

Carito v Savino

2011 NY Slip Op 31254(U)

May 9, 2011

Supreme Court, Richmond County

Docket Number: 100579/2009

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
DINA MARIE CARITO, as Executrix of the Estate
of LAURA CARITO, Deceased,

DCM PART 5

Plaintiff(s),
-against-

Present:
HON. JUDITH N. McMAHON

THOMAS SAVINO, M.D., and STATEN ISLAND
UNIVERSITY HOSPITAL,

DECISION AND ORDER

Index No. 100579/2009
Motion Nos. 001, 002

Defendant(s).
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The following papers numbered 1 to 5 were used on this motion this 12th day of April, 2011:

Notice of Motion [Defendants Dr. Savino][Motion No. 001](Affirmation in Support).....	1
Notice of Motion [Defendant SIUH][Motion No. 002](Affirmation in Support).....	2
Affirmation in Opposition [Plaintiff]	3
Reply Affirmation [Defendant SIUH].....	4
Reply Affirmation [Defendant Savino].....	5

On or about August 5, 2008, the plaintiff commenced this action for medical malpractice against defendants Dr. Thomas Savino and Staten Island University Hospital [hereinafter “SIUH”]. Specifically, the plaintiff contends that the defendants were negligent in their treatment to the plaintiff decedent, Laura Carito, upon her admission to SIUH from June 21, 2006, through August 7, 2006. At present, discovery is complete and the case is ready for trial. The instant motions, made separately by defendants SIUH and Dr. Savino, are seeking summary judgment contending that they each did not deviate from accepted medical practice in the treatment and care they rendered to the plaintiff decedent Laura Carito.

It is undisputed that plaintiff decedent Laura Carito had a history of cardiac conditions which included, *inter alia*, surgery for a mitral valve replacement, hospital admission for congestive heart failure and at-home oxygen. On or about July 21, 2006,

Laura Carito presented to her private cardiologist non-party Dr. Thomas Constantino, with complaints of, *inter alia*, shortness of breath and fatigue. Dr. Constantino instructed decedent to proceed immediately to the hospital, whereby she was admitted to SIUH.

Upon her admission, defendant Dr. Thomas Savino was covering for the plaintiff's primary care physician, Dr. Maria Lucarelli, and remained her attending physician throughout her admission at SIUH. It is uncontroverted that Dr. Savino, as well as Dr. Lucarelli, are both private physicians and not employed by SIUH. It is undisputed that Dr. Savino noted, in the emergency room records, that Laura Carito was complaining of, *inter alia*, weakness, fatigue and dyspnea for a period of two weeks prior.

During her stay at SIUH, Dr. Savino ordered multiple consultations for the plaintiff decedent Laura Carito. Included in these consultations was a pulmonary consult for plaintiff decedent's sleep apnea. On July 27, 2006, Ms. Carito underwent a transthoracic echocardiogram which found an ejection fraction of 55% of the left ventricle, mild stenosis of the pulmonic valve, among other valve issues. On August 7, 2006, the plaintiff Laura Carito was discharged, instructed to follow up with her primary care physician Dr. Constantino. On the morning of August 8, 2006, the plaintiff passed away.

I. Dr. Savino's Motion for Summary Judgment [001]

It is well settled that, in a medical malpractice action, "[o]n a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Rebozo v. Wilen, 41 AD3d 457, 458-59 [2d Dept., 2007]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]; Geller v. Walbaum, 33 AD3d 855, 855-

56 [2d Dept., 2006]). “In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury” (Rebozo v. Wilen, 41 AD3d at 458-59; Rosenman v. Shrestha, 48 AD3d 781, 783 [2d Dept., 2008]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]).

The defendant Dr. Savino has established his prima facie entitlement to summary judgment by adducing expert opinion that he did not deviate from good and accepted medical practice in his treatment rendered to the plaintiff decedent Laura Carito (Alvarez v. Prospect Hosp., 68 NY2d 320, 325 [1986]; Rebozo v. Wilen, 41 AD3d 457, 458-59 [2d Dept., 2007]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]; Geller v. Walbaum, 33 AD3d 855, 855-56 [2d Dept., 2006]). Dr. Savino has submitted the expert affirmation of Dr. Richard Blum, board certified in internal medicine, who opined that Dr. Savino did not deviate from accepted medical practice in his treatment of Laura Carito. Specifically, Dr. Blum opined that Dr. Savino’s treatment and multiple consultations on locating the source of Ms. Carito’s complaints was well within accepted medical practice. Further, that the determination not to perform a TEE (transesophageal echocardiogram) was appropriate considering the test results and potential for danger to the patient.

In opposition, however, the plaintiff has successfully raised a triable issue of fact by presenting the expert affirmation of Dr. Michael Golding, board certified in surgery (Chance v. Felder, 33 AD3d 645, 645-46 [2d Dept., 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Rebozo v. Wilen, 41 AD3d at 458-59). Plaintiff’s expert opined that

the defendant Dr. Savino deviated from good and accepted medical practice in the treatment he rendered to the plaintiff decedent Laura Carito. Specifically, plaintiff's expert contends that Dr. Savino, *inter alia*, deviated from accepted medical practice by discharging Ms. Carito on August 7, 2006, and failing to determine the cause of the fluid overload. In addition, Dr. Golding opines that Dr. Savino's prescription of Restoril was contraindicated in Ms. Carito, who had obstructive sleep apnea. Thus, the medical expert affirmations of the parties clearly differ on the alleged deviations by defendant Dr. Savino and, it is well settled that where triable issues of fact exist when the parties offer conflicting expert opinions, a credibility question is presented that requires a jury's resolution (Dandrea, v. Hertz, 23 AD3d 332 [2d Dept. 2005]; Shields v. Baktidy, 11 AD3d 671 [2d Dept. 2004]; Barbuto v. Winthrop University Hospital, 305 AD2d 623 [2d Dept. 2003]). As a result, summary judgment in favor of Dr. Savino is inappropriate.

With respect to plaintiff's claims for wrongful death, they have failed to oppose this portion of the motion and as such, it is granted.

II. Staten Island University Hospital's Motion for Summary Judgment [002]

“Generally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee” (Quezada v. O'Reilly-Green, 24 AD3d 744, 746 [2d Dept. 2005]). Nor, can it be held liable “where its employees follow the direction of the attending physician, unless that physician's orders ‘are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders’” (Garson v. Beth Israel Medical Ctr., 41 AD3d 159, 159 [1st Dept. 2007]; Toth v. Bloshinsky, 39 AD3d 848, 850 [2d Dept. 2007]; Cerny v. Williams, 32 AD3d

881, 883 [2d Dept. 2006]; Welch v. Scheinfeld, 21 AD3d 802, 807 [1st Dept. 2005]).

Here, the defendant SIUH has established its entitlement to summary judgment by demonstrating that the doctors that treated the plaintiff decedent, Laura Carito, upon her admission to SIUH were private independent contractors and not employees of the hospital (Quezada v. O'Reilly-Green, 24 AD3d 744, 746 [2d Dept. 2005]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Defendant established that the plaintiff presented to SIUH at the recommendation of Dr. Constantino and was treated by co-defendant, Dr. Savino, her private attending physician for her entire admission to SIUH. Further, SIUH established that its employees neither committed independent acts of negligence, nor did they follow orders from Dr. Savino that were “so clearly contraindicated by normal practice” that they should have inquired into the accuracy of such orders (Garson v. Beth Israel Medical Ctr., 41 AD3d at 159; Cerny v. Williams, 32 AD3d at 883). The plaintiff has failed to oppose the motion of SIUH and has presented no evidence, testimony or expert affirmation attesting to any alleged deviations by SIUH employees. As such, SIUH is entitled to summary judgment, dismissing the complaint, in its entirety, as against it.

Accordingly, it is

ORDERED that defendant Dr. Savino’s motion [001] for summary judgment is hereby denied with respect plaintiff’s negligence claims, and it is further

ORDERED that defendant Dr. Savino’s motion [001] for summary judgment is hereby granted with respect to plaintiff’s wrongful death claims, and it is further

ORDERED that the complaint’s wrongful death causes of action are dismissed, and it is further

ORDERED that defendant Staten Island University Hospital's motion [002] is hereby granted, and it is further

ORDERED that the complaint is dismissed in its entirety against defendant Staten Island University Medical Center **ONLY**; and it is further

ORDERED that any and all additional requests are hereby denied, and it is further,

ORDERED that the case proceed immediately to trial, and it is further

ORDERED that the Clerk enter Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: May 9, 2011

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court