

Cutrona v Marciano

2014 NY Slip Op 33693(U)

October 28, 2014

Supreme Court, Nassau County

Docket Number: 2588/12

Judge: Robert A. Bruno

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----x
LISA CUTRONA, as Mother and Natural Guardian of
ALLISON CUTRONA, JOSEPH CUTRONA,
Individually; and LISA CUTRONA, Individually,

Plaintiffs,

TRIAL/IAS PART 19
INDEX No.: 2588/12
Submission Date: 08/29/14
Motion Sequence: 001 & 002

-against-

TUVIA AHARON MARCIANO, D.O.; FRAN
SCHNEIDER, PNP; ARTHUR S. KAYE, M.D.; PAR
PEDIATRICS, LLP; WINTHROP PEDIATRIC
ASSOCIATES, P.C.; and WINTHROP UNIVERSITY
HOSPITAL,

Defendants.

DECISION & ORDER

Papers Numbered

Sequence #001

Notice of Motion, Affirmation & Exhibits (defendants
Arthur S. Kaye, MD and Park Pediatrics, LLP 1

Sequence #002

Notice of Motion, Affirmation & Exhibits (defendants
Tuvia Aharon Marciano, DO, Winthrop Pediatric
Associates, PC and Winthrop University Hospital 2

Affirmation in Opposition & Exhibits 3

Reply Affirmation & Exhibits 4

Upon the foregoing papers, it is ordered that the motion (Mot. Seq. #001) by defendant Arthur S. Kaye, M.D. ("Dr. Kaye") for summary judgment, pursuant to CPLR 3212, and the motion (Mot. Seq. #002) by defendants Tuvia Aharon Marciano, D.O. ("Dr. Marciano"), Winthrop Pediatric Associates, P.C. ("WPA") and Winthrop University Hospital ("WUH") for summary judgment, pursuant to CPLR 3212, are determined as set forth below.

This medical malpractice action was commenced by the filing of a summons and verified complaint on February 29, 2012. Issue was joined by service of answers on behalf of each of the defendants.

The note of issue was prematurely filed on September 5, 2013. The matter was certified

[* 2]
Cutrona v Marciano et al
Index No.: 2588/12

as ready for trial on October 10, 2013 and the note of issue was thereafter accepted on December 9, 2013. Defendants' motions for summary judgment are timely.

This medical malpractice action arises from defendants' alleged failure to timely diagnose the infant plaintiff's appendicitis. The verified complaint alleges that defendants failed to appreciate the signs and symptoms of appendicitis, failed to perform an adequate physical examination and take a thorough history, and failed to order appropriate tests, causing the infant plaintiff, Allison Cutrona, to suffer from undiagnosed appendicitis, with her appendix rupturing on July 28, 2010, requiring surgical intervention.

To prevail on a motion for summary judgment in a medical malpractice action, defendants bear the burden of establishing either the absence of any departure from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries (*Heller v Weinberg*, 77 AD3d 622 [2d Dept 2010]). Once defendants meet that burden, plaintiff must submit evidentiary facts or materials to rebut defendants' *prima facie* showing so as to demonstrate the existence of a triable issue of fact. General, conclusory allegations unsupported by competent evidence are insufficient to defeat defendants' motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In support of his motion for summary judgment dismissing the complaint as against him, defendant Dr. Kaye offers the affirmation of Dr. Arnold J. Goldman, a board certified pediatrician, who opines that Dr. Kaye's assessment of the infant plaintiff and plan of care were entirely within the standard of care, that his examination was thorough and his recommendation for an ultrasound was appropriate and led to the correct diagnosis. He further opines that the infant plaintiff's appendix had already perforated by the time she was seen by Dr. Kaye.

He concludes that the care and treatment rendered by Dr. Kaye to the infant plaintiff was at all times in accord with good and accepted medical practice and instrumental in achieving the correct diagnosis, and that nothing he did or did not do proximately caused the infant plaintiff's injuries.

Based upon the foregoing, defendant Dr. Kaye has met his *prima facie* burden by establishing the absence of any departure from good and accepted medical practice in his treatment of the infant plaintiff, as well as demonstrating a lack of causation. Plaintiffs have failed to offer any opposition to Dr. Kaye's motion for summary judgment. Therefore, the motion for summary judgment by defendant Dr. Kaye is granted and the complaint is dismissed as against him.

In support of their motion for summary judgment, defendants Dr. Marciano WPA and WUH offer the affirmation of Dr. Leif Holgersen, a board certified pediatric surgeon and Chief of Pediatric Surgery at St. Luke's Roosevelt Hospital, who opines that they did not depart from accepted standards of medical care and practice or fail to obtain informed consent in connection with the treatment rendered to the infant plaintiff on July 13, 2010, and that none of their acts or omissions were a substantial factor in causing the infant plaintiff's injuries. Specifically, he

[* 3]
Autrona v Marciano et al
Index No.: 2588/12

avers that the standard of care to determine whether a patient has appendicitis is careful palpation of the abdomen in an attempt to elicit signs of peritonitis, as well as vigorous movement, such as having the patient cough or jump. He notes that Dr. Marciano performed an appropriate, comprehensive abdominal exam and observed that the infant plaintiff was able to jump without pain. He further opines that a CT scan was not indicated based on the infant plaintiff's history and physical exam and that it is not the standard of care to perform CT scans on every patient complaining of abdominal pain because of the radiation risks associated with such studies. It is also his opinion that none of the acts or omissions of defendants Dr. Marciano, WPA or WUH were a substantial factor in causing the infant plaintiff's injuries since surgical intervention would have been required regardless of when the infant plaintiff was diagnosed with appendicitis.

Contrary to plaintiffs' contentions, Dr. Holgersen's expertise and experience are sufficient to establish the prima facie burden of defendants Dr. Marciano, WPA and WUH that they did not depart from good and accepted medical practice in their treatment of the infant plaintiff. However, in opposition, plaintiffs offer the detailed affirmation of their expert, who is board certified in pediatrics and pediatric emergency medicine and who opines, based on his review of the records, that Dr. Marciano made several departures from good and accepted medical practice in failing to diagnose the infant plaintiff with appendicitis. He further opines that the delay in diagnosing the infant plaintiff's appendicitis was a substantial factor in causing the infant plaintiff to suffer a ruptured appendix, abscesses and the need for intravenous antibiotics and drainage. Specifically, plaintiffs' expert opines that Dr. Marciano departed from the standard of care by ordering a plain X-ray and failing to order a CT scan, or even an ultrasound, which would have involved no radiation. He further opines that Dr. Marciano departed from good and accepted medical practice by failing to take an accurate history and by failing to request a consultation from a surgeon or a pediatric emergency medicine specialist. It is also plaintiffs' expert's opinion that Dr. Marciano departed from good and accepted medical practice by failing to obtain an informed consent because the risk of the infant plaintiff's appendix rupturing was not explained to her parents when she was treated at the WUH emergency room by Dr. Marciano.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, which raise issues of credibility to be resolved by a jury (*Romano v Persky*, 117 AD3d 814 [2d Dept 2014]; *Shehebar v Boro Park Obstetrics & Gynecology, P.C.*, 106 AD3d 715 [2d Dept 2013]; *Poter v Adams*, 104 AD3d 925 [2d Dept 2013]).

The conflicting opinions of the parties' respective experts regarding the appropriate standard of care and proximate cause raise issues of fact as to the liability of defendants Dr. Marciano, WPA and WUH which must be resolved by the trier of fact.

Accordingly, it is,

ORDERED, that the motion (Mot. Seq. #001) for summary judgment seeking to dismiss

Cutrona v Marciano et al
Index No.: 2588/12

the complaint as against defendant Arthur S. Kaye, M.D. is GRANTED, without opposition, and it is further

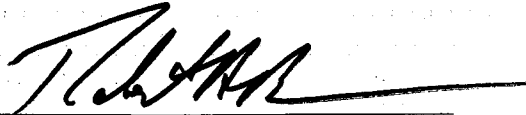
ORDERED, that the motion (Mot. Seq. #002) for summary judgment seeking dismissal of the complaint as against defendants Tuvia Aharon Marciano, D.O., Winthrop Pediatric Associates, P.C. and Winthrop University Hospital is DENIED.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: October 28, 2014
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE