

Calise v Mahon

2014 NY Slip Op 32800(U)

May 7, 2014

Sup Ct, Westchester County

Docket Number: 50436/2012

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
**DAVIDE CALISE, As Administrator of the Estate
of ANNA CALISE, Deceased, and DAVID CALISE,
Individually,**

Plaintiffs,

-against-

**DECISION & ORDER
Index No. 50436/2012
Seq Nos. 1&3**

**THERESA MAHON, M.D., JOANNE MAZZIO, CMN,
HUDSON VALLEY OB/GYN ASSOCIATES, LLP,
DOUGLAS R. MAILLY, M.D., DAVID BURNS, M.D.,
THE WESTCHESTER MEDICAL PRACTICE, P.C.,
HUDSON VALLEY HOSPITAL CENTER, AQSA
MALIK, M.D. and BECKER MEDICAL, P.C.,**

Defendants.

-----X
WOOD, J.

The following papers numbered 1-36 were read and considered in connection with the moving defendant's motion for summary judgment, and plaintiffs' cross-motion to add a new party defendant:

Defendant Maily's Notice of Motion, Counsel's Affirmation, Exhibits.	1-14
Notice of Plaintiffs' Cross-Motion, Counsel's Affirmation, Exhibits.	15-26
Defendant Maily's Counsel's Reply and Affirmation in Opposition, Exhibits.	27-35
Plaintiffs' Counsel's Reply Affirmation.	36

On August 12, 2010, plaintiffs commenced this action by the filing of a summons and verified complaint on August 12, 2010, under Index #19523/10.¹ Moving defendant Dr. Maily

¹This action was consolidated with a new action against defendants Malik and Becker Medical, P.C. on March 27, 2012 under the Index #50436/12.

("Dr. Maily"), joined issue by service of a verified answer on or about September 16, 2010. Plaintiffs filed a note of issue on October 30, 2013. Plaintiffs' action sounds in medical malpractice and wrongful death to recover damages against Dr. Maily and the various co-defendants, for allegedly negligently failing to diagnose and treat toxic shock syndrome of the decedent, Anna Calise, ("the decedent"), causing her death from acute peritonitis, anoxic brain damage and sepsis from toxic shock syndrome on January 18, 2010.

The decedent, 32 years of age, had given birth to her fourth child on October 26, 2009. A tubal ligation procedure was performed on January 14, 2010, at Hudson Valley Hospital by Dr. Theresa Mahon. One day later, the decedent was seen by Dr. Maily in the Hudson Valley Hospital Emergency Room, complaining of abdominal pain following the tubal ligation. On examination, Dr. Maily found that the abdominal pain was mild and diffuse. There was no rebound, guarding masses or distension. There was no sign of infection of the laparotomy incisions. Dr. Maily took a history and performed a physical examination, he ordered blood chemistries and a CT of the abdomen (as was suggested by Dr. Mahon, the decedent's ob/gyn, who had initial sent her to the hospital). Dr. Maily's shift ended at 6:48 p.m., before the results of these tests came back, and he had no further contact with the decedent. The patient's care was subsequently handled by ER attending Dr. Geller (non-party), and Dr. Mahon. Dr. Mahon evaluated the patient later that evening after the lab results and CT report were available. The decedent was discharged at 10:07 p.m. with printed instructions to follow up with her primary physicians in 1 day and with her obstetrician, Dr. Mahon, in 1-2 days. The decedent was specifically advised to contact her physician or return to the emergency room if she had constant or increased pain, pain that is not improved in 24 hours, or loss of appetite. The decedent returned to the ER two days later on January 17, 2010, reporting she had felt fine

after the discharge on January 15, 2010. New symptoms of nausea, vomiting, diarrhea and diffuse body rash had begun the morning of January 17, 2010. She was found to have Group A streptococcal peritonitis and post operatively deteriorated despite full resuscitation measures. On January 18, 2010, at 7:05 p.m. she expired due to septic shock.

Dr. Maily now brings this motion for summary judgment pursuant to CPLR §3212 to dismiss all claims against him; direct the entry of judgment in favor of Dr. Maily; and amend the caption to delete “Douglas R. Maily, M.D.” therefrom.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a 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 demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakobovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v

Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

“To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (Stukas v. Streiter, 83 AD3d 18,23 [2d Dept 2011]). “In a medical malpractice action...a defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby” (Iulo v. Staten Island University Hospital, 106 AD3d 696,697 [2d Dept 2013]). To defeat the defendant’s application, the plaintiff must only submit evidentiary facts or materials to rebut the defendant’s prima facie showing. In other words, “this means that if the defendant demonstrates only that he or she did not depart from good and accepted medical practice, plaintiff need only raise a triable issue of fact as to whether such a departure occurred. The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff’s injuries” (Stukas v. Streiter, 83 AD3d 18 [2d Dept 2011]).

In order to successfully oppose a motion for summary judgment dismissing a cause of action sounding in medical malpractice, a plaintiff must submit a physician’s affidavit of merit attesting to (depending on the defendant’s prima facie showing) a departure from accepted practice and/or containing the attesting doctor’s opinion that the defendant’s omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]; see Arkin v Resnick, 68 AD3d 692,694 [2d Dept

2009]). Conclusory or general allegations of medical malpractice, “unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for summary judgment” (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]; see Alvarez v Prospect Hospital, supra, at 325). Deposition testimony may establish issues of fact that require the denial of summary judgment (Stancil v. Supermarkets General, 16 AD3d 402 [2d Dept 2005]). To establish proximate cause in a medical malpractice action, “a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; see Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, “the plaintiff’s expert need not quantify the exact extent to which a particular act or omission decreased a patient’s chances [of a cure or increased her injury], as long as the jury can infer that it was probable that some diminution” in the plaintiff’s chance of a better outcome (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]). In addition, summary judgment “is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...such credibility can only be resolved by a jury” (Feinberg v Feit, 23 AD3d 517, 519 [2d Dept 2005] quoting Shields v Baktidy, 11 AD3d 671, 672 [2d Dept 2004]; see generally Darwick v Paternoster, 56 AD3d 714, 715 [2d Dept 2008]; Adjetey v. New York City Health and Hospitals Corp., 63 AD3d 865 [2d Dept 2009]).

Further, to establish a cause of action to recover damages for malpractice based on informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment and the alternatives that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (McKinney's Public Health Law §2805-d(1) ; *see also* Magel v. John T. Mather Memorial Hospital, 95 AD3d 1081 [2d Dept 2012]).

Here, Dr. Maily's motion for summary judgment is supported by evidence establishing prima facie entitlement to judgment as a matter of law. In support of his motion, Dr. Maily submitted hospital records, and the transcript of his own deposition. Dr. Maily also offers the affirmation of Dr. Joseph LaMantia, M.D., board certified in Emergency Medicine and Internal Medicine, who opines that Dr. Maily's care was wholly within the relevant standards of care: "Dr. Maily's care was proper in all respects. He took an appropriate history and did a proper physical examination. He ordered appropriate lab work and CT of the abdomen. Those results were not yet available when his shift ended at 6:48 p.m. At that time, the patient appeared stable and her care was turned over to Dr. Geller and her private Ob/Gyn, Dr. Mahon. His preliminary consideration of viral infection was reasonable."² Dr. LaMantia advanced that "Dr. Maily could not be expected to diagnose peritonitis given the patient's presentation and the limited clinical information available to him. At the time his care ended, no additional testing or consultations were indicated. He did not depart from the standard of care in failing to

² *See Dr. Maily's Exh. G.*

diagnose peritonitis. His care did not cause the patient any injury”.³ Dr. LaMantia also addresses that was no indication for blood cultures, IV antibiotics, or an infectious disease consult at the time that Dr. Maily signed off to Dr. Geller (6:48 p.m.), because the CT scan results were not available until 8:39 p.m., and the lab results were still pending. Dr. Lamantia explains that Dr. Geller and Dr. Mahon reviewed the CT findings and lab results when Dr. Mahon arrived at Emergency later that evening, and arrived at a diagnosis of a viral illness. This evidentiary submission which indicates that Dr. Maily did not deviate from accepted standards of medical care is sufficient to meet Dr. Maily’s burden as a proponent of a summary judgment motion.

Accordingly, the burden shifts to plaintiffs to submit evidence which raises a triable issue of fact regarding these matters, and to demonstrate that Dr. Maily’s actions were a departure from the accepted standard of care in the medical community, and a proximate cause in bringing about the injury.

Plaintiffs have met their burden. Opposition to the summary judgment motion is supported by expert medical evidence raising a triable issue of fact. Here, plaintiffs have presented expert testimony, by way of an expert affidavit⁴ of a board certified physician in emergency medicine. The expert opined that Dr. Maily departed from good and accepted practice in failing to take blood cultures to determine if the decedent was having a bacterial infectious process and what strand of bacteria was causing the infection. Moreover, the expert advances that Dr. Maily failed to start the decedent on empiric IV broad spectrum antibiotics

³See Dr. Maily’s Exh. G.

⁴Under CPLR 3101(d) (1) (i) the expert affidavit contained within the motion papers has been redacted so as not to reveal the expert’s identity. The court was not presented with an in camera review of the expert’s identity. As Dr. Maily has not raised an objection, the court will consider the affidavit.

which would indicate what kind of infection the decedent was fighting and would have started her on a regiment of antibiotics before she evolved into full toxic shock syndrome and sepsis, prior to going off duty on January 15, 2010. Plaintiffs' expert opines that it was clear that based upon the decedent's presentation, infection was at top of the differential diagnosis when she came to the emergency room, as she presented with fever, shakes/chills, incision pain, tachycardia, abdominal pain and nausea which are all symptoms consistent with infection. Her history of a tubal ligation the day before dramatically increased the likelihood that her illness was caused by an infection. Plaintiffs' expert concludes that the failure of Dr. Mailyly to administer broad spectrum empiric IV antibiotics in the face of a clear infection was a violation of good and accepted medical care and a contributing factor in the decedent developing sepsis, peritonitis, toxic shock syndrome cardiac arrest and eventual death.

The court finds that the expert's affidavit did contain sufficient allegations to demonstrate that the conclusions it contained are more than mere speculation, in that it set forth foundational facts for his opinion, and it contained opinions within his area of expertise .

In light of the foregoing, plaintiffs have raised triable issues of fact to sufficiently defeat the motion by Dr. Mailyly, and therefore, the summary judgment motion is **DENIED**. The motion papers submitted have presented a credibility battle between the parties' experts and issues of credibility are properly left to a jury for its resolution (Barbuto v. Winthrop University Hospital, 305 AD2d 623 [2d Dept 2003]).

Plaintiffs' Cross-Motion to Add Emergency Medical Association of New York, P.C. as a named defendant

Leave to amend a pleading, absent prejudice or surprise to the opposing party, should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of

merit” (G.K. Alan Assoc., Inc. v Lazzari, 44 AD3d 95, 99 [2d Dept 2007]; Bogal v Finger, 59 AD3d 653, 655 [2d Dept 2009]; Holchender v We Transp., Inc., 292 A.D.2d 568, 569 [2d Dept 2002]). The granting of leave to amend a pleading is in the sound discretion of the trial court and the exercise of the court’s discretion will not be lightly disturbed (Henderson v Gulati, 270 AD2d 308, 309 [2d Dept 2000]). If an opposing party “wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing” (Lucido v Mancuso, 49 AD3d 220, 228-229 [2d Dept 2008]).

It is well settled, that a three prong test should be applied “in order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well” (Stevens v Winthrop S. Nassau Univ. Health Sys., Inc., 89 AD3d 835, 836 [2d Dept 2011]). The ‘linchpin’ of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period” (Alvarado v. Beth Israel Med. Ctr., 60 A.D.3d 981, 982, [2d Dept 2009]).

Under New York law, the doctrine of respondeat superior, a master may be vicariously liable for a tort committed by his servant that is within the scope of employment (Rivera v. Fenix Car Service Corp., 81 AD3d 622 [2d Dept 2011]). Plaintiffs raise the point that

Emergency Medical Association of New York, P.C. (“Emergency Medical”) is united in interest with Dr. Maily and by reason of that relationship can be charged with notice of the institution of the action such that they will not be prejudiced in maintaining a defense on the merits (Quiroz v. Beitia, 68 AD3d 957 [2d Dept 2009]). Plaintiffs claim that they first learned that Dr. Maily was providing medical care and treatment to the decedent as an employee/partner of Emergency Medical, during his examination before trial dated May 21, 2013. Plaintiffs claim that Dr. Maily will not be prejudiced by this amendment and will in no way hinder this case from going to trial.

However, Dr. Maily opposes the addition of Emergency Medical, claiming that plaintiffs only wish to add Emergency Medical at this time because of some sort of tactical strategy, that plaintiffs may settle with Hudson Valley Hospital. Dr. Maily claims that the timing of this application is telling, including that it is almost one year after his deposition, and have offered no excuse for the delay in moving to add Emergency Medical.

Since the statute of limitations has now expired on both plaintiffs’ conscious pain and suffering claim, as well as the wrongful death claim, plaintiffs have the burden to present evidence sufficient to establish that the relation-back doctrine applies. To that end, the court finds that plaintiffs satisfied the requirements of the three prong test, *inter alia*, that the claims going to be alleged against Emergency Medical arise out of the care Dr. Maily provided to the decedent; Dr. Maily is an employee and partner of Emergency Medical; the first time plaintiff learned that Dr. Maily was a member of Emergency Medical was at Dr. Maily’s deposition on May 21, 2013, and at that point the statute of limitations had expired on both plaintiffs’ conscious pain and suffering claim as well as the wrongful death claim. Moreover, Dr. Maily has not shown prejudice why his group should not be named as a defendant in this action.

Further, there is no credible evidence that the new defendant did not have knowledge of this litigation.

Therefore, in the instant matter, plaintiffs have set forth sufficient proof that the proposed amendment is permissible. The Court finds that the defendants will not be prejudiced or subject to unfair surprise based on the proposed amendment to the proposed complaint. Accordingly, the court grants plaintiffs' cross-motion in accordance with CPLR §3025(b) to add "Emergency Medical Association of New York, P.C." as a defendant in this action.


NOW, therefore, it is hereby

ORDERED that within thirty (30) days of service of a copy of this order, plaintiffs are directed to serve the supplemental summons and amended complaint upon defendants and the added party defendant, "Emergency Medical Association of New York, P.C.," which shall have twenty (20) days, upon service of the supplemental summons and amended complaint, to serve an answer or amended answer, and it is further

ORDERED, that the parties are directed to appear at a settlement conference on 6/25/14 at 9³⁰ a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

All matters not herein decided are denied. Plaintiffs are directed to serve a copy of this Decision and Order, with notice of entry, upon defendants, and newly added defendant within 10 days of such entry. This constitutes the Decision and Order of the court.

**Dated: May 7, 2014
White Plains, New York**


HON. CHARLES D. WOOD
Justice of the Supreme Court