

Miranda v Heller

2013 NY Slip Op 32962(U)

November 20, 2013

Supreme Court, Richmond County

Docket Number: 101605/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101605/10
Motion No.:004**

BEATRICE MIRANDA,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ELLIOT M. HELLER, M.D.,
ALLURE PLASTIC SURGERY CENTER,
ADVANCED SURGICAL ARTS FACILITY, L.L.C.,
ADVANCED SURGICAL ARTS CENTER, L.L.C.,
ALLURE AMBULATOR SURGICAL CENTER,
INDEPENDENT ANESTHESIA SERVICES, P.C.,
ANTONIO LUCIANO, C.R.N.A., and
VIRGILIO MANGONON, M.D.,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Affirmation in Reply	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants Antonio Luciano, C.R.N.A. (“Luciano”), a certified registered nurse anaesthetist, and his professional corporation, Independent Anesthesia Services, P.C. (“Independent”) move for summary judgment dismissing the plaintiff’s causes of action against them. The motion is granted.

This is an action to recover for personal injuries allegedly sustained as a result of medical malpractice. The plaintiff is a fifty year old woman that hired the defendant Elliot M. Heller, M.D. to perform breast surgery. The plaintiff informed Dr. Heller that she had a breast nodule in the right breast and also wished to have breast augmentation surgery. The plaintiff presented to the offices

of the defendant Allure Plastic Surgery Center where Dr. Heller performed these procedures on January 23, 2008. It is conceded that the defendant, Luciano was not present during this surgery. On January 29, 2008 the plaintiff had her first post-operative office visit. Records from that date do not indicate that the plaintiff complained of any pain. On February 5, 2008 the plaintiff had sutures removed, but the medical records do not reference any complaints of pain. It is not until February 18, 2008 that the plaintiff's record indicates that she was feeling pain. On March 4, 2008 the plaintiff's chart notes continued pain along with an inability to fully abduct the right arm superiorly. A mild contracture is noted in the right breast pocket, and the plaintiff complains of pain upon direct palpation. The plaintiff underwent a second surgery on March 21, 2008 where Luciano was present and administered anesthesia. The purpose of this second surgery was to correct the contraction and scar tissue in the right breast, to revise scars and to readjust the breast implants.

The plaintiff's bill of particulars alleges that Luciano and Independent Anesthesia Associates, P.C. engaged in actions that injured the plaintiff on January 23, 2008. The defendants, Luciano and Independent Anesthesia Services, P.C. now move for summary judgment to dismiss the plaintiff's complaint.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

“On a motion for summary judgment, a defendant. . . has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . .”⁶

Here, the defendants have come forward with evidence demonstrating that they did not perform the anesthesia services on January 23, 2008. The moving defendants have come forward with evidence that demonstrates that Independent Anesthesia Services, P.C. (“Independent”) is a professional corporation with only one principal, Antonio Luciano. The professional corporation operates out of Luciano’s home. When questioned at his deposition about the plaintiff’s surgery Luciano testified that he was unable to perform anesthesia services for Dr. Heller on January 23, 2008. Luciano testified further that he called Dr. Jordan Fersel, a board certified anesthesiologist, who was the managing partner of Bayonne Anesthesia Services as a courtesy to Dr. Heller to see if he would be available to offer his services on January 23, 2008. Dr. Fersel was not able administer the anesthesia to the plaintiff on the date of her surgery, however his

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

employee and co-defendant Dr. Virgilio Mangonon did. Consequently, the defendants Antonio Luciano and his professional corporation, Independent Anesthesia Services, P.C. have demonstrated their prima facie entitlement to a judgment of dismissal as a matter of law.

In opposition, the plaintiff does not contest that the Dr. Mangonon provided the anesthesia services to the plaintiff on January 23, 2008. Instead, the plaintiff argues that Independent acted as an agent to procure the services of Bayonne Anesthesia Services and co-defendant, Dr. Mangonon. The plaintiff states that the log books kept by Dr. Heller indicate that “. . . Luciano appeared at Heller’s office 11 days in January including the day of Plaintiff’s surgery (indicating Fersel covered for him).” The court reviewed Dr. Heller’s log book excerpts annexed as Exhibit “C” to the plaintiff’s opposition. On January 23, 2008 the log book indicates one entry. On the line for January 23, 2008 the entry for patient shows “Miranda”; the entry for surgeon shows “Heller”; the entry for anesthesiologist “Fersel” and the entry for procedure reads “Breast Aug.” There is no indication anywhere on this log entry that Fersel was covering for Luciano. Moreover, the plaintiff has failed to come forward with any evidence to substantiate her claim that Independent shared in any fees with Dr. Fersel or his business entity. Consequently, the plaintiff has failed to raise any issue of fact which would support the denial of summary judgment.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by defendants Independent Anesthesia Services, P.C. and Antonio Luciano, C.R.N.A. to dismiss the plaintiff’s complaint is granted; and it is further

ORDERED, that the complaint is severed and dismissed as to the defendants, Independent Anesthesia Services, P.C. and Antonio Luciano, C.R.N.A., with costs and disbursements to the defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED, that remainder of this action shall continue; and it is further

ORDERED, that this action is hereby transferred to **JCP 8, 18 Richmond Terrace, on Monday, January 13, 2014 at 9:30 a.m.**; and it is further

ORDERED, that parties must supply a list of HIPAA compliant authorizations that will be needed for trial to opposing counsel at the time the case first appears on the JCP 8 calendar. Thereafter, HIPAA authorizations are to be served within sixty (60) days.

ENTER,

DATED: November 20, 2013

Joseph J. Maltese
Justice of the Supreme Court