

**Mulligan v Rausch**

2013 NY Slip Op 30154(U)

January 17, 2013

Sup Ct, Suffolk County

Docket Number: 08-8298

Judge: Asher

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. 08-8298  
CAL. No. 11-02396MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 4-27-12 (#005)  
MOTION DATE 4-30-12 (#006)  
ADJ. DATE 7-24-12  
Mot. Seq. # 005 - ~~Mot~~ MG  
# 006 - MD

-----X  
THOMAS MULLIGAN, :  
 :  
 :  
 Plaintiff, :  
 :  
 :  
 :  
 - against - :  
 :  
 :  
 HARRY A. RAUSCH, JR., FRANCES C. :  
 RAUSCH, AGOSTINO CERVONE, M.D., :  
 GEORGE D. KECKEISEN, M.D., DOUGLAS M. :  
 PETRACO, M.D., PECONIC BAY MEDICAL :  
 CENTER, PECONIC SURGICAL GROUP, P.C., :  
 and DOUGLAS M. PETRACO, M.D., P.C., :  
 :  
 Defendants. :  
-----X

SALENGER, SACK, KIMMEL & BAVARO  
Attorney for Plaintiff  
233 Broadway, Suite 950  
New York, New York 10279  
  
HELWIG HENDERSON RYAN & SPINOLA LLP  
Attorney for Defendants Harry & Frances Rausch  
One Old Country Road, Suite 428  
Carle Place, New York 11514  
  
PATRICK F. ADAMS, P.C.  
Attorney for Defendants Agostino Cervone &  
Peconic Surgical Group  
49 Fifth Avenue, P.O. Box 1089M  
Bay Shore, New York 11706-7306  
  
GEISLER & GABRIELE, LLP  
Attorney for Defendants George Keckeisen &  
Douglas Petraco  
100 Quentin Roosevelt Boulevard, P.O. Box 8022  
Garden City, New York 11530  
  
FUREY, KERLEY, WALSH, MATERA &  
CINQUEMANI, P.C.  
Attorney for Defendant Peconic Bay Med. Ctr.  
2174 Jackson Avenue  
Seaford, New York 11783

Upon the following papers numbered 1 to 84 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; 31 - 64; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 65 - 70; 71 - 76; 77 - 78; Replying Affidavits and supporting papers 79 - 80; 81 - 82; Other medical records, 83 - 84; 85; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#005) by defendants George Keckeisen, M.D., Douglas Petraco, M.D., and Douglas Petraco, M.D., P.C., and the motion (#006) by defendant Peconic Bay Medical Center are consolidated for the purposes of this determination; and it is further

**ORDERED** that this motion (#005) by defendants George Keckeisen, M.D., Douglas Petraco, M.D., and Douglas Petraco, M.D., P.C., for summary judgment dismissing the complaint and all cross claims against them is determined as follows; and it is further

**ORDERED** that this motion (#006) by defendant Peconic Bay Medical Center for summary judgment dismissing the complaint and all cross claims against it is denied.

Plaintiff Thomas Mulligan commenced this action to recover damages for medical malpractice and lack of informed consent. On May 18, 2006, plaintiff was involved in a motor vehicle accident and taken by ambulance to Central Suffolk Hospital, now known as Peconic Bay Medical Center, with a fractured left tibia. While plaintiff was at the medical center, he was examined by Dr. Agostino Cervone, Dr. George Keckeisen, and Dr. Douglas Petraco. On May 30, 2006, after a determination was made that an above-the-knee amputation of plaintiff's left leg was necessary, Dr. Cervone performed the procedure. As to Dr. Keckeisen, Dr. Petraco and Peconic Bay Medical Center, plaintiff's bill of particulars alleges that they were negligent in failing to promptly and properly diagnose plaintiff's condition, in failing to timely perform vascular testing, and in failing to obtain consultations from a vascular surgeon.

Dr. Keckeisen, Dr. Petraco, and Douglas Petraco, M.D., P.C. now move for summary judgment dismissing the complaint against them, arguing that the medical care they rendered plaintiff was in accordance with good medical practice. In support of their motion, they submit, among other things, a copy of the pleadings, transcripts of the parties' deposition testimony, medical records regarding plaintiff's treatment at Peconic Bay Medical Center, and an expert affirmation of Dr. Nicholas Morrissey.

Plaintiff opposes the motion as to Dr. Petraco and Douglas Petraco, M.D., P.C., arguing that issues of fact exist as to whether such defendants departed from accepted standards of medical care. In opposition, plaintiff submits transcripts of the deposition testimony of Dr. Petraco and Dr. Cervone, and two expert affidavits. As to defendant Dr. Keckeisen, plaintiff takes no position with respect to his entitlement to the relief sought. However, plaintiff requests that the Court require co-defendants to make a prima facie showing as to the malpractice of defendant Dr. Keckeisen, or be precluded from asserting their rights under Article 16 at trial.

Peconic Bay Medical Center (hereinafter Peconic Bay) moves for summary judgment dismissing the complaint against it, arguing that it cannot be held directly liable to plaintiff for medical malpractice, and that the treatment rendered to plaintiff by Peconic Bay was at all times within good and accepted standards of nursing practice. Peconic Bay also argues that no proximate cause exists as to the treatment by its staff and plaintiff's injuries. In support of the motion, Peconic Bay submits a copy of the pleadings, an expert affidavit of Barbara Messina, transcripts of the parties' deposition testimony, medical records regarding plaintiff's treatment at the hospital, and an affidavit of Lisa Squicciarini.

Plaintiff opposes the motion by Peconic Bay, arguing that it failed to meet its burden and that it did not address plaintiff's specific claims. In opposition, plaintiff submits transcripts of the deposition testimony of Dr. Petraco and Dr. Cervone, and two expert affidavits.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of the plaintiff's injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Deutsch v Chaglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

Dr. Nicholas Morrissey states in his affidavit that it is his opinion within a reasonable degree of medical certainty that Dr. Keckeisen, Dr. Petraco, and Douglas Petraco, M.D., P.C. did not depart from good and accepted medical practice in the care and treatment rendered to plaintiff from May 18, 2006 through June 19, 2006. Based on his review of plaintiff's medical records, Dr. Morrissey summarizes the care and treatment rendered to plaintiff. He states Dr. Petraco's examination of plaintiff on May 18, 2006 revealed that he had normal blood flow to the left foot and that it was vascularly intact. He states Dr. Petraco determined that, because of plaintiff's age and bone quality, conservative management of the left leg was indicated versus open reduction and internal fixation surgery. He further states Dr. Petraco ordered that a neurovascular check be performed on plaintiff's left foot every two hours to closely monitor his vascular status, and the records show nurses repeatedly checked plaintiff's left pedis pulses, which remained positive from May 19 through May 20.

According to Dr. Morrissey's affidavit, on May 19, Dr. Petraco evaluated plaintiff's left leg and recommended continued leg elevation, strict bed rest, and casting when the swelling decreased. It states

that on May 20 and May 21, Neil Storms, an orthopedic physician's assistant, evaluated plaintiff's left leg and indicated on the progress notes that he found no vascular compromise, and that this progress note was co-signed by Dr. Petraco. It states that on May 22, Thomas Hare, an orthopedic physician's assistant, could not palpate pedal pulses in plaintiff's left leg and that an arterial doppler ultrasound of plaintiff's left leg was conducted. Dr. Morrissey's affidavit further states that P.A. Hare called for a consultation in vascular surgery, which was provided by Dr. Agostino Cervone. It states that on May 22, Dr. Cervone ordered an angiogram to be conducted on May 25 and determined that conservative care was indicated. It states that on May 27, Dr. George Keckeisen palpated plaintiff's left foot, finding only trace sensation, and recommended continued conservative care. A nursing entry notes that plaintiff's left leg was discolored, mottled, cool to the touch, and that the left foot did not have audible pulses. The affidavit states that on May 28, Dr. Keckeisen observed progressive discoloration of plaintiff's left foot and noted it was cool to touch and virtually insensate. It further states that Dr. Keckeisen advised that left above-the-knee amputation would probably be indicated at some point. It states that on May 29, Dr. Cervone also determined that the amputation was indicated and performed the procedure on May 30.

Dr. Morrissey opines that Dr. Petraco's conservative orthopedic treatment of plaintiff and his order for repeated evaluation of the vascular status of plaintiff's left leg was proper and appropriate. He further states that between May 18 through May 21, the vascular status of plaintiff's left leg was properly and repeatedly evaluated and assessed, and that a consultation by a vascular surgeon was not indicated. He asserts that the orthopedic service properly and timely evaluated plaintiff's vascular status, which continuously showed positive left pedal pulses until May 22, and that a consultation in vascular surgery was first indicated on May 22, when P.A. Hare was unable to assess a left dorsalis pedis pulse by palpation in plaintiff's foot. He also concludes P.A. Hare properly and timely called for a consultation and Dr. Cervone performed a consultation that day.

Dr. Morrissey states that Dr. Keckeisen only saw plaintiff on May 27 and May 28, and that revascularization of plaintiff's left leg was not an option at that time. He states that plaintiff only had trace sensation in his left leg and foot, that dorsalis pedis pulses were negative, the foot was discolored, mottled, and cool to the touch. He opines that based on the condition of plaintiff's left leg on May 27, surgery attempting to revascularize plaintiff's left leg would have been futile. He concludes that Dr. Keckeisen properly suggested that a left above the knee amputation would probably be indicated.

The affidavit of Barbara Messina, a nurse practitioner, states that, within a reasonable degree of nursing certainty, the care and treatment rendered to plaintiff by the staff at Peconic Bay during his admission was at all times within the confines of good and accepted nursing practice. She states that the allegations of negligence asserted in the bill of particulars involve acts that would be performed by physicians, not the hospital staff. She further states that the role of the staff is to observe patients, administer medications pursuant to doctor's orders, and advise physicians of any significant changes in the patients; the staff do not prescribe diagnostic studies or refer patients for testing. She states that the record demonstrates the hospital staff closely monitored plaintiff, and that when significant findings were noted in the chart, it promptly advised the attending physicians. She further states that it is not the role of the hospital staff to recommend the performance of an aortogram. Nurse Messina concludes that plaintiff's admission at Peconic Bay was managed appropriately by the hospital staff and at no times was there any deviation from good and accepted standards of practice.

Here, defendants Dr. Keckeisen, Dr. Petraco, and Douglas Petraco, M.D., P.C. established a prima facie case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the parties' deposition testimony, and the expert affirmation of Dr. Morriessey (see *Sandmann v Shapiro*, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *Jonassen v Staten Is. Univ. Hosp.*, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). Peconic Bay's submissions also established a prima facie case that its staff did not deviate or depart from accepted medical practice. Therefore, the burden shifted to plaintiff to come forth with admissible evidence refuting defendants' prima facie showing (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]; *Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 616 NYS2d 815 [2d Dept 1994]).

Plaintiff does not oppose the application for summary judgment in favor of Dr. Keckeisen. Therefore, plaintiff has failed to raise a triable issue of fact as to whether Dr. Keckeisen deviated from the applicable standard of care in his treatment of plaintiff and whether such deviation was a proximate cause of plaintiff's injuries (see *Moore v St. Luke's Roosevelt Hosp. Ctr.*, 60 AD3d 828, 874 NYS2d 389 [2d Dept 2009]). Accordingly, the application for summary judgment in favor of Dr. Keckeisen is granted.

Plaintiff does, however, oppose the application for summary judgment in favor of Dr. Petraco, Douglas Petraco, M.D., P.C., and the motion by Peconic Bay for summary judgment. In opposition, plaintiff submits an expert affirmation of a physician board certified in orthopedic surgery who opines that Dr. Petraco and Peconic Bay Medical Center departed from good and accepted practice in their treatment of plaintiff. It states that Dr. Petraco's finding on May 19 of decreased dorsalis pedis pulse in the left lower extremity was a significant change in plaintiff's condition, and that, given plaintiff's age, the severity of his lower extremity injury, and the finding of a decreased pulse, a vascular consult was indicated on that date. The expert concludes that Dr. Petraco's failure to order a vascular consult on May 19 was a departure from good and accepted medical practice, and that surgical intervention at that point would have greatly increased plaintiff's chances of saving his leg. The affidavit further states that the physician assistants departed from good and accepted medical practice by failing to order a vascular consult on May 20 and May 21. It states that as there was a decrease in pulse, all treating orthopedics, as well as physician assistants, should have recognized the need for a vascular consult.

An affirmation by plaintiff's second expert, a physician board certified in surgery, states that if plaintiff received proper treatment in a timely manner, his vascular insufficiency would have been detected and treated earlier, which would have substantially increased his chances for successful surgical intervention, avoiding the above the knee amputation. It states that a review of the films and aortogram report from May 25 shows plaintiff was amenable to a bypass from the femoral artery to the distal popliteal artery, and that such a procedure would likely have been successful. It states that according to the aortogram, there was a blockage in the adductor canal, which is located in the thigh, and that a bypass would have circumvented both the occluded area and some of the soft tissue swelling from the trauma. The expert opines that the departures committed by Dr. Petraco, Peconic Bay Medical Center, and Douglas M. Petraco, M.D., P.C., were a proximate cause of plaintiff's amputation.

Mulligan v Rausch  
Index No. 08-8298  
Page No. 6

“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” (*Feinberg v Feit*, *supra* at 519; *see Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Graham v Mitchell*, 37 AD3d 408, 829 NYS2d 628 [2d Dept 2007]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]). Here, plaintiff raised triable issues of fact by submitting affirmations of expert physicians which contradict defendants’ experts by opining that Dr. Petraco’s failure to order a vascular consult on May 19 was a departure from good and accepted medical practice, and that the physician assistants at Peconic Bay departed from good and accepted medical practice by failing to order a vascular consult on May 20 and May 21 (*see Magel v John T. Mather Mem. Hosp.*, 95 AD3d 1081, 945 NYS2d 113 [2d Dept 2012]; *Bengston v Wang*, *supra*). Accordingly, the application by Dr. Petraco, and Douglas Petraco, M.D., P.C., and the motion by Peconic Bay for summary judgment dismissing the complaint against them is denied.

Dated: January 17, 2013

W. Gerard Asker  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION