SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

THE ESTATE OF JOSEPH V. MALTESE by BARBARA MALTESE, Administrator and BARBARA MALTESE, Individually,

Plaintiffs,

-against-

DIAGNOSTIC MEDICAL IMAGING OF L.I., P.C., RADIOLOGICAL ASSOCIATES OF LONG ISLAND, P.C. and LUCILLE P. TAVERNA-GIARDINA, M.D.,

Defendants.

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 9831/09
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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In motion sequence number one, the plaintiffs move for an order pursuant to CPLR §3025(b) granting them leave to amend their complaint to interpose a cause of action for wrongful death; an order pursuant to CPLR §3124 precluding the defendants from denying knowledge of the plaintiff decedent's medical history; and, an order pursuant to CPLR §3212 granting them summary judgment with respect to liability.

In motion sequence number two, the defendants cross-move for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint against defendants Diagnostic Medical Imaging of L.I., P.C. and Lucille Taverna-Giardina, M.D.

The plaintiffs in this action seek to recover damages for, *inter alia*, injuries the plaintiff

decedent allegedly sustained as he was climbing off an examining table at defendant Radiological Associates on February 12, 2009. John Karr, a radiologist-technician employed by Radiological Associates of Long Island, testified at his examination-before-trial that the plaintiff decedent looked "pretty unsteady" as he walked down the hall to the examining room but he responded "no" when he asked him if he needed help. He further testified that after the ultrasound, the decedent "was begging to get up" and he put his left arm under his right armpit as he was "stepping off the step at the bottom of the table at (which) point, he somehow missed the step." Karr testified that he "still doesn't know what happened . . . [that he] spun and fell right down on the side of the floor in front of him." He testified that the plaintiff decedent did not do anything with his body that he knew of. He testified that "[b]asically he was halfway getting off the table. I put my hand on him and that's when he fell."

The plaintiffs have advanced causes of action sounding in negligence, failure to supervise, manage and train the staff of Radiological Associates, and loss of consortium on behalf of the decedent plaintiff's wife. The plaintiffs allege in their Bill of Particulars that the plaintiff decedent was not adequately assisted as he dismounted the examining table, particularly in view of his medical condition.

In support of their motion, the defendants maintain that Steven Karr was an employee of the defendant Radiological Associates of Long Island, P.C.; that Radiological Associates was not related to the defendant Diagnostic Medical Imaging; and that while defendant Lucille P. Taverna-Giardina, M.D. is a principal of both of those corporations, standing alone, her relationship with Radiological Associates is an insufficient predicate for personal liability.

Dr. Taverna-Giardina has not appeared for a deposition. Accordingly, her relationship to Radiological Associates of Long Island as well as the subject incident cannot be fairly judged. In fact, the plaintiff's claim of failure to supervise, manage and train has not even been addressed. Similarly,

absent Dr. Taverna-Giardina's deposition, the relationship between the two corporations and concomitantly Diagnostic Medical Imaging of L.I., P.C.'s lack of potential liability has not been conclusively established, either. CPLR §3212(f). Based on the foregoing, the defendants' motion is ***denied***.

Contrary to the defendants' opposition, the wrongful death claim is not untimely. The Statute of Limitations for wrongful death is two years. EPTL 5-4.1. The plaintiff's decedent died on July 24, 2009. Not only was this action and the Statute of Limitations stayed from the date of death until letters testamentary were procured on October 29, 2009 (*Carrick v Central General Hospital*, 51 NY2d 240 [1980]), this motion tolled the Statute of Limitations until its determination *(Perez v Paramount Communications*, 92 NY2d 749 [1999]) and it was interposed on June 20, 2011, within the two year window. In any event, assuming, *arguendo*, that timeliness was a problem, under the circumstances, the proposed claim would relate back to the original filing of the complaint, as "[i]nclusion of the cause for wrongful death will not significantly expand the scope of proof or the legal considerations on the issue of liability." *Caffaro v Trayna*, 35 NY2d 235, 241 (1974).

"[A] plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance." *Lucido v Mancuso*, 49 AD3d 220, 226 (2d Dept 2008). And, "in the absence of prejudice or surprise," a motion to amend should be denied "only if the new cause of action would not withstand a motion to dismiss under CPLR §3211(a)(7)." The proposed cause of action is not so lacking in merit as to warrant denial of the plaintiff's motion to amend. The plaintiffs' motion for leave to amend their complaint is ***granted***. The court notes however that the defendants are clearly entitled to discovery with respect to this new cause of action should they be so inclined.

Preclusion pursuant to CPLR §3124 is ***denied***. The defendants have established that all of the decedent's medical records have been produced. The form that the decedent filled out on October 5, 2005 which indicated that he suffered from diabetes and high blood pressure has been produced and the records of February 1, 2006, July 12, 2006, October 9, 2006 and February 12, 2009 all indicate "NC" which defendant Taverna-Giardina has adequately explains means "No Change."

Turning to the plaintiffs' motion for summary judgment. "[o]n a motion for summary judgment pursuant to CPLR §3212, the proponent 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." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

The plaintiffs have not established their entitlement to summary judgment. Their expert orthopedist has observed that after the fall and ensuing hip fracture, the decedent's health was compromised and continued to decline until his ultimate demise when "he had acute anemia, acute blood loss and cardio respiratory arrest." Then he opines to a reasonable degree of medical certainty that the decedent "would have continued to live for an additional length of time but for the fall and hip

fracture." This conclusory statement fails to satisfy the plaintiffs' burden of establishing causation. Absolutely no details have been provided as to how the hip fracture contributed to his death. Indeed, whether principals of medical malpractice or straight forward negligence apply (*see, Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235 [1st Dept 2002], citing *Smee v Sistersof Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994] and *Stanley v Lebetkin*, 123 AD2d 854 [2d Dept 1986]; *see also, DiElia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848 [2d Dept 2008]) issues of fact clearly exist.

Nor are the plaintiffs entitled to summary judgment based upon a theory of *res ipsa loquitur*. Falls certainly occur absent negligence and the defendants – specifically Mr. Karr – was not in exclusive control of the plaintiff decedent when he fell. The plaintiffs' reliance on *Thomas v New York University Medical Center*, 283 AD2d 316 (1st Dept 2001) is misplaced: The patient in that case was unconscious.

Based on the foregoing, the plaintiffs' motion for summary judgment is ***denied***. It is hereby

ORDERED, that the parties are directed to appear for a certification conference on January 4, 2012.

This constitutes the Decision and Order of the Court.

DATED: December 8, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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