

Tomo v O'Leary

2023 NY Slip Op 33552(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 805024/2020

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

granted the Order to Show Cause, and gave plaintiffs until July 27, 2023, to either retain new counsel (*see* NYSCEF Doc. No. 60), or to advise this Court whether they wished to represent themselves. Plaintiffs chose the latter, served opposition to this motion on or about September 18, 2023, and participated in oral argument of the motion which was held on the record on October 5, 2023.

To prevail on a motion for summary judgment, the proponent must make *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 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

Here, defendants submit, *inter alia*, the expert affirmation of an orthopedic surgeon, Andrew C. Hecht, M.D. (*see* NYSCEF Doc. No. 27), who concludes to a reasonable degree of medical certainty that “Dr. O’Leary and the HSS staff treated and cared for plaintiff in accordance with the applicable standards of care, and that any alleged departure from good and accepted medical practice did not cause or contribute to any of the injuries claimed” (*id.*, para 3).

“Movants’ expert affirmation is detailed, specific and factual in nature and is based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [internal citations omitted]). Accordingly, “[t]he affirmation of defendants’ expert was sufficient to meet defendants’ *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any

such departure was not a proximate cause of plaintiff's alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]).

"Where a defendant makes a *prima facie* entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]).

Here, despite his 40-year career in hospital administration (even serving as hospital vice president), Mr. Tomo has failed to adequately oppose defendants' summary judgment motion. While delineating his complaints in great detail, Mr. Tomo neglected (1) to submit the affirmation of a medical expert identifying defendants' departures from the standard of medical care, and (2) explain the proximate causation between defendants' allegedly negligent conduct and plaintiff's injuries. "An expert's opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert's opinion is without probative force" (*Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; *Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). The purported transcript of the dialogue between plaintiff and Dr. Diwashish Biswas fails to raise a triable issue of fact sufficient to defeat this motion.

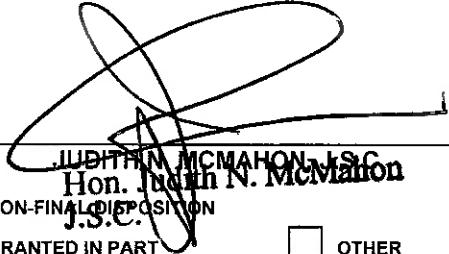
Accordingly, it is

ORDERED that the motion for summary judgment by the defendants Hospital for Special Surgery and Patrick F. O'Leary, M.D. is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing the plaintiffs' complaint with prejudice; and it is further

ORDERED that the captioned matter is dismissed.

10/10/2023
DATE


JUDITH N. MCMAHON, J.S.C.
Hon. Judith N. McMahon
J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE