

Ryan v Wainscott Walk-In Med. Care, P.L.L.C.

2016 NY Slip Op 31480(U)

April 8, 2016

Supreme Court, Suffolk County

Docket Number: 12-35725

Judge: Ralph T. Gazzillo

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PUBLISH

SHORT FORM ORDER

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INDEX No. 12-35725
CAL No. 15-00097MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-5-15
MOTION DATE 6-25-15
ADJ. DATE 7-9-15
Mot. Seq. # 003 - MD

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WILLIAM RYAN,

Plaintiff,

- against -

WAINSCOTT WALK-IN MEDICAL CARE,
P.L.L.C., and WILLIAM BLAKELY KERR,
M.D., ILONA POLAK, M.D., and

Defendants.

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Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 30; Replying Affidavits and supporting papers 31 - 38; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by Ilona Polak, M.D., for summary judgment dismissing the complaint against her is denied.

Plaintiff William Ryan commenced this action to recover damages for injuries he allegedly sustained as a result of defendants William Blakely Kerr, M.D., Ilona Polack, M.D., and Wainscott Walk-In Medical Care, PLLC's medical malpractice and lack of informed consent. The complaint alleges that defendants departed from good and accepted medical care in failing to timely and properly diagnose and treat plaintiff's medical condition.

On May 29, 2010, plaintiff initially visited defendant Wainscott Walk-in Medical Care and was seen by Dr. Polack with complaints of a sore throat and thick nasal drip. Dr. Polak's diagnosed

plaintiff's medical condition as pharyngitis and noted that it was likely viral. Plaintiff returned to the walk-in clinic on June 7 and saw Dr. Polack with complaints including a sore on his lip. Dr. Polack prescribed Valtrex for plaintiff and her assessment was questionable early herpes labialis. Plaintiff returned to the walk-in clinic on June 10 and June 15 for treatment of his medical condition, and was seen by Dr. Kerr. The last contact plaintiff had with the walk-in clinic was on June 18 during a phone conversation with Dr. Kerr. On June 21, plaintiff sought treatment from a different physician and was admitted to NYU Medical Center after being diagnosed with babesiosis.

Dr. Polak now moves for summary judgment dismissing the complaint against her, arguing that she did not deviate from good and accepted medical practice in her treatment of plaintiff. In support of her motion, Dr. Polak submits, among other things, copies of the pleadings, an expert affirmation of Dr. Gary Wormser, a transcript of the parties' deposition testimony, and various medical records and reports regarding plaintiff's medical treatment. Plaintiff opposes the motion on the ground that there are triable issues of fact as to whether Dr. Polak deviated from the acceptable standards of medical practice while rendering treatment to plaintiff. In opposition, plaintiff submits, among other things, an expert affirmation of Dr. Yoram Puius and excerpts of the parties' deposition testimony.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of plaintiff's injury or damage (see *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (see *Carioscia v Welischar*, 124 AD3d 816, 2 NYS3d 550 [2d Dept 2015]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Deutsch v Chaglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

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Dr. Gary Wormser, a physician licensed to practice medicine in the State of New York and board certified in internal medicine and infectious diseases, opines that Dr. Polak treated plaintiff properly from May 29 until June 7. He states that plaintiff presented to Dr. Polak on May 29 with complaints of sore throat, nasal drip and lost of voice, and returned on June 7, because of a sore on his lip. He states that plaintiff's symptoms were highly suggestive of a viral respiratory tract infection and not suggestive of a tick-transmitted infection such as babesiosis. He states that while patient was previously diagnosed by Dr. Polak with Lyme disease in June 2009, and patients living in the area where plaintiff lives are likely to be exposed to ticks, plaintiff did not have symptoms that was suggestive of a tick-borne illness. He states in his affidavit that patients with babesiosis have fever, typically a high-grade fever associated with shaking chills, and that because the babesia parasite infects red blood cells, infected patients typically become anemic. Wormser states that it is not standard practice to test for babesiosis in patients who are not having documented fevers, unless there is unexplained anemia with thrombocytopenia. He states that while plaintiff states in his deposition that he reported night time fevers to Dr. Polak during one of his visits, "a patient's perception of having a fever is, however, notoriously unreliable."

Dr. Wormser states that when plaintiff was diagnosed with babesiosis on June 22, he had a documented fever but was not anemic, and that since his babesia infection was high-grade, meaning over 10% of the red blood cells were infected, and he was not anemic, this suggests that the infection started recently. He states that plaintiff presented with no symptoms of tick-borne illness on May 29 or June 7; thus, there was no reason for Dr. Polak to believe that plaintiff was experiencing anything other than a standard upper respiratory tract infection. Dr. Wormser also states that even if plaintiff advised Dr. Polak that he saw an unengorged tick behind his knee, there would still be no reason that a tick-borne diseases should be part of Dr. Polak's differential diagnosis. He concludes that Dr. Polak did not depart from good and accepted medical practice during her treatment of plaintiff.

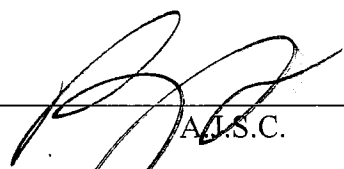
Dr. Polak has failed to establish her prima facie entitlement to summary judgment as a matter of law. Significantly, the expert affirmation Dr. Wormser was conclusory, as he failed to set forth the applicable standard of care, and merely recounted the treatment rendered, and opined, in a conclusory manner, that such treatment did not represent a departure from good and accepted medical practice (*see Tomeo v Beccia*, 127 AD3d 1071, 7 NYS3d 472 [2d Dept 2015]; *Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]). Furthermore, while Dr. Wormser states that "it is unheard of, in [his] experience, to test for babesiosis in a patient without documented fever whose complaints consist of only a nasal drip, sore throat, and hoarseness, or in patients without documented fever who have only a cold sore on the lips," he failed to explain whether Dr. Polak departed from the accepted standard of care by not ruling out the possibility of a tick-borne illness based on the circumstances. Moreover, the conflicting deposition testimony of plaintiff and Dr. Polak raises triable issues of fact. While plaintiff testified that he informed Dr. Polak at one of his visits that he had pulled a tick from his body and that he was feverish at night, Dr. Polak testified that these symptoms were not indicated on the medical records. In addition, while Dr. Polak's records indicate that plaintiff was feeling better during his June 7 visit and that his main complaint was of a sore on his lip, plaintiff testified that he told Dr. Polak that he was feeling worse on that visit. Furthermore, Dr. Polak testified that she would always ask patients with flu-like symptoms if they had been bitten by a tick because the area they reside in is a tick prevalent area, however, the records do not indicate whether this was addressed during either of plaintiff's visits. Finally, Dr. Wormser's affidavit stating that plaintiff's

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perception of having a fever was unreliable and that even if Dr. Polak was informed by plaintiff that he found a tick on his body, there would be no reason to include babesiosis on her differential diagnosis is conclusory (see *Yaegel v Ciuffo*, 95 AD3d 1110, 944 NYS2d 601 [2d Dept 2012]; *Couch v County of Suffolk*, 296 AD2d 194, 746 NYS2d 187 [2d Dept 2002]; *Brosnan v Shafron*, 278 AD2d 442, 718 NYS2d 641 [2d Dept 2000]).

In any event, even if Dr. Polak established her prima facie entitlement to summary judgment, the affidavit of plaintiff's expert Dr. Yoram Puius would have raised a triable issue of fact. Significantly, Dr. Yoram Puius, a physician licensed to practice medicine in the State of New York and board certified in internal medicine and infectious diseases, opines that Dr. Polak should have ordered plaintiff undergo blood tests for tick-borne diseases based on "plaintiff's symptoms, age, the fact that he lives in an endemic area for tick-borne disease, his history of prior tick-borne illness, and the fact that he had recently removed a tick from his body." He further states that since plaintiff had two prior diagnoses of tick-borne illness, the threshold for Dr. Polak to suspect such an illness should have been lowered. Accordingly, Dr. Polak's motion for summary judgment dismissing the complaint against her is denied.

Dated: 4/8/16



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION