

**Volovar v Catholic Health Sys. of L.I., Inc.**

2007 NY Slip Op 31368(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0013894/2002

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 2-13-07  
ADJ. DATE 4-10-07  
Mot. Seq. # 002 - MG  
003 - XMotD  
004 - MotD

-----X  
KAREN VOLOVAR, as Administratrix of the :  
Estate of KARL VOLOVAR, deceased, :  
 :  
 :  
Plaintiff, :  
 :  
- against - :  
 :  
CATHOLIC HEALTH SYSTEM OF LONG :  
ISLAND, INC., a New York corporation, ST. :  
FRANCIS HOSPITAL, ROSLYN, NEW YORK, :  
INC., A New York corporation, PAUL S. DAMUS, :  
M.D., P.C., a New York professional corporation, :  
PAUL S. DAMUS, M.D., individually, :  
PEDIATRIC CARDIOLOGY OF LONG ISLAND, :  
P.C., a New York professional corporation, :  
MILTON J. REITMAN, M.D., individually, :  
 :  
Defendants. :  
-----X

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 :  
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 :  
BARTLETT, McDONOUGH, et al.  
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Reitman  
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Upon the following papers numbered 1 to 62 read on these motions and cross motion for summary judgment ;  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15-20; 21-37 ; Answering Affidavits and supporting papers 38-48; 49-52; 53-54 ; Replying Affidavits and supporting papers 55-56; 57-58; 59-62 ; Other \_\_\_\_\_ ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (002) by defendants, Catholic Health Systems of Long Island, Inc., St. Francis Hospital, Paul S. Damus, M.D., PC and Paul S. Damus, M.D., for summary judgment on the first through sixth and ninth through twelfth causes of action is granted; and it is further

**ORDERED** that the cross motion (003) by plaintiff, Karen Volovar, as Administratrix of the Estate of Karl Volovar, deceased, for an order denying the motion by defendants, Catholic Health Systems of Long Island, Inc., St. Francis Hospital, Paul S. Damus, M.D., PC and Paul S. Damus, M.D., as untimely; deeming defendants to be precluded from asserting limited liability pursuant to CPLR

Article 16 and deeming any dismissals by defendants to be law of the case with regard to limited liability pursuant to Article 16; and deeming that good cause exists for the delay in bringing the cross motion is determined as hereinafter set forth; and it is further

**ORDERED** that the cross motion (004) by defendants, Pediatric Cardiology of Long Island, PC and Milton J. Reitman, M.D. for an order dismissing plaintiff's punitive damages claims is determined as follows.

Plaintiff, Karen Volovar, as administratrix of the estate of Karl Volovar, deceased, alleges that defendants were negligent and departed from accepted standards of care in the treatment of decedent. Plaintiff further alleges that defendants wrongfully caused his death by their failure to timely perform necessary surgical procedures. The record reveals that decedent was diagnosed with a congenital heart condition shortly after his birth on November 9, 1970 which was surgically repaired at five months of age by doctors at Good Samaritan Hospital. In 1980, defendant Paul S. Damus, M.D. (hereinafter referred to as "Damus"), surgically repaired a ventricular septal defect.

In March, 2000, decedent was experiencing shortness of breath and fatigue and was diagnosed with congestive heart failure while a patient at Good Samaritan Hospital. The next day, March 31, 2000, he was transferred to defendant St. Francis Hospital in the care of defendant Milton J. Reitman, M.D. (hereinafter referred to as "Reitman"), a pediatric cardiologist, who treated decedent for the next six days and performed several diagnostic tests. At discharge on April 5, 2000, plaintiff and decedent were instructed to call defendant Damus for an appointment and a surgical consultation. At the appointment Damus learned that decedent had a recent history of hemoptysis and directed decedent to obtain a pulmonary consultation for surgical clearance. The record reveals that decedent failed to make the appointment. Approximately two months later, on June 4, 2000, decedent collapsed at home. Although efforts at resuscitation were made en route to Good Samaritan Hospital, he died.

Plaintiff alleges that defendants conspired to abandon and did abandon the decedent due to his lack of insurance. Plaintiff alleges that defendants were waiting for insurance to be effective before they would schedule the surgery. Defendants assert that decedent died as a direct result of his failure to comply with his doctor's instructions to appear at the pulmonary specialist's office for evaluation. Before the court are three motions. Defendants Catholic Health System of Long Island, Inc., St. Francis Hospital, Paul S. Damus, M.D., PC, and Paul S. Damus, M.D. (hereinafter referred to as "the hospital defendants") move for summary judgment dismissing the first through sixth and ninth through twelfth causes of action. Plaintiff cross-moves for an order denying the motion for summary judgment by the hospital defendants on the ground that the motion was submitted late and denying defendants the benefit of Article 16. Finally, defendant Reitman moves for summary judgment to dismiss the punitive damages.

Initially, the Court finds that the hospital defendants' motion and plaintiff's motion are timely. The Court's computer reveals that the note of issue was filed on September 11, 2006, and one hundred twenty days after that filing was January 9, 2007, the date upon which the defendants' motion was submitted. Accordingly, that branch of plaintiff's motion to determine the hospital defendants' motion as untimely is denied. In addition, inasmuch as the language of CPLR 1601 (1) indicates that the statute

automatically applies whenever a defendant's share of the liability is 50% or less, plaintiff's request for a waiver of Article 16 by any defendant is denied (*Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 [1994]).

Turning to the hospital defendants' motion, plaintiff's allegations in the third and fourth causes of action are dismissed as against defendants Damus and Reitman inasmuch as there is no substantive tort of conspiracy (*Manning v Turtel*, 115 AD2d 712, 496 NYS2d 775 [1985]). In support of the motion to dismiss the remaining causes of action, defendants submit, *inter alia*, the pleadings; bill of particulars; office records of defendant Damus; examination before trial transcripts of plaintiff, defendant Damus, defendant Reitman and Nancy Reynolds. In addition, defendants submit a copy of the history and physical examination upon admission on March 31, 2000 and the discharge summary and discharge instructions from St. Francis Hospital; and medical records from Good Samaritan Hospital.

At her examination before trial, plaintiff testified to the effect that decedent had not been feeling well from the beginning of 2000. He was seen at Good Samaritan Hospital on March 30, 2000 and then was transferred to St. Francis Hospital the next day. She told hospital officials that decedent had no insurance, but was told it was no problem. She stated that Dr. Reitman told her that decedent would need heart surgery and it was her understanding that the surgery would be performed during that admission. However, she was not told by the doctor that decedent's condition was fatal. After discharge, she took decedent to Damus for evaluation and was asked by the secretary about payment. When plaintiff replied that they had applied for medicaid, the secretary told her that the hospital needed a method of payment before scheduling the surgery. Although Damus made it clear that decedent would need surgery, plaintiff did not remember being told that a medical clearance with a pulmonologist was necessary. She recalled that the medicaid was approved after decedent's death and all medical bills were subsequently paid.

Defendant Damus' office record reveals that a consultation with decedent occurred on April 17, 2000 and the phrase "consult with pulmonary first" was entered in the medical chart. In a letter to Reitman, dated April 17, 2000, Damus states that surgery would be scheduled in the near future and noted his reservations that the surgery would be risky with a possibility of post operative bleeding. In his examination before trial, Damus testified to the effect that he is board certified in thoracic surgery. He is employed at St. Francis Hospital as an attending physician. He stated that he first met decedent in 1980 when he performed surgery and provided post operative care. He had no contact with decedent between the post operative visits in 1980 and 2000.

Damus stated that he saw decedent again in his office on April 17, 2000. He stated that he was not aware that decedent was a patient in St. Francis in 2000 until after discharge when he obtained a letter from Reitman and the angiograms which were performed in the hospital. After examining decedent, he contemplated surgically replacing the left sided atrio-ventricular ("AV") valve. Damus stated that surgery would not be scheduled until decedent was evaluated by the pulmonologist due to decedent's complaint of hemoptysis, coughing up bloody sputum. He stated that insurance was unimportant to him and was never an issue even after decedent's mother brought it up. He denied telling plaintiff that decedent would die if he didn't have the surgery.

In his examination before trial, defendant Reitman testified to the effect that he is board certified in pediatrics and pediatric cardiology. He first met decedent on March 31, 2000 after receiving a call from the Good Samaritan Hospital emergency department. He recalls that after he performed a cardiac catheterization he told plaintiff that decedent would need surgery. However, he never attempted to schedule surgery prior to discharge. Reitman stated that he discharged decedent from St. Francis Hospital on April 5, 2000 because the decedent's condition had improved. In addition, he was unaware that decedent had no insurance and had no discussions with Damus regarding this issue. He stated that Damus called him after his appointment with decedent and told him that he was concerned about hemoptysis. Damus wanted to send decedent to a pulmonologist for evaluation before scheduling surgery. Reitman stated that he was also waiting for the report from the pulmonologist before proceeding with other treatment.

At her examination before trial, Nancy Reynolds testified to the effect that she is employed in the office of defendant Damus. She stated that she was present at the appointment on April 17, 2000 when decedent was evaluated by Damus. She was aware that Damus wanted decedent to be evaluated by a pulmonary specialist prior to scheduling surgery. She stated that at the end of the appointment she gave plaintiff a card which contained a telephone number of the pulmonary specialist as advised by Damus.

Lorraine Falzone testified to the effect that she worked for St. Francis Hospital in 2000. She stated that when a patient was admitted to the hospital and had no insurance, she would receive a fax from the admitting department which she would refer to a law firm who would make an application for medicaid on the patient's behalf. She also stated that doctors could admit a patient for surgery without insurance. Ms. Falzone stated that the hospital has never refused to treat a patient based on lack of funds.

The St. Francis Hospital admission history and physical examination dated March 31, 2000, reveals decedent's medical history from birth and states that decedent was followed by another cardiologist from his surgery in 1980 until 1992 and had no medical care since that time. Upon examination, the decedent was experiencing shortness of breath on exertion and was only able to walk for two minutes without stopping due to the difficulty breathing. This report also documents decedent's complaints of hemoptysis approximately one month before. The discharge summary reveals that decedent was treated with several medications and treatments and underwent several diagnostic tests which revealed cardiac insufficiency. He was discharged six days later with a plan to follow up with defendants Damus and Reitman. There were no restrictions placed on his activity or diet. The summary stated that decedent was discharged in a stable condition. The nursing discharge instructions reveal that plaintiff was to follow up with defendants Damus and Reitman and take certain medications. There were no restrictions on diet or activity and decedent's response to discharge was "happy". In addition, decedent signed the instruction sheet indicating that he received a copy of the instructions and understood the instructions.

With respect to the first and second causes of action alleging abandonment, it is clear from the record that the defendant Damus did not abandon the decedent (*see, Graham V. Columbia Presbyterian Medical Center*, 185 AD2d 753, 754, 588 NYS2d 2 [1992]) and his conduct was not "wanton or

malicious” or “activated by evil or reprehensible motives” (*Spinosa v Weinstein*, 168 AD2d 32, 43, 571 NYS2d 747 [1991]; *see, Arumugam v Smith*, 277 AD2d 979, 716 NYS2d 518 [2000]) since decedent himself failed to follow through in making an appointment for evaluation by a pulmonary specialist prior to surgery. Inasmuch as a court may search the record and grant summary judgment to a non-moving party “on any related claim” (*Conroy v Swartout*, 135 AD2d 945, 522 NYS2d 354 [1987]), the Court finds that defendant Reitman also did not abandon the decedent for the reasons stated above. Plaintiff has failed to raise an issue of fact by her testimony. In addition, the experts’ opinions<sup>1</sup> are not supported by the evidence in the record (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-5, 508 NYS2d 923 [1986]). Thus, summary judgment is granted to defendants Damus and Reitman on the first and second causes of action.

With respect to plaintiff’s allegations of negligent misrepresentation by defendant Damus and his secretary, Nancy Reynolds, a cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information (*see, Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 736 NYS2d 737 [2002]; *Grammar v Turits*, 271 AD2d 644, 706 NYS2d 453 [2000]). Here, defendant Damus did state the decedent needed surgery, but only after the pulmonary clearance was obtained, which decedent failed to do. In addition, Reynolds gave plaintiff the business card of a pulmonary specialist to call. Reynolds also knew, however, that surgery would not be scheduled at St. Francis without decedent’s having first obtained a pulmonary consultation.

Plaintiff fails to raise an issue of fact inasmuch as the bill of particulars do not allege that the information provided by defendant Damus was false. The fact that decedent was previously treated at both Good Samaritan Hospital and St. Francis Hospital without insurance belies plaintiff’s statements that her son could not be admitted for surgery. In addition, her two experts merely speculate about whether plaintiff had a better chance of survival if the surgery was performed while decedent was in the hospital. In any event, plaintiff fails to provide evidence of injuries arising from negligent misrepresentation that are separate and apart from the injuries allegedly arising from medical malpractice (*see, Abbondandolo v Hitzig*, 282 AD2d 224, 724 NYS2d 26 [2001]; *Otero v Presbyterian Hosp.*, 240 AD2d 279, 658 NYS2d 624 [1997]; *Bellera v Handler*, 284 AD2d 488, 727 NYS2d 137 [2001]). Thus, the branch of the motion to dismiss the fifth and sixth causes of action is granted.

Turning to the hospital defendants’ request to dismiss the allegations in the ninth through twelfth causes of action for failing to provide an adequate discharge plan, defendants contend that the nurses’ discharge sheet provided decedent with instructions to follow up with the cardiologist and a surgeon. In addition, the discharge summary revealed that decedent would be followed by defendants Reitman and Damus. Defendants’ contention that since Reitman wrote to Damus regarding a surgical consultation

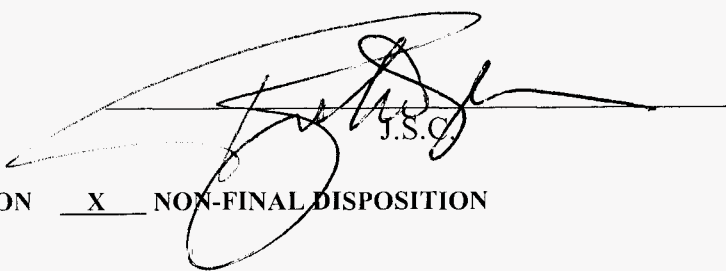
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<sup>1</sup> The Court has conducted an in-camera inspection of the original unredacted affirmations and finds them to be identical in every way to the redacted affirmations in plaintiff’s opposition papers with the exception of the redacted experts’ names. In addition, the Court has returned the unredacted affirmations to the plaintiff’s attorney.

and provided Damus with recent diagnostic tests performed in the hospital and since decedent visited Damus' office 12 days after discharge all demonstrate sufficient evidence that the hospital instructions were adequate as a matter of law. Plaintiff's testimony and affidavit fail to raise an issue of fact to preclude summary judgment. The court again notes that plaintiffs' experts' opinions are conclusory without specific analysis, which is insufficient to raise any issue of fact (*see, Diaz v New York Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]). Accordingly, the branch of the hospital defendants' motion to dismiss the ninth through the twelfth causes of action is granted. As a result, the claim for punitive damages insofar as asserted against defendants which are based upon the above causes of action are dismissed (*Anzalone v Long Is. Care Ctr., Inc.*, 26 AD3d 449, 810 NYS2d 514 [2006]).

Accordingly, the motion by the hospital defendants for partial summary judgment dismissing the first through sixth and ninth through twelfth causes of action is granted; the cross motion by plaintiff is granted to the extent that her motion is deemed timely; and the motion by defendant Reitman dismissing the first and second causes of action and punitive damages based upon those causes of action is granted.

Dated:           MAY 21 2007          

  
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J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION