Sarkisyan v The Parkway Hosp., Inc.
2007 NY Slip Op 32368(U)
July 24, 2007
Supreme Court, Queens County
Docket Number: 0003631/2205
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

GRIGOR SARKISYAN, etc., et al., x Plaintiffs, - against - THE PARKWAY HOSPITAL, INC., et al., Defendants. x	Index Number 3631 2005 Motion Date April 25, 2007 Motion Cal. Numbers 38-43 Motion Seq. No. 6

The following papers numbered 1 to 78 read on these separate motions by defendants Spyros Harisiadis, M.D. (s/h/a S. Harisiadis), Chandrasekaran Janakiraman, M.D. (s/h/a C. Janakiraman), Michael G. Tartell, M.D. (s/h/a M. Tartell) and Dayanand V. Huded, M.D. (s/h/a D. Huded) for summary judgment in their favor dismissing plaintiffs' complaint; and on these separate motions and cross motions by defendants Abdul A. Khuwaja, M.D. (s/h/a Abdul Khuwaja), Jang B. Chadha, M.D. (s/h/a Jang B. Chadha), Qinghong Huang, M.D. (s/h/a Qinghong Huang), Rajesh Sriraman, M.D. (s/h/a R. Sriraman), Shashi Patel, M.D. (s/h/a Shashikant A. Patel), Vijay K. Chhabra, M.D. (s/h/a Vijay K. Chhabra), Joel J. Zdanowitz, M.D. (s/h/a Joel J. Zdanowitz), Spyros Harisiadis, M.D., Chandrasekaran Janakiraman, M.D., Michael G. Tartell, M.D., and Jeffrey S. Stein, M.D. (s/h/a Jeffrey S. Stein) for the following relief: (1) to compel discovery (CPLR 3124); (2) to strike Aida Sarkisayan, an infant by her father and natural guardian, from the caption; (3) to strike the allegations sounding in misrepresentation, fraud and concealment; (4) to strike the seventh cause of action for res ipsa loquitur; (5) to strike the claims for punitive damages; and (6) to strike the redundant eighth and ninth causes of action; and on these separate motions by defendant Antonio Subietas-Mayol, M.D. (s/h/a Antonio Subietas-Mayol) for the aforementioned relief and, in addition thereto, for the following relief: (1) to dismiss the action as abandoned (CPLR 3215[c]); (2)to vacate or modify the order, dated January 17, 2007, which lifted the bankruptcy stay; (3) to dismiss the fourth cause of action for lack of informed consent; (4) to dismiss the fifth and sixth causes of action

sounding in negligent hiring and retention; (5) to compel plaintiff to serve an adequate bill of particulars specific to each defendant; and by defendants Dr. Janakiraman, Dr. Tartell and Dr. Harisiadis to strike plaintiffs' bills of particulars (CPLR 3040) or directing plaintiffs to serve proper bills of particulars.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits........	1-30
Notices of Cross Motion - Affidavits - Exhibits..	31-40
Answering Affidavits - Exhibits..................	41-51
Reply Affidavits.................................	52-78

Upon the foregoing papers it is ordered that these motions and cross motions are consolidated and determined as follows:

In this action for medical malpractice and wrongful death, it is alleged, inter alia, that defendants deviated from the requisite standards of care in failing to timely diagnose and properly treat decedent Yelena Sarkisyan's colon cancer, thereby causing her death.

Decedent was admitted to defendant The Parkway Hospital, Inc. (Hospital) on May 27, 2002 with severe abdominal pain and anemia. After a series of tests, she was diagnosed with colon cancer and underwent emergency colectomy surgery on May 31, 2002, was discharged on June 7, 2002, and received chemotherapy thereafter. On February 2, 2003 decedent was readmitted to defendant Hospital with abdominal pain, nausea and vomiting. She underwent a series of tests and an exploratory laparotomy which revealed a bowel abscess, went into a coma, and expired on February 15, 2003.

In support of his motion for summary judgment, defendant Dr. Tartell, a radiologist who interpreted several of decedent's x-ray films during both admissions to the Hospital, submits his own affidavit which asserts that he did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and that he did not contribute to or proximately cause her fatal injuries. This evidentiary submission, which indicates that the moving defendant did not deviate from accepted standards of medical care, is sufficient to meet Dr. Tartell'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]).

In support of his motion for summary judgment, defendant Dr. Harisiadis, a radiologist who interpreted several of decedent's x-rays, CT and ultrasound films during both admissions to the Hospital, submits his own affidavit which asserts that he did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and that he did not contribute to or proximately cause her fatal injuries. This evidentiary submission, which indicates that the moving defendant did not deviate from accepted standards of medical care, is sufficient to meet Dr. Harisiadis' 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 support of his motion for summary judgment, defendant Dr. Chandrasekaran Janakiraman, an emergency room doctor who examined decedent upon her second admission on February 2, 2003 and ordered tests and IV fluids and a surgical consult to rule out a bowel obstruction, submits his own affidavit which asserts that he did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and that he did not contribute to or proximately cause her fatal injuries. This evidentiary submission, which indicates that the moving defendant did not deviate from accepted standards of medical care, is sufficient to meet Dr. Janakiraman'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).

The burden now shifts to plaintiffs to respond with rebutting medical evidence demonstrating that defendants' 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 defendants' motion, plaintiffs submit the redacted affidavit of an internist who opines that defendants Dr. Tartell and Dr. Harisiadis departed from good and accepted standards of medical practice in their treatment of plaintiff in their February 2003 treatment of decedent in that:

> "By not fully communicating to other members of the medical team all findings from the

> radiology tests performed, Dr. Tartell and Dr. Harisiadis contributed to a delay in further exploration of the intestinal tract ... [and] ... a delay in performing timely and appropriate follow up, which unfortunately led to a significant delay in reaching the appropriate diagnosis of intestinal perforation and treatment of sepsis ... and treatment of this underlying cause of sepsis ultimately resulted in Mrs. Sarkisyan's death."

In opposition, plaintiffs' expert offers only conclusory opinions which do not refute the movants' prima facie showing, and are insufficient to demonstrate the existence of genuine issues of fact (see Spaeth v Goldberg, 248 AD2d 704 [1998]; Leon v Southside Hosp., 227 AD2d 384 [1993]; Marinaccio v Society of N. Y. Hosp., 224 AD2d 595 [1996]; Guida v Hsu, 187 AD2d 485 [1992]). In addition, 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 her unfortunate demise. Thus, the affidavit submitted by plaintiffs' medical expert does 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]).

Furthermore, the affidavit of plaintiffs' expert did not mention whether the expert had any specific training or expertise in radiology and did not indicate that the expert was familiar with the relevant literature or otherwise set forth how the expert was, or became, familiar with the applicable standards of care in this specialized area of practice. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (Postlethwaite v United Health Servs. Hosps., 5 AD3d 892, 895 [2004]; see LaMarque v North Shore Univ. Hosp., 227 AD2d 594 [1996]). Where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (see Romano v Stanley, 90 NY2d 444 [1997]; Nangano v Mount Sinai Hosp.,

305 AD2d 473 [2003]). In the circumstances of this case, as plaintiffs' expert failed to lay the requisite foundation for the asserted familiarity with the applicable standards of care, the expert's affidavit is of no probative value (Behar v Coren, 21 AD3d 1045 [2005]). Moreover, plaintiffs' expert is completely silent as to Dr. Janakiraman and therefore fails to raise a triable issue of fact regarding any malpractice with respect to Dr. Janakiraman's treatment of decedent.

In support of his motion for summary judgment, defendant Dr. Huded, an internist and nephrologist who evaluated and treated decedent's renal failure during her second admission to the Hospital, submits his own affidavit which asserts that he did not depart from good and accepted standards of medical practice with respect to his treatment of decedent and that he did not contribute to or proximately cause her fatal injuries. This evidentiary submission, which indicates that the moving defendant did not deviate from accepted standards of medical care, is sufficient to meet Dr. Huded'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, plaintiffs submit the redacted affidavit of the same internist who opposed the summary judgment motions of Dr. Harisiadis and Dr. Tartell, and failed to address Dr. Janakiraman's opposition. Similarly, this affidavit is 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 her demise and therefore does not establish that if any departure from acceptable standards of medical care by Dr. Huded occurred, such departure was a proximate cause of the decedent's death (see Mendez v City of New York, supra; Eisen v John T. Mather Memorial Hosp., supra; Kaplan v Hamilton Med. Assocs., supra). In addition, the affidavit of plaintiffs' expert was insufficient in that it did not mention whether the expert had any specific training or expertise in nephrology and did not indicate that the expert was familiar with the relevant literature or otherwise set forth how the expert was, or became, familiar with the applicable standards of care in this specialized area of practice (see Romano v Stanley, supra; Behar v Coren, supra; Nangano v Mount Sinai Hosp., supra).

In light of the foregoing, summary judgment is granted dismissing the claims against defendants Harisiadis, Tartell, Janakiraman and Huded.

The court now turns to the branches of defendants' motions and cross motions which seek to strike the allegations sounding in res ipsa loquitur. Plaintiffs contend that the doctrine of res ipsa loquitur is applicable to this case and assert that "the decedent's death and other complications do not occur in the absence of defendants' alleged negligent acts and omissions ..." In order for res ipsa loquitur to apply, three elements must be established: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (see Dermatossian v New York City Tr. Auth., 67 NY2d 219 [1986]). In the typical res ipsa loquitur case, the jury can reasonably draw upon past experience common to the community for the conclusion that the adverse event generally would not occur absent negligent conduct (Prosser and Keeton, Torts § 39, at 247 [5th ed]; Restatement [Second] of Torts § 328 D, Comment d).

In medical malpractice cases, however, the common knowledge and everyday experience of lay jurors may be inadequate to reach the conclusion that negligence is an attending factor of the occurrence (Kambat v St. Francis Hosp., 89 NY2d 489 [1997]). There are some medical and surgical errors on which any layperson is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care, such as where a surgeon leaves a sponge or foreign object inside the plaintiff's body after an operation. In those cases, "the thing speaks for itself without the aid of any expert's advice." (Prosser and Keeton, Torts § 40, at 256-257 [5th ed]).

Here, in light of decedent's underlying colon cancer and its attendant medical repercussions, a layperson could not determine whether decedent's death was an occurrence of a kind that ordinarily does not occur in the absence of negligence without evaluating the parties' expert testimony. Therefore, the doctrine of res ipsa loquitur does not apply to the instant case.

With respect to those branches of defendants' motions and cross motions seeking to strike Aida Sarkisayan, the infant daughter of decedent, from the caption, EPTL 5-4.1(1) provides in relevant part, that:

> "The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for

> a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued .... When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit."

Thus, since a cause of action to recover damages for wrongful death may only be brought by the decedent's personal representative on behalf of all of the distributees of the decedent, decedent's daughter, Aida Sarkisyan, is not entitled to bring an individual action on her own behalf (Meroni v Holy Spirit Assoc. for Unification of the World Christianity, 119 AD2d 200 [1986]).

With regard to those branches of defendants' motions and cross motions seeking to strike the allegations sounding in misrepresentation, fraud, concealment and punitive damages, plaintiffs' letter dated March 22, 2007 states as follows:

> "After discussions with out client, the Plaintiffs would consent to strike any and all allegations sounding in: misrepresentation, fraud and concealment including any punitive damages. This would apply for all answering defendants."

Pursuant to this consent, all allegations regarding misrepresentation, fraud, concealment and punitive damages are hereby stricken.

Those branches of defendants' motions and cross motions seeking to strike the eighth and ninth causes of action as redundant are granted as they are unopposed by plaintiffs.

In light of the foregoing, those branches of the motions and cross motions of defendants Harisiadis, Tartell and Janakiraman seeking to compel discovery (CPLR 3124) and to strike plaintiffs' bills of particulars (CPLR 3040) are denied as academic.

Those branches of the motions and cross motions of defendants Khuwaja, Chadha, Huang, Sriraman, Patel and Chhabra seeking to

compel discovery are held in abeyance pending the outcome of the preliminary conference scheduled for August 21, 2007. Likewise, that branch of defendant Subietas-Mayol's motion seeking to compel plaintiffs to serve an "adequate" bill of particulars is held in abeyance pending the preliminary conference.

With respect to that branch of defendant Dr. Subietas-Mayol seeking to dismiss the action as abandoned (CPLR 3215[c]), it appears that no grounds exist for this relief as plaintiffs and defendant concede that defendant appeared in the action.

That branch of defendant Subietas-Mayol's motion seeking to vacate or modify the order of this court dated January 17, 2007, has not been properly brought, pursuant to CPLR 2221, as a motion for leave to renew or reargue and is therefore denied.

Those branches of defendant Subietas-Mayol's motion which seek to dismiss the causes of action for informed consent and negligent hiring and retention are granted as plaintiffs present no argument in opposition thereto.

Dated: July 24, 2007

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J.S.C.