

Cavaliere v Kirshy

2013 NY Slip Op 30287(U)

February 4, 2013

Supreme Court, Suffolk County

Docket Number: 09-37515

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-2-12
ADJ. DATE 12-6-12
Mot. Seq. # 001 - MG

-----X
DEBORAH CAVALIERE and WAYNE :
CAVALIERE, :
: Plaintiffs, :
: :
- against - :
: :
DAVID MICHAEL KIRSHY, M.D., HAMPTON :
RADIOLOGY, P.C., EAST END RADIOLOGY, :
P.C., NORTH FORK RADIOLOGY, P.C., :
SOUTHAMPTON RADIOLOGY, P.C., :
AGOSTINO CERVONE, M.D. and CENTRAL :
SUFFOLK HOSPITAL d/b/a PECONIC BAY :
MEDICAL CENTER, :
Defendants. :
-----X

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment, Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 17; 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 (001) by defendants David Michael Kirshy, M.D., Hampton Radiology, P.C., East End Radiology, P.C., North Fork Radiology, P.C., and Southampton Radiology, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted and the complaint and any cross claims asserted against them are dismissed.

This medical malpractice action is premised upon the alleged negligence of defendant doctors during their care and treatment of Deborah Cavaliere from about March 10, 2008, during a continuous course of treatment through May 21, 2008. The plaintiff alleges that on March 10, 2008, she underwent a CT scan of the abdomen, which the defendants, David Michael Kirshy, M.D., Hampton Radiology, P.C., East End Radiology, P.C., North Fork Radiology, P.C., and Southampton Radiology, P.C., negligently performed, interpreted, and reported, causing her to undergo unnecessary surgical procedures and treatment. It is further claimed that as a result of the moving defendants' negligent departures from the standard of care in treating her, she was caused to suffer a perforated bowel; segmental bowel resection; colostomy; pneumonia; sepsis; anemia; blood transfusions; abdominal hernia; extensive abdominal scarring; pain; MRSA infection; among other things, and prolonged hospitalization.

In motion (001), the defendants, David Michael Kirshy, M.D., Hampton Radiology, P.C., East End Radiology, P.C., North Fork Radiology, P.C., and Southampton Radiology, P.C., seek summary judgment dismissing the complaint on the bases that they fully complied with the standard of care in performing and interpreting the CT scan of March 10, 2008, and that the care and treatment rendered by them did not cause or contribute to the plaintiff's injuries.

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 (*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[2nd 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]).

In support of this application, the moving defendants have submitted, inter alia; an attorney's affirmation; the affidavit of David M. Kirshy, M.D.; expert affirmation of Lawrence A. Gordon, M.D.; expert affirmation of Evan Mair, M.D.; copies of the summons and complaints, defendants' answers and various demands; certified copies of the Peconic Bay Medical Center records; the unsigned but certified copies of the deposition transcript of Deborah Cavaliere dated May 16, 2011, Wayne Cavaliere dated August 2, 2011, and Augustino Cervone, M.D. dated November 17, 2011 with copies of the exhibits marked at his deposition, and which transcripts are considered without objection by any party (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

Lawrence A. Gordon, M.D. affirmed that he is a physician licensed to practice medicine in New York and is board certified in surgery. He set forth the materials and records he reviewed, and opined within a reasonable degree of medical certainty that the defendants, David Michael Kirshy, M.D., Hampton Radiology, P.C., East End Radiology, P.C., North Fork Radiology, P.C., and Southampton Radiology, P.C., did not depart from the good and accepted standards of care and treatment, and that there is nothing that they did or did not do which contributed to or proximately caused the injuries claimed by the plaintiff.

Dr. Gordon continued that the plaintiff presented to co-defendant Agostino Cervone, M.D. on March 12, 2008 with complaints of chronic right lower quadrant abdominal pain for one month, and she reported that the pain was limiting her activities. Dr. Gordon stated that Dr. Cervone's record and testimony established that the plaintiff's symptoms were of unclear etiology, and that her complaint "may or may not" represent an appendiceal abscess, or a cyst, and that there was also a possibility of an ovarian cyst. Dr. Cervone recommended an exploratory laparoscopy to explore and visualize the abdominal cavity to help determine the cause of the abdominal pain, a possible appendectomy (removal of the appendix), and possible oophorectomy (removal of the ovary).

Dr. Gordon continued that on March 18, 2008, Dr. Cervone performed surgery at Peconic Bay Medical Center, and that the appendix appeared grossly normal, but was a little boggy at its tip. Significant adhesions (scar tissue) were noted in the right upper quadrant of the abdomen and on the left side. These adhesions were lysed (cut away). Dr. Gordon stated that the cecum (beginning of the intestine) was grossly distended and likely folded on itself. He stated that Dr. Cervone noted in his operative note that this possibly represented the area of abnormality visible on the CT scan of March 10, 2008. Dr. Gordon continued that when the cecum folds upon itself as a result of adhesions or scar tissue, it is a condition referred to as a cecal bascule. He continued that the appendix was also removed without difficulty. The post-operative diagnosis was that of right lower quadrant abdominal pain secondary to adhesions. In the post-operative period, the plaintiff experienced a perforation at the site of the lysis of adhesions, a possible complication associated with the lysis of the adhesions, stated Dr. Gordon, for which further procedures and treatment were performed to address this complication.

Dr. Gordon opined that the radiologist Dr. Kirshy and his P.C. did not depart from the standard of care as Dr. Kirshy fully appreciated the existence of the area of abnormality found during surgery, and that he appropriately reported it to the treating physician. While Dr. Kirshy reported that "appendicitis or appendiceal abscess could not be excluded at this time," a radiologist indicating that something cannot be excluded does not constitute a diagnosis, but rather, merely provides the surgeon with a possibility to be

considered in conjunction with the patient's total clinical picture. Dr. Gordon stated that there is no medical or surgical basis to support any claim that Dr. Kirshy caused an unnecessary surgery in that the plaintiff had a history of the right lower quadrant pain for a month, and combined with the fact that the CT scan showed an abnormality, the surgeon had an adequate basis to recommend and perform the exploratory procedure, even wholly independent of the possibility of abscess or appendicitis. Dr. Gordon continued that the surgery performed on March 18, 2008 was warranted and appropriate whether or not Dr. Kirshy raised the possibility of appendicitis or abscess in his impression, and as such, Dr. Kirshy's interpretation of the CT scan on March 10, 2008 did not cause or contribute to any purported complications flowing from that procedure. Additionally, the fact that the surgery was done on an elective basis on March 18, 2008, indicates that the surgeon was not operating under the theory that the plaintiff was suffering from an acute appendicitis because, then, the surgery would have been conducted on an emergency basis. The surgeon indicated that the cause of the plaintiff's pain was from an unknown etiology. The removal of the plaintiff's appendix was conducted without issue and was not a cause, or contributing factor, to any complications or perforation that may have occurred during the surgery.

Evan Mair, M.D. affirmed that he is a physician licensed to practice medicine in New York and is board certified in radiology. He set forth the medical records and materials which he reviewed and opined within a reasonable degree of radiology certainty that Dr. Kirshy did not depart from the standard of care, and that there is nothing which the moving defendants did or did not do which proximately caused or contributed to the injuries claimed by the plaintiff. Dr. Mair stated that a physician may advance a possible differential diagnosis of what he believes could be present rather than give an affirmative final diagnosis regarding the cause of an abnormality seen on a film. Dr. Mair stated that the fact that Dr. Kirshy's impression included that of a possible appendiceal abscess or appendicitis could not be excluded does not indicate that he made a diagnosis of appendicitis, and does not constitute a departure from the appropriate standards of care. Dr. Mair continued that the CT scan film of March 10, 2008 was of an appropriate quality, the plaintiff was properly positioned, and the study was of diagnostic quality. He added that Dr. Kirshy appropriately recognized that there was an area of abnormality on the film, he identified its location, and relayed this information to the clinician who could take the information and review it in light of the plaintiff's complete clinical picture. Dr. Mair concluded that Dr. Kirshy did not proximately cause the injuries claimed by the plaintiff in that the plaintiff presented evidence of an inflammatory process, and continuing complaints, so that an exploratory surgery was recommended and performed by the plaintiff's surgeon. Dr. Mair concluded that Dr. Kirshy's participation in the care and treatment of the plaintiff, including his impression and/or characterization of the abnormality which he identified in no way caused or contributed to the plaintiff's claimed injuries.

By way of his supporting affidavit, David M. Kirshy, M.D. averred that he is a physician duly licensed to practice medicine in New York and is certified in radiology. It is his opinion that in interpreting or reading the plaintiff's CT scan of March 10, 2008, that he did not depart from the accepted standards of care, and his actions were not the proximate cause of any purported injury claimed by the plaintiff. Dr. Kirshy continued that his only participation in this matter was his review of the CT scan of the plaintiff's abdomen and pelvis performed on March 10, 2008. His impression was that of "appendicitis or appendiceal abscess is not excluded." He continued that at no time in his report, or at any other time, did he diagnose the plaintiff with appendicitis or appendiceal abscess; and rather, his review of the films determined that

Cavaliere v Kirshy
Index No. 09-37515
Page No. 5

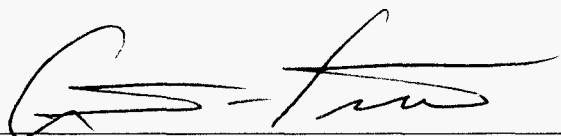
there was a possible abnormality in the right paracolic gutter and that the possibility of appendicitis could not be ruled out by the CT scan. He concluded that his report and medical opinion did not include an affirmative diagnosis of any kind, inclusive of appendicitis.

Upon review and consideration of the evidentiary submissions, it is determined that the moving defendants, David Michael Kirshy, M.D., Hampton Radiology, P.C., East End Radiology, P.C., North Fork Radiology, P.C., and Southampton Radiology, P.C., have established prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against them on the bases that they did not depart from the appropriate standards of care and treatment in their care and treatment of the plaintiff, Deborah Cavaliere, and that there is nothing that they did or did not do that was a contributing factor or proximately caused the plaintiff's claimed injuries.

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]). Here, the plaintiff and the remaining defendants have not submitted expert affidavits or affirmations to demonstrate the presence of a triable issue of fact. Moreover, the plaintiff has not submitted any opposition to this motion.

Accordingly, motion (001) is granted.

Dated: February 4, 2013



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION