

Bleir v Haberman

2013 NY Slip Op 30525(U)

February 19, 2013

Supreme Court, Suffolk County

Docket Number: 18709/2008

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Shannon Bleier,

Plaintiff,

-against-

Jeffrey Haberman, M.D. and North Shore
Urological Consultants, P.C., Island Medical
Associates, P.C., Salvatore V. Fiorenti, M.D.,
Gerard Xavier Brogan, M.D. and North Shore
University Hospital at Plainview,

Defendants.

Clerk of the CourtIndex No.: 18709/2008Motion Sequence No.: 002; MDMotion Date: 5/31/12Submitted: 1/3/13Motion Sequence No.: 003; MDMotion Date: 6/15/12Submitted: 1/3/13Attorney for Plaintiff:Duffy & Duffy
1370 RXR Plaza, West Tower, 13th Fl.
Uniondale, New York 11556Attorney for Defendants Jeffrey
Haberman, M.D. and North Shore
Urological Consultants, P.C.:Fumuso, Kelly, DeVerna,
Snyder Swart & Farrell, LLP
110 Marcus Boulevard, Suite 500
Hauppauge, New York 11788Attorney for Defendants
Salvatore V. Fiorenti, M.D.,
Gerard Xavier Brogan, M.D. and North
Shore University Hospital at Plainview:Heidell, Pittoni, Murphy & Bach, LLP
1050 Franklin Avenue, Suite 408
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Upon the following papers numbered 1 to 38 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers (002), 1 - 13; Notice of Cross Motion and supporting papers (003), 14 - 38; it is

ORDERED that motion (002) by the defendants, Jeffrey Haberman, M.D. and North Shore Urological Associates, P.C., for summary judgment dismissing the complaint as asserted against them is denied; and it is further

ORDERED that motion (003) by the defendants, Salvatore V. Fiorenti, M.D. and North Shore University Hospital at Plainview, for summary judgment dismissing the complaint as asserted against them is denied.

In this medical malpractice action, the plaintiff, Shannon Bleier, alleges that beginning on or about August 21, 2005, and continuing during a continuous course of treatment through September 21, 2006, the defendants negligently departed from accepted standards of medical care and treatment, that the defendants failed to provide her with informed consent, and that North Shore University Hospital at Plainview (Plainview), by its staff and employees, negligently hired and gave privileges to incompetent employees who rendered care and treatment to her. The plaintiff alleges that she developed a large staghorn calculus (stone) in the left uterovesical junction of the left kidney, which the defendants negligently failed to timely diagnose and treat, causing among other things, renal tissue destruction, renal failure, nephroureterectomy, anemia, septic shock, pulmonary collapse, hypovolemia, urosepsis, pleural effusion, cardiac dysrhythmias, and hydronephrosis.

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

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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 [1999]). 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*, 224 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 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]).

In motion (002), defendants Jeffery Haberman, M.D. and North Shore Urological Consultants, P.C. have submitted, inter alia, an attorney's affirmation; the affirmation of Arthur David Smith, M.D.; a copy of the summons and complaint, the moving defendants' answer, and plaintiff's verified bill of particulars; copies of the unsigned and uncertified transcripts of the examination before trial of Shannon Bleier dated May 25, 2010 and James A. Bleier date April 13, 2011, which are not in admissible form to be considered in that they fail to comport with CPLR 3212, and are not accompanied by proof of service upon the plaintiff pursuant to CPLR 3116 (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); the unsigned but certified transcript of the examination before trial of Jeffrey Haberman, M.D. which is considered to be adopted as accurate by the moving defendant (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); and copies of uncertified medical records which are not in admissible form as required pursuant to CPLR 3212, (*see Friends of Animals v Associated Fur Mfrs.*, *supra*. Expert testimony is limited to facts in evidence (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). The defendants have not provided copies of the answers served by the co-defendants, as required by CPLR 3212, for this court to determine if any cross claims have been asserted by any of the defendants. Additionally, the defendants have not provided copies of the plaintiff's amended and supplemental bill of particulars.

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It is determined that even if the moving defendants' evidentiary submissions (motion 002) were in admissible form, they have failed to establish *prima facie* entitlement to summary judgment dismissing the complaint asserted against them.

Arthur David Smith, M.D. affirms that he is licensed to practice medicine in New York State and is board certified in urology. He set forth his education and training, and the records and materials which he reviewed, which records are not in evidence. He opined within a reasonable degree of medical certainty that the care and treatment rendered by Jeffery Haberman, M.D. and North Shore Urology Consultants, P.C. was at all times timely and appropriate and conformed to good and accepted standards of medical and urologic practice, and that none of the alleged acts or omissions asserted against them were the proximate cause, or contributed to, the injuries claimed by the plaintiff. Dr. Smith set forth that Dr. Haberman exercised appropriate judgment in recognizing that the plaintiff was a candidate for an endourologic evaluation and possible ureteroscopic stone extraction and percutaneous nephrolithotomy and that he properly gave the patient contact information to get in touch with his (Dr. Smith's) office for referral. Dr. Smith continued that Dr. Haberman had no further obligation to pick up the telephone or directly communicate with him or his office in terms of arranging an appointment with him, or to contact the patient to determine if she followed through with his recommendation. However, Dr. Smith does not opine whether or not the standard of care required that Dr. Haberman contact Dr. Smith to apprise him of the medical reasons for his referral of the plaintiff. Dr. Smith continued that the plaintiff did not follow up with his office and did not present to the emergency room at Plainview Hospital until August 29, 2006, approximately seven months after Dr. Haberman instructed the plaintiff to follow up with him (Smith).

It is determined that even if the motion were legally sufficient on its face, that the moving defendants have not demonstrated *prima facie* entitlement to summary judgment dismissing the complaint against Dr. Haberman and North Shore Urology Consultants, P.C. Dr. Smith has not set forth what information was conveyed by Dr. Haberman to the plaintiff and whether she was apprised of any complications or problems should she fail to follow up with Dr. Smith. Dr. Smith has not demonstrated that the plaintiff received appropriate informed consent, thus precluding summary judgment. Additionally, Dr. Smith has not established the standard of care which Dr. Haberman should have followed, and has set forth conclusory and unsupported statements that Dr. Haberman timely and appropriately conformed with the accepted standards of care and practice, thus precluding summary judgment.

Accordingly, motion (002) by the defendants, Jeffrey Haberman, M.D. and North Shore Urological Associates, P.C., for summary judgment dismissing the complaint as asserted against them is denied.

In motion (003), defendants Salvatore V. Fiorenti, M.D. and North Shore University Hospital at Plainview have submitted, inter alia, an attorney's affirmation; the affirmations of Gregory I. Mazarin, M.D., Craig H. Sherman, M.D., and Jeffrey M. Brensilver, M.D.; copies of the summons

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and complaint, their answer and the answer served by the defendants in motion (002); the plaintiff's verified and amended and supplemental bills of particulars; uncertified copies of the plaintiff's medical records which are not in admissible form pursuant to CPLR 3212 and 22 NYCRR 202 (a); and copies of the transcripts of the examinations before trial of Shannon Bleier dated May 25, 2010, Salvatore Fiorenti, M.D., and Jeffrey Haberman, which are not in admissible form pursuant to 22 NYCRR 205 (a).

Defendants' expert, Gregory J. Mazarin, M.D. set forth that he is licensed to practice medicine in New York and is board certified in emergency medicine. He set forth his education and training and the records and materials which he reviewed. He opined within a reasonable degree of medical certainty that Dr. Fiorenti and the staff at Plainview did not depart from accepted standards of medical care and practice or fail to obtain informed consent from the plaintiff, and that there were no acts or omissions by them which was a substantial factor in causing the plaintiff's claimed injuries.

Dr. Mazarin set forth that the plaintiff presented to the emergency department at Plainview on August 21, 2005, reporting a history of urinary tract infection, symptoms of fever, left flank pain and flank tenderness, consistent with pyelonephritis or ascending urinary tract infection. Dr. Mazarin, however, does not set forth the symptoms consistent with renal calculus or stones and does not indicate that the same was included in the differential diagnosis by Dr. Fiorenti when he saw the patient. In opining that the plaintiff was appropriately evaluated and treated in the emergency room, he does not opine that the plaintiff was appropriately diagnosed on that visit.

Dr. Mazarin opined that when the plaintiff again presented to Plainview on November 28, 2005, with complaints of left-sided lower abdominal pain, elevated blood pressure of 172/133, that Dr. Fiorenti performed a thorough evaluation and work-up, and included the differential diagnosis of kidney stone at that time. Dr. Mazarin indicated that the sonogram of the kidney suggested left-sided kidney stones and some dilation of the collecting system, for which he does not indicate the significance. The CT imaging of the kidneys revealed a 3-4 mm calculus impacted in the left ureterovesical junction and a stagnorn calculus in the left central renal collecting system. She was given an antibiotic and discharged with a referral to see a urologist, Dr. Luntz. Dr. Mazarin opined that there was no reason to admit the plaintiff at this time, and her blood pressure improved to 145/87. He continued that outpatient treatment for this condition is reasonable, but he does not set forth the standard of care in light of the plaintiff's presenting symptoms and the results of the diagnostic testing. He continued that the plaintiff saw Dr. Haberman on December 14, 2005, who then referred her to Dr. Arthur Smith to discuss treatment options for kidney stones.

Defendants expert Craig H. Sherman, M.D. set forth that he is licensed to practice medicine in New York and is board certified in diagnostic radiology and nuclear medicine, with an added qualification in neuroradiology. He set forth his education and training and the records and materials which he reviewed. He stated that the plaintiff claims that the staff at Plainview Hospital departed from accepted standards of medical care by failing to appropriately treat her during her presentations

to the emergency department on August 21, 2005 and November 28, 2005. He opined within a reasonable degree of medical certainty that the radiological studies performed at Plainview Hospital were appropriately performed, correctly interpreted, and timely reported, and those interpretations were not a substantial factor in causing any of the injuries claimed by the plaintiff.

Dr. Sherman opined that the sonogram of the kidney on November 28, 2005 was essentially normal, but the images suggest the presence of left-sided kidney stones and some dilation of the collecting system, consistent with the ultrasound report and preliminary interpretation of the ultrasound noted in the emergency room chart. Such statement that the sonogram was essentially negative is contradictory to what he stated in a conclusory manner that the images suggest. He continued that the CT scan of November 28, 2005, upon his review, revealed the presence of a staghorn calculus in the left central renal collecting system and a second calculus impacted in the left UVJ, and that Dr. Klayman did not depart from good and accepted standards of radiological practice in his review and reporting of that CT scan. However, Dr. Sherman does not state the reported findings by Dr. Klayman. It is noted, however, that the CT report of Dr. Klayman indicated that there was a large, staghorn calculus noted in the left renal pelvis with no evidence of hydronephrosis or size discrepancy in the bilateral kidneys, while the renal sonogram of the same date indicates size difference between the two kidneys, the left greater than the right in dimension, with a mild degree of dilation of the left upper collecting system. Dr. Sherman does not address these findings and does not address the significance, if any, of the size difference of the two kidneys, or the dilation of the upper collecting system, or whether there was any impaired kidney function relative thereto. Dr. Sherman concluded that the aforementioned studies were appropriately performed and interpreted, thus raising factual issues to preclude summary judgment.

Defendants' expert, Jeffrey M. Brensilver, M.D. affirmed that he is licensed to practice medicine in New York, New Jersey and Massachusetts, and is board certified in internal medicine and nephrology. He set forth his education and training and the records and materials which he reviewed. He opined within a reasonable degree of medical certainty that Plainview did not depart from accepted standards of medical care or fail to obtain informed consent when they treated the plaintiff, and did not commit any act or omission which was a substantial factor in causing the plaintiff's claimed injuries.


Dr. Brensilver continued that the plaintiff was evaluated in the emergency department at Plainview on August 21, 2005 and that her presenting symptoms were consistent with pyelonephritis or an ascending urinary tract infection. He does not opine, however, as to the signs and symptoms of renal calculi, and does not indicate whether or not, or why kidney stones should not have been included in the differential diagnosis, and what the standard of care is to rule out such condition, thus raising factual issues.

Dr. Brensilver continued that when the plaintiff presented again to the emergency room at Plainview on November 28, 2005, she was diagnosed with kidney stones as per pelvic and kidney sonogram and a CT scan. He stated that it was appropriate to discharge the plaintiff on antibiotics

with specific instructions to follow up with a urologist. He does not address the significance, if any, of the plaintiff's elevated blood pressure of 172/133 in relation to the kidney stones and kidney function. and has not set forth how informed consent was provided to the plaintiff concerning her kidney stones so that she could make an informed consent concerning the necessity for follow up care and treatment. Further, he has not addressed the significance, if any, of the CT scan finding that there were multiple kidney stones involving the left kidney with mild dilation of the left upper collecting system. Dr. Brensilver does not address, and has omitted, the finding of dilation of the left upper collecting system, and has failed to set forth the standard of care with regard to the same, thus raising further factual issue. While Dr. Brensilver opined that the plaintiff's failed to timely follow up with Dr. Arthur Smith, as referred by Dr. Haberman, and that she is alone responsible for her claimed injuries, this opinion does not address the standard of care provided by defendant hospital with regard to informed consent and liability, or those factual issues set forth above.

Based upon the foregoing, even if the defendants' moving papers were in admissible form, the opinions set forth by the defendants' experts raise factual issues and do not establish *prima facie* entitlement to summary judgment dismissing the complaint as asserted against them.

Dated: 2/19/2013


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION