

Russell v Garafalo

2018 NY Slip Op 34401(U)

March 29, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 601810/2015

Judge: John H. Rouse

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INDEX NO. 601810/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 02/21/2018
ADJ. DATE: 03/07/2018
Mot. Seq. 002-MD

MOTION DATE: 03/07/2018
ADJ. DATE:
Mot. Seq. 003-MG

MOTION DATE: 02/28/2018
ADJ. DATE: 03/07/2018
Mot. Seq. 004-MD
e-filed full participation

Nancy E. Russell as Executrix of the Estate of David M. Russell,
Deceased, Nancy E. Russell Individually,

Plaintiffs

DECISION & ORDER

-against-

Anthony J. Garafalo M.D., South Bay Cardiovascular Associates,
P.C., Eastern Cardiology Associates, P.C., Cory A. Muscara M.D.,
Cory A. Muscara, M.D. D/B/A Family Medicine Associates Of
West Babylon, St. Francis Hospital,

Defendants

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Upon the reading and filing of the following papers in this matter:

(1) Notice of Motion (Seq. 002) for an Order pursuant to CPLR 3212 granting summary judgment on behalf of moving defendants, St. Francis Cardiovascular Physicians, P.C., d/b/a South Bay Cardiovascular Associates, P.C. s/h/a Southbay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C. and St. Francis Hospital dismissing plaintiff's Complaint against them with prejudice; all e-filed documents numbered 54-69 and 105, 108-110 and 115; and

(2) Notice of Motion (Seq. 003) by Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon for An Order granting summary judgment, pursuant to CPLR §3212 on the grounds that there are no triable issues of fact, and dismissing the Complaint and severing the action against the moving defendants, removing their names from the caption, and directing the Clerk of the Court to enter judgment in favor of the moving defendants and against the plaintiff; all e-filed documents numbered 70-87, 106, 107 and 114; and

(3) Notice of Motion (Seq. 004) by Defendant Anthony J. Garafalo, MD Pursuant to CPLR §3212, granting Defendant summary judgment and dismissing all claims against said defendant; directing the entry of judgment in favor of Defendant Anthony J. Garafalo, MD; and for an award of costs and disbursements, 88-104, 111-113, and 116.

it is:

ORDERED that the motion (Seq. #002) by defendants, St. Francis Cardiovascular Physicians, P.C., d/b/a South Bay Cardiovascular Associates, P.C. s/h/a Southbay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C. and St. Francis Hospital is denied; and it is further

ORDERED that the motion (Seq. #002) by defendants, Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon for summary judgment is granted the names of Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon shall be removed from the caption, and the Clerk of the Court to enter judgment in favor Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon; and it is further

ORDERED that the caption shall be as follows:

Nancy E. Russell as Executrix of the Estate of David
M. Russell, Deceased, Nancy E. Russell Individually,

Plaintiffs

-against-

Anthony J. Garafalo M.D., South Bay Cardiovascular
Associates, P.C., Eastern Cardiology Associates,
P.C., and St. Francis Hospital,

Defendants

ORDERED that Plaintiff is granted leave, within 20 days of service of this decision and order with notice of entry, to make a motion *in limine*, to preclude Defendants from offering evidence that Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon contributed in whole or part to the Plaintiff's injuries; and it is further

ORDERED that Plaintiff is directed to serve a copy of this decision and order as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.* <https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

DECISION

This medical malpractice/wrongful death lawsuit was brought on behalf of the estate of the plaintiff-decedent, David Russell. Plaintiff allege that the defendants failed to properly treat his cardiac condition, a left ventricular enlargement. Dr. Garafalo treated plaintiff-decedent at St. Francis Hospital South Bay Cardiovascular for 3 visits on August 28, 2012, September 5, 2012 and October 9, 2012. The moving defendants are said to be vicariously liable for his alleged acts/omissions. Plaintiff additionally claims that St. Francis Hospital South Bay Cardiovascular did not have a system in place for follow-up testing. Plaintiff-decedent died on September 11, 2014 from a ruptured ascending aortic aneurysm according to the autopsy report.

Motion 002 for Summary Judgment

St. Francis Cardiovascular Physicians, P.C., d/b/a South Bay Cardiovascular Associates, P.C. s/h/a Southbay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C. and St. Francis Hospital now move for summary judgment. In support of their motion Defendants offer the affidavit of Robert Perlmutter, M.D. wherein he opines that:

"Dr. Anthony Garafalo and his office, St. Francis Hospital South Bay Cardiovascular, did not deviate from accepted standards of care in the treatment that was rendered to the plaintiff-decedent, David Russell. It is further my opinion, within a reasonable degree of medical certainty, that the injuries and death of Mr. Russell were not proximately related to any of the care rendered by Dr. Garafalo/St. Francis Hospital South Bay Cardiovascular."

The movants have made a *prima facie* case in support of their motion for summary judgment. However, in opposition Plaintiff offers its expert who provided:

It is my opinion that the defendants Anthony J. Garafalo, M.D., South Bay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C., and St. Francis Hospital, deviated from reasonable and accepted standards of practice in their care and treatment of the plaintiff's decedent, David Russell, in failing to perform the required further diagnostic work up for the decedent's enlarged aortic root, which was evidence of a potential aortic aneurysm of the ascending thoracic aorta which was seen on the echocardiogram performed at defendant South Bay by defendant Garafalo, on September 5, 2012. This enlargement, when considered in connection with plaintiff's decedent's elevated blood pressure, hypertensive response to exercise, prior complaints of chest pain, discomfort, chest heaviness, light headedness upon exertion, and shortness of breath, required further work up, including chest x-ray, C/T scan or MRI of the chest. Had said testing been done the entirety of the ascending aorta would have been visualized evidencing an aortic aneurysm which required close follow up and referral to a surgery. Furthermore, the defendants failed to inform the decedent of said finding of an enlarged aortic root, the possible causes of same and the implications of the possibilities of said finding, including an aneurysm. The aforesaid deviations from accepted standard of practice were a competent and producing cause of the injuries to the decedent, that is the rupture with the resulting death suffered by David Russell, by depriving him of a significant and reasonable opportunity for early diagnosis and intervention for his aortic aneurysm.

The issues of fact presented by competing experts can only be resolved upon a trial of the action, not upon a motion for summary judgment. Accordingly the motion for summary judgment (Seq. #002) by St. Francis Cardiovascular Physicians, P.C., d/b/a South Bay Cardiovascular Associates, P.C. s/h/a Southbay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C. and St. Francis Hospital is in every respect denied.

Motion 003 for Summary Judgment

Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon move for summary judgment on the claims against them.

Prior to the Defendants making this motion Plaintiffs' counsel prepared and executed a Stipulation of Discontinuance as to Dr. Muscara and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon. However, the co-defendants would not execute the Stipulation due to the restrictive language. Specifically the stipulation of discontinuance provided that it was not a release or covenant not to sue as defined by General Obligations Law 15-108, and further that all parties waive any right to a reduction and/or apportionment of liability or damages as might otherwise be permitted under General Obligations Law 15-108. Notably, the co-defendants have not asserted any cross claims in this action.

In support of their motion for summary judgment Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon offer the affidavit of David I. Hauer, MD wherein he opines that:

"I can state the following opinions within a reasonable degree of medical certainty that the medical treatment rendered to the plaintiff-decedent, David Russell by Dr. Muscara and Family Medicine Associates of West Babylon were at an times within good and accepted standards, and that the injuries alleged by the plaintiff, were in no way caused or contributed by any actions or omissions asserted against Dr. Muscara or Family Medicine Associates of West Babylon... [I]t is my opinion to a reasonable degree of medical certainty that Dr. Muscara comported with the standard of care at all times. It is further my opinion, to a reasonable degree of medical certainty that there is nothing that Dr. Muscara did or failed to do that was the proximate cause of plaintiffs alleged death."

Defendants Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon have made a *prima facie* case in support of their motion for summary judgment and Plaintiff has failed to raise a material issue of fact. Accordingly Defendants, Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C. d/b/a Family Medicine Associates of West Babylon, motion for summary judgment is granted. None of the Defendants have opposed this motion.

An outstanding question that has not been briefed by the parties is whether the remaining defendants are permitted to offer evidence that, in fact, Cory A. Muscara, M.D. bears some or all of the responsibility for the damages claimed by Plaintiff now that these Defendants have been granted summary judgment. See *Sellino v Kirtane*, 73 A.D.3d 728 (2nd Dept. 2010); *Johnson v Peloro*, 62 A.D.3d 955(2nd Dept. 2009).

Motion 004 for Summary Judgment

Defendant Anthony J. Garafalo, MD, in support of his motion for summary judgment offers the affidavit of Stanley Schneller, MD wherein he opines that:

"Upon a careful review of the aforementioned materials, it if my opinion within a reasonable degree of medical certainty that the treatment rendered by Dr. Garafalo was within good and accepted medical practice, did not deviate from the accepted standard of care, and that the rendered treatment did not in any manner proximately cause or contribute to the injuries or death of the decedent. Specifically, it is my opinion that Dr. Garafalo comported with good and accepted medical practice in properly evaluating the decedent, in properly performing a cardiac work-up, in properly interpreting the results of diagnostic testing and in properly evaluating and assessing the decedent. Moreover, there is no objective medical evidence correlating or connecting the decedent's medical treatment by Dr. Garafalo with decedent's injuries or death... Here, the unfortunate cardiac event which resulted in Mr. Russell's death - two year after his last visit to Dr.

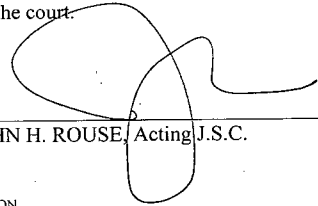
Garafalo's office - was not as a result of any departure from good and accepted medical practice by Dr. Garafalo. There were no acts or omissions which were departures from the standard of care, and there was no indication for any additional testing or referrals for testing or evaluation by any other medical provider at any time"

In opposition to Defendant's motion Plaintiff offers the affidavit of its own expert wherein this expert opines:

"It is my opinion that the defendants Anthony J. Garafalo, M.D., South Bay Cardiovascular Associates, P.C., Eastern Cardiology Associates, P.C., and St. Francis Hospital, deviated from reasonable and accepted standards of practice in their care and treatment of the plaintiff's decedent, David Russell, in failing to perform the required further diagnostic work up for the decedent's enlarged aorticroot, which was evidence of a potential aortic aneurysm of the ascending thoracic aorta which was seen on the echocardiogram performed at defendant South Bay by defendant Garafalo, on September 5, 2012. This enlargement, when considered in connection with plaintiff's decedent's elevated blood pressure, hypertensive response to exercise, prior complaints of chest pain, discomfort, chest heaviness, light headedness upon exertion, and shortness of breath, required further work up, including chest x-ray, C/T scan or MRI of the chest. Had said testing been done the entirety of the ascending aorta would have been visualized evidencing an aortic aneurysm which required close follow up and referral to a surgery. Furthermore, the defendants failed to inform the decedent of said finding of an enlarged aortic root, the possible causes of same and the implications of the possibilities of said finding, including an aneurysm. The aforesaid deviations from accepted standard of practice were a competent and producing cause of the injuries to the decedent, that is the rupture with the resulting death suffered by David Russell, by depriving him of a significant and reasonable opportunity for early diagnosis and intervention for his aortic aneurysm."

The issues of fact presented by competing experts can only be resolved upon a trial of the action, not upon a motion for summary judgment. Accordingly the motion for summary judgment (Seq. #004) by Defendant Anthony J. Garafalo, MD is denied.

The foregoing shall constitute the decision and order of the court.



JOHN H. ROUSE, Acting J.S.C.

Dated: March 29, 2018

NON-FINAL DISPOSITION