

Maggiotta v Fortes

2014 NY Slip Op 30410(U)

February 11, 2014

Supreme Court, Suffolk County

Docket Number: 04-24035

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-26-13
ADJ. DATE 11-13-13
Mot. Seq. # 002 - MG

-----X
MARGARET MAGGIOTTA, as Executrix of the
Estate of Margaret Peirano, Deceased,

Plaintiff,

- against -

DUFFY & DUFFY
Attorney for Plaintiff
1370 RXR Plaza, West Tower, 13th Floor
Uniondale, New York 11556

KRAL, CLERKIN, REDMOND, RYAN, PERRY
& VAN ETTEN, LLP
Attorney for Defendant Good Samaritan &
Mackoff, M.D.
538 Broadhollow Road, Suite 200
Melville, New York 11747

VINCENT D. MCNAMARA, ESQ.
Attorney for Defendant Brunswick Hospital
1045 Oyster Bay Road, Tower Square
E. Norwich, New York 11732

KELLY, RODE & KELLY, LLP
Attorney for Defendant Hsieh, M.D.
330 Old Country Road
Mineola, New York 11530

GABRIELE & MARANO, LLP
Attorney for Defendants Fortes, M.D., Flashner,
M.D., Kessler, D.O., Sound Emergency
Physicians, P.C., Eastern Emergency, Kessler,
D.O., P.C. and United Emergency Room
Physicians
100 Quentin Roosevelt Boulevard
P.O. Box 8022
Garden City, New York 11530

CESAR FONTANILLA FORTES, M.D., HWA
CHENG HSIEH, M.D., ROBIN CINDY
MACKOFF, M.D., THE BRUNSWICK
HOSPITAL CENTER, INC., and GOOD
SAMARITAN HOSPITAL MEDICAL
CENTER, SCOTT JAY FLASHNER, M.D.,
SCOTT J. FLASHNER, M.D., P.C.,
ECHENIQUE & FLASHNER, M.D., P.C.,
LAWRENCE JAY KESSLER, D.O., SOUND
EMERGENCY PHYSICIANS, P.C., EASTERN
EMERGENCY PHYSICIANS, P.C., SCOTT J.
FLASHNER, M.D. and LAWRENCE J.
KESSLER, D.O., P.C. and UNITED
EMERGENCY ROOM PHYSICIANS,

Defendants.
-----X

Upon the following papers numbered 1 to 23 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-23; 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,

RR

Maggiotta v Fortes
Index No. 04-24035
Page No. 2

ORDERED that motion (002) by the defendant, Cesar F. Fortes, M.D. s/h/a Cesar Funtanilla Fortes, M.D.; Scott J. Flashner, M.D., Scott J. Flashner, M.D., P.C., Echenique & Flashner, M.D., P.C., Lawrence J. Kessler, D.O., Sound Emergency Physicians, P.C., Eastern Emergency Physicians, P.C., Scott J. Flashner, M.D. & Lawrence J. Kessler, D.O., P.C. d/b/a United Emergency Physicians s/h/a Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. and United Emergency Room Physicians pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is granted.

In this medical malpractice action, it is alleged that the moving defendants negligently departed from good and accepted standards of care and treatment of the plaintiff's decedent, Margaret Peirano, on or about March 2, 2004, by failing to timely diagnose and treat the plaintiff for epistaxis (bleeding from her nose), resulting in her ultimately suffering cardiac arrest and death. The moving defendants rendered care and treatment to the plaintiff's decedent at Brunswick Hospital Center, Inc. on March 2, 2004, and discharged her home about 11:30 a.m. She was seen later that afternoon at Good Samaritan Hospital emergency room and was discharged home at about 6:00 p.m. Upon returning to Good Samaritan Hospital emergency room at about 8:30 p.m., it was noted that she had anemia. The decedent was then admitted to a medical floor at Good Samaritan Hospital. At approximately 7:20 a.m. on March 3, 2004, the plaintiff's decedent developed ventricular fibrillation, went into cardiac arrest, and was pronounced dead at 7:50 a.m., at age 69. Causes of action for negligence, lack of informed consent, and wrongful death have been asserted against the moving defendants.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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]).

In support of this application, the defendants submitted, inter alia, an attorney's affirmation; affirmation of Paul A. Puffer, M.D. and the affidavit of Scott J. Flashner, M.D.; copies of the summons and complaint, defendants' answers, and plaintiff's verified bill of particulars; uncertified medical records from Brunswick Hospital, Good Samaritan Hospital; transcripts of the examinations before trial of Cesar Fortes, M.D., Margaret Margiotta, Robin Cindy Mackoff, M.D. with proof of service, Hwa Cheng Hsieh, M.D. (unsigned but certified and not objected to (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011])); and disclosure.

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*

Maggiotta v Fortes
Index No. 04-24035
Page No. 3

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 Derdarian 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]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

In order to rebut a prima facie showing of entitlement to an order granting summary judgment, the opposing party in a medical malpractice action 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]).

Margaret Maggiotta testified as to her mother's medical history and the fact that she had a significant nosebleed early in the morning on March 2, 2004, for which she was taken to Brunswick Hospital emergency room. She also testified about her mother's additional care and treatment at Good Samaritan Hospital.

Cesar Fortes, M.D. testified to the extent that he saw the decedent, Margaret Peirano, as a patient at Brunswick Hospital, where he was working on March 2, 2004, on the 7:00 p.m. to 7:00 a.m. shift. He testified that he was employed as a full-time emergency room staff physician at Brunswick from July 1984 through March 2000, at which time he and others were fired by Dr. Singh, the owner of Brunswick Hospital. From March 2000 through February 2001, he was employed by the Flashner Group, an independent group which was hired by the hospital. He stated that Larry Kessler was a partner with the Flashner Group. While he was employed by the Flashner Group, he received his paychecks from them. Dr. Fortes continued that he resumed working for Brunswick Hospital in February 2001. Dr. Fortes stated that he is board certified in emergency medicine and internal medicine.

Dr. Fortes testified that he saw the decedent about 5:05 a.m. in the emergency room at Brunswick Hospital for a nosebleed (epistaxis) which started at about 3:00 a.m. He treated the nosebleed with nasal packing into the right nostril to make sure she did not bleed and to observe that she was not actively bleeding. He continued that when he inserted the packing, plaintiff's decedent was not actively bleeding at

the time, but might have had some oozing. He stated that sometimes nosebleeds stop without any intervention. Dr. Fortes stated that the decedent was anxious, so he prescribed Ativan 1 mg intravenously. He noted that she had a history of coronary artery disease and hypertension, and that she was taking Plavix to help prevent blood clotting, but it can cause bleeding. He stated that hypertension can sometimes cause or affect bleeding, or affect. He did not know how much bleeding she had prior to presenting at the emergency room. He ordered an EKG, which was done at 7:30 a.m. He also ordered additional blood tests, including cardiac enzymes, and a Chem 7. He did not know the cause of the bleeding, so he called for an ENT (ear, nose, and throat) consult with Dr. Berman. He spoke with Dr. Berman about 6:00 a.m. and was told that he would be coming in to see the decedent. The decedent's family wanted Dr. Dash called, but he no longer had privileges at the hospital. Dr. Fortes stated that his shift ended at 7:00 a.m., at which time he went home. The results of the blood tests and the EKG were not available before he left. Dr. Berman was involved in a car accident on his way to the emergency room, so Dr. Ramsatong was called to see the decedent, however, the emergency room staff learned at 9:50 a.m. that Dr. Ramsatong was not available. The decedent was thereafter discharged home with instructions at 11:30 a.m., by Dr. Jana, the incoming emergency room physician who made the final diagnosis of epistaxis.

Robin Cindy Mackoff, M.D. testified to the extent that she has been employed by Good Samaritan Hospital for eleven and one-half years as an emergency room physician. She treated the decedent for a nosebleed at the emergency room at Good Samaritan Hospital at about 3 p.m. on March 2, 2004. She described the care and treatment, including packing the decedent's nose and obtaining blood work. She stated that the decedent was discharged home at about 6 p.m.

Dr. Hwa Cheng Hsieh, M. D. testified to the extent that he is a medical doctor licensed to practice medicine in New York. He retired from the private practice of medicine in December 2004. The decedent, whom he stated he knew very well, had been his patient in his office practice since June 18, 1977. He last saw her on February 23, 2004, at which time she was getting over bronchitis and advised him that her regurgitation was improved. He set forth her medical history, including high blood pressure, arteriosclerotic heart disease (angina), hyperlipidemia, carotid stenosis, peripheral vascular disease, and GERDS. He stated that she was a chronic smoker, and that she refused cardiac catheterization recommended by her cardiologist. Dr. Hsieh testified that he received a call from the decedent's daughter on March 2, 2004, advising that her mother had been seen at Brunswick Hospital for a nose bleed, and that she was bleeding again. He thought she may have told him on the afternoon of March 2, 2004, that her mother was also seen at Good Samaritan Hospital emergency room that day for a nosebleed. He spoke with a lady doctor at Good Samaritan Hospital that afternoon and was advised that there was discussion about the decedent signing out AMA (against medical advice). Thereafter, he received the call from the decedent's daughter that her mother was having another nosebleed, so he advised her to go to Good Samaritan Hospital emergency room, as he had privileges there.

Dr. Hsieh continued that he saw and examined the decedent between 11:30 p.m. and 12:00 midnight on March 2, 2004. The bleeding from the decedent's nose had stopped. He gave an order to admit the decedent to the hospital for observation for severe epistaxis, as she was experiencing dizziness, hypotension, had multiple medical problems, and had a drop in her hematocrit and hemoglobin. He ordered, inter alia, that her H&H (hemoglobin and hematocrit) was to be checked every 6 hours, and vital signs every 4 hours. He ordered an ENT consult with Dr. Campbell. He arrived home about 1:00 a.m. on March 3, 2004, and at about 2:00 a.m. on March 3, 2004, he received a telephone call from Dr. Hall, the

emergency room physician, who advised him that the decedent was having chest pain and had acute changes in her EKG, suggesting coronary insufficiency and ischemia. He advised the emergency room physician to call Dr. Chengot, decedent's cardiologist. Dr. Chengot did not arrive at the hospital that night. About 7:00 a.m. on March 3, 2004, he received a telephone call from a nurse at the hospital advising that the decedent suddenly lost consciousness, was having ventricular fibrillation, and that Dr. Brahma, a cardiologist with Dr. Chengot's group, was trying to insert a temporary pacemaker while the decedent was being coded. He arrived at the hospital and pronounced the plaintiff's decedent dead at 7:50 a.m. It was Dr. Hsieh's opinion that the decedent suffered a massive nosebleed which may or may not have contributed to the ischemia that produced her cardiac arrest.

Scott J. Flashner, M.D. averred that he is a physician licensed to practice medicine in New York and is a shareholder and officer in Scott J. Flashner, M.D., P.C.; Eastern Emergency Physicians, P.C., Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O. d/b/a United Emergency Physicians s/h/a Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. and United Emergency Physicians. He avers that he is seeking summary judgment based upon the lack of treatment of the decedent by him and his corporate entities, either individually or as an agent, shareholder, or employee of the professional corporations. He continued that, moreover, as he was a shareholder of Scott J. Flashner, M.D. and Echenique & Flashner, M.D., P.C., he can say with certainty that these entities did not provide any staff or services to Brunswick Hospital Emergency Room or Good Samaritan Hospital, and that they did not employ Dr. Fortes or any other emergency room physicians or personnel who provided services to Brunswick Hospital Center, Inc. or Good Samaritan Hospital.

Dr. Flashner continued that he is also a shareholder in the professional corporation of Sound Emergency Physicians, P.C. and Eastern Emergency Physicians, P.C., and is an officer of Eastern Emergency Physicians, Inc. Dr. Flashner stated that, with certainty, he can state that neither Sound Emergency Physicians, P.C. or Eastern Emergency Physicians, P.C. employed Dr. Fortes or any other emergency room physicians or personnel that provided services to Brunswick Hospital Center, Inc., or Good Samaritan Hospital, and that neither of these two professional corporations provided any staff or had any agreements with Brunswick Hospital Center, Inc., or Good Samaritan Hospital, to staff their emergency room with physicians or other personnel. He added that these aforementioned entities had no input on how either of the emergency rooms were run and had no involvement in the care and treatment rendered to Margaret Peirano on March 2, 2004 or March 3, 2004.

Dr. Flashner also stated that he was a member of the defendant Echenique & Flashner, M.D., P.C. in 2004, which is now known as Echenique Medical Office, P.C. and that he is no longer associated with said entity. He stated, with certainty, that Echenique & Flashner, M.D., P.C. did not employ Dr. Fortes or any emergency room physicians or provide staff that provided services to the decedent at Brunswick Hospital Center, or at Good Samaritan Hospital in March 2004, nor did it have any agreements with them to provide staff for their emergency rooms.

Dr. Flashner averred that he was also the sole shareholder of Scott J. Flashner, M.D., P.C., which was an inactive corporation at the time of the alleged treatment rendered to the decedent as it was dissolved by Proclamation on December 24, 1997. He stated that he did not provide any services to the plaintiff as an individual physician or as a member of this professional entity, which did not have any contracts or agreements with Brunswick Hospital Center, Inc., or Good Samaritan Hospital, to provide staff or

Maggiotta v Fortes
 Index No. 04-24035
 Page No. 6

physicians for the treatment of patients in their respective emergency rooms.

The expert affirmation of Paul A. Feffer, M.D. has been submitted on behalf of the moving defendants. Dr. Feffer set forth that he is licensed to practice medicine in New York and is board certified in internal medicine, hematology, oncology, and medical oncology. Dr. Feffer has not set forth the training and work experience upon which he bases his opinions and to qualify as an expert. He opined within a reasonable degree of medical certainty that Dr. Fortes and the emergency room physicians that treated the decedent at Brunswick Hospital on March 2, 2004 did not depart from good and accepted medical practice in the care and treatment rendered to plaintiff's decedent, and that no negligent acts or omissions by the defendants proximately caused any injury to the decedent.

Dr. Feffer opined that Dr. Fortes appropriately called an ENT consult on behalf of the plaintiff's decedent, and although the ENT physician did not appear and evaluate the decedent while he was in the emergency department, it was not under the control of Dr. Fortes. He stated that Dr. Fortes appropriately relied upon the hospital staff to carry out his orders for blood work, EKG, and ENT consultation, even after his work shift was over and he left. Dr. Fortes did not discharge the decedent. Dr. Feffer continued that the decedent's vital signs were stable while she was in the emergency department. Her laboratory work was normal and the bleeding from her nose was controlled with packing. Dr. Feffer concluded that Dr. Fortes did not depart from the good and accepted standards of care and treatment, and there were no negligent acts or omissions which proximately caused any of the alleged injury to plaintiff's decedent.


Based upon the foregoing, it is determined that the moving defendants, Scott J. Flashner, M.D., Scott J. Flashner, M.D., P.C., Echenique & Flashner, M.D., P.C., Lawrence J. Kessler, D.O., Sound Emergency Physicians, P.C., Eastern Emergency Physicians, P.C., Scott J. Flashner, M.D. & Lawrence J. Kessler, D.O., P.C. d/b/a United Emergency Physicians s/h/a Scott J. Flashner, M.D. and Lawrence J. Kessler, D.O., P.C. and United Emergency Room Physicians, did not participate in the care and treatment of the plaintiff's decedent, that none of their staff or employees provided care and treatment to the plaintiff's decedent, or that there was an agreement between them and the defendant hospitals which would have caused them to provide care and treatment at those facilities. It is further determined that Cesar F. Fortes, M.D. s/h/a Cesar Funtanilla Fortes, M.D., demonstrated prima facie that he was not an employee or partner, and was not working pursuant to an agreement with the moving defendants, that he did not depart from good and accepted standards of care and treatment of the decedent, and that there is nothing which he did or did not do which proximately caused the injuries sustained by the decedent.

The plaintiff has not submitted opposition to this motion and has, therefore, failed to raise a factual issue to preclude summary judgment from being granted to the moving defendants.

Accordingly, motion (002) is granted.

Dated: _____

2/11/14



 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION