

O'Neill v Cappellino

2012 NY Slip Op 33069(U)

December 19, 2012

Sup Ct, Suffolk County

Docket Number: 08-37751

Judge: Hector D. LaSalle

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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 10-9-12
ADJ. DATE 11-27-12
Mot. Seq. # 001 - MD

-----X
HEATHER O'NEILL,

Plaintiff,

CASTRO & TRODDEN, LLC
Attorney for Plaintiff
29 Bellemeade Avenue, Suite 201
Smithtown, New York 11787

- against -

LAWRENCE WORDEN & RAINIS & BARD, PC
Attorney for Defendant Cappellino, M.D.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

HELWIG, HENDERSON, RYAN & SPINOLA
Attorney for Defendant Kennedy, RPA-C
One Old Country Road, Suite 428
Carle Place, New York 11514

ANTHONY CAPPELLINO, M.D., KEVIN
KENNEDY, RPA-C and GOOD SAMARITAN
HOSPITAL MEDICAL CENTER,

Defendants.
-----X

LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendant Good Samaritan Hospital
425 Broad Hollow Road
Melville, New York 11747

Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19-30; Replying Affidavits and supporting papers 31-32; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant Kevin Kennedy, RPA-C pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is denied.

In this action, plaintiff Heather O'Neill, seeks damages for personal injuries premised upon the alleged medical malpractice and lack of informed consent by the defendants in the care and treatment provided to her for a fractured left ankle. It is alleged that the plaintiff came under the care and treatment of defendants Anthony Cappellino, M.D. and Kevin Kennedy, RPA-C, on or about April 14, 2006 through July 31, 2007, during which time a left ankle open reduction with internal fixation with syndesmotomic screw placement was performed by defendant Cappellino. It is alleged, inter alia, that the defendants failed to recognize a fibular displacement during surgery leaving the fibular fracture out of alignment, and failed to thereafter recognize and treat ankle mortise widening demonstrated in x-rays taken during the post operative follow-up period, failed to recognize significant displacement and widening of the ankle joint after the syndesmotomic screw was removed, and failed to advise her of the risks, benefits, hazards and alternatives to treatment of the ankle joint so that informed consent could be given.

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 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]).

In support of this application, defendant Kennedy has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the moving defendant's answer and demands, and plaintiff's verified bill of particulars; an uncertified copy of plaintiff's Good Samaritan Hospital record; a certified copy of the office records for the plaintiff maintained by defendant Cappellino; copies of the transcripts of the examinations before trial of Heather O'Neill dated September 1, 2009, Anthony Cappellino, M.D. dated January 22, 2010, Kevin Thomas Kennedy dated August 31, 2010, and Barbara Harris dated February 4, 2011; and the affidavit of Craig Levitz, M.D. Although the certified transcript of the examination before trial of Kevin Kennedy is not signed, it is adopted as accurate by the moving defendant (*see, Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

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]).

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]).

In motion (001), Kevin Kennedy seeks summary judgment dismissing the complaint on the basis that the care and treatment he provided to the decedent comported with the standard of care and that there is nothing which he did or failed to do which proximately caused the plaintiff's alleged injuries.

Dr. Cappellino testified to the extent that he is a physician licensed to practice medicine in New York State

and is board certified in orthopedics. In 2004, he was practicing under the name of Anthony Cappellino, M.D. and hired Kevin Kennedy in 2005 as a physician's assistant in his office through 2008. He first treated the plaintiff on April 14, 2006, when she presented to Good Samaritan Hospital with an injury to her left ankle, sustained when she fell down some stairs. X-rays had been taken, which he stated revealed a fracture dislocation of the left ankle and a syndesmotic disruption of the ankle mortise. A closed reduction had been done by someone, and he assisted in applying the splint. He was not satisfied with the post-reduction x-ray of the ankle, so surgery was discussed with the plaintiff for the purpose of realigning the mortise, and inserting a syndesmotic screw, which would remain in place for about three months. Surgery was not an option but a necessity. Surgery was conducted, and once plaintiff was asleep, a closed reduction was attempted without success, as there was a small osteochondral fragment which was removed. The mortise was still a little widened, so he did an additional procedure on the lateral malleolus and applied a pelvic reduction clamp to close down the mortise and tighten it. He stated that thereafter, with dorsiflexion of the ankle, the mortise closed down, the reduction looked good, and the screw was inserted across the dorsiflexed ankle. Alignment looked fine and a splint was placed.

Dr. Cappellino discussed his postoperative care and treatment of the plaintiff. X-rays on June 5th showed good alignment and there was no interval change. The screw was surgically removed on July 5, 2006. He stated that he did not see the plaintiff for her July 17th office visit at which time her sutures were removed by Kevin Kennedy. He saw her on August 14, 2006 and reviewed the previous note but could not recall if he reviewed the x-rays. While giving testimony, he reviewed the films and stated that the ankle mortise looked slightly widened medially. He continued that there was good overlap between the tibia and fibula without splaying, and stated that the x-ray was taken with the ankle flexed which gives an abnormal widening of the mortise, but stated that there was good overlap and it was pretty well aligned. He did not disagree with Kennedy's interpretation of the films, or Kennedy placing her ankle in a velocity brace and ordering physical therapy. Cappellino saw the plaintiff on August 14th and noted some soft tissue swelling laterally, and saw that she had an intact neurovascular exam, but had a mild restriction in dorsiflexion, which he stated was pretty common with ankle fracture dislocations. Although she had slight restriction of dorsiflexion on July 5, 2006, this did not represent a worsening of her condition, which he stated they were continuing to monitor. The film obtained on September 25th was interpreted by Kevin Kennedy who indicated that the fracture was healing well. Cappellino testified that the film showed some medial widening of the mortise, but there was no splaying to the tibia and fibula. The plaintiff did not return after that visit. Dr. Cappellino testified that there was always the possibility of future surgery in that there had been an osteochondral fragment, which is damaged cartilage.

Kevin Kennedy testified to the extent that he is currently licensed as a physician's assistant in New York State, and every two years completes 50 continuing medical education credits. He continued that there is a certification as a physician's assistant specializing in orthopedics, but he has not obtained that particular certification, which is not required. He is currently employed at Southside Hospital as a physician's assistant assigned to the orthopedic department. He first began working in Dr. Cappellino's office in 2004 and assisted him in surgery and in seeing patients in Dr. Cappellino's office. He testified that he also was a trained x-ray technician, but never performed x-rays in Dr. Cappellino's office. He, however, would read or interpret x-rays in the office through on-the-job training.

Kennedy continued that he first saw Heather O'Neill as a patient at Dr. Cappellino's office on June 5, 2006, and it would have been his custom and practice to review her chart prior to conducting his examination of her. He was aware that she had surgery performed by Dr. Cappellino on April 14, 2006 at Good Samaritan Hospital and that she followed up with office visits with Dr. Cappellino on April 19th and 24th. Kennedy stated that he also saw the plaintiff with Dr. Cappellino on July 17, 2006 and did not see the plaintiff without Dr. Cappellino. During surgery, the plaintiff had the syndesmotic screw placed which crossed distally in the leg through two bones to stabilize the

syndemosis where the two bones meet. It had been removed prior to the July 17 visit, and is usually removed three to six months after placement. He stated that the x-ray of July 17, 2006 taken of the plaintiff's left ankle after removal of the screw was reviewed by both he and Dr. Cappellino, and compared with previous office x-rays, including the x-ray of July 5, 2006, taken prior to removal of the screw. Referring to the July 5, 2006 left ankle x-ray, Kennedy testified that it showed that the fracture was acceptably aligned, in good position-a well aligned fracture and ankle mortise. Referring to the July 17th x-ray, he continued that it showed no change from the July 5th x-ray, the left ankle remained acceptably aligned, there was no change in widening of the ankle mortise, and that the ankle mortise was not widening on the July 17th x-ray.

At the time of the September 25, 2006 office visit, x-rays revealed the ankle was well-healed and positioned. In comparing the July 5th x-ray with the September 25th x-ray, Kennedy testified that the latter x-ray showed the screw had been removed and there was no interval change in the fracture or ankle mortise, and that the ankle mortise did not appear to be widened. He continued that the ankle mortise should be symmetric, and the gapping should be the same all the way along. He continued that the maximum gapping would be a maximum of three millimeters. On September 25th, he noted the plaintiff had slightly increased swelling and tenderness laterally. Range of motion was the same, but she had 0 to 5 degrees of dorsiflexion and 0 to 10 degrees of plantarflexion on September 25th, which was somewhat less than previously noted, and was not normal for the plaintiff. She had completed physical therapy at that time. He did not see her after September 25, 2006.

Defendant Kennedy's expert, Craig Levitz, M.D. set forth that he is a physician licensed in New York State and is board certified in orthopaedic medicine. He set forth his education and training and the materials and records which he reviewed in rendering his opinion. He rendered his opinion within a reasonable degree of medical certainty that at all times, the care and treatment rendered to the plaintiff by defendant Kennedy was in conformity with good and accepted medical practices and that he did not proximately cause the plaintiff's claimed injuries. Dr. Levitz continued that Kevin Kennedy properly reviewed and documented all x-ray films in Dr. Cappellino's office for the plaintiff, and properly examined her in accordance with the appropriate standard of care.

Although Dr. Levitz stated that he reviewed the x-ray films of the plaintiff's left ankle, he did not set forth what his findings or interpretations of those films were, and merely stated that the x-rays remained unchanged throughout the time period that the plaintiff visited the defendant's office, leaving this court to speculate as to what is meant by that opinion and whether or not the films revealed any negative findings. He continued that timely radiographic examinations were ordered, and the findings were appropriately documented as normal examinations. Although he stated that defendant Kennedy comported with the standard of care, he has not set forth the standard of care to be employed by the moving defendant as a licensed physician's assistant. It is noted that while Dr. Levitz opined that the findings on the aforementioned x-rays were unchanged throughout the time the plaintiff visited the defendant's office, Dr. Cappellino testified that there was widening of the gap of the ankle mortise without flaying of the tibia and fibula. Thus, the plaintiff's expert has raised factual issue which precludes summary judgment in favor of the moving defendant.

In reviewing the plaintiff's evidentiary submissions, it is determined that the plaintiff has raised factual issues which preclude summary judgment from being granted, as well. The plaintiff has submitted the affidavit of her expert physician who avers that he is licensed to practice medicine in New York State and is board certified in orthopaedic surgery. He set forth his education and training and work experience, and the materials and records which he reviewed, including x-ray films taken of the plaintiff's left ankle, preoperatively and postoperatively. He opined with a reasonable degree of medical certainty that Kevin Kennedy departed from good and accepted medical practice by failing to advise the plaintiff of the treatment alternatives along with the risks and benefits of each alternative so that informed consent could be given, and that such departures were a substantial contributing cause

of the plaintiff's injuries.

The plaintiff's expert set forth that the plaintiff underwent surgery on April 14, 2006, by Dr. Cappellino for a left ankle fracture with dislocation with syndesmotic disruption. He performed a left ankle open reduction with internal fixation with a syndesmotic screw, and from April 19, 2006 through September 25, 2006, the plaintiff followed up at Dr. Cappellino's office. She was seen by Kevin Kennedy on June 5, 2006, July 17, 2006 and September 25, 2006, at which time Kennedy reviewed the plaintiff's medical file, took interval history, performed a physical examination, and ordered and interpreted x-rays, and implemented a treatment plan. The plaintiff's expert stated that he reviewed the x-rays of June 5, 2006, July 17, 2006, and September 25, 2006 obtained and interpreted by Kennedy. He continued that while Kennedy reported that there was "no interval change" and that the fracture was well-healing and in good position, that any reasonable interpretation of the these x-rays shows significant interval changes, particularly after the syndesmotic screw was removed, and a poorly aligned fracture with ankle mortise displacement with instability. The plaintiff's expert stated that Kennedy failed to diagnose, document, and report other significant radiographic findings, specifically the films on all three dates demonstrate a poorly aligned fracture, ankle mortise widening with displacement, and clear signs of instability. He continued, that additional radiographic films should have been ordered, including, but not limited to, a complete ankle series with a mortise view.

The plaintiff's expert stated that on July 17th and September 25th, that Kennedy prescribed physical therapy, but did not recommend or discuss with the plaintiff the option of additional surgery. He opined that Kennedy's inaccurate and incomplete interpretations of the plaintiff's left ankle films, as well as the failure to order additional studies, were all departures from good and accepted medical practice. The plaintiff's expert further opined that the plaintiff needed additional surgery to realign the ankle fracture and stabilize her ankle joint, and that Kennedy's failure to discuss the true and presenting condition of the ankle and the option for additional surgery, was a departure from good and accepted medical practice. He concluded that Kennedy further departed from good and accepted medical practice by prescribing physical therapy on July 17th and September 25th in light of the ankle instability.

The plaintiff's expert continued that when the plaintiff presented to a subsequent treating physician, Dr. Gazzaniga, she had complaints of ankle pain, swelling, locking, buckling, dysfunction, and a very limited range of motion present for a year and several months. X-rays revealed end stage osteoarthritis of the left ankle for which Dr. Gazzaniga discussed treatment options, including, but not limited to, an ankle fusion which was done on August 17, 2007. The plaintiff's expert continued that had Kennedy properly and timely diagnosed and treated the ankle fracture, plaintiff would not have developed end stage osteoarthritis and the necessity for ankle fusion. He added that these departures were a substantial contributing cause of the plaintiff's injuries.

Based upon the foregoing, motion (001) by defendant Kevin Kennedy, RPA-C for summary judgment dismissing the complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: December 19, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.