

Marshall v United Health Servs. Hosps., Inc.
2015 NY Slip Op 30888(U)
March 9, 2015
Supreme Court, Broome County
Docket Number: 2012-1985
Judge: Jeffrey A. Tait
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 23rd day of January 2015.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

Lynell R. Marshall, et ux. David M. Marshall,

Plaintiffs,

DECISION AND ORDER

vs.

**Index No. 2012-1985
RJI No. 2013-0712-C**

United Health Services Hospitals, Inc., d/b/a UHS
Dermatology, Romeo Morales, M.D. and Michael
Barton, RPA-C,

Defendants.

APPEARANCES:

Ronald R. Benjamin, Esq.,
Law Office of Ronald R. Benjamin
Attorneys for Plaintiff
126 Riverside Drive
Binghamton, NY 13902-0607

James Moran, Esq.
Aswad & Ingraham
Attorneys for Defendant
46 Front Street
Binghamton, NY 13905

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the defendants' (Romeo Morales, M.D. and Michael Barton, RPA-C¹) motion for summary judgment. The plaintiffs (Lynell R. Marshall and David M. Marshall) oppose the motion. The action was discontinued against the defendant United Health Services Hospitals, Inc., d/b/a UHS Dermatology by Stipulation of Discontinuance filed on December 9, 2014.

This action was commenced by filing a summons and complaint on August 8, 2012. The complaint asserts causes of action for medical malpractice and a derivative claim for spousal loss of consortium. Defendants served answers and the parties conducted discovery.

The claim asserts that Ms. Marshall visited the office of the defendant concerning a spot of dark pigmentation on the end of her nose. She was seen by the defendant Michael Barton, a physician's assistant. She spoke with PA Barton and upon examination he noted a pigmented area on the end of her nose. PA Barton felt the area did not need treatment and no treatment was performed or suggested. She was advised to return at a future date or if the area changed. A year later the area had changed, Ms. Marshall returned, and a biopsy was performed. The biopsy revealed a malignancy. Treatment was provided.

¹
Mr. Barton will be referred to herein as PA Barton.

Ms. Marshall asserts that this course of action was below the applicable standard of care and the defendants PA Barton and Dr. Morales were negligent in the treatment or lack of treatment of her condition and Dr. Morales was negligent in the supervision of PA Barton.

PA Barton and Dr. Morales deny that the action taken or not taken was below the applicable standard of care and deny that there was a failure to properly supervise PA Barton.

Summary judgment

This is a motion for summary judgment in which the defendants seek an order dismissing the plaintiffs' complaint in its entirety.

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward

with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

The standard for summary judgment and analysis of a motion for summary judgment in a medical malpractice action was succinctly stated by the Third Department in *Suib v. Keller* (6 AD3d 805, 806 [3d Dept 2004]) in which the Court stated:

“In a medical malpractice action, the physician’s burden on a motion for summary judgment can be met by the submission of affidavits and/or deposition testimony and medical records to rebut plaintiff’s claim of [medical] malpractice with factual proof” (*Horth v. Mansur*, 243 AD2d 1041, 1042 [1997][citation omitted]). Plaintiffs must then rebut defendants showing by demonstrating, typically through expert medical opinion, a deviation from accepted practice and that the deviation was a proximate cause of the injury (*see Giambona v. Stein*, 265 AD2d 775, 776 [1999]). “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” [citations omitted].

Where a defendant medical care provider makes a prima facie showing of entitlement to summary judgment, plaintiff must establish a departure from accepted medical practice as well as a nexus between the alleged malpractice and plaintiff’s injury (*Passero v. Puleo*, 17 AD3d 953, 954 [3d Dept 2005], *citing Grzelecki v. Sipperly*, 2 AD3d 939, 941 [3d Dept 2003]).

Analysis

In support of their motion for summary judgment, the defendants provide the pleadings, Bill of Particulars, medical records, plaintiffs’ and PA Barton’s deposition testimony, the affidavit of their attorney, and an affirmation from Elizabeth Arthur, MD, an expert. In response, the Marshalls submit the affidavit of their expert Michael H. Tirgan, MD.

The defendants’ expert states in her affirmation that the medical records and testimony of PA Barton show that the care received by Ms. Marshall was within accepted standards for

dermatological care and there was no need for PA Barton to consult Dr. Morales, as Ms. Marshall's condition was one that is commonly handled by a physician's assistant. Regarding Ms. Marshall's June 20, 2011 office visit, defendants' expert affirms that even with a family history of melanoma, the accepted standard of care does not require a biopsy or referral to a specialist upon initial presentation of the pigmentation or discoloration. In short, nothing in the medical records or the testimony of PA Barton supports a finding that the care and treatment of Ms. Marshall was below the accepted standards for dermatological care.

The plaintiffs' expert disagrees and provides an affirmation which states that PA Barton failed to adhere to the standard of care for a physician's assistant and the supervision of PA Barton by Dr. Morales was below the accepted standards. Specifically, with regard to the office visit of June 29, 2011, he opines there was a failure to take a proper medical history, a failure to perform a proper physical exam, a failure to identify the malignant nature of the lesion, a failure to consult with his supervising physician, and a failure to arrange for a biopsy.

Among the items relied on by plaintiffs' expert is PA Barton's drawing of the lesion included in the medical record. Plaintiffs' expert notes that the drawing depicts a lesion that was "irregularly shaped and had an irregular border, a notch on the upper right margins . . . and a very thin band that extended over the left nostril . . ."

Plaintiffs' expert states that on June 29, 2011 the lesion had 4 out of 5 characteristics that indicate a melanoma in that it was asymmetrical, had an irregular border, was greater than 6 millimeters in size, and had evolved in size and had grown rapidly in a matter of a few months. This, he opines, required that PA Barton have her examined by Dr. Morales. He also opines that the supervision of PA Barton by Dr. Morales was deficient as well.

Clearly, among the factual disputes here are what the characteristics of the lesion were on June 29, 2011 and the appropriate treatment for that lesion.

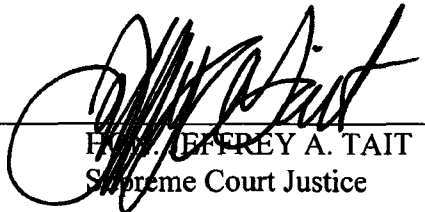
Such disputes are for resolution by a trier of fact—in this instance a jury. It is not the Court’s role or prerogative to make a summary determination when such issues of material fact are in dispute.

Conclusion

Based on the foregoing, the defendants’ motion for summary judgment is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: March 9, 2015
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
MAR 10 2015
BROOME COUNTY CLERK