

Padovan v Kormylo

2012 NY Slip Op 31162(U)

April 16, 2012

Sup Ct, Suffolk County

Docket Number: 09-28244

Judge: Joseph C. Pastoressa

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INDEX No. 09-28244
CAL. No. 11-01628MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-4-12
ADJ. DATE 2-1-12
Mot. Seq. # 002 - MG

-----X

ROSE PADOVAN and JOSEPH PADOVAN,

Plaintiffs,

- against -

DANIEL KORMYLO, D.P.M., EDWARD J.
KORMYLO, D.P.M. and EAST PATCHOGUE
PODIATRY, P.C.,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 13; Notice of Cross Motion and supporting papers ; 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 unopposed motion (002) by the defendants, Edward Kormylo and East Patchogue Podiatry, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them, is granted.

In this podiatric malpractice action, the plaintiff, Rose Padovan, asserts that commencing January 29, 2007, and subsequent thereto, the defendants were negligent and departed from accepted standards of podiatric/medical/surgical care and treatment of a bunion on her right foot. It is alleged that the defendants negligently failed to conform to proper and accepted podiatric surgical and diagnostic practice and procedures in performing an Austin bunionectomy, arthroplasty, and partial metatarsal head resection, causing her to undergo additional and extensive diagnostic tests and procedures. She further alleges that the defendants failed to provide her with proper informed consent. A derivative cause of action has been asserted on behalf of the plaintiff's spouse, Joseph Padovan.

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The moving defendants seek summary judgment dismissing the complaint as asserted against them on the basis that the surgical assistance rendered by Dr. Edward Kormylo during the procedure performed by Dr. Daniel Kormylo was performed in a proper manner; that his assistance during the procedure was de minimis and in no way contributed to any of the plaintiff's alleged injuries; that the post-operative complication of an elevated second toe is not an uncommon complication of such procedure; and that Dr. Daniel Kormylo's directions and supervision of Dr. Edward Kormylo did not so greatly deviate from normal medical practice that it necessitated the intervention of Dr. Edward Kormylo.

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 (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [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 [1981]).

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 [2d Dept 1998], *app denied* 92 NY2d 818). 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 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2d 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 [3d Dept 1985]; Lyons v McCauley, 252 AD2d 516 [2d Dept 1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2d 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 [2d Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2d 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 [2d Dept 2007]).

The medical records submitted in support of a motion for summary judgment must be certified to be in admissible form as required by CPLR 3212. Expert testimony is limited to facts in evidence. (*see also*

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Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2d Dept 1984]).

In support of motion (004), the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answers served by defendants, and plaintiffs' verified bills of particulars; copy of the plaintiff's medical records maintained by the defendants; the affidavit of the moving defendants' expert Michael H. Loshigian, D.P.M.; a copy of the transcript of the unsigned but certified examination before trial of Edward Kormylo, D.P.M. which is considered herein (*see* Zalot v Zieba, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); the unsigned and uncertified transcript of the examination before trial of Daniel Kormylo, D.P.M., dated October 15, 2010, continued November 1, 2010, which is not in admissible form in that it fails to comport with CPLR 3212 and is not accompanied by proof of service pursuant to CPLR 3116 (*see* Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; McDonald v Maus, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). Said transcript, and the uncertified copy of the St. Charles Hospital record, which is not in admissible form, are not considered.

Upon review and consideration of the admissible moving papers, it is determined that the defendants, Edward Kormylo, D.P.M. and East Patchogue Podiatry, P.C., have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them. The plaintiffs have not opposed this application, and, thus, have failed to raise a factual issue to preclude summary judgment.

Dr. Edward Kormylo testified to the extent that he is licensed to practice podiatry in New York. In 1992, he formed his professional corporation. He stated that he first saw Rose Padovan in January 2007 when he assisted his brother, Dr. Daniel Kormylo, in performing surgery on plaintiff's right foot. At that time a bunionectomy with a K-wire fixation, and correction of a hammer toe was performed. Previously, he had performed or assisted in over 6,000 cases for the same condition on other patients. On January 30, 2008, movant also assisted his brother with surgery on plaintiff, for a partial metatarsal head resection on her right second toe.

Dr. Kormylo continued that after the second surgery, the plaintiff came to his office without an appointment on August 19, 2008, demanding to be seen. He performed an examination and reached the impression that she had an elevation of the right second toe, secondary to the partial metatarsal head resection. Thereafter, he saw the plaintiff at his brother's office, just to assist him with the plaintiff. He determined that he agreed with his brother's treatment plan. He did not examine the plaintiff on that visit at his brother's office, but stated that she had a few questions for which his brother explained the treatment options concerning skin lengthening, a tenotomy, a wedge of tissue in the bottom, and insertion of a pin. His brother also informed her of a stepdown osteotomy on her third metatarsal. He agreed with this advice.

Michael H. Losghigian, D.P.M., the moving defendants' expert, averred that he is a podiatrist duly licensed to practice podiatry in New York State and is board certified in podiatric surgery. He set forth his educational training and experience, and averred that he is familiar with the standards of practice in the podiatric community and with podiatric medicine. It is Dr. Losghigian's opinion within a reasonable degree of podiatric certainty that the treatment provided to Rose Padovan by Dr. Edward Kormylo and East

Patchogue Podiatry, P.C. at all times comported with good and accepted standards of podiatric practice, and that no alleged negligent act or omission by them caused or contributed to the plaintiff's alleged injuries.

Dr. Losghigian set forth that the plaintiff first presented to the office of Daniel Kormylo, D.P.M. on March 27, 2000, with complaints of a painful bunion and ingrown nails. Physical examination revealed bilateral bunions and a hammertoe of the plaintiff's second toe of her right foot. Surgery was discussed at that time, but the plaintiff declined. She returned on July 31, 2006 for treatment of bilateral bunions and neuromas which were causing pain in both feet, and for which Dr. Daniel Kormylo administered injections to her right foot on several visits. On September 26, 2006, the plaintiff and Dr. Daniel Kormylo discussed surgical options and shoe gear modification concerning her right foot. On October 7, 2006, Dr. Daniel Kormylo prescribed Celebrex and provided strapping and padding to help relieve the pain on the dorsum of the plaintiff's right foot. However, when the plaintiff returned on October 17, 2006, she advised Dr. Daniel Kormylo that she had not kept the bandage on her foot for seven days, as directed, as she wanted to wear dress shoes. On November 7, 2006, Dr. Daniel Kormylo discussed an Austin bunionectomy on her right foot and arthroplasty of the right second toe. He advised her of the risks, benefits and alternatives, including infection, suture reaction, swelling, re-occurrence, shortened toe, stiffness, elevated or lowered toe, and age related problems.

Dr. Losghigian continued that on January 29, 2007, Dr. Daniel Kormylo performed the Austin bunionectomy with k-wire fixation, and arthroplasty of the plaintiff's second toe of the right foot at St. Charles Hospital, assisted by Dr. Edward Kormylo. Dr. Edward Kormylo's participation during this surgery was limited to holding retractors, holding the toe in place as Dr. Daniel Kormylo placed sutures, and cutting sutures. Dr. Losghigian stated that Dr. Edward Kormylo worked under the direction of Dr. Daniel Kormylo, who determined what surgical procedures were to be performed. Dr. Losghigian noted that the operative report of January 29, 2007 indicted that during the procedure, that there was a "track bound phenomenon exhibited on range of motion of the first MPJ of the right second toe. He continued that the plaintiff was advised preoperatively that this condition would not afford a perfectly straight first ray to that toe, and that the patient understood and agreed to the procedure.

Dr. Losghigian further stated that on March 8, 2007, the plaintiff's first ray was in good alignment and that a Darco splint was applied. On April 12, 2007, Dr. Daniel Kormylo's records indicated that the plaintiff was concerned that the second toe on her right foot was raising. She advised Dr. Daniel Kormylo that she did not wear the splint all the time because she wanted to wear her shoes. He noted slight elevation of the second MPL and readvised the plaintiff concerning the use of the Darco splint. On May 10, 2007, Dr. Daniel Kormylo noted in his records that the plaintiff was not wearing her splint at all. She was thus advised to wear a surgical shoe since she told him she could not wear the splint with her shoe. Dr. Losghigian continued, setting forth the plaintiff's ongoing visits to Dr. Daniel Kormylo, including her visit on September 6, 2007, wherein she was wearing "fashionable shoes." She was advised of surgical options for her elevated right second toe, and to wear the surgical splint. On January 30, 2008, Dr. Daniel Kormylo performed a partial metatarsal head resection with open capsulotomy of her right second toe, for which Dr. Edward Kormylo was listed as the assistant. Defendant Edward Kormylo's participation involved holding retractors and manipulating or distracting the right second toe. As of March 11, 2008, the plaintiff ambulated with regular shoes and without a Darco splint, but was instructed to use the splint as much as possible. She was also instructed to wear a shoe with a deep toe box. On June 10, 2008, the plaintiff

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refused physical therapy and was adamant about not changing her shoe style. She was referred to Dr. Edward Kormylo for a consultation.

Dr. Dr. Losghigian further set forth that on August 18, 2008, the plaintiff saw Dr. Edward Kormylo for a single visit, at which time she presented with pain in her right second toe. She was wearing normal shoe gear, and had a noticeable limp. The second toe of the right foot was noted to be elevated. Dr. Edward Kormylo recommended that she undergo a skin plasty on the dorsal aspect of the foot and a tenotomy and tendon lengthening, with k-wire fixation to correct the condition.

Dr. Losghigian opined that the care and treatment rendered by Dr. Edward Kormylo and East Patchogue Podiatry was appropriately performed in accordance with the standards of podiatric practice; and that his role during both surgical procedures was primarily to assist Dr. Daniel Kormylo, while exercising no independent medical judgment. Dr. Losghigian stated that Dr. Edward Kormylo did not participate in the surgical planning, or any of the informed consent discussions for either surgery. He continued that the surgical procedures were indicated and were performed in a satisfactory manner; that Dr. Edward Kormylo clearly acted under the supervision and guidance of Dr. Daniel Kormylo; and that the de minimis tasks performed by Dr. Edward Kormylo during those procedures were appropriately completed, and in no way contributed to any alleged injuries. He added that Dr. Edward Kormylo did not participate in any postoperative care, and that although the plaintiff had been advised post-operatively on multiple occasions by Dr. Daniel Kormylo of the importance of using a Darco splint and wearing wider shoe gear, the plaintiff continually refused to do so.

Based upon the foregoing, the moving defendants have established that they did not depart from the good and accepted standards of podiatric care in the care and treatment of the plaintiff, and did not proximately cause any of the injuries alleged by the plaintiff. Dr. Edward Kormylo has further established that he did not exercise independent medical judgment in determining the procedures and methods employed during the surgery in that his role was limited to assisting the surgeon with suturing, cutting sutures, retracting tissue, and holding the toe (see Cook v Reisner, 295 AD2d 466 [2d Dept 2002]). Further, it has been established that the directions provided by the co-defendant, Dr. Daniel Kormylo, did not deviate from normal medical practice to warrant intervention by Dr. Edward Kormylo (see Costello v Kirmani, 54 AD3d 656 [2d Dept 2008]).

Accordingly, motion (002) by the defendants, Edward Kormylo and East Patchogue Podiatry, P.C., for summary judgment dismissing the complaint as asserted against them, is granted.

Dated: April 16, 2012


 HON. JOSEPH C. PASTORESSA, J.S.C.

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