

Cannon v Darakchiev
2014 NY Slip Op 32578(U)
September 29, 2014
Supreme Court, Suffolk County
Docket Number: 11-4570
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY**PRESENT:**Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme CourtMOTION DATE 5-14-14
ADJ. DATE 6-11-14
Mot. Seq. # 003 - MG
004 - MG-----X
LAURIE CANNON,

Plaintiff,

-against-

BORIMIR DARAKCHIEV, M.D., BORIMIR
DARAKCHIEV, M.D., P.C., DARAKCHIEV
McCORMICK MULLINS, GOOD SAMARITAN
HOSPITAL MEDICAL CENTER, JOHN JOSEPH
LABIAK, M.D., JOHN J. LABIAK, M.D., P.C., DAN
W. JOACHIM, M.D., NEURO PHYSIOLOGICAL
SERVICES OF NEW YORK, P.C., RAKESH D.
PATEL, M.D., ORTHOPEDIC ASSOCIATES OF
LONG ISLAND, L.L.P. and ST. CHARLES HOSPITAL
AND REHABILITATION CENTER,Defendants.
-----XDUFFY & DUFFY
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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003)1 - 13; (004) 14-33; 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 motion (003) by defendant Good Samaritan Hospital, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is granted; and it is further

ORDERED that motion (004) by defendant St. Charles Hospital and Rehabilitation Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it, is granted.

In this medical malpractice action, Laurie Cannon seeks damages for personal injuries caused by the defendants' alleged negligent departures from the good and accepted standards of medical practice while providing her with medical care and treatment. On September 25, 2008, at defendant Good Samaritan Hospital, defendant Borimir Darakchiev performed anterior surgical surgery on the plaintiff including a discectomy, partial corpectomy of the C6 vertebrae, removal of a herniated disc, bilateral foraminectomy, and fusion of C5-6 with PEEK implant, bone allograft, plates and screws. On October 21, 2008, the plaintiff suffered severe sudden neck pain while cleaning her house. X-rays revealed partial disengagement of the inferior screws of the anterior plate. Revisional surgery was performed by Dr. Darakchiev at Good Samaritan Hospital on October 22, 2008, consisting of removal of the PEEK graft, completion of the C6 corpectomy, C6-7 discectomy, and fusion with placement of a titanium cage and plating from C5 to C7. During this surgery, it was noted that the previous instrumentation had moved inferiorly and there was a screw in the C6-7 disc space. On December 23, 2008, the plaintiff presented to Rakesh Patel, M.D. and Orthopedic Associates of Long Island, LLP, status post two surgical procedures, where she was noted to have implants which appeared not to be placed in the correct fashion. After several visits with Dr. Patel, he admitted the plaintiff to St. Charles Hospital and Rehabilitation Center from March, 19, 2009 through March 25, 2009 at which time he performed surgery assisted by defendant John Labiak, M.D. The surgery involved a multi-level cervical laminectomy at C3-5 and C3-6 spinal fusion with instrumentation, lateral mass screws and rods from an invasive posterior cervical tray, and bone autograft, and fusion, secondary to cervical myelopathy. Plaintiff alleges that, as a result of defendants' alleged negligence in providing her medical care and treatment, she sustained various injuries, including, but not limited to, cervical pain, stiffness, and injury, cervical stenosis and radiculopathy, left upper extremity weakness, limited cervical motion, decreased fine motor coordination in bilateral hands, muscle spasms, right laryngeal palsy, and the need for multiple revision surgeries. Causes of action are premised upon defendants' alleged professional negligence, lack of informed consent, and negligent hiring and employment by both Good Samaritan Hospital and St. Charles Hospital and Rehabilitation Center.

Good Samaritan Hospital and St. Charles Hospital and Rehabilitation Center seek summary dismissal of the complaint as asserted against them on the basis that the private physicians directed, controlled, and supervised the care and treatment of the plaintiff; there is no evidence that the attending physicians' orders were contraindicated by normal practice; these moving defendants did not depart from the standard of care; and they did not proximately cause the plaintiff's alleged 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 (*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]).

In support of motion (003), Good Samaritan Hospital submitted, inter alia, copies of the summons and complaint, its answer, plaintiffs' verified bill of particulars; certified copy of the Good Samaritan Hospital record for the admissions of August 10, 2008, September 25, 2008, and October 21, 2008; copy of consents for the surgeries of September 25, 2008 and October 22, 2008; certified medical record maintained by Dr. Darakchiev's office; deposition transcripts of Laurie Cannon with proof of service, and defendant Darakchiev; and the affirmation of Jeffrey Goldstein, M.D.

In support of motion (004), St. Charles Hospital and Rehabilitation Center submitted, inter alia, an attorney's affirmation; copy of the summons and complaint, its answer, and plaintiff's verified bill of particulars; plaintiff's deposition transcript which is not in admissible form, but in searching the record, an admissible copy is submitted with motion (003); an unsigned and uncertified copy of the transcript of the examination before trial of defendant Patel, M.D. which is not in admissible form and is not considered (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]); an unsigned but certified transcript of the examination before trial of defendant Labiak, M.D. which is considered as not objected to (see, *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); uncertified copies of plaintiff's Good Samaritan Hospital records and other uncertified medical records which are not in admissible form; a certified copy of the St. Charles Hospital medical record; affirmation of Philip Sumner, M.D. and affidavit of James O'Connor.

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 [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 [2nd 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 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd 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, 690 NYS2d 762 [3d Dept 1999]).

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 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (*Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]). Here, it has been determined that defendant Darakchiev was not an employee of Good Samaritan Hospital, and that its staff and employees did not depart from good and accepted standards of care and treatment or contribute to the plaintiff's alleged injuries.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*Shehebar v Boro Park Obstetrics and Gynecology, P.C.*, 106 AD3d 715, 964 NYS2d 239 [2d Dept 2013]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]).

Turning to motion (003), Good Samaritan Hospital submitted the affirmation of Jeffrey Goldstein, M.D., who affirms that he is licensed to practice medicine in New York State and is board certified in orthopedic surgery with advanced training in surgery of the spine. He set forth his education and training and current medical practice. He indicated that he reviewed the relevant medical records in this action. It is Dr. Goldstein's opinion within a reasonable degree of medical certainty that Good Samaritan Hospital, by its employees and staff, comported with good and accepted medical practice at all times, and that none of the care and treatment provided by them caused or contributed to the injuries claimed by the plaintiff.

Dr. Goldstein stated that the plaintiff first presented to Dr. Darakchiev on August 28, 2008 with complaints of neck and arm pain. On September 2, 2008, when the plaintiff again presented, she had complaints of neck and arm pain, left arm weakness and bilateral arm numbness, gradually progressing. Recent cervical MRI studies revealed significant degenerative disc disease in the cervical spine, especially at the C5-6 level. A CAT scan confirmed the MRI impression of multilevel disc degeneration, spondylosis, and disc herniation at C5-6 causing severe spinal canal stenosis. He continued that surgery was recommended by Dr. Darakchiev for removal of the herniated disc and fusion of the cervical spine due to the size of the disc and migration of the disc material. The risks, benefits, and alternatives were provided to the plaintiff. On September 25, 2008, at Good Samaritan Hospital, Dr. Darakchiev performed anterior surgical surgery on the plaintiff. The surgery consisted of a discectomy, partial corpectomy of the C6 vertebrae, removal of a herniated disc, bilateral foraminectomy, and fusion of C5-6 with PEEK implant, bone allograft, plates and screws. The plaintiff was discharged on September 29, 2008, and was noted to be stable when followed postoperatively by Dr. Darakchiev.

Dr. Goldstein continued that, on October 21, the plaintiff presented to Dr. Darakchiev with complaints of severe and sudden neck pain. Because x-rays showed partial disengagement of the inferior screws of the anterior plate, Dr. Darakchiev performed revisional surgery on October 22, 2008, at Good Samaritan Hospital, at which time he removed the PEEK graft, completed the C6 corpectomy, C6-7 discectomy and fusion with placement of a titanium case and plating from C5 to C7. Intraoperative spinal cord monitoring was used and did not show any abnormalities, however, it was noted during the surgery that the previous instrumentation moved anteriorly and there was a screw in the C6-7 disc space.

Dr. Goldstein stated that Dr. Darakchiev was a private attending physician at Good Samaritan Hospital who provided care and treatment to the plaintiff for voluntary inpatient surgeries. He continued that depositions of Good Samaritan Hospital were waived in this action. From his review of the records, he

noted the plaintiff was referred to Dr. Darakchiev by plaintiff's primary physician, and not by Good Samaritan Hospital. Consent forms were signed by the plaintiff for each surgical procedure, for which the surgeon, Dr. Darakchiev, was responsible to provide informed consent by advising of the risks, benefits, and alternatives of each procedure. Good Samaritan Hospital and its employees and staff were not responsible for obtaining informed consent. Dr. Darakchiev was responsible for determining the manner in which the surgery would be performed, and the techniques utilized at the time of surgery, based upon his experience, prior examinations and work ups of the plaintiff.

Dr. Goldstein stated that the employees and staff at Good Samaritan Hospital carried out the supportive care appropriately and within prevailing standards of care at all times, and none of its care was the proximate cause of, or significantly contributed to, any of the plaintiff's alleged injuries. He opined that none of the care they provided was inappropriate such that any of the hospital employees had an obligation to question the orders or the treatment plan, or to bring the plaintiff's care and treatment to the attention of the hospital administration. Dr. Goldstein concluded that there are no allegations of, nor any evidence of, any act or omission on the part of any hospital employee prior to surgery, at the time of surgery, or post-operatively, which constituted a departure from medical care and/or which was a substantial factor in causing or contributing to the plaintiff's alleged damages.

Based upon the foregoing, it is determined that Good Samaritan Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against it. Neither the plaintiff nor co-defendants have opposed this motion, or otherwise raised a factual issue to preclude summary judgment from being granted to Good Samaritan Hospital.

Accordingly, the motion (003) by Good Samaritan Hospital for summary dismissal of the complaint as asserted against it is granted.

Turning to motion (004), St. Charles Hospital and Rehabilitation Center submitted the affidavit of James O'Connor who avers that he is the executive vice president and chief administrative officer at St. Charles Hospital and Rehabilitation Center. As such, he determined that defendants Rakesh D. Patel, M.D. and John J. Labiak, M.D. were not employees of St. Charles Hospital and Rehabilitation Center at any time, but rather, were voluntary attending physicians.

The affirmation of Philip Sumner, M.D. was also submitted, wherein Dr. Sumner affirmed that he is licensed to practice medicine in New York State and is board certified in internal medicine. He reviewed the pertinent material with reference to this action, although he does not specifically identify all the materials reviewed. It is Dr. Sumner's opinion within a reasonable degree of medical certainty that the care and treatment rendered to the plaintiff by the employees and staff at St. Charles Hospital and Rehabilitation Center between March 19, 2009 and March 25, 2009, was at all times in conformity with good and accepted medical practice. He continued that none of the alleged injuries were proximately caused by any care and treatment rendered by them. He stated that none of the nurses were deposed in this action, and the plaintiff has failed to name any particular nurse.

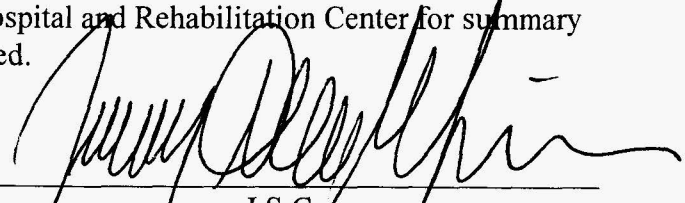
Dr. Sumner stated that his review of the medical records revealed that there were no independent acts of malpractice committed by any nurses working at St. Charles Hospital and Rehabilitation Center between March 19, 2009 and March 25, 2009. None of the allegations set forth by the plaintiff can be attributed to the nurses in the employ of St. Charles Hospital and Rehabilitation Center. He continued that it is not up to

the nurses to decide or determine the patient's course of medical treatment; rather, their primary duty is to follow and implement the physician's orders. Dr. Sumner opined that there is no evidence that any nurse failed to follow or implement any physician's orders, or that any nurse otherwise deviated from any standards of nursing practice. He concluded that there is no causal connection between the care provided by them and St. Charles Hospital and Rehabilitation Center and the plaintiff's alleged injuries.

Based upon the foregoing, it is determined that St. Charles Hospital and Rehabilitation Center has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against it. Neither the plaintiff nor co-defendants have opposed this motion, or otherwise raised a factual issue to preclude summary judgment from being granted to St. Charles Hospital and Rehabilitation Center.

Accordingly, the motion (004) by St. Charles Hospital and Rehabilitation Center for summary dismissal of the complaint as asserted against it is granted.

Dated: SEP 29 2014



HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION