Safuto v Rand
2024 NY Slip Op 35305(U)
March 21, 2024
Supreme Court, Queens County
Docket Number: Index No. 710255/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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KATHLEEN SAFUTO, as Administratrix of the Estate of DOMINICK SAFUTO, Deceased, and KATHLEEN SAFUTO, Individually,

Plaintiff,

-against-

JAMES RAND, M.D., RUCHIR GUPTA, M.D., MAGDY MIKHAIL, M.D., QUEENS ENDOSCOPY ASC, LLC, and QUEENS HEALTH/MEDICINE, LLC,

Defendants.

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Index No. 710255/2020

Part MDP
Motion Date: March 6, 2024

Calendar No. 22
Sequence No. 1

FILED
3/22/2024
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF-21 to EF-39 read on this motion by defendant JAMES RAND, M.D., for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Memorandum, Exhibits……EF21-EF39	

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant James Rand, M.D.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted without opposition, as defendant Dr. Rand established a prima facie case by eliminating all triable issues of fact with respect to whether he departed from accepted standards of medical care and proximately caused plaintiff's injuries. (*See generally Pirri-Logan v. Pearl*, 192 A.D.3d 1149 [2d Dept. 2021].)

Plaintiff Kathleen Safuto commenced this medical malpractice and wrongful death action arising out of plaintiff decedent Dominick Safuto's injuries and death suffered during his colonoscopy performed by defendant Dr. Rand on March 20, 2018. Plaintiff filed the Summons and Complaint on July 16, 2020 and issue was joined by defendant Dr. Rand via the filing of his Answer on or about November 5, 2019.

Defendant Dr. Rand argues that summary judgment should be granted, and presents the pleadings, deposition testimony, and expert affirmation from Dr. Michael Frank in support of his motion. Defendant Dr. Rand argues that the evidence shows he did not depart from acceptable standards of care or proximately cause or contribute to plaintiff's injuries. Defendant Dr. Rand argues that the colonoscopy was necessary based upon plaintiff decedent's history of polyps, and the procedure was properly performed. Defendant Dr. Rand further argues that he did not owe plaintiff decedent an actionable duty of care in terms of rendering anesthesia or resuscitation, as he was not the physician who sedated him, monitored him, checked his vital signs, intubated him, or administered medications when he coded. Defendant Dr. Rand further argues that he was not the physician responsible for providing plaintiff decedent with informed consent for the anesthesia, as that was the responsibility of the anesthesiologist. Finally, defendant Dr. Rand argues that he cannot be vicariously liable for other physicians and personnel involved in the colonoscopy.

Defendant Dr. Rand presents the affirmation of Michael Frank, M.D., a physician licensed to practice medicine in New York and board certified in internal medicine with a subspeciality certification in gastroenterology. Dr. Frank affirmed he reviewed plaintiff's Bill of Particulars and medical records in rendering his opinions. Dr. Frank opined that the colonoscopy was indicated because plaintiff decedent underwent prior colonoscopies that revealed three polyps measuring over 10mm, for which 2012 guidelines recommended follow up colonoscopies every three years. Dr. Frank further opined that Dr. Rand performed plaintiff decedent's colonoscopy within the standard of care expected of gastroenterologists and did not proximately cause or contribute to his death. Dr. Frank further opined that as the gastroenterologist performing the colonoscopy, it would not have been expected of him to have any role in administering anesthesia or resuscitating plaintiff decedent when he went into respiratory distress. Dr. Frank reasoned that as the gastroenterologist performing the colonoscopy, Dr. Rand did not choose plaintiff decedent's sedation or administer it, did not monitor his vital signs, did not assess him for hemodynamic stability during the procedure, did not intubate him, and did not make resuscitative efforts. Dr. Frank further reasoned that the above treatments are not the gastroenterologist's responsibilities, but rather these responsibilities lie with the anesthesiologist. Based upon the foregoing, defendant Dr. Rand argues that he is entitled to summary judgment and dismissal of plaintiff's Complaint.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The 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. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers.

(*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolia & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendant Dr. Rand established a prima facie entitlement to summary judgment, as he demonstrated through the documentary evidence presented that he did not depart from good and accepted standards of care and did not proximately cause or contribute to plaintiff's injuries. Defendant Dr. Rand demonstrated through Dr. Frank's expert affirmation that the colonoscopy was necessary in light of plaintiff decedent's history of polyps, and defendant Dr. Rand properly performed the colonoscopy. Defendant Dr. Rand further demonstrated through Dr. Frank's expert affirmation that as the gastroenterologist performing the colonoscopy, he did not and was not under any responsibility to choose or administer the sedation, monitor the vitals, or perform the intubation and resuscitation as these responsibilities lie with the anesthesiologist. Based upon the foregoing, defendant Dr. Rand established a prima facie entitlement to summary judgment. As plaintiff and co-defendants failed to oppose the motion, they failed to raise triable issues of material fact.

Accordingly, defendant James Rand, M.D.'s motion for summary judgment and dismissal

of plaintiff's Complaint pursuant to CPLR §3212 is granted without opposition. Plaintiff's Complaint is hereby dismissed as to defendant James Rand, M.D.

This constitutes the decision and Order of the Court.

Dated: March 21, 2024

Hon. Tracy Catapano-Fox, J.S.C.