

**Martinez v Quintana**

2014 NY Slip Op 32009(U)

July 24, 2014

Supreme Court, Suffolk County

Docket Number: 09-1296

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 9-12-13 (#006)  
MOTION DATE 12-19-13 (#007)  
ADJ. DATE 5-6-14  
Mot. Seq. # 006 - MG  
# 007 - MD

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<p>EVELYN MARTINEZ,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>ANDREA QUINTANA, D.O., ANTHONY CAPPELLINO, M.D., SENGHAO FONG, M.D., and NASSAU-SUFFOLK RADIOLOGICAL ASSOCIATES,</p> <p style="text-align: right;">Defendants.</p>	<p>THE MARGIOTTA LAW FIRM, P.C. Attorney for Plaintiff Four West Main Street Bay Shore, New York 11706</p> <p>ROGAK &amp; GIBBONS, LLP Attorney for Defendant Andrea Quintana, D.O. 50 Charles Lindbergh Boulevard, Suite 320 Uniondale, New York 11553</p> <p>KELLER, O'REILLY &amp; WATSON, P.C. Attorney for Defendants Fong, M.D. and Nassau- Suffolk Radiological Associates 242 Crossways Park West Woodbury, New York 11797</p> <p>LAWRENCE WORDEN &amp; RAINIS &amp; BARD Attorney for Defendant Anthony Cappellino, M.D. 225 Broad Hollow Road, Suite 105E Melville, New York 11747</p>
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Upon the following papers numbered 1 to 49 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1-15; (007) 16-35; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 36-47; Replying Affidavits and supporting papers 48-49; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (006) by the defendant Andrea Quintana, D.O. pursuant to CPLR 3212 granting summary dismissal of plaintiff's complaint as asserted against her is granted; and it is further

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**ORDERED** that this motion (007) by the defendants Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates pursuant to CPLR 3212 granting summary dismissal of plaintiff's complaint as asserted against them is denied.

In this medical malpractice action, it is asserted that the plaintiff came under the care and treatment of the defendants for pain in her right hand after she fell onto her outstretched hand on October 23, 2006. She was first seen on October 23, 2006, by Dr. Quintana who ordered anti-inflammatory medication and referred her to co-defendant Senghao Fong, M.D. for x-rays, and instructed her to return in 3-5 days if the symptoms persisted. It is alleged that the aforementioned defendants departed from good and accepted standards of care and treatment in failing to diagnose a fracture in plaintiff's right hand. A non-displaced healing fracture of the fourth metacarpal neck was diagnosed by defendant Anthony Cappellino on November 30, 2006, after he obtained additional x-rays in his office on November 30, 2006, at the plaintiff's first visit to his office. As a result of the defendants' alleged departures from the standard of care, the plaintiff alleges, inter alia, that she suffers a crooked and deformed appearance of her right hand, with tingling and numbness, limitation of movement, pain, swelling and aching.

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 (*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 motion (006), the moving defendant submitted, inter alia, an attorney's affirmation; the affirmation of Thomas Palmieri, M.D.; memorandum of law; copies of the summons and complaint, the moving defendants' respective answers and demands, the plaintiff's verified bill of particulars; unsigned transcript of the examination before trial of defendant Quintana which is considered as adopted as accurate by him as a moving defendant (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); the unsigned transcript of plaintiff's examination before trial and the unsigned but certified transcripts of the examinations before trial of Senghao Fong, M.D. with proof of service pursuant to CPLR 3116; and the transcript of the examination before trial of Anthony Cappellino which is not accompanied by proof of service 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]); and certified office records certified by Andrea Quintana, D.O.

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In support of motion (007), the moving defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, their verified and amended answers, and plaintiff's verified bill of particulars; transcripts of the examinations before trial of the plaintiff, Andrea Quintana, D.O., Senghao Fong, M.D.; the unsigned and uncertified transcript of the examination before trial of Anthony Cappellino, M.D. which is not accompanied by proof of service (*see Martinez v 123-16 Liberty Ave. Realty Corp., supra; McDonald v Maus, supra; Pina v Flik Intl. Corp., supra*; affidavits of Elaine Gould, M.D. and Neal Hochwald, M.D.; uncertified medical records which are not in admissible form pursuant to CPLR 3212 and 4518 (*see Friends of Animals v Associated Fur Mfrs., supra*)).

Expert testimony is limited to facts in evidence and the inadmissible records submitted by defendants in motion (007), except for Dr. Quintana's records, are not 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 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 [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, 517, 675 NYS2d 375 [2d Dept], app denied 92 NY2d 814, 681 NYS2d 475 [1998]; Bloom v City of New York, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]*).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, 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 defendants' 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]*).

In motion (006), defendant Andrea Quintana, D.O. submitted the affirmation of Thomas Palmieri, M.D. in support of her application for summary dismissal of the complaint in her favor. Dr. Palmieri affirmed that he is licensed to practice medicine in New York State and is board certified in surgery with a sub-specialty certification in surgery of the hand. He set forth his education and training, but he does not indicate any current or past employment or work experience to qualify as an expert. He indicated the records and reports which he reviewed, but, except for Dr. Quintana's office records, the medical records reviewed by him have not been provided and are not in evidence. It is Dr. Palmieri's opinion within a reasonable degree of medical certainty that Andrea Quintana rendered care and

treatment to the plaintiff, Evelyn Martinez, in accordance with acceptable medical practice, and that her treatment was not the proximate cause of the injuries claimed by the plaintiff.

Dr. Palmieri stated that the plaintiff presented to Dr. Quintana on October 23, 2006 with complaints of pain in her right hand after she fell onto her outstretched hand that day. The pain was described as being in the region of the metacarpophalangeal (MP) joint of the index and middle finger of the plaintiff's right hand. Dr. Quintana noted the her hand was swollen with tenderness in the region of the MP joint of the index and middle fingers, for which she ordered a non-steroidal anti-inflammatory medication, Naprosyn 500mg, advised the use of ice packs, and referred the plaintiff to Dr. Senghao Fong, M.D. for x-rays, with instructions to follow-up for re-evaluation in 3-5 days if the symptoms persisted. Dr. Palmieri stated that Dr. Quintana's record notes that Dr. Fong's x-ray report was received on October 24, 2006 via facsimile containing Dr. Fong's impression that the x-ray was negative for fracture in the plaintiff's right hand.

Dr. Palmieri indicated that Dr. Quintana's record reflects that the plaintiff did not return to her office until November 7, 2006, and she did not attempt to contact Dr. Quintana's office in the interim. When the plaintiff presented to Dr. Quintana's office on November 7, 2006, she complained of nasal congestion as well as discomfort in her right hand which was noted by Dr. Quintana to be swollen and stiff, an enlargement and deformity of the metacarpophalangeal joints of that hand. Dr. Quintana's note provided a differential diagnosis of a right hand sprain, so she referred the plaintiff to an orthopedist, and advised her to follow-up with her in two to three weeks if the symptoms persisted. Dr. Quintana testified that she would have instructed the plaintiff to contact her office if there was any difficulty in getting the appointment with the orthopedist. The plaintiff then saw Dr. Cappellino on November 30, 2006, at which time x-rays were taken which revealed a non-displaced healing fracture of the fourth metacarpal neck of the right hand. Dr. Palmieri continued that the next entry into Dr. Quintana's office record was on December 7, 2006, reflecting that the plaintiff cancelled the appointment. When Dr. Quintana saw the plaintiff on December 14, 2006, she presented with complaints of vomiting and diarrhea. There were no complaints pertaining to her right hand. Dr. Quintana did not examine the plaintiff's right hand on that visit as the plaintiff was already under the care of an orthopedist.

Dr. Palmieri opined that the medical care and treatment provided to the plaintiff by Dr. Quintana was in accordance with good and accepted standards of medical practice and was not the proximate cause of the injuries claimed by the plaintiff. On October 23, 2006, Dr. Quintana appropriately examined the plaintiff's hand, referred her for x-rays, and prescribed Naprosyn for pain and inflammation in her right hand, and instructed her to follow up in 3-5 days for re-evaluation if the symptoms persisted. He continued that Dr. Quintana, as a family practice physician, appropriately relied upon Dr. Fong's interpretation of the x-ray as negative for fracture, and she properly deferred to Dr. Fong's impression under the circumstances. Dr. Quintana's differential diagnosis of a sprain of the right hand was not inconsistent with the negative interpretation of the x-ray by Dr. Fong. He continued that Dr. Quintana did not delay in referring the plaintiff for an orthopedic evaluation on November 7, 2006, and she was not negligent due to the plaintiff's failure to seek the care of an orthopedist at an earlier date.

It is Dr. Palmieri's opinion within a reasonable degree of medical certainty that the non-displaced fracture that occurred in the plaintiff's right fourth (ring finger) metacarpal bone neck would not be sufficient to cause the ulnar drift that the plaintiff is claiming in this action. He concluded that a fracture of the right fourth metacarpal would not cause the plaintiff to suffer any long-term injury or limitations, including the injuries being claimed by the plaintiff.

Based upon the foregoing, it is determined that defendant Quintana has established prima facie entitlement to summary judgment dismissing the complaint asserted against her. The plaintiff has not submitted opposing papers in response to defendant Quintana's application for summary dismissal of the complaint as asserted against her and has thus failed to raise a factual issue to preclude summary judgment in Dr. Quintana's favor.

Accordingly, motion (006) is granted and the complaint as asserted against Dr. Quintana is dismissed with prejudice.

In motion (007), Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates seek summary dismissal of the complaint on the basis that Dr. Fong did not see any fractures on any of the x-rays, including the site of the second or third metacarpal, that he and Nassau-Suffolk Radiological Associates did not depart from accepted practice relative to the care of the plaintiff, and they were not the proximate cause of her injuries.

It is noted that Dr. Senghao's report, dated October 23, 2006, of the x-ray of plaintiff's right hand, "attention: second finger," provides, "The right hand, with special attention to the second finger, shows no evidence of fracture, subluxation, or bone destruction. The second metacarpophalangeal joint is well maintained. Moderate hypertrophic changes with severe narrowing of the joint space at the base of the first metacarpal and the greater multangular are noted. Conclusion: No evidence of fracture. Severe arthritic changes at the base of the first metacarpal."

Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates submitted the affidavit of Elaine Gould, M.D., a physician licensed to practice medicine in New York State who is board certified in diagnostic radiology. She set forth the records and materials which she reviewed and opined within a reasonable degree of medical certainty that based upon her review of the records, films and testimony in this case, the fracture can be visualized but is very subtle. She continued that it is likely that most general radiologists would not see the fracture, particularly, as the submitted history was that of "rule out fracture and pay special attention to the second metacarpophalangeal joint." Also, she stated, the fracture was non-displaced. Dr. Gould further opined that not visualizing this fracture is not considered a departure from good and accepted medical practice, and the non-displaced fracture healed anatomically and without consequence.

Dr. Gould continued that, at his deposition, Dr. Fong stated he did not see any fracture of the right hand. She continued that a fracture is often better visualized during its healing phase rather than at the time of the injury as the normal physiological process of bone resorption about the fracture occurs as well as formation of callus. This, she stated, is why physicians obtain follow-up films to assure that a subtle fracture is not missed, or the physician may immobilize the same with cast or splint, depending on

the concern. Often by three months, many fractures are healed clinically or radiographically.

Dr. Gould stated that when Dr. Cappellino took x-rays of the plaintiff's right hand on November 30, 2006 and January 11, 2007, he identified a healing, non-displaced fracture of the fourth metacarpal, and revealed more soft tissue than Dr. Fong's films. Dr. Cappellino was able to visualize the non-displaced fracture because the bone regeneration process had begun by forming a callus, which illuminated a widened, white fracture line around the fourth metacarpal, which was not present when Dr. Fong reviewed the films of plaintiff's right hand on October 24, 2006. Therefore, when Dr. Fong reviewed the films of October 23, 2006, he would not have visualized a non-displaced fracture, and Dr. Fong came to the correct diagnosis of no fracture and arthritic changes.

Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates also submitted the affidavit of Neal Hochwald, MD., a physician licensed to practice medicine in New York State who is board certified in orthopedic surgery with a certification of added qualification in surgery of the hand. Dr. Hochwald set forth the material and records he reviewed and stated his opinions within a reasonable degree of medical certainty. It is Dr. Hochwald's opinion that Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates did not depart from good and accepted medical practice in the treatment of the plaintiff and that the treatment did not cause the injuries alleged by the plaintiff. He indicated that Dr. Fong testified that when reviewing the plaintiff's x-ray film of October 2006, he did not see any fracture of the right hand. Dr. Hochwald stated that the plaintiff's problems were ligament problems, which would not be seen on plain x-ray film, without examining the plaintiff. Even assuming that a non-displaced fracture of the "ring metacarpal" were diagnosed on October 24, 2006, no further treatment recommendations by Dr. Fong would have changed the outcome of this case.

Dr. Hochwald continued that surgery was not indicated for a non-displaced fracture of the metacarpal since these fractures tend to heal on their own in good position. Cast immobilization would not have changed the outcome of the plaintiff's right hand having residual deformities as these deformities are likely due to sprains of the metacarpophalangeal joints of the right hand with tearing of the radial collateral ligaments superimposed with possible rheumatoid arthritis. This was evidenced by the swelling around the metacarpophalangeal joints of the index and long fingers, and thus, a cast would not have made a difference with respect to bone healing, and would not have prevented further injuries to the ligaments combined with plaintiff's pre-existing rheumatoid arthritis. Dr. Hochwald continued that Dr. Fong diagnosed severe arthritic changes at the base of the thumb, consistent with Dr. Rumore's diagnosis of rheumatoid arthritis in the plaintiff in 2007. Thus, the fall may have exacerbated the arthritis, but it did not cause the arthritis.

Dr. Hochwald continued that Dr. Cappellini's record indicate the plaintiff had an ulnar deviation and injury likely to the radial collateral ligament of the metacarpophalangeal joint of the long finger, consistent with the deviation of her fingers ulnarly, originating at the metacarpophalangeal joints. He continued the metacarpophalangeal joint injuries with tears at the radial collateral ligament can cause ulnar deviation of the fingers. Similarly, rheumatoid arthritis can also cause ulnar deviation of the fingers, but a non-displaced fracture of the ring metacarpal could not cause an ulnar deviation of the middle and small finger, as exhibited by the plaintiff.

Dr. Hochwald also opined that an alleged failure to diagnose a non-displaced fracture of the ring metacarpal could not have caused plaintiff's carpal tunnel syndrome as plaintiff had several risk factors for developing carpal tunnel syndrome, and when combined with the injury to the right hand, would have caused the carpal tunnel syndrome or exacerbated it. Numbness and tingling experienced by the plaintiff was caused by the carpal tunnel syndrome. Ulnar deviation of the second, third, and fourth fingers was caused by plaintiff's pre-existing rheumatoid arthritis and ligament problem she experienced with the fall.

Based upon the foregoing, it is determined that Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates have established prima facie entitlement to summary judgment dismissing the complaint.

In opposing this application, the plaintiff has submitted, inter alia, the affidavit of A. Robert Tantleff, M.D., a physician licensed to practice medicine in New York State and board certified in diagnostic radiology radiographic imaging. He has not set forth his education or training, but stated that he reviewed the x-rays and records of Senghao Fong, M.D. and Suffolk Radiology concerning the plaintiff's right hand x-ray of October 23, 2006, and the affidavits of Dr. Hochwald and Dr. Gould, and the medical records of Dr. Anthony Cappelino and Orlin and Cohen. It is Dr. Tantleff's opinion within a reasonable degree of medical certainty that the x-rays taken, interpreted, reviewed and reported by Dr. Fong and Suffolk Radiology, which report the findings as there being no evidence of fracture, and severe arthritic changes at the base of the first metacarpal, is incorrect. It is Dr. Tantleff's further opinion that based upon his review, the x-ray demonstrates a non-displaced fracture of the fourth metacarpal head, with regional soft tissue swelling. There is also a congenital negative ulnar variance and diastasis of the lunotriquetral joint space; a negative ulnar variance associated with Keinbock's disease; and osteoarthritic changes of the trapezium and first metacarpal joint. He continued that the images also reveals a fourth metacarpal neck fracture, non-displaced; negative ulnar variance; diastasis of the luntotriquetral joint space; osteoarthritis changes of the trapezium and first metacarpal joint.

Dr. Tantleff further opined that the failure to diagnose the apparent and obvious fracture caused the plaintiff's injuries, including, but not limited to the ulnar drift, decreased use of the hand and wrist, caused the crooked and deformed appearance, arthritis, stiffness, aching, bruising, limitation of movement, numbness and tingling, bluish swelling of the hand and fingers, and changes in finger movement. He continued that plaintiff's injuries and conditions will continue to deteriorate and worsen with age, may require surgical intervention in the future, and that she is more vulnerable to having additional, or re-injuries, due to the instability caused by her injuries. Dr. Tantleff concluded that the failure to diagnose the apparent and obvious fracture was a deviation from accepted standards of medical care, and that the deviation caused the injuries complained of herein.

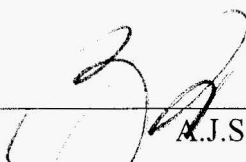
Based upon the foregoing, it is determined that the plaintiff has raised factual issues which preclude summary judgment from being granted to Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates with regard to whether it was a departure for Dr. Fong to fail to diagnose the fracture, which Dr. Fong's expert, Dr. Gould, was also able to identify upon her examination of the films of October 23, 2006. There are also factual issues concerning the additional findings identified by both Dr. Hockwald, and Dr. Tantleff, and their respective opinions concerning the cause or causes of

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plaintiff's alleged conditions.

Accordingly, motion (007) by defendants Senghao Fong, M.D. and Nassau-Suffolk Radiological Associates for summary dismissal of the complaint as asserted against them is denied.

Dated: 2/27/04

  
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A.J.S.C.

       FINAL DISPOSITION   X   NON-FINAL DISPOSITION