

Borrometi v Addeo

2019 NY Slip Op 30817(U)

March 20, 2019

Supreme Court, Kings County

Docket Number: 501468/2014

Judge: Bernard J. Graham

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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of March, 2019.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

-----X
GERARDO BORROMETI AND GRACE BORROMETI,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 501468/2014

JOSEPH ADDEO, M.D. AND OVINGTON MEDICAL ASSOCIATES, P.C.,

Defendants.

-----X
The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed _____	1-3
Opposing Affidavits (Affirmations) _____	4-5
Reply Affidavits (Affirmations) _____	6

Upon the foregoing papers, the defendants Joseph Addeo, M.D., and Ovington Medical Associates, P.C., seek an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them (MS #5).

Plaintiff Gerardo Borrrometi¹ commenced this action on February 20, 2014 by filing a summons and complaint alleging medical malpractice by the defendants for failing to diagnose and treat his heart attack. Issue was joined by the defendants on March 24, 2014

¹ Plaintiff Grace Borrrometi brings a derivative claim for loss of consortium.

and a note of issue was filed on April 7, 2017. Pursuant to a court order dated August 18, 2017, the defendants' time to move for summary judgment was extended to October 18, 2017. The defendants brought the instant and timely motion which was marked fully submitted on December 15, 2017 in Part 2 (Hon. Gloria M. Dabiri). Following Justice Dabiri's retirement, the present motion and underlying action was transferred to Part 36 (Hon. Bernard J. Graham) and marked fully submitted on March 14, 2019.

BACKGROUND

In the afternoon of November 4, 2013, plaintiff Gerardo Borrrometi ("Borrrometi") presented to Dr. Joseph Addeo ("Addeo") at Ovington Medical Associates, P.C., with complaints of chest and epigastric pain. In connection with this visit, Borrrometi stated that he had been experiencing chest pain and epigastric pain since the afternoon of November 3rd and had vomited that same evening. Dr. Addeo conducted a clinical evaluation and performed an EKG which revealed a "completed anterior wall myocardial infarction, possibly acute, with ST elevation in Q waves." Dr. Addeo prescribed dexolant for indigestion and advised Borrrometi that his symptoms were indicative of Gastroesophageal Reflux Disease (GERD) or a cardiac issue. Dr. Addeo recommended that Borrrometi follow-up with Dr. Mirsakov, a cardiologist at Ovington Medical Associates, and Borrrometi, accordingly, scheduled an appointment with Dr. Mirsakov for November 14, 2013. However, Borrrometi advanced his appointment to November 7, 2013 given his persistent symptoms. At the November 7th appointment, Dr. Mirsakov performed another EKG which revealed "QRS(T) contour abnormality consistent with anteroseptal infarct." Dr. Mirsakov

sent Borrrometi to Maimonides Medical Center (“Maimonides”) where he was admitted from November 7 through November 11, 2013. An angiogram performed at Maimonides revealed a 100% blockage of the left anterior descending artery (LAD) which was treated by stent placement. On November 11, 2013, Borrrometi had an ejection fraction of thirty percent and was discharged from Maimonides with a wearable defibrillator.

The plaintiffs’ bill of particulars alleges, *inter alia*, that Dr. Addeo was negligent in failing to properly evaluate Borrrometi’s complaints of epigastric pain, nausea, vomiting, chest pain and back pain; in failing to properly interpret the EKG performed on November 4, 2013; in failing to recognize that the plaintiff was suffering from an acute myocardial infarction that required immediate hospitalization; in failing to recognize that immediate treatment would reduce long term cardiac damage and increase the probability of survival; in negligently advising the plaintiff that his complaints were indigestion; and in negligently advising the plaintiff to return to the office in three days for assessment by a cardiologist. Borrrometi alleges that as a result of the defendants’ malpractice, he has sustained permanent injuries including ischemic cardiomyopathy; moderate to severe left ventricular dysfunction; a decreased ejection fraction; heart failure; diminished life expectancy; and conscious pain and suffering.

THE PARTIES’ CONTENTIONS

In support of their motion, the defendants provide the affirmation of Dr. Philip M. Gelber – a board-certified physician, licensed to practice in New York, with a sub-certification in cardiovascular disease. Dr. Gelber avers that he has reviewed the pleadings,

the plaintiffs' verified bill of particulars, the parties' deposition transcripts and Borrrometi's medical records maintained by Dr. Addeo, Ovington Medical Associates, Dr. Mirsakov and Maimonides Medical Center. Dr. Gelber opines, *inter alia*, that any alleged departures by Dr. Addeo were not the proximate cause of any of plaintiff's alleged injuries. Dr. Gelber avers that based on Borrrometi's November 4, 2013 EKG, plaintiff sustained an anterior wall myocardial infarction (i.e. a heart attack) on November 3rd that was completed by the time he presented to Dr. Addeo on November 4th. Dr. Gelber explains that a patient who suffers an actual myocardial infarction has a window of approximately six hours to seek medical treatment to preserve cardiac function and that thereafter any "damage to the myocardium and resultant decline in cardiac function is permanent and irreversible." Thus, Dr. Gelber concludes that Borrrometi sustained his alleged injuries prior to his November 4th visit to Dr. Addeo and that, as a result, Dr. Addeo's actions or inactions did not proximately cause harm to him.

In opposition, the plaintiffs contend that Dr. Addeo's failure to diagnose Borrrometi's heart attack on November 4th caused further cardiac damage than if he had been timely diagnosed and treated. In support of their opposition, the plaintiffs offer a redacted affidavit² from a board certified cardiologist with subspecialties in internal medicine and cardiovascular disease licensed to practice in New York. The plaintiffs' expert states that he has reviewed Borrrometi's relevant medical records, the deposition testimonies of the plaintiffs and Dr. Addeo and the affirmation of Dr. Gelber. The expert opines that Dr. Addeo

² An unredacted affidavit of plaintiffs' expert was provided to this court.

departed from acceptable standards of medical practice when he failed to diagnose Borrrometi's heart attack when presented with the November 4th EKG result in conjunction with Borrrometi's then complaints of chest pain and vomiting from the night before. The expert explains that Borrrometi's November 4th EKG was "highly suggestive" of a heart attack as it read: "ST-segment and T-wave changes consistent with an acute ST elevation anteroseptal infarct (a STEMI)." The expert opines that the second EKG, conducted by Dr. Mirsakov on November 7, 2013, showed additional changes including "ST-segment elevation in the inferior leads and worsening of the ST-segment elevation previously noted in the anterior leads." Accordingly, the plaintiffs' expert opines that had Borrrometi been timely diagnosed and treated, via stent placement on November 4th as opposed to November 7th, blood flow restoration to his heart would have resulted in less cardiac damage.

In reply, the defendants assert that the plaintiffs' expert's affirmation is insufficient and conclusory in that the physician fails to set forth medical evidence establishing that Borrrometi was deprived of a chance for a cure. In addition, defendants contend that plaintiffs' verified bill of particulars fails to allege that Dr. Addeo's malpractice *exacerbated* the irreversible injuries Borrrometi sustained as a result of the heart attack.

DISCUSSION

Summary judgment deprives a litigant of his or her day in court and, therefore, should only be granted when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, Dr. Addeo establishes, through the affirmation of Dr. Gelber, that his treatment of Borrrometi did not proximately cause Borrrometi’s alleged injuries. Dr. Gelber’s affirmation, which is based upon his review of the deposition testimonies and Borrrometi’s medical records, including physician’s notes and EKG findings, *prima facie* establishes that Borrrometi sustained a heart attack on November 3rd, the day before his appointment with Dr. Addeo, and that any damage to his heart and cardiac function was irreversible by the time he presented to Dr. Addeo. Dr. Gelber underscores that it is generally accepted within the field of cardiology that patients who suffer an acute myocardial infarction have a window of approximately six hours to seek medical treatment in an attempt to salvage damaged heart muscle and preserve cardiac function. Given that Borrrometi presented to Dr. Addeo approximately twenty-two hours after the onset of cardiac symptoms, the defendants have made a *prima facie* showing that Dr. Addeo did not proximately cause Borrrometi’s injuries.

In opposition, the plaintiff must “lay bare [his] proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, ‘(1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such departure was a proximate cause of injury’”

(*Sheridan v Bieniewicz*, 7 AD3d 508, 509 [2d Dept 2004] quoting *DiMitri v Monsouri*, 302 AD2d 420, 421 [2d Dept 2003]; see *Gargiulo v Geiss*, 40 AD3d 811, 811-812 [2d Dept 2007]). The non-moving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of non-liability that is the subject of the moving party's *prima facie* showing (*Stukas v Streiters*, 83 AD3d 18, 24 [2d Dept 2011]). "Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Shields v Baktidy*, 11 AD3d 671, 672 [2004]; see also *Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2003]).

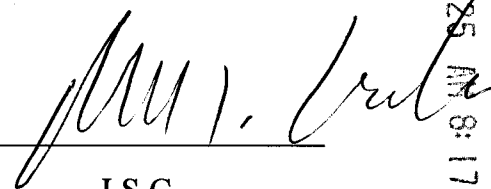
In this instance, plaintiffs' expert contends that based on his review of Borrrometi's medical record, the pleadings, and deposition testimonies, Dr. Addeo's failure to diagnose Borrrometi's heart attack on November 4th proximately caused him to sustain further cardiac damage. The physician points to marked changes in Borrrometi's November 4th and November 7th EKG findings with the latter EKG depicting additional changes including ST-segment elevation in the inferior leads and worsening of the ST-segment elevations previously noted in the anterior leads. Accordingly, the plaintiffs' and defendants' experts present conflicting opinions as to whether Dr. Addeo's failure to diagnose and treat Borrrometi's heart attack on November 4th exacerbated his cardiac damage. Defendants contend that such a claim was not alleged in plaintiffs' bill of particulars and is thus improperly before the court. A bill of particulars in a medical malpractice action "must

provide a general statement of the acts or omissions constituting the alleged negligence” (*Toth v. Bloshtinsky*, 39 A.D.3d 848, 849 [2d Dept 2007]; *see* CPLR 3043[a][3]; *Kaplan v. Rosiello*, 16 A.D.3d 626, 792 [2d Dept 2005]). However, “[t]he purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial – it is not an evidence gathering device” (*Scalone v. Phelps Memorial Hosp.Center*, 184 AD2d 65, 76 [1992]). The plaintiffs’ bill of particulars satisfies this standard by apprising the defendants of their failure to diagnose claim and alleging injuries such as ischemic cardiomyopathy; moderate to severe left ventricular dysfunction; a decreased ejection fraction; heart failure; diminished life expectancy and conscious pain and suffering. Consequently, the plaintiffs’ bill of particulars need not explicitly set forth how the delay in diagnosing Borrometi’s heart attack exacerbated damage to his heart. Accordingly, it is

ORDERED that the motion by defendants Dr. Addeo and Ovington Medical Associates, P.C., for summary judgment is denied.

The foregoing constitutes the decision and order of this court.

ENTER



 JSC

HON. BERNARD J. GRAHAM

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 KINGS COUNTY CLERK
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