

Kluesener v Good Samaritan Hosp. Med. Ctr.

2018 NY Slip Op 32688(U)

October 16, 2018

Supreme Court, Suffolk County

Docket Number: 08-4773

Judge: Sanford N. Berland

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INDEX No. 08-4773
CAL. No. 17-02519MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND,
A.J.S.C.

MOTION DATE 4-24-18 (007)
MOTION DATE 5-8-18 (008)
MOTION DATE 5-22-18 (009)
MOTION DATE 5-29-18 (010)
ADJ. DATE 7-24-18
Mot. Seq. # 007 - MG #009 - MG
008 - MG # 010 - MG; CASEDISP

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- against -

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GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, VOICHITA IONESCU, MD, ANSER
LONE, MD, ADRIANE COLLINS, DO,
MICHAEL F. GEWIRTZ, MD, s/h/a MICHAEL
GEWIRTZ, MD, MARK WAXS, MD, and
SANDHAYA SINGH, MD,

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Defendants.
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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant Adriane Collins, D.O., dated March 15, 2018; by defendants Voichita Ionescu, M.D., Anser Lone, M.D., and Mark Wax, M.D., dated April 16, 2018; by defendant Good Samaritan Hospital Medical Center, dated April 24, 2018; by defendant Michael F. Gewirtz, M.D., dated April 25, 2018; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated June 19, 2018, June 15, 2018, June 16, 2018 and June 19, 2018; Replying Affidavits and supporting papers by defendant Adriane Collins, D.O., dated July 13, 2018, by defendants Voichita Ionescu, M.D., Anser Lone, M.D., and Mark Wax, M.D., dated July 23, 2018, by defendant Good Samaritan Hospital Medical Center, dated July 19, 2018, and by defendant Michael F. Gewirtz, M.D., dated July 18, 2018; and after due deliberation thereon, it is,

ORDERED that the motion (seq. 007) by defendant Adriane Collins, D.O., the motion (seq. 008) by defendants Voichita Ionescu, M.D., Anser Lone, M.D., and Mark Wax, M.D., the motion (seq. 009) by defendant Good Samaritan Hospital Medical Center, and the motion (seq. 010) by defendant Michael F. Gewirtz, M.D., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Adriane Collins, D.O., for summary judgment in her favor dismissing the complaint and all cross-claims asserted against her is granted; and it is further

ORDERED that the motion by defendants Voichita Ionescu, M.D., Anser Lone, M.D., and Mark Wax, M.D., for summary judgment in their favor dismissing the complaint and all cross-claims asserted against them is granted; and it is further

ORDERED that the motion by defendant Good Samaritan Hospital Medical Center for summary judgment dismissing the complaint and all cross-claims asserted against it is granted; and it is further

ORDERED that the motion by defendant Michael F. Gewirtz, M.D., for summary judgment in his favor dismissing the complaint and all cross-claims asserted against him is granted.

Plaintiff Karen Kluesener commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice, *inter alia*, in failing to examine her mouth, x-ray her teeth, and diagnosis a dental abscess. Issue has been joined, discovery is complete, and a note of issue has been filed. The action against defendant Sandhaya Singh, M.D., has been discontinued by stipulation of discontinuance dated July 7, 2016.

Defendant Adriane Collins, D.O., now moves for summary judgment in her favor dismissing the complaint and all cross-claims asserted against her. In support of the motion, Dr. Collins submits, among other things, copies of the pleadings; her own deposition transcript and the deposition transcripts of plaintiff, defendant Voichita Ionescu, M.D., defendant Anser Lone, M.D., defendant Michael Gewirtz, M.D., and defendant Mark Wax, M.D.; plaintiff's medical records; and the expert affirmation of Irwin Ingwer, M.D.

Dr. Ionescu, Dr. Lone and Dr. Wax move for summary judgment in their favor dismissing the complaint and all cross-claims against them. In support of the motion, Dr. Ionescu, Dr. Lone and Dr. Wax submit expert affirmations of Rosario J. Romano, M.D., and Ivy A. Engel, M.D.; copies of the pleadings; their own deposition transcripts and the deposition transcripts of plaintiff, Ronald Kluesener, Dr. Gewirtz and Dr. Collins; and plaintiff's medical records.

Defendant Good Samaritan Hospital Medical Center moves for summary judgment in its favor dismissing the complaint and all cross-claims against it. In support of the motion, Good Samaritan Hospital submits copies of the pleadings; the deposition transcripts of plaintiff, Ronald Kluesener, Dr. Ionescu, Dr. Lone, Dr. Wax, Dr. Gewirtz, and Dr. Collins; expert affirmation of Rosario J. Romano, M.D., Ivy A. Engel, M.D., Irwin Ingwer, M.D., and Gregory Mazarin, M.D.; and plaintiff's medical records.

Defendant Dr. Gewirtz, moves for summary judgment in his favor dismissing the complaint and all cross-claims against him. In support of the motion, Dr. Gewirtz submits an expert affirmation of Gregory Mazarin, M.D.; copies of the pleadings; his own deposition transcript and the deposition transcript of plaintiff; and plaintiff's medical records.

In opposition to the motions, plaintiff submits an affirmation of counsel, her own deposition transcript and the deposition transcripts of the other parties.

Plaintiff presented to the emergency room of Good Samaritan Hospital Medical Center on August 30, 2005, with a reddened and swollen right eye and swelling to the right side of her face. Medical records indicate that she was examined by Dr. Gewirtz, who noted a right 7th nerve palsy with swelling to plaintiff's face. Dr. Gewirtz testified that he examined plaintiff, and medical records indicate he ordered a CBC, a Panel 14 study, a PT/PTT test and a urinalysis. Dr. Gewirtz also ordered the antibiotics Ancef and Zosyn, and diagnosed plaintiff with an abscess and cellulitis of the face. Plaintiff was admitted to the hospital by internist Dr. Ionescu and was evaluated by internist Dr. Lone. Dr. Lone noted, among other things, right facial cellulitis and fibromyalgia, as well as plaintiff's bipolar condition. He did not report any dental swelling, decay or bleeding. Dr. Lone ordered a CT scan of plaintiff's head and infectious disease, oral surgery and psychiatry consultations. Medical records indicate plaintiff was taking Wellbutrin, Effexor, and Risperdal.

Nonparty Dr. Michael Gray performed an infectious disease consultation on August 30, 2005, and his examination noted evidence of right periocular (the area near the orbit of the eye) and cheek swelling, and that the latter was tender to the touch, mildly warm and erythematous. Examination of plaintiff's gums revealed no obvious swelling, nor was there obvious dental decay or bleeding. Dr. Gray ordered a CT scan of plaintiff's right cheek, eyelid and orbits, and a head CT, and noted that an ENT evaluation might be necessary if there were evidence of sinusitis and a dental evaluation if there were evidence of a dental infection. He changed the antibiotic to Invanz. Plaintiff developed a possible allergic reaction to Invanz and her upper lip swelled and she experienced mouth pain. Medical records indicate that Benadryl was administered and infectious disease consultation was again called.

On August 31, 2005, infectious disease specialist Adriane Collins, D.O., examined plaintiff and changed the antibiotic to Vancomycin. The CT scan of plaintiff's sinuses revealed a bilateral swelling anterior to the maxilla, greater on the right side with a small fluid collection and some maxillary thickening. On September 1, 2005, plaintiff was examined by Dr. Collins and Dr. Lone. Plaintiff was also seen by oral surgeon, non-party Dr. Mazzei, who diagnosed plaintiff with a possible maxilla dental infection. Dr. Mazzei changed the antibiotic to Cleocin and discharged plaintiff, with follow-up at his

office on September 2, 2005. On September 2, 2005, Dr. Mazzei drained an abscess and during that month and the following month, plaintiff underwent root canal procedures.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (see *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (see *Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (see *Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (see *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (see *Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (see *Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, Dr. Collins has established a prima facie case of entitlement to summary judgment. Dr. Collin's expert, Dr. Irwin Ingwer, who is a board-certified in internal medicine and infectious disease, opines that the care provided by Dr. Collins was in keeping with the standards of good and accepted medical practice. He also opines that the care rendered by Dr. Collins or any alleged failure to render care was not the proximate cause of, or a significant factor in causing, any injury alleged by plaintiff. He specifically opines that Dr. Collins appropriately examined and evaluated plaintiff, appropriately discontinued Invanz, and appropriately started plaintiff on Vancomycin, an antibiotic that provides coverage for organisms causing cellulitis. Dr. Ingwer also opines that Dr. Collins appropriately re-evaluated plaintiff on September 1, 2005, and found improvement, including decreased facial swelling.

Finally, Dr. Ingwer opines that 7th nerve palsy was present on admission, and, therefore, Dr. Collins was not the cause of any injury to plaintiff.

Plaintiff has failed raised an issue of fact with regard to her claims against Dr. Collins. Plaintiff's opposition fails to include an expert affirmation that defendant Dr. Collins deviated from accepted standards of medical care and fails to establish proximate cause (*Burns v Goyal*, 145 AD3d 952, 44 NYS3d 180 [2d Dept 2016]; *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 26 NYS3d 182 [2d Dept 2016]; *Meade v Yland*, 140 AD3d 931, 33 NYS3d 444 [2d Dept 2016]). Accordingly the motion by Dr. Collins for summary judgment dismissing the complaint and all cross-claims asserted against her is granted.

Dr. Ionescu, Dr. Lone, and Dr. Wax have established their respective cases of prima facie entitlement to summary judgment. Dr. Rosario Romano, who is board-certified in internal medicine, opines that the treatment rendered by Dr. Ionescu and Dr. Lone was within the standard of good and accepted medical practice and that such treatment was not a proximate cause of plaintiff's alleged injuries. Dr. Romano opines that Dr. Ionescu's single examination of plaintiff, on August 30, 2005, at 6:00 - 6:30 a.m., was timely, thorough and proper. He specifically opines that the decision to admit plaintiff to the hospital and administer Zosyn, a broad spectrum antibiotic, was appropriate. He also opines that the treatment rendered by Dr. Ionescu did not cause plaintiff's alleged injuries. With regard to Dr. Lone, Dr. Romano opines that the request for an infectious disease consultation was timely and appropriate, and based upon a CT scan revealing maxillary swelling, an oral surgery consultation was also appropriate and in accordance with good and accepted medical practice. Finally, he opines that Dr. Lone's treatment of plaintiff did not proximately cause plaintiff's alleged injuries. Likewise, Dr. Ivy Engel, Dr. Wax's board-certified expert radiologist, opines that Dr. Wax's interpretation of the August 31, 2005, CT scan of plaintiff's sinuses was within the standard of good and accepted medical practice and that Dr. Wax's interpretation of the CT scan was not a proximate cause of plaintiff's alleged injuries.

Plaintiff has failed raised an issue of fact with regard to her claims against Dr. Ionescu, Dr. Lone, and Dr. Wax. Plaintiff's counsel's affirmation in opposition is insufficient, as a matter of law, to raise a triable issue of fact (*Fiore v Galang*, 564 NY2d 999, 489 NYS2d 47 [1985]; *Fileccia v Massapequa Gen. Hosp.*, 99 AD2d 796, 472 NYS2d 127 *affd* 63 NY2d 639, 479 NYS2d 520 [1984]). Accordingly the motion by Dr. Ionescu, Dr. Lone, and Dr. Wax for summary judgment dismissing the complaint and all cross-claims asserted against them is granted.

Good Samaritan Hospital Medical Center also has established a prima facie case of entitlement to summary judgment. Dr. Romano, Dr. Engel, Dr. Ingwer and Dr. Gregory Mazarin, Good Samaritan Hospital's expert witnesses, each opine that the care and treatment rendered to plaintiff at Good Samaritan Hospital did not deviate or depart from the accepted standards of medical care and that the treatment afforded plaintiff was not the proximate cause of any of plaintiff's alleged injuries. Dr. Ingwer, an infectious disease specialist, opines that plaintiff was properly and timely examined, that proper laboratory tests and radiological images were performed and that appropriate consultations and antibiotics were ordered. Significantly, Dr. Ingwer opines that plaintiff suffered from 7th nerve palsy upon admission to Good Samaritan Hospital and that the care rendered by Good Samaritan Hospital was

not the proximate cause of any of plaintiff's alleged injuries. In fact, the medical records here indicate that the treatment provided by the defendant hospital resulted in plaintiff's facial swelling to decreasing.

Plaintiff has failed to raised an issue of fact with regard to her claims against Good Samaritan Hospital Medical Center. Plaintiff offers no expert testimony raising an issue of fact with respect to any alleged deviation from accepted standards of medical care and also fails to establish any issue of fact with respect to proximate cause (*Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]). Accordingly the motion by Good Samaritan Hospital Medical Center for summary judgment dismissing the complaint and all cross-claims asserted against it is granted.

Dr. Gewirtz has established his prima facie entitlement to summary judgment. Dr. Gregory Mazarin, his expert specializing in emergency medicine, opines that the care rendered by Dr. Gewirtz was appropriate and within all applicable standards of care. Dr. Mazarin opines that there is no evidence in the medical records supporting plaintiff's claim that she was treated for a spider bite or an unknown brain infection as alleged in her bill of particulars. Dr. Mazarin opines that the appropriate antibiotic, Ancef, was started by Dr. Gewirtz on August 30, 2005, followed by Zosyn. Further, Dr. Mazarin opines that there is no proximate causal connection between the treatment rendered by Dr. Gewirtz and the injuries alleged by plaintiff.

Plaintiff has failed to raised an issue of fact with regard to her claims against Dr. Gewirtz. Plaintiff submits no expert medical affidavit to support her claim against Dr. Gewirtz, and her opposition is insufficient as a matter of law to raise an issue of fact with respect to any alleged departure from the applicable standard care or proximate cause (*Alvarez v Prospect Hosp.*, *supra*). Accordingly the motion by Dr. Gewirtz for summary judgment dismissing the complaint and all cross-claims asserted against him is granted.

Finally, the court notes that plaintiff has abandoned all additional claims, including an alleged violation of Public Health Law § 2803-c and an alleged HIPAA violation (*Kane v Triboro Bridge and Tunnel Authority*, 8 AD3d 239, 778 NYS2d 52 [2d Dept 2004]).

The foregoing constitutes the decision and order of the court.

Dated: 10/14/2008



Hon. Sanford Neil Berland
A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION