

**Hernandez v Hochman**

2007 NY Slip Op 30648(U)

February 15, 2007

Supreme Court, Queens County

Docket Number: 0012732/2004

Judge: James P. Dollard

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decedent was evaluated as "extremely high risk" for the development of bedsores and ulcers.

In support of his motion for summary judgment, Dr. Hochman submits the affidavit of Howard D. Kolodny, M.D., board certified in internal medicine and endocrinology, who concludes that defendant Dr. Hochman did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and did not cause her decubitus skin ulcers, and that Dr. Hochman's care was not the proximate cause of decedent's death. Dr. Hochman's medical expert further avers that decedent's "ulcers developed as an unavoidable consequence of her compromised medical condition which included hemiplegia, contracture of the left knee, diabetes mellitus, cardiac disease, poor circulation, immobility and poor nutrition. She was the type of patient most at risk to develop decubiti ulcers as attested to by her high bedsore analysis score at NYHMCQ." This evidentiary submission, which indicates that defendant Dr. Hochman did not deviate from accepted standards of medical care, is sufficient to meet defendant's burden as a proponent of a summary judgment motion (see Alvarez v Prospect Hosp., 68 NY2d 320 [1987]; Berger v Becker, 272 AD2d 565 [2001]; Juba v Bachman, 255 AD2d 492 [1998]; Whalen v Victory Memorial Hosp., 187 AD2d 503 [1983]).

The burden now shifts to plaintiffs to respond with rebutting medical evidence demonstrating that Dr. Hochman's actions were a departure from the accepted standard of care in the medical community (see Alvarez v Prospect Hosp., supra; Whalen v Victory Memorial Hosp., supra), and a proximate cause in bringing about the injury (see Mortensen v Memorial Hosp., 105 AD2d 151 [1985]).

In opposition to Dr. Hochman's motion, plaintiffs submit the affidavit of Louis J. Vorhaus, M.D., board certified in internal medicine, who opines that defendant Dr. Hochman departed from good and accepted standards of medical practice, inter alia, in his failure to write any orders regarding the prevention of bedsores and that his "failure to perform a proper physical examination led to a failure to implement more aggressive treatment and preventative measures." These assertions are insufficient to raise a triable issue of fact since plaintiffs' expert fails to address the effect of the decedent's severe pre-existing medical condition and poor prognosis on the development of her decubitus ulcers and her unfortunate demise. Thus, the affidavit submitted by plaintiffs' medical expert did not establish that if any departure from acceptable standards of medical care by the doctors occurred, such departure was a proximate cause of the decedent's death (see Mendez v City of New York, 295 AD2d 487 [2002]; Eisen v John T. Mather Memorial Hosp., 278 AD2d 272 [2000]; Kaplan v Hamilton Med. Assocs., 262 AD2d 609

[1999]).

In support of its motion for summary judgment, defendant NYHMCQ submits the affidavit of Luigi M. Capobianco, M.D., board certified in family practice and geriatrics, long term care medical directorship and quality assurance, who concludes that "the actions of the [NYHMCQ] ... staff did not proximately cause the development of the [decedent's] ... skin ulcers, nor did these actions result in any aggravation of the condition. The inability to heal the ulcers related to the [decedent's] ... severely innate and ... compromised vascular and immune state, caused by multi-organ failure. It was this multi-organ failure that directly lead to her death." NYHMCQ's medical expert further opined that "the multiple medical problems afflicting [decedent] ... created an environment in which the development of skin breakdown was inevitable. The same conditions prevented the effectiveness of any measures to control the ulcers."

This evidentiary submission, which indicates that defendant NYHMCQ did not deviate from accepted standards of medical care, is sufficient to meet defendant's burden as a proponent of a summary judgment motion (see Alvarez v Prospect Hosp., supra; Berger v Becker, supra; Juba v Bachman, supra; Whalen v Victory Memorial Hosp., supra).

In opposition to NYHMCQ's motion, plaintiffs submit an affidavit from a nurse-practitioner. The plaintiffs' purported expert is not a medical doctor and lacks the qualifications to render a medical opinion as to the relevant standard of care, and whether the defendant deviated from such standard (Elliot v Long Island Home, Ltd., 12 AD3d 481 [2004]; Mills v Moriarty, 302 AD2d 436 [2003]; LaMarque v North Shore Univ. Hosp., 227 AD2d 594 [1996]; Douglass v Gibson, 218 AD2d 856 [1995]). Thus, plaintiffs inadequate submission fails to raise a triable issue of fact to defeat NYHMCQ's summary judgment motion.

Accordingly, the summary judgment motions of defendants Dr. Hochman and NYHMCQ are both hereby granted.

Dated: February 15, 2007

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