well as being an untimely notice. Movant denied knowledge or sufficient information to form a belief as to the truth.

CPLR §3123 permits a party to serve another party a request for admission “... as to the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.” The underlying purpose of such a notice procedure “is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial, but only to eliminate from the issues in litigation matters which will not really be in dispute at the trial.” *Falkowitz v. Kings Highway Hospital*, 43 A.D.2d 696, 792 (2nd Dept. 1973). Additionally, the Notice to Admit “may not seek information which would not reasonably be expected to be within the personal knowledge

of the party served.” *Vasquez v. Vengroff*, 295 A.D.2d 421, 422 (2nd Dept. 2002).

The policies and procedures had been disclosed during discovery, and the notice was not to substitute movant’s deposition, which was scheduled for August 3, 2009. In the February 9, 2007 Notice to Admit, plaintiffs were requesting that there would be no dispute that these policies and procedures were in effect during February 16, 2007 through April 11, 2007. Movant testified that he has maintained a continuous relationship with RUMC from roughly around 1999 until present time. Movant also testified that his current title was a voluntary attending and stated he has duties and responsibilities to the institution, which included coverage to the clinic and on-call responsibilities to the ER. Such on-call responsibilities require that on certain days he be contacted for any orthopedic emergencies or urgencies or consults that are requested in the ER or on the floor. Therefore, as someone who maintained a continuous relationship with the hospital and held a title, it is presumed that he had knowledge of the policies and procedures of the Emergency Room Department of Richmond University Medical Center for orthopedic injuries, but whether the policies or procedures were the effective procedures at that time is properly within the knowledge of Richmond University Medical Center and more appropriately to be directed to them.

Accordingly, it is hereby

ORDERED, that defendant’s motion for summary judgment is denied; and it is further

ORDERED, that plaintiffs’ cross-motion to strike movant’s objections and compel a further response to plaintiffs’ Notice to Admit is denied; and it is further

ORDERED, that plaintiffs will have twenty (20) days after the entry of this order with notice of entry to amend its pleading to reflect a negligent supervision claim against movant.

Dated: August 22, 2011

E N T E R,

Hon. John A. Fusco
Justice of the Supreme Court