

Cucalon v Staten Is. Univ. Hosp.

2015 NY Slip Op 32590(U)

May 14, 2015

Supreme Court, Richmond County

Docket Number: 102371/2011

Judge: Judith N. McMahon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

To: 212-606-8991

From: InSync Litigation Support

Pg 2/ 8 08/04/15 2:40 pm

Office of the Richmond County Clerk - Page 1 of 7 7/31/2015 11:57:12 AM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

ORIGINAL

-----X
RIGOBERTO CUCALON,

DCM PART 3

Plaintiff(s),

Present:
HON. JUDITH N. McMAHON

- against -

DECISION AND ORDER

STATEN ISLAND UNIVERSITY HOSPITAL,
JOHN SHIAU, M.D., and AZIZ GHOBRIEL, M.D.,

Index No. 102371/2011
Motion Nos. 001, 002, 003
004, 005

Defendant(s).
-----X

The following papers numbered 1 through 10 were used on these motions this 24th day of March, 2015:

[001] Notice of Motion (Defendant)(Affirmation in Support)-----	1
[002] Notice of X-Motion (Defendant)(Affirmation in Support)-----	2
[003] Notice of X-Motion (Defendant)(Affirmation in Support)-----	3
[004] Notice of Motion (Plaintiff)(Affirmation in Support)-----	4
[005] Notice of Motion (Defendant)(Affirmation in Support)-----	5
[001] Affirmation in Opposition (Plaintiff)-----	6
[002,003,005] Affirmation in Opposition (Plaintiff)-----	7
[001] Reply Affirmation (Defendant)(Affirmation in Support)-----	8
[005] Reply Affirmation (Defendant)-----	9
[001] Reply Affirmation (Plaintiff)(Affirmation in Support)-----	10

REC'D
 MAR 23 3 40 55
 RICHMOND COUNTY CLERK
 OFFICE OF THE CLERK

Upon a reading of the foregoing cited papers, it is ordered that Defendant's, Aziz Ghobriel, M.D. ("GHOBRIEL"), Motion for Summary Judgment seeking to dismiss the case as against GHOBRIEL is denied. The Motions to Strike Plaintiff's Supplemental Bill of Particulars made by GHOBRIEL, Defendant John Shiau, M.D. ("SHIAU"), and Defendant Staten Island University Hospital ("SIUH") were previously denied on the record on December 15, 2014, except insofar as the Court granted the further supplementation of the Bill of Particulars and allowed both parties to submit additional reply affirmations from their medical experts on this Motion Sequence 001. Plaintiff's Motion to extend the time to file notice of a medical malpractice action was granted on the record on December 16, 2014.

To: 212-608-8301

From: InSync Litigation Support

Pg 3/ 8 08/04/15 2:43 pm

Office of the Richmond County Clerk - Page 2 of 7 7/31/2016 11:57:13 AM

This action was commenced by Plaintiff, alleging medical malpractice for the alleged failure to treat Plaintiff, Rigoberto Cucalon ("CUCALON"), in a good, accepted, and proper medical manner.

Presently, issue has been joined, discovery is complete, and GHOBRIEL is moving for Summary Judgment, pursuant to CPLR Section 3212, on the ground that he did not deviate from accepted medical practice.

On June 30, 2009, CUCALON presented to the Emergency Room of SIUH complaining of lower back pain.

CUCALON was diagnosed with a T7-T8 herniated disc and was scheduled for surgery on July 7, 2009, at SIUH.

CUCALON's July 7, 2009 T7-T8 discectomy was performed by SHIAU. GHOBRIEL was the first of three anesthesiologists present for the procedure.

GHOBRIEL rendered pre-anesthesia from 1:30 - 1:40 P.M. GHOBRIEL began administering anesthesia at 1:48 P.M.

GHOBRIEL was present in the operating room until he was relieved by Dr. Lampert at 3:30 P.M. Dr. Lampert was relieved by Dr. Zaky at 6:00 P.M.

At approximately 7:35 P.M., SHIAU was advised by the monitoring technician that CUCALON's left tibial SEP (Somatosensory Evoked Potentials) amplitude was decreasing, and was unable to be detected. SHIAU testified that CUCALON, "was stable throughout the case. There were no untoward events other than the evoked potentials dropping down."

To: 212-688-8901

From: InSync Litigation Support

Pg 4/ 8 08/04/15 2:40 pm

Office of the Richmond County Clerk - Page 3 of 7 7/31/2015 11:57:12 AM

CUCALON alleges, among other allegations, that due to the negligence of Defendant(s) he suffered permanent paraplegia of the lower extremities and is permanently bound to a wheelchair.

CUCALON alleges that Defendant(s) failed to properly care for and treat him. CUCALON alleges that GHOBRIEL departed from good and accepted medical practice in hospital care, neurosurgery, and anesthesiology.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

In a medical malpractice action, "[o]n a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby." *Robozo v. Wren*, 41 A.D.3d 457, 838 N.Y.S.2d 121 (N.Y.A.D. 2nd Dept. 2007); See also *Williams v. Sahoy*, 12 A.D.3d 366, 783 N.Y.S.2d 664 (N.Y.A.D. 2nd Dept. 2004).

GHOBRIEL submits an Affirmation from Dr. Lisa Ross in support of his Motion for Summary Judgment. Dr. Ross states that GHOBRIEL's treatment of CUCALON conformed to accepted standards of practice and was at all times appropriate for a case of this particular nature, in which CUCALON had a known history of underlying medical conditions. Dr. Ross concludes

To: 212-686-8301

From: InSync Litigation Support

Pg 5/ 8 08/04/15 2:40 pm

Office of the Richmond County Clerk - Page 4 of 7 7/31/2016 11:57:11 AM

by stating that "[GHOBRIEL] committed no medical malpractice, act, or omission that did, or even could have caused the damages to [CUCALON]." *Ross Affirmation paragraph 7.*

Once the moving parties have satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact." *Chance v. Felder*, 33 A.D.3d 645, 823 N.Y.S.2d 172 (N.Y.A.D. 2nd Dept. 2006); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980). However, "the motion must be denied if there is even arguably any doubt as to the existence of a triable issue." *Baker v. Briarcliff Sch. Dist.*, 205 A.D.2d 652, 613 N.Y.S.2d 660 (N.Y.A.D. 2nd Dept. 1994).

CUCALON opposes the Motion and submits an affirmation from a medical expert who opines that GHOBRIEL departed from good and accepted medical practice in his treatment of CUCALON. *CUCALON Expert Affirmation paragraph 4.*

CUCALON's Expert states that, but not limited to, GHOBRIEL departed from accepted medical standards of practice by failing to conduct and/or participate in an inter-disciplinary conference with the neurosurgeon, the neurophysiological professional, and the neurophysiological technician prior to the operation. *CUCALON Expert Affirmation paragraph 5.* CUCALON's Expert also lists all of the topics and decisions that should have taken place during said discussion.

CUCALON's Expert also states that GHOBRIEL failed to decrease anesthesia levels in order to maintain adequate blood and oxygen perfusion to the spinal cord. *CUCALON Expert Affirmation paragraph 5.*

To: 212-688-8901

From: InSync Litigation Support

Pg 6/ 8 08/04/15 2:40 pm

Office of the Richmond County Clerk - Page 8 of 12 8/31/2016 11:27:44 AM

CUCALON's Expert further states that GHOBRIEL negligently permitted CUCALON's Spinal Cord Perfusion Pressure, Mean Arterial Pressure and blood pressure to decrease below standard and accepted levels. *CUCALON Expert Affirmation paragraph 5.*

CUCALON's Expert concludes that "these departures by [GHOBRIEL] were a proximate cause of the injuries sustained by [CUCALON] on July 7, 2009. *CUCALON Expert Affirmation paragraph 5.*

At Oral Argument before the Court on December 16, 2014, this Court granted both sides the opportunity to further address the allegations made in CUCALON's Supplemental Bill of Particulars, specifically the allegation that it was negligent for GHOBRIEL to not have had a multi-disciplinary discussion prior to CUCALON's procedure and not to have required a neurophysiologist to be present during the procedure.

In her second Affirmation, Dr. Ross states that, "it is not standard practice in the field of anesthesia for an anesthesiologist to determine whether a neurophysiologist should be present at a neurosurgical procedure. It is clearly the province of the surgeon to make that decision." *Ross Second Affirmation paragraph 8.*

Dr. Ross also states that, "there is no medical evidence presented that an infarct/ischemia occurred during the time period in which [GHOBRIEL] was at the surgery." *Ross Second Affirmation paragraph 10.*

In their second Affirmation, CUCALON's Expert states that GHOBRIEL's "failure to discuss MEP (Motor Evoked Potentials) neurophysiological monitoring in the pre-operative conversation shows a breach of [GHOBRIEL]'s duty to advise and recommend with regards to

To: 212-688-8901

From: InSync Litigation Support

Pg 7/ 8 08/04/15 2:48 pm

Office of the Richmond County Clerk - Page 6 of 7 7/31/2015 11:57:12 AM

the details of the anesthesia in connection with the neurophysiological monitoring, and as a member of the surgical team providing neurosurgery to [CUCALON]. [GHOBRIEL] had a duty to speak up, if he saw that the proper neurophysiological monitoring was not going to be used in the surgery. In this case, he breached his duty, because he failed to say an objection to the limited use of only SSEP neurophysiological monitoring." *CUCALON Expert Second Affirmation paragraph 7.*

CUCALON's Expert also states that it is their, "opinion to a reasonable degree of medical certainty that the hypotension of 100/60, which occurred from 1400 to 1500, while [GHOBRIEL] was providing anesthesia and responsible for maintaining adequate blood pressure and perfusion of oxygen to the spinal cord, said decline in blood pressure contributed to the paralysis sustained by [CUCALON] during the neurosurgery on July 7, 2009." *CUCALON Expert Second Affirmation paragraph 14.*

"[T]he opinions of [CUCALON]'s expert were based upon facts in evidence, and were not conclusory or otherwise insufficient." *Dandrea v. Hertz*, 23 A.D.3d 332, 804 N.Y.S.2d 106 (N.Y.A.D. 2nd Dept. 2005).

CUCALON's Expert's Affirmation(s) raises clear questions of fact that require a jury's resolution and as such, GHOBRIEL's Motion for Summary Judgment must be denied. *Shielder v. Bakhty*, 11 A.D.3d 671, 783 N.Y.S.2d 652 (N.Y.A.D. 2nd Dept. 2004).

As noted above, the Cross-Motions to Strike the Supplemental Bill of Particulars [Motion Sequence #'s 002, 003, 005] were previously denied on the record on December 16, 2014, except insofar as the Court granted the further supplementation of the Bill of Particulars and allowed

To: 212-688-8301

From: InSync Litigation Support

Pg 8/ 6 08/04/15 2:48 pm

Office of the Richmond County Clerk - Page 7 of 7 7/31/2015 11:57:12 AM

both parties to submit additional reply affirmations from their medical experts on this Motion Sequence 001 and the Motion to Extend the time to file notice of a medical malpractice action [Motion Sequence #004] was granted on the record on December 16, 2014.

Accordingly, it is

ORDERED that Defendant Aziz Ghobriel, M.D.'s Motion for Summary Judgment [Motion Sequence #001] seeking dismissal is denied, and it is further

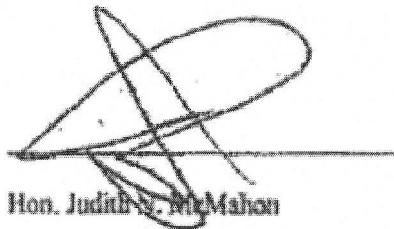
ORDERED that all parties appear for the previously scheduled conference on June 22, 2015, at 9:30 a.m. in the Jury Coordinating Part, and it is further

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 5/14, 2015

ENTER



Hon. Judith S. Mahon
Justice of the Supreme Court

GRANTED
MAY 26 2015
STEPHEN J. FIALA