

**Cregan v Sachs**

2008 NY Slip Op 30474(U)

February 15, 2008

Supreme Court, New York County

Docket Number: 0117401/2005

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Liam Cregan

INDEX NO. 117401/05

MOTION DATE 12/19/07

MOTION SEQ. NO. 002

- v -

Michael E. Sachs, M.D., et al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to or \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
FEB 21 2008  
NEW YORK COUNTY CLERK'S OFFICE  
PAGES NUMBERED \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendant Madhavarao Subbarao, M.D., s/h/a Madhavarao Subbaro, M.D. for summary judgment dismissing the complaint is granted.

This wrongful death action arises out of the death of plaintiff's decedent, Kay Cregan, subsequent to plastic surgery (a facelift and blethroplasty) performed by defendant Michael E. Sachs, M.D. in his office. Dr. Subbarao was the anesthesiologist. The record shows that the surgery began on March 14, 2005 at approximately 6:30 P.M. and ended at approximately 9:10 P.M. Ms. Cregan was taken into a recovery room at the office in stable condition. She was left in the care of defendant Susan L. Alonzo-Francisco, R.N.

On March 15, 2005 at approximately 6:30 A.M., Ms. Cregan complained of dizziness and lost consciousness. EMS arrived at 6:40 A.M. and the patient was transported to St. Luke's-Roosevelt Hospital where she

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

was noted to have an air way obstruction secondary to bleeding, blood clots, hypoxia and arrest. She died on March 17, 2005 at 2:18 P.M. An autopsy report lists the diagnosis as " I. subarachnoid hemorrhage, supratentorial; II. cerebral edema with diffuse anoxic/ischemic myelo-encephalopathy and cerebellar tonsilar herniation; III. acute hemorrhage, cerebral cortex."(Movant's Ex. J.) Plaintiffs' expert has opined that Ms. Cregan " . . . suffered a respiratory arrest from post-operative bleeding resulting in airway obstruction."(Expert's affidavit, ¶ 12.)

Defendant has made a prima facie showing of entitlement to summary judgment based upon the records and the expert's affirmation of Martin Griffel, M.D., a board certified anesthesiologist and internist. Dr. Griffel reviews the record and opines that Dr. Subbarao provided a proper informed consent regarding the anesthesia. Regarding the procedure, Dr. Griffel notes that the patient tolerated the anesthesia and operation very well, that she was taken into the recovery room in stable condition, and that Dr. Subbarao checked on Ms. Cregan approximately an hour after the surgery was completed and that she was noted to be in stable condition. Dr. Griffel states that defendant appropriately left the patient with a nurse in the recovery room and that defendant was not required to stay with the patient and to monitor her. He concludes that the events which transpired at approximately 6:30 A.M. on March 15, 2005 had nothing to do with the surgical anesthesia or with Dr. Subbarao's care of the patient.

In opposition to the motion, plaintiffs' expert has opined that Dr. Subbarao committed a gross departure from proper practice by leaving the patient in the care of a nurse who, in the opinion of plaintiffs' expert, was not a qualified individual. The conclusion that Nurse Alonzo-Francisco was not qualified to care for the patient is based upon her deposition testimony that no doctor had ever taught her how to put an endotracheal tube down a patient and that she was not allowed to intubate a patient (Deposition, p. 28). However, as an initial matter, plaintiffs must establish that Dr. Subbarao

owed a duty to Ms. Cregan to ensure that the recovery room nurse was qualified to manage an airway obstruction and to intubate the patient.

The issue of duty " . . . as between physicians, and ultimately, to the patient, is a question of law (citations omitted)." (Koeppel v. Park, 228 AD2d 288, 290 [1996].) Thus, the proffered opinion by plaintiffs' expert that defendant owed a duty to the patient in this regard " . . . intrudes upon the exclusive prerogative of the court." (Lipton v. Kaye, 214 AD2d 319 [1995].)

Under these circumstances, Dr. Subbarao did not have a duty to ensure that Nurse Alonzo-Francisco was qualified to intubate patients. The nurse was an agent/employee of Dr. Sachs, not of Dr. Subbarao. Dr. Subbarao left the patient in stable condition, under the care of the nurse in Dr. Sach's recovery room, after leaving instructions for the patient's care with the nurse. There is nothing in this record to indicate that at the time that Dr. Subbarao left the office he should have been concerned about the patient's post-operative status or the nurse's ability to care for the patient.

There is no triable issue of fact as to whether Dr. Subbarao provided appropriate anesthesiology care during the procedure or post-operatively, and under these circumstances, he cannot be charged with a duty to assume responsibility for Nurse Alonzo-Francisco's qualifications to intubate the patient (see e.g. Yasin v. Manhattan Eye, Ear & Throat Hospital, 254 AD2d 281 [1998]).

Finally, with respect to the lack of informed consent claim, there is no triable issue of fact regarding the information given about the risks of anesthesia. And, under the facts of this case, the court finds that Dr. Subbarao did not have a duty to inform the patient of risks associated with her post-operative care in the doctor's office by a nurse because there is no proof that those risks involved the risks of anesthesia.

Based upon the foregoing, the motion is granted.

ORDERED that the Clerk enter judgment dismissing the complaint against defendant Madhavarao Subbarao, M.D., s/h/a Madhavarao Subbaro, M.D. and severing the action against the remaining defendant; and it is further

ORDERED that the caption be amended to delete the name of defendant Madhavarao Subbarao, M.D., s/h/a Madhavarao Subbaro, M.D.

Dated: 2/15/08

SA-S

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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