

Longo v Patel
2012 NY Slip Op 32337(U)
September 4, 2012
Supreme Court, Richmond County
Docket Number: 104730/07
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:104730/07
Motion No.: 004**

**NICHOLAS LONGO, Individually and as Administrator of
the Estate of CAROL LONGO,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**SUNIL A. PATEL, M.D.,
DAVID TAYLOR, M.D.,
PAUL A. GESSMAN, M.D.,
CHRISTOPHER LORENZI, M.D.,
MICHAEL T. MANTELLO, M.D.,
KUMUD GUGLIADA, M.D.,
INTERNAL MEDICINE ASSOCIATES OF
RICHMOND COUNTY, P.C., and
REGIONAL IMAGING & THERAPEUTIC
RADIOLOGY SERVICE, P.C.,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Memorandum of Law in Opposition	3
Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Christopher Lorenzi, M.D. (“Dr. Lorenzi”), Michael T. Mantello, M.D. (“Dr. Mantello”), Kumud Gugliada, M.D. (“Dr. Gugliada”), and Regional Imaging & Therapeutic Radiology Services, P.C. (“Regional”) move for summary judgment dismissing the plaintiff’s complaint. The motion is denied.

Facts

This is an action to recover for alleged medical malpractice for the defendants' failure to diagnose lung cancer. It is alleged that the moving defendants failed to properly read radiological images taken on October 23, 2006, November 8, 2006 and December 26, 2006 of the deceased plaintiff, Carol Longo. The defendants state that the report produced from the October 23, 2006 image by Dr. Lorenzi showed left lower lobe lingular infiltrate and that follow up was recommended to document resolution. The follow up x-ray was conducted on November 8, 2006 and the image was read by Dr. Mantello, who reported that there was no evidence of infiltrate. On December 26, 2006 another x-ray was taken and Dr. Gugliada evaluated the film and believed that it showed worsening findings in the left lung and recommended a CT scan. The CT scan of the chest was conducted on July 5, 2007 and the radiologist evaluating the image recommended a bronchoscope. Longo was admitted to Staten Island University Hospital on July 24, 2007 for a bronchoscope which led to a diagnoses of non-small cell lung cancer. She began chemotherapy on July 31, 2007, but died on September 28, 2008.

The plaintiff maintains that Drs. Lorenzi, Mantello and Gugliada failed to properly read the images taken of Carol Longo's chest on October 23, 2006, November 8, 2006 and December 26, 2006 and that as a result these errors her lung cancer went untreated leading to her eventual death.

Drs. Lorenzi, Mantello and Gugliada along with their employer Regional move for summary judgment dismissing the plaintiff's complaint as against them. In support of their motion the defendants submit the expert affirmation of Evan H. Dillon, M.D. ("Dr. Dillon") who is board certified in radiology. Dr. Dillon asserts that Drs. Lorenzi, Mantello and Gugliada and their employer Regional did not cause a delay in diagnosing Carol Longo with lung cancer. According to Dr. Dillon each of the named radiologists properly read the films taken at Regional and consequently, there has been no deviation from good and acceptable radiological practice.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

“On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to

¹ *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

defeat summary judgment . . .”⁶

The moving defendants expert evaluation of Dr. Dillon shows that the radiologists properly evaluated the films in question. The burden therefore shifts to the plaintiff to demonstrate that the moving defendants departed from acceptable practice. Here, the plaintiff submits the affirmation of an unnamed board certified radiologist with a sub-certification in nuclear radiology. Plaintiff’s expert studied the films taken of Carol Longo’s chest on October 23, 2006, November 8, 2006 and December 26, 2006. According to plaintiff’s expert the October 23, 2006 x-ray shows a mass in the hilar area of the left lung which was not noted in the report produced by Dr. Lorenzi. Similarly, the review of the November 8, 2006 x-ray by plaintiff’s expert finds that the mass existed in the same area as the October 23, 2006 x-ray and Dr. Mantello failed to make any note of it in his report. Plaintiff’s expert concedes that Dr. Gugliada issued a report which read “worsened finding, left lung.” But plaintiff’s expert maintains that Dr. Gugliada departed from good and accepted practice by relying on the prior two reports produced by Drs. Lorenzi and Mantello rather than performing a “. . . through examination of [those] films himself.” These alleged deviations from good and accepted practice led plaintiff’s expert to conclude that “[t]heir failure to observe and report the presence of a mass in the hilar region of the left lung was a departure from the standard of care, and accordingly, allowed said mass to continue to grow and/or metastasize to other parts of Mrs. Longo’s body. It was a further departure from good an accepted practices for Drs. Lorenzi and Mantello to fail to recommend the performance of a CT Scan and/or biopsy of the are in light of their interpretations of these exams [October 23, 2006 and November 6, 2006].”

Consequently, given the divergent evaluations of the radiological images of the two experts, summary judgment must be denied.

⁶*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is denied; and it is further

ORDERED, that the parties shall appear in DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, September 10, 2012 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: September 4, 2012

Joseph J. Maltese
Justice of the Supreme Court