

**Congo v Brookhaven Memorial Hosp. Med. Ctr.**

2012 NY Slip Op 32570(U)

October 4, 2012

Supreme Court, Suffolk County

Docket Number: 09-3786

Judge: Denise M. Molia

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**COPY**

INDEX No. 09-3786  
CAL No. 11-00390MM

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

**PRESENT:**

Hon. DENISE M. MOLIA  
Justice of the Supreme Court

MOTION DATE 7-13-11  
ADJ. DATE 9-28-12  
Mot. Seq. # 005 - MG

-----X

CHERYL CONGO,  
  
Plaintiff,

- against -

BROOKHAVEN MEMORIAL HOSPITAL  
MEDICAL CENTER, RANDALL PHILLIPS,  
M.D., ALEXANDER S. FINGER, M.D., and  
BROOKHAVEN ORTHOPEDIC  
ASSOCIATES, M.D., P.C.,  
  
Defendants.

-----X

BAUMAN & KUNKIS, P.C.  
Attorney for Plaintiff  
14 Penn Plaza, Suite 2208  
New York, New York 10122

FUMUSO, KELLY, DEVERNA, SNYDER  
SWART & FARRELL, LLP  
Attorney for Defendant Brookhaven Memorial  
Hospital  
110 Marcus Boulevard, Suite 500  
Hauppauge, New York 11788

KOPFF, NARDELLI & DOPF, ESQS.  
Attorney for Defendant Doctors Phillips and  
Finger and Brookhaven Orthopedic Associates  
440 Ninth Avenue  
New York, New York 10001

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 20; 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 motion (005) by defendant Brookhaven Memorial Hospital Medical Center for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted.

In this medical malpractice action, the plaintiff Cheryl Congo's claims are premised upon the alleged negligence of defendants and their failure to provide her with informed consent. The plaintiff was seen and treated in the emergency room at Brookhaven Hospital Medical Center (Brookhaven Hospital) on or about September 5, 2006, and was subsequently admitted to Brookhaven Hospital due to injuries she sustained as a pedestrian when she was struck by a car while crossing the street. She came under the care and treatment of Alexander S. Finger, M.D. and Brookhaven Orthopedic Associates, M.D., P.C. on or about September 5, 2006. It is alleged that the defendants negligently departed from good and accepted standards of care and treatment when Dr. Phillips, on September 7, 2006, interpreted an x-ray of her left foot as

RST

Congo v Brookhaven Hospital Medical Center

Index No. 09-3786

Page No. 2

indicating that there was no fracture or dislocation appreciated. She further alleges that, thereafter, Dr. Finger and Brookhaven Orthopedic Associates failed to properly treat her condition. The plaintiff asserts that due to the negligent departures by the defendants in failing to diagnose the fracture in her left foot, she was caused to undergo debridement, calcaneocuboid joint/exostomy with neurolysis of the sural nerve, intertarsal arthrodesis with internal fixation of the left foot, and application of a fiberglass cast due to a LIS Fran injury and post-traumatic arthritis on or about April 11, 2008.

Defendant Brookhaven Memorial Hospital seeks summary judgment dismissing the complaint as asserted against it on the bases that Brookhaven Memorial Hospital, through its medical and nursing staff, did not depart from good and accepted medical and nursing practice in the care and treatment of the plaintiff, and that there is nothing that they did or did not do which proximately caused the accident.

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, 416 NYS2d 790 [1979]; *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 [2d Dept 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, 678 NYS2d 503[2d 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, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (*Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]).

Congo v Brookhaven Hospital Medical Center

Index No. 09-3786

Page No. 3

In support of motion (005), Brookhaven Hospital has submitted, inter alia, an attorney's affidavit; the expert affirmation of Anthony Mustalish, M.D.; copies of the summons and complaint, its answer and amended verified answer, and the plaintiff's verified bill of particulars; plaintiff's certified Brookhaven Hospital records, including the x-ray report of the plaintiff's left foot, dated September 7, 2006; the signed transcript of the examination before trial of Claudia Fernandez dated December 7, 2010; and the unsigned transcripts of the examinations before trial of Alexander Finger dated April 13, 2010<sup>1</sup>, and Randall Phillips, M.D. dated March 24, 2010, with proof of mailing pursuant to CPLR 3116.

Anthony Mustalish, M.D. affirmed that he is a physician licensed to practice medicine in New York State and is board certified in emergency medicine. He set forth that he reviewed the bill of particulars, relevant medical records and deposition testimony and opined with a reasonable degree of medical certainty that Brookhaven Memorial Hospital, by its medical and nursing staff, acted appropriately and did not depart from the accepted standards of medical and nursing practice in their care and treatment of Cheryl Congo.

Dr. Mustalish stated that when the plaintiff presented to the emergency room at Brookhaven Hospital on September 5, 2006, after having been struck by a motor vehicle while she was crossing a street, she was awake and oriented to person, time and place, and complained of pain in her left hand, arm, hip, and leg. She was seen and examined by the emergency department physician, Claudia Fernandez, M.D., who noted those injuries in the plaintiff's hospital record. Upon examination of the plaintiff, Dr. Fernandez found, inter alia, that her left hip was flexed and unable to extend, with slight internal rotation. She testified that her examination involved the entire left leg and foot to the toes with visual inspection, palpation, range of motion, and check of pulses, and that the plaintiff wiggled the toes on her left foot and did not complain of pain in her left foot. Thereafter, x-rays were positive for fracture of the plaintiff's left clavicle, left proximal tibia and fibula, and left fifth digit. No x-ray of the plaintiff's left foot was ordered as the plaintiff did not complain of pain in her left foot.

Dr. Mustalish continued that Alexander Finger, M.D., an orthopedic surgeon, and Dr. Saad Shukri, a trauma surgeon, examined the plaintiff in the emergency room on September 5, 2006. Dr. Finger set forth in his consultation note that there was some mild tenderness in the plaintiff's left foot, which was neurovascularly intact distally. Dr. Mustalish set forth the care and treatment rendered to the plaintiff during her subsequent admission to the hospital from the emergency room. Dr. Shukri's note indicated that she had knee and ankle pain. On September 7, 2006, the plaintiff was seen by Dr. Finger's orthopedic assistant, Ron Alois, who indicated that the plaintiff was still with significant pain and had tenderness in her left foot. He found that the left lower extremity was neurovascularly intact. A left foot x-ray was therefore done and interpreted by defendant radiologist Randall Phillips, M.D., who determined there was no fracture or dislocation.

On September 8, 2006, the plaintiff had an open reduction, internal fixation of her left knee tibial plateau fracture by Dr. Finger. Thereafter, she was discharged to Island Rehabilitation, where, on September 20, 2006, a portable x-ray of her left foot revealed no evidence of acute fracture or dislocation. On January 15, 2007, the plaintiff was complaining of left ankle pain. Swelling and tenderness at the lateral aspect of her left foot and ankle was noted, but an x-ray of her left foot and ankle showed no acute bony

---

<sup>1</sup> with the unsigned signature page for Cheryl Congo annexed thereto.

injury. Her left foot was placed in an air cast. Dr. Mustalish continued that on March 2, 2007, Dr. Finger's note indicated that the plaintiff's main complaints were of pain in her left foot and ankle on the medial side. There was some tenderness of the posterior tibial tendon on the left with some flat foot. An MRI was therefore ordered, however, it could not be done due to aneurysm clips in the plaintiff's brain. She continued to complain of pain in her left foot. On October 9, 2007, the plaintiff was then seen by Dr. Boccio, a foot and ankle specialist. An x-ray revealed no acute fracture pathology evidence, but there was a healed medial cuneiform fracture. Dr. Boccio's impression was that of status post LIS Fran injury with medial cuneiform fracture, possible articulate injury calcaneal cuboid joint of the left foot. Dr. Boccio indicated that there was no indication for surgical intervention at that time. Dr. Mustalish continued that the plaintiff saw Dr. Boccio on February 12, 2008 with complaints of persistent left foot pain. On April 11, 2008, at St. Catherine of Sienna Medical Center, Dr. Boccio performed surgery consisting of debridement, calcaneal cuboid joint exostectomy with neurolysis sural nerve, internal fixation of the left foot with application of a fiber glass cast.

Dr. Mustalish opined that Dr. Fernandez, the emergency room physician who initially saw the plaintiff, appropriately evaluated and treated the plaintiff in the emergency room, and ordered appropriate radiological exams on September 5, 2006, since the patient had no complaints of left foot pain at the time. The physical examination, assessment and evaluation was properly conducted prior to administration of pain medication to the plaintiff, and documentation of findings was appropriate. He continued that Dr. Fernandez timely requested appropriate consultations with the orthopedic and trauma services and did not depart from accepted medical care and treatment. It was not until two days later that the plaintiff complained of left foot pain to her orthopedic physician. He stated that it was appropriate for the hospital staff to rely upon Dr. Phillips' interpretation of the left foot x-ray which was subsequently ordered, and that the hospital staff did not depart from the standards of nursing care in their reporting, documenting, and care and treatment of the plaintiff, and that they correctly and appropriately followed all the physician's orders. There were no negligent acts or omissions by any of the medical or nursing staff at Brookhaven Hospital, he opined, and there was nothing that they did or did not do which proximately caused the plaintiff's injuries.


Based upon review and consideration of the evidentiary submissions and the affirmation of Dr. Mustalish, it is determined that Brookhaven Memorial Hospital has established prima facie entitlement to summary judgment dismissing the complaint on the basis that they did not depart from accepted standards of medical and nursing care and treatment, and that there is nothing which they did or failed to do which proximately caused the injuries claimed by the plaintiff.

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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [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, 839 NYS2d 159 [2d Dept 2007]). Here, the plaintiff has not opposed this motion and has thus failed to raise a factual issue to preclude summary judgment from being granted to the defendant Brookhaven Memorial Hospital.

Congo v Brookhaven Hospital Medical Center  
Index No. 09-3786  
Page No. 5

Accordingly, motion (005) is granted and the complaint as asserted against Brookhaven Memorial Hospital Medical Center is dismissed.

Dated: October 4, 2012

  
Hon. Dennis F. McCall  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION