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

PRESENT: Hon. Stanley J. Sklar PART 29

Justice

Index Number : 106918/2006

SCHWARTZ, JAY

INDEX NO. _____

vs

MOUNT SINAI HOSPITAL

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 9/29/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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JAY SCHWARTZ, as Executor of the Estate of
SHIRLEY SCHWARTZ, deceased,

Index # 106918/2006

Plaintiff,

THE MOUNT SINAI HOSPITAL,

Defendant.

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SKLAR, J.:

In this medical malpractice action in which it is claimed that the employees and agents of defendant Mt. Sinai Hospital ("the hospital") failed to diagnose and treat plaintiff's decedent Shirley Schwartz' ("Schwartz") heart condition, thereby resulting in her death from a myocardial infarction, which death occurred 6 days after her discharge from the hospital, the hospital moves for summary judgment dismissing the action on the ground that it did not commit malpractice because Schwartz allegedly exhibited no signs of ischemic disease while at the hospital and did not have an evolving or completed myocardial infarction while there, and thus the hospital did not cause Schwartz' death.

Schwartz, who was 80 years old and suffering from moderate to advanced Alzheimer's disease, attended an Alzheimer's day program and lived at home with her husband and son, the plaintiff, Jay Schwartz, where she had an aide to help her dress in the morning and evening when she returned from her day program. She could recognize her son and husband but was not oriented to time and date and needed assistance with the activities of daily living. Her ability to

communicate was limited. On December 15, 2003 her husband and son brought her to the hospital's emergency room because for about a day she had been experiencing severe pains in her back. The son was not sure whether his mother had fallen. J. Schwartz ebt, p.119 Schwartz had no known history of heart disease, and it appears that on examination at the hospital her heart showed normal sounds, her pulse and respiratory rate were normal, she had no extremity edema, and the blood pressure in both arms was normal with normal peripheral circulation. See Bruns ebt, p26; Hundert aff. ¶ 6 Also a chest x-ray showed a slight increase in the interstitial pattern but was "fairly normal." Bruns ebt, p.64. Nonetheless the resident ordered an EKG. According to the hospital's attending ER physician, Dr. John Bruns, it would be his customary practice to consider a cardiopulmonary etiology of back pain particularly with a patient such as Schwartz who was "non-verbal and unable to provide significant subjective information." ebt, p.51 The hospital's Emergency Record indicates, according to the 19:14 note of Nurse Aguila, that the patient was sent for an EKG and, because the patient was to be admitted, was awaiting a bed. Nurse Aguila then went off duty at 19:19, and whether or not an EKG was ever done is unclear because there was no EKG strip in the patient's hospital record (see Brun ebt, p. 47).

The patient was worked up for back injury and it was concluded after some testing that the pain was attributable to disc degeneration. A hospital social worker met with the patient's husband and son. The social worker was of the opinion that since the son worked full-time, the husband was elderly and had ambulation problems of his own and the home aide was no longer available to help the patient, it might be best to send the patient to a residential rehabilitation facility so as to give the family time to make plans to enable them to care for the patient. After looking at the Franklin Center for Rehabilitation and Nursing near their home which the son and

husband found to be unsuitable, they decided to bring the patient home. She was discharged from the hospital on December 19 and was prescribed pain medication. According to the discharge summary the patient denied pain or discomfort. According to the patient's son the patient only experienced pain when she was in certain positions and left the hospital in the same condition in which she had arrived (J. Schwartz ebt, pp158, 207).

Within two days of returning home the son and husband brought Schwartz to the Franklin Center because they could not help her with her daily activities and because of her pain. They felt she needed medical attention that they could not provide. Schwartz was admitted to Franklin on December 22. The husband signed a DNR order that stated that the if the patient stopped breathing or if her heart stopped, cardio-pulmonary resuscitation would be withheld.
Late in the afternoon of December 23 the patient's heart rate increased and her oxygen saturation level decreased, and she was transferred to New York Hospital, Queens ("NYHQ") where she arrived at about 5:30 p.m. that day.

Although the chest x-ray taken at NYHQ was normal, an EKG was performed at 7:56 p.m. that day and was labeled "abnormal ECG." The EKG recited, "SINUS TACHYCARDIA, RATE 126, ATRIAL PREMATURE COMPLEX, LEFT ATRIAL ABNORMALITY, LEFT ANTERIOR FASCICULAR BLOCK. PROBABLE LEFT VENTRICULAR HYPERTROPHY, ST ELEVATION, CONSIDER ANTERIOR INJURY." According to the initial assessment notes following the EKG results there was a question about the St elevation in the anterior leads. Noting that there were no prior EKGs to compare the physician wanted to" r/o MI." Blood tests for cardiac markers were ordered, including for Troponin, "a biomarker for myocardial ischemia" (see Bruns ebt, p.53)and for CPK. At 8:11 p.m.on December 23 the CPK which had a reference

range of 10-60 was reported to be 58 and the Troponin level which had a reference range of 0-2 was reported to be 2.6. The plan was to repeat the EKG and blood tests and to call a cardiology consult.

The patient was not doing well and the husband was called at 3 a.m. by the resident on December 24 to discuss "DNR/DNI," and the husband verbally indicated that he did not want the patient resuscitated and would sign a DNR order when he came in that morning. When he came in he signed a DNR order blocking cardio-pulmonary resuscitation in the event the patient's heart stopped beating or she ceased breathing. The son also signed that order. Another abnormal EKG was obtained at 10:37 on December 24 and repeat blood tests reported at 2:45 that afternoon showed a CPK level of 58 and a Troponin level of 4.5. Blood tests were again taken and the 7 p.m. lab report showed a CPK level of 65 and a Troponin level or 4.7. A "BMA Medical Attending" entry which noted the blood test results and the "abnormal" EKG recited, "concerned about recent cardiac ischemic event."

At about 9:10 the next morning the patient was found to be restless, hyperventilating and unable to follow commands. The nurse could not obtain a pulse due to tremors, and Dr. Patel was called at about 9:20.The patient became progressively pale and by 9:30 no blood pressure or pulse could be obtained. Dr. Patel and another doctor came to Schwartz' bedside, and she was declared dead. Dr. Patel signed the death certificate in which he listed the immediate cause of death as cardiopulmonary arrest which had an onset of "minutes', which was due to acute myocardial infarction which had an onset of "days" which was due to hypertensive cardio-vascular disease which had an onset of "years."

The hospital relying, inter alia, on the affidavit of its expert internist and geriatrician, Dr.

Michael Hundert, now seeks summary judgment dismissing the action. Dr. Hundert asserts that Schwartz did not have any signs of ischemic disease and did not have an evolving or completed myocardial infarction while at the hospital. Hundert aff. ,¶¶6,10 Dr. Hundert apparently opines that the first EKG taken at NYHQ showed no cardiac changes consistent with a myocardial infarction in the recent past, but that the initial blood tests showed that on admission to NYHQ the patient's "risk for cardiac events was now suspicious as evidenced by her normal CPK and mildly elevated Troponin level." See Hundert aff., ¶13 Dr. Hundert further asserts that based on the CPK and Troponin levels of the patient's second day of presentment at NYHQ, evidently referring to Dec 24, the patient had an evolving acute myocardial infarction during her NYHQ admission. Dr. Hundert, apparently referring to the DNR order, asserts that the family decided to allow the patient's condition to run "its natural course without cardiac intervention at the time of admission and during acute infarction." id,¶ 15 Dr. Hundert concludes that Mt. Sinai's treatment was appropriate and thus was not the cause of Schwartz developing a myocardial infarction at NYHQ.

Plaintiff's expert internist, Dr. Kenneth Ackerman, maintains that the hospital was negligent and that such negligence was a proximate cause of Schwartz developing an evolving myocardial infarction at NYHQ, which resulted in her cardiopulmonary arrest and death. Ackerman aff., ¶ 4 Dr. Ackerman opines that while at the hospital the patient did in fact show signs and symptoms of ischemic heart disease, namely her back pain. Ackerman aff, ¶¶ 7,11 According to Dr. Ackerman referred pain is one of the hallmark presentations for cardiac disease. id, ¶7 Dr. Ackerman asserts that because of the pain the hospital was required to rule out cardiovascular disease as a cause of the pain and that the failure to do so was a departure

from standards of accepted medical practice. In particular Dr. Ackerman opined that the hospital was required to have performed an EKG, and that its failure to do so was a departure from the standard of care. id, ¶ 7 Dr. Ackerman states that had an EKG been performed it would have shown an acute coronary syndrome which would have led to a cardiac evaluation. Id, ¶ 9 Once evaluated Schwartz allegedly would have been started on cardiac medication which according to Dr. Ackerman would have prevented Schwartz' fatal heart attack. Ibid

Dr. Ackerman maintains that by the time Schwartz presented to NYHQ four days after her discharge from Mt. Sinai her cardiac condition had progressed to "the point of no return." Ibid According to Dr. Ackerman prescribing pain medication was a departure and simply delayed the diagnosis by masking the "evolution of the presentation of a heart attack." id,¶ 8 While at NYHQ Schwartz' EKG was markedly abnormal and showed left ventricular hypertrophy and left anterior hemiblock which Dr. Ackerman maintains are chronic findings that take a long time to develop. Id, ¶10 Dr. Ackerman asserts that at NYHQ the patient also exhibited acute changes that were indicative of ischemia and had positive enzymes consistent with acute myocardial infarction. Dr. Ackerman concludes that Schwartz had an evolving myocardial infarction while at Mt. Sinai and that Mt. Sinai's failure to diagnose and treat Schwartz caused her ischemic heart condition to progress, thereby leading to her death.

Following a review of the papers submitted on this application, the hospital's motion is denied. The papers raise an issue of fact as to whether the patient's back pain was a sign of an ischemic heart condition which required the hospital to perform an EKG, which allegedly would have revealed an acute coronary syndrome requiring a cardiac evaluation and medication to prevent the imminent heart attack. An EKG was ordered at Mt. Sinai, which does not reveal why

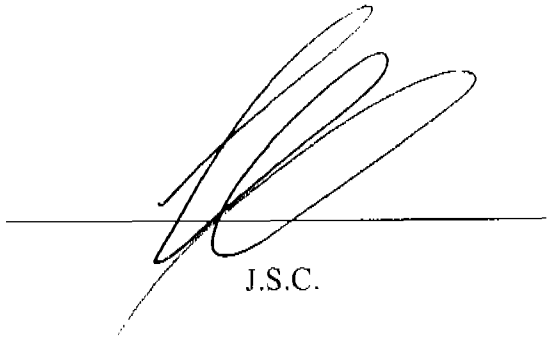
one was ordered and why the order was not carried out. Mt. Sinai's own ER attending testified that it was his custom to consider cardiopulmonary etiology of back pain especially with non-verbal patients. Also, contrary to Dr. Hundert's suggestion that the first EKG at NYHQ showed no changes consistent with a myocardial infarction, the first EKG was reported as "abnormal," and the doctor's note at NYHQ indicated that the EKG results raised a question sufficient for that doctor to want to rule out a myocardial infarction. While Dr. Hundert and defense counsel suggest that the husband's signing of DNR orders demonstrates a lack of causation, this is not so because it was only cardio-pulmonary resuscitation in the event that the patient stopped breathing or her heart stopped which was the subject of the DNR order, not less invasive means of sustaining life, such as the giving of medications. In conclusion the motion is denied.

Settle order.

Dated: September 29, 2008

60 Centre Street

New York, New York



J.S.C.