

Grossman v Northwell Health, Inc.

2023 NY Slip Op 33802(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 805263/2018

Judge: Judith N. McMahon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

-----X

ROSEMARY GROSSMAN, ROSEMARY GROSSMAN, B. G., J. G.,

Plaintiff,

- v -

NORTHWELL HEALTH, INC., STATEN ISLAND UNIVERSITY HOSPITAL, ELZBIETA PILAT, JENNIFER DIMA, LEONARD LEFKOVIC¹, MICHAEL FLYNN, DAN SHILO

Defendant.

-----X

INDEX NO. 805263/2018
MOTION DATE 10/02/2023
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion for summary judgment of the defendants Northwell Health, Inc., Staten Island University Hospital ("SIUH"), Elzbieta Pilat, M.D., Jennifer A. Dima, M.D., Michael P. Flynn, P.A. and Dan Shilo, M.D. (hereinafter collectively "defendants") is granted to the extent that the complaint is severed and dismissed, as withdrawn, against defendants Northwell Health, Inc., Dr. Dima, and Dr. Shilo. All of plaintiffs' claims for damages arising from lack of informed consent, negligent hiring, training, education, and supervision are also dismissed as withdrawn. The balance of the motion is denied. The only defendants remaining in this case are Dr. Pilat, PA Michael P. Flynn and SIUH to the extent of its vicarious liability for the alleged negligent conduct of Dr. Pilat and PA Flynn.

¹ A so-ordered Stipulation of Discontinuance with Prejudice on behalf of Dr. Lefkovic was filed on August 22, 2022 (see NYSCEF Doc. No. 52).

This medical malpractice action arises out of defendants' alleged failure to timely diagnose and treat the 41-year-old decedent for an aortic dissection on August 10, 2016. It is undisputed that decedent was transported by ambulance to the emergency department of SIUH (south campus) after experiencing "crushing chest pain" during a heavy workout at a nearby gym. Upon arrival at the hospital, his acuity level was assessed at "ESI Level 1" (*see* NYSCEF Doc. No. 64, p. 16), which requires the highest level of emergency care. Decedent received no treatment for the aortic dissection during a six hour and 22-minute admission to the emergency department and passed away before being transferred to SIUH's north campus for surgical intervention.

Plaintiffs allege, *inter alia*, that defendants departed from accepted standards of medical care and "failed to heed decedent's signs symptoms and complaints...delayed in treating decedent; failed to properly read and interpret test results, make adequate referrals for emergency surgical treatment, refer decedent to a cardiothoracic surgeon for emergency surgical intervention to repair an ascending aortic dissection...resulting in decedent's wrongful death" (*see* NYSCEF Doc. No. 88, p. 10).

FACTUAL BACKGROUND

Michael Grossman arrived at SIUH at 2:37 p.m., having been brought there by ambulance from the gym. He reported sudden onset of non-radiating chest pain in the middle of his chest and shortness of breath and stated that he had been working out and took a pre-workout supplement. He was sweating heavily but denied dizziness and nausea. The ECG taken by EMS at 2:21 p.m. indicated that it was "abnormal" and noted "nonspecific T abnormalities" (*see* NYSCEF Doc. No. 64 p. 9).

The primary nursing assessment indicates that decedent described crushing pain and pressure located in the left chest area that radiated to the abdomen and informed that the symptoms started while he was engaged in strenuous activity. His blood pressure was 123/58, pulse 60, respiration 20 and oxygen level was at 100% upon arrival. In addition to bloodwork and other testing, PA Flynn ordered a chest x-ray to evaluate chest pain. The chest x-ray was not performed until 5:01 p.m. (*i.e.*, over two hours after it was ordered). The PA discussed the case with emergency room attending, Dr. Pilat, before placing the orders.

Dr. Pilat examined decedent between 3:10 p.m. and 3:37 p.m. and authored her first written note at 3:37 p.m. She testified at her deposition that Mr. Grossman was “always on the top of the list” in terms of patient priority (*see* NYSCEF Doc. No. 69, p. 90, ll. 10-11), based on his presenting symptoms, which were chest pain, shortness of breath, and abnormal ECGs. The doctor had a high suspicion for acute coronary syndrome.

At 3:40 p.m. decedent’s pain level was reported as 10/10. PA Flynn spoke with x-ray and learned that they did not perform the bedside chest x-ray because Mr. Grossman was on the bedpan and was in gastrointestinal distress. Dr. Pilat noted that Mr. Grossman was “clinically not aortic dissection” because of the quality of his pain, additional gastrointestinal symptoms, absence of neurological deficits, hypertension, or pulse deficit on physical exam. According to Dr. Pilat, none of Mr. Grossman’s presenting symptoms were typical of aortic dissection. At this point she had not consulted with cardiology.

At 5:01 p.m. the chest x-ray was performed and, when compared to a chest x-ray from October of 2013, revealed a “widening of the superior mediastinum,” consistent with aortic dissection.

At 5:21 p.m. PA Flynn entered an order for a chest CT with IV contrast. (As with the chest x-ray, this study was not performed until 7:34 p.m., well over two hours after it was ordered.) By now, Dr. Pilat purportedly considered an aortic dissection as opposed to a heart attack but did not contact the cardiothoracic team to arrange for a transfer to SIUH's north campus.

At 7:30 p.m., PA Flynn noted that decedent had not been taken for the chest CT scan, as he was still experiencing diarrhea. The PA brought decedent to radiology himself.

At 7:34 p.m. the chest CT studies with IV contrast were performed. The clinical history and reason for the exam is listed as "aortic dissection". The test revealed "Type A aortic dissection arising from an aortic root aneurysm measuring up to 7.1 x 6.1, extending along the length of the aorta, into the right external iliac artery and right common femoral artery, incompletely imaged.... there is suggestion of extension into the left subclavian artery...dissection extends into the celiac axis.". The preliminary findings were discussed with Dr. Pilat at 7:48 p.m. with readback.

At 8:17 p.m. Dr. Pilat initiated the transfer to SIUH north for surgical intervention.

By 8:14 p.m., however, decedent's blood pressure was 97/40, pulse 96, and he complained of 9/10 level of chest pain. Mr. Grossman became clammy and cold and was decompensating. After two attempts he was intubated, quickly became bradycardic and pulseless and a code was initiated. Despite resuscitation efforts, including the administration of epinephrine, decedent was pronounced at 9:01 p.m.

MOTION FOR SUMMARY JUDGMENT

Defendants seek judgment dismissing the complaint on the grounds, *inter alia*, that the decedent received appropriate medical treatment, and that neither Dr. Pilat nor PA Flynn proximately caused any of his alleged injuries or wrongful death.

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 the 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, 152 [1st Dept. 2012]).

In support of the motion, defendants submit, *inter alia*, the expert affirmations of John E. Arbo, M.D., who is board certified in Emergency Medicine and Internal Medicine-Critical Care Medicine (*see* NYSCEF Doc. No. 57), Eugene A. Grossi, M.D., a thoracic surgeon (*see* NYSCEF Doc. No. 58), and Richard P. Gold, M.D., a radiologist (*see* NYSCEF Doc. No. 59), each of whom opine to a reasonable degree of medical certainty in their respective fields that the defendants adhered to the applicable standard of care and that decedent’s injuries death were not caused by malpractice or negligence.

For his part, Dr. Arbo opines that defendants’ definitive diagnosis of an aortic dissection within a five-hour timeframe was “timely, appropriate and within the standard of care” (NYSCEF Doc. No. 57, para 10), since decedent did not present with the classic signs and symptoms indicative of an aortic dissection, which includes ripping or tearing chest pain

radiating from the front to back, syncope, pulse differences and shortness of breath. According to Dr. Arbo, “defendants did not depart from the standard of care in ordering the chest x-ray at 3:11 p.m. and performing the study at 5:01 p.m. considering decedent’s documented gastrointestinal issues” (*id.*, para 19), and “did not depart from the standard of care by ordering the chest CT scan at 5:21 p.m. and performing the study at 7:34 p.m. in light of decedent’s continued... gastrointestinal issues” (*id.* para 23).

Dr. Grossi opines that all work-ups and assessments were timely made by defendants, that “there was no clinical basis to diagnose an aortic dissection,” and moreover, that “even if the diagnosis had been made earlier, based upon decedent’s history significant for steroid use, clinical course that included his decompensation shortly after the 7:48 p.m. diagnosis of a dissection, and the decedent’s need to transfer to a facility properly equipped to perform his complex surgical repair, his outcome would not have changed” (NYSCEF Doc. No. 58, para 9).

To the extent relevant, defendants’ expert radiologist, Dr. Gold, opines that “defendants did not depart from the standard of care by ordering the chest CT scan at 5:21 p.m. and performing the study at 7:34 p.m. considering the decedent’s clinical picture and extrinsic factors” (NYSCEF Doc. No. 59, para 18).

Defendants’ expert affirmations are detailed, specific and factual in nature, and are based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascoello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [*internal citations omitted*]). Accordingly, the affirmations of defendants’ experts are “sufficient to meet the *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* case of entitlement to summary judgment dismissing a medical malpractice action by submitting an 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]; [citing *Alvarez v. Prospect Hosp.*, 68 NY2d 68 NY2d 320, 324 [1986]]; 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, plaintiff has met her burden on the motion by submitting the expert affirmations of an emergency physician, Christopher L. Moore, M.D. (see NYSCEF Doc. No. 83) and a thoracic surgeon, Steven D. Herman, M.D. (see NYSCEF Doc. No. 84).

For his part, Dr. Moore maintains that had decedent been diagnosed in under two hours, as he should have been based on his presenting symptoms, then he would have had a high likelihood of survival from operative repair. Dr. Moore opines that decedent had the classic signs and symptoms of aortic dissection, and that defendant(s) departed from standard of care by (1) taking the chest x-ray two hours after it was ordered; (2) not personally reviewing the x-ray images; (3) not ordering/performing a bedside ultrasound, and (4) failing to seek another consult from a cardiology specialist when Dr. Lefkovic told Dr. Pilat that he was unavailable. Dr. Moore emphasizes that decedent was not provided with *immediate life-saving care required by an acuity level of “1,”* and that defendants and their staff failed to appreciate the seriousness and potential lethality of decedent’s condition. According to Dr. Moore, significant departures from the standard of care occurred when a simple chest film and a chest CT scan took some two hours

to perform on an ESI Level 1 patient, and when SIUH north was not contacted until 8:17 p.m., after the opportunity for successful treatment had passed.

Dr. Herman (*see* NYSCEF Doc No. 84) finds that defendants failed to appreciate the emergency that decedent presented with and opines that had Dr. Pilat personally reviewed the chest x-ray it “should have indicated to her that more likely than not Mr. Grossman had an aortic dissection and that he required a higher level of care than what was available in her small community hospital” (*id.*, para. 21). Dr. Herman further opines that defendant(s) “deviated from good and accepted medical practice” by failing to consult with SIUH’s north campus until 8:17 p.m. (*id.*, para 41).

Here, the affirmations of plaintiff’s experts raise questions of fact sufficient to defeat summary judgment in favor of the defendants. “The medical experts’ conflicting opinions...raise issues of fact that must be resolved at trial” (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]).

As such, the motion for summary judgment by the defendants PA Michael Flynn, Dr. Pilat and SIUH is denied.

Accordingly, it is

ORDERED that the complaint is severed and dismissed as against the defendants Northwell Health, Inc., Jennifer A. Dima, M.D., and Dan Shilo, M.D.; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants Northwell Health, Inc., Jennifer A. Dima, M.D. and Dan Shilo, M.D. dismissing the complaint; and it is further

ORDERED that the motion for summary judgment by the defendants PA Michael P. Flynn, Dr. Elzbieta Pilat and SIUH is denied; and it is further

ORDERED that SIUH remains a viable defendant in this case only to the extent that it may be found vicariously liable for the conduct of its employees, Dr. Pilat and PA Flynn; and it is further

ORDERED that the parties shall appear for a pre-trial conference via Microsoft Teams on **December 11, 2023 at 11:00 a.m.**

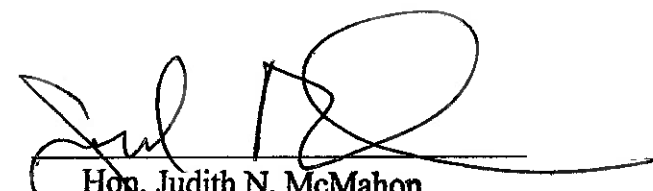
10/13/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


Hon. Judith N. McMahon
J.S.C.