

Roques v Noble

2008 NY Slip Op 33663(U)

June 27, 2008

Sup Ct, Bronx County

Docket Number: 13721-06

Judge: Sallie Manzanet

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PART 05

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

ROQUES, TETLA

Index No. 0013721/2006

-against-

Hon. SALLIE MANZANET

NOBLE, DAVID H. M.D.

Justice.

The following papers numbered 1 to _____ Read on this motion, SUMMARY JUDGEMENT DEFENDANT
Noticed on January 08 2008 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2
Answering Affidavit and Exhibits	3
Replying Affidavit and Exhibits	4, 5, 6
_____ Affidavits and Exhibits	
Pleadings - Exhibit	
Stipulation(s) - Referee's Report - Minutes	
Filed Papers	
Memoranda of Law	

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BRONX COUNTY CLERK'S OFFICE

JUN 27 2008

PAID

NO FEE

Upon the foregoing papers this

The motion for Summary Judgment seeking dismissal of the second cause of action only based on wrongful death is granted in accordance with the attached order of dismissal.

Motion is Respectfully Referred to:
Justice:
Dated:

Dated: 6.19.08

Hon. *[Signature]*
SALLIE MANZANET, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM: IA PART: 05

TETLA ROQUES, As Administratrix of the Estate of
PATRICK F. ROQUES, SR., Deceased and TETLA
ROQUES, Individually,

Plaintiffs,

Index No. 13721-06

- against -

DECISION AND ORDER

DAVID H. NOBLE, M.D., UNIVERSITY DIAGNOSTIC
MEDICAL IMAGING, KAMRAN TABADDOR,
M.D., NEW YORK NEUROSCIENCE INSTITUTE, P.C., and OUR LADY OF MERCY MEDICAL CENTER,

RECEIVED
BRONX COUNTY CLERK'S OFFICE
JUN 27 2008

Defendants.

HON. SALLIE MANZANET-DANIELS:

PAID

NO FEE

In this medical malpractice/wrongful death action wherein plaintiff seeks damages for injuries sustained as a result of allegedly unnecessary brain surgery performed on her late husband, Patrick Roques, Sr. (Mr. Roques), defendants Kamran Tabaddor, M.D. (Dr. Tabaddor) and New York Neuroscience Institute have moved for an order pursuant to CPLR 3212 granting summary judgment as to the second cause of action based in wrongful death and dismissing that cause of action on the ground that Mr. Roques' death in January 2006 was not proximately caused by the two surgical procedures performed by Dr. Tabaddor in April 2005 or any complications resulting from these procedures. In a separate motion, defendants David H. Noble, M.D. (Dr. Noble) and University Diagnostic Medical Imaging have moved for the same relief. The court will consolidate the aforesaid motions for purposes of decision. For the reasons set forth hereinafter, the motions are granted and the wrongful death cause of action is dismissed.

The relevant facts are as follows. On April 1, 2005, Mr. Roques went to his primary care physician, Firas Barakat, M.D., complaining of severe headaches and neck pain for approximately 1 - 2 weeks. Dr. Barakat ordered Mr. Roques to undergo a CT scan of his head without contrast. Mr. Roques had a prior history of hypertension, high cholesterol and Type II diabetes, and was being treated with various medications for these conditions (Defendant Tabaddor's Exhibit M). In December 2004, Mr. Roques was admitted to Montefiore Medical Center via the Emergency Room with complaints of shortness of breath, chest pain and non-productive cough. (Defendant Tabaddor's Exhibit N). After diagnostic testing, a heart attack was ruled out. Mr. Roques' discharge diagnoses included mild congestive heart failure, hypertension, high cholesterol and Type II diabetes. (Defendant Tabaddor's Exhibit N).

On April 1, 2005, Mr. Roques underwent the CT scan at University Diagnostic Medical Imaging, P.C. which was interpreted by Dr. Noble, a radiologist, as revealing a 3.3 cm x 1.8 cm predominantly calcified lesion within the right lateral ventricle with some adjacent edema in the right periventricular white matter. (Defendant Tabaddor's Exhibit O). A subarachnoid hemorrhage and subdural hematoma were ruled out. (Defendant Tabaddor's Exhibit O). Dr. Noble ordered an MRI of the brain with and without IV contrast which was also performed at University Diagnostic Medical Imaging, P.C. that day. Dr. Noble interpreted the MRI films as revealing a 3.6 cm x 2 cm x 2.7 cm non-enhancing low T2 lesion centered on the right lateral ventricle consistent with the calcified lesion identified on the CT scan. (Defendant Tabaddor's Exhibit O). Dr. Noble concluded this lesion to be an intraventricular meningioma with some adjacent periventricular white matter edema.

(Defendant Tabaddor's Exhibit O).

On April 4, 2005, Mr. Roques returned to Dr. Barakat's office. After completing an examination and reviewing the results of the CT scan and MRI, Dr. Barakat referred Mr. Roques to Dr. Tabaddor for a neurosurgery consultation to discuss a possible craniotomy. (Defendant Tabaddor's Exhibit M). Mr. Roques saw Dr. Tabaddor that same day. Dr. Tabaddor reviewed the MRI films and concluded that Mr. Roques was suffering from an intraventricular tumor attached to the lateral wall of the right posterior frontal horn with periventricular reaction, and recommended a craniotomy for excision/biopsy. (Defendant Tabaddor's Exhibit P). Mr. Roques consented to the surgery and the procedure was scheduled for April 12, 2005.

On April 12, 2005, Mr. Roques was admitted to Our Lady of Mercy Medical Center. Prior to the surgery, he provided written consent for the procedure. (Defendant Tabaddor's Exhibit Q). Dr. Tabaddor then attempted to perform a right frontal craniotomy with exploration of the right frontal horn and ventricle, but the procedure was aborted as a result of excessive bleeding from the area. (Defendant Tabaddor's Exhibit Q). A stereotactic biopsy was planned for a later date.

Following the surgery, Mr. Roques suffered from left hemiparesis, confusion and speech impediments (Defendant Tabaddor's Exhibit H, p. 64). He was transferred to the SICU and underwent physical and occupational therapy with gradual improvement of his paralysis. (Defendant Tabaddor's Exhibit H, p. 71; Exhibit Q).

On April 13, 2005, a post-operative CT scan of Mr. Roques' head was performed which revealed slightly heterogenous increased attenuation in the right frontal lobe anteriorly and superiorly at the site of the surgery consistent with

hemorrhage and postoperative changes. (Defendant Tabaddor's Exhibit Q). A CT scan performed on April 21, 2005 revealed post-operative changes in the right frontal lobe at the site of the surgery and the previously observed intraparenchymal hemorrhage was now faint. (Defendant Tabaddor's Exhibit Q).

On April 26, 2005, Dr. Tabaddor performed a stereotactic biopsy at the site of the prior surgery. Several biopsies were obtained and revealed white matter with gliosis, fresh hemorrhage, indications of a prior hemorrhage, necrosis and reactive histiocytic infiltration. (Defendant Tabaddor's Exhibit Q). These biopsies were sent for a second opinion to a neuropathologist at Memorial Sloan Kettering Cancer Center where they were similarly diagnosed as a fresh hemorrhage and indications of a prior hemorrhage. (Defendant Tabaddor's Exhibit Q). No evidence of an intraventricular tumor was found.

On April 29, 2005, Mr. Roques was transferred to Burke Rehabilitation Center for in-patient physical and occupational therapy for his left hemiparesis.

On May 13, 2005, Mr. Roques was transferred from Burke to St. Luke's-Roosevelt Hospital at the plaintiff's request (Defendant Tabaddor's Exhibit H, p. 81) for in-patient physical therapy and possible surgery for the previously diagnosed brain tumor¹. On May 13, 2005, Mr. Roques underwent a CT scan of the head with and without contrast which indicated post-surgical changes in the right frontal lobe and no abnormal enhancement. (Defendant Tabaddor's Exhibit S). On May 15, 2005, an MRI of the brain with and without contrast was performed which also indicated post-surgical

¹At this time, plaintiff was still under the belief that her husband was suffering from a brain tumor.

changes. (Defendant Tabaddor's Exhibit S). Again, no evidence of a brain tumor was found. On May 16, 2005, Mr. Roques underwent a cerebral angiogram which revealed no arteriovenous malformation or aneurysm. (Defendant Tabaddor's Exhibit S). Mr. Roques was discharged on May 20, 2005.

For several weeks following his discharge from the hospital, Mr. Roques received physical and occupational therapy at home and then began out-patient physical therapy at Montefiore Rehabilitation Center. (Defendant Tabaddor's Exhibit H, p. 94).

On November 11, 2005, Mr. Roques suffered a seizure and was taken to Montefiore Medical Center. A CT scan of the head was performed which revealed no acute intracranial hemorrhage, mass or mass effect. Mr. Roques' Dilantin level (a medication prescribed after the April surgeries) was found to be low and his medication was increased. Mr. Roques discontinued physical therapy after the seizure.

On December 16, 2005, Mr. Roques was admitted to Beth Israel Medical Center for seizure monitoring and was discharged on December 18, 2005. (Defendant Tabaddor's Exhibit T).

On January 1, 2006, Mr. Roques died at his home. Plaintiff discovered her husband kneeling at the side of his bed, unresponsive, after he walked upstairs to the bedroom following breakfast. (Defendant Tabaddor's Exhibit H, p. 107). An autopsy was performed by Dr. James Gill of the Office of the Chief Medical Examiner on January 2, 2006. (The Autopsy Report is submitted as Defendant Tabaddor's Exhibit U). The cause of death was determined to be hypertensive and atherosclerotic cardiovascular disease with diabetes mellitus listed as a contributing condition. The

autopsy revealed no evidence of a brain tumor.

On April 6, 2006, plaintiff commenced this action by the filing of a summons and verified complaint containing four causes of action alleging medical malpractice, wrongful death, lack of informed consent, and loss of services, society, companionship and consortium.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hosp. 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. Makaj v. Metropolitan Transport Authority, 18 AD3d 625, 626 (2d Dept. 2005).

In order to sustain a cause of action to recover damages for wrongful death, a plaintiff must establish a wrongful act, neglect or default by a defendant which caused the decedent's death, provided the defendant would have been liable to the deceased had death not ensued. EPTL §5-4.1(1); Chong v. New York City Transit Authority, 83 AD2d 546 (2d Dept. 1981).

It is the plaintiff's position that Drs. Noble and Tabaddor were negligent in misinterpreting the CT scan and MRI performed on Mr. Roques on April 1, 2005 which resulted in Dr. Tabaddor performing an unnecessary craniotomy on Mr. Roques on April 12, 2005 and a stereotactic biopsy on April 26, 2005. The plaintiff further asserts that the sequelae of events following these unnecessary surgeries caused Mr. Roques to suffer from chronic physical and emotional stress resulting in his death on January 1, 2006.

The defendants assert that because the autopsy performed on Mr. Roques determined his cause of death to be hypertensive and atherosclerotic cardiovascular disease, plaintiff cannot prove the element of causation and, therefore, the wrongful death cause of action must be dismissed. In support of their application, Dr. Tabaddor and New York Neuroscience Institute have submitted the affirmation of Richard Stein, M.D., a Board Certified physician in Internal Medicine and Cardiovascular Disease. (Defendant Tabaddor's Exhibit W). Dr. Noble and University Diagnostic Medical Imaging also rely on Dr. Stein's affirmation in support of their motion.

In his affidavit, Dr. Stein states that he reviewed Mr. Roques' relevant medical records, autopsy report and death certificate. Dr. Stein notes that the autopsy report indicates that Mr. Roques' cause of death was atherosclerotic and hypertensive cardiovascular disease. Findings from the autopsy demonstrate that Mr. Roques suffered from coronary artery atherosclerosis (70% - 80% atherosclerotic stenosis of the mid left circumflex and right coronary arteries, moderate atherosclerosis of the aorta), cardiac hypertrophy (enlarged heart) and nephrosclerosis (arteriosclerosis of

kidneys). The arteries at the base of Mr. Roques' brain were also found to be atherosclerotic. In addition, Mr. Roques' history of Type II diabetes and hypertension put him at an increased risk for a heart attack. During his December 2004 hospitalization at Montefiore Medical Center, prior to the procedures at issue in this case, Mr. Roques' stress EKG indicated that he had a low exercise tolerance (Defendant Tabaddor's Exhibit N). Dr. Stein states that it is his opinion, within a reasonable degree of medical certainty, that Mr. Roques' death on January 1, 2006 was due to atherosclerotic and hypertensive cardiovascular disease which was not proximately caused by the right frontal craniotomy and/or the stereotactic biopsy performed eight months earlier.

The court finds that based on the affirmation of Dr. Stein, the defendants have each met their prima facie burden of establishing that Mr. Roques' death was not caused by a wrongful act, neglect or default on their part.

In opposition, the plaintiff has submitted the redacted² affirmation of a Board Certified physician in Internal Medicine and Cardiovascular Disease (Plaintiff's Exhibit B). In this affirmation, the plaintiff's expert states that he/she reviewed Mr. Roques' relevant medical records, autopsy report and death certificate which reflect that in the eight and one-half months following the craniotomy, Mr. Roques suffered from seizure disorder, frontal lobe syndrome, inability to participate in his own healthcare, marked physical limitations, pain, decreased cognition and expressive language skills,

² A party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an original is provided to the court for in camera inspection. Marano v. Mercy Hospital, 241 AD2d 48, 50 (2d Dept. 1998).

deficits in gross and fine motor functioning, and frustration at being unable to meaningfully participate in his former life. The plaintiff's expert states that these impairments were caused by the April 12, 2005 right frontal craniotomy and/or the April 26, 2005 stereotactic biopsy and that these impairments caused Mr. Roques to suffer from physical and emotional stress which can adversely affect the cardiovascular system in several ways including causing hypertension and increasing cholesterol. The plaintiff's expert further opines that stress can be responsible for sudden death as the inflow into the body of chemicals such as adrenaline and noradrenaline can cause the narrowing of the coronary arteries, impeding blood flow to the heart and resulting in abnormal heart rhythm. In support of this position, the plaintiff's expert cites published Georgetown University studies which found that stress could induce rapid blocking of the arteries following angioplasty procedures, resulting in death. It is the plaintiff's expert's opinion that the "complicated clinical course" suffered by Mr. Roques from April 2005 until his death was caused by Dr. Tabaddor's treatment and involved the type of chronic physical and emotional stress known to result in worsening hypertension, arrhythmia and atherosclerotic disease leading to Mr. Roques' ultimate demise. The plaintiff's expert further opines that Mr. Roques' prior history of coronary risk factors and diabetes mellitus does not alter his or her conclusion that Mr. Roques' death was precipitated by his neurological injury and the stress caused by said injury.

In Reply, Dr. Tabaddor and New York Neuroscience Institute have submitted a second affirmation from Dr. Stein (Defendant Tabaddor's Reply, Exhibit A). In this affirmation, Dr. Stein states that it is his opinion, within a reasonable degree of medical certainty, that there is no medical or factual basis for the opinion of plaintiff's

expert and that it is not generally accepted in the medical community that the alleged chronic stress suffered by Mr. Roques as a result of Dr. Tabaddor's treatment was a substantial factor in causing Mr. Roques' death eight and one-half months later. In this regard, Dr. Stein notes that the only studies which show a causal relationship of stress to heart attack and death involve acute stress and sudden cardiac death, and these studies establish that the causal relationship lasts only hours after the stressful event and no more than one week. Dr. Stein further opines that the Georgetown University studies referred to in the plaintiff's expert's affirmation do not support his/her opinion regarding Mr. Roques' death as the studies involved the increased risk of reocclusion in patients who had recently undergone angioplasties, and, as such, are not relevant to Mr. Roques' situation. Dr. Stein also states that there are no published scientific studies which demonstrate a causal relationship between chronic stress, as perceived by the subjects, and acute cardiovascular death, and that several significant studies involving job-related stress and "life stress" have been negative in this regard. Dr. Stein again notes that Mr. Roques had long-standing history of coronary artery disease that preceded the April 12 and April 26, 2005 surgical procedures and was at a significantly increased risk for cardiovascular death. It is Dr. Stein's opinion, within a reasonable degree of medical certainty, that any alleged chronic stress suffered by Mr. Roques following his surgery was not a substantial factor in causing his death eight and one-half months later.

The court finds that the plaintiff has failed to meet her burden of demonstrating that a triable issue of fact exists as to whether Mr. Roques' death was

caused by a wrongful act, neglect or default on the part of either Dr. Tabaddor or Dr. Noble.

At the outset, the court notes that the plaintiff's expert's affirmation is deficient in that it fails to raise an issue of fact as to whether either Dr. Tabaddor or Dr. Noble committed a wrongful act, neglect or default which caused Mr. Roques' death. The conclusory assertion in the plaintiff's expert's affirmation that the craniotomy and stereotactic biopsies performed by Dr. Tabaddor in April 2005 were contraindicated is clearly not sufficient. Collymore v. Montefiore Medical Center, 39 AD3d 237 (1st Dept. 2007).

In addition, the plaintiff has failed to raise an issue of fact as to a causal relationship between any allegedly negligent act by either Dr. Tabaddor or Dr. Noble and Mr. Roques' death. The autopsy report is clear – Mr. Roques died as a result of atherosclerotic and hypertensive cardiovascular disease with Type II diabetes mellitus as a contributing factor. The autopsy revealed that Mr. Roques suffered from 70% - 80% atherosclerotic stenosis of the mid left circumflex and right coronary arteries, moderate atherosclerosis of the aorta, cardiac hypertrophy, nephrosclerosis and atherosclerosis of the arteries at the base of his brain. It is undisputed that Mr. Roques had a prior history of cardiovascular disease and was taking medications for hypertension, high cholesterol and Type II diabetes prior to the two April 2005 surgical procedures.

Plaintiff's expert has failed to provide any competent medical proof in support for his/her opinion that the chronic stress suffered by Mr. Roques following the


April 2005 surgeries resulted in his death from cardiovascular disease on January 1, 2006. The only named studies relied on by the plaintiff's expert are the Georgetown University studies which demonstrated a causal relationship between stress and heart attack for patients who had undergone an angiogram in the preceding week, a situation clearly not applicable here. The plaintiff's expert acknowledges that Mr. Roques had a prior history of cardiac disease and related ailments and concludes that this prior history does alter his opinion that the April 2005 surgeries and the sequelae of events following these procedures were a proximate cause of his death. In support of this position, the plaintiff's expert notes that Mr. Roques did not suffer from seizure disorder or frontal lobe syndrome prior to April 2005. However, the autopsy did not demonstrate that Mr. Roques death was the result of a seizure or any other condition which may be attributable to the April 2005 surgeries.

It is well established that absent a causal connection between a defendant's alleged wrongful act, neglect or default and the decedent's death, a survivor has no cause of action for wrongful death. Collymore v. Montefiore Medical Center, *supra*; Bickford v. St. Francis Hospital, 19 AD3d 344, 345 (2d Dept. 2005). The court finds the affirmation of the plaintiff's expert on the issue of the causal relationship between Mr. Roques' death and any allegedly negligent act by Drs. Tabaddor and/or Noble to be conclusory and speculative and, therefore, insufficient to defeat a motion for summary judgment. See Diaz v. New York Downtown Hospital, 99 NY2d 542, 544 [2002]; Romano v. Stanley, 90 NY2d 444, 451-52 [1997]; Candia v. Estepan, 289 AD2d 38, 40 (1st Dept. 2001). The defendants' motions for summary judgment are

accordingly granted and the wrongful death cause of action is dismissed.

This opinion constitutes the decision and order of the court.

Dated: June , 2008


SALLIE MANZANET-DANIELS
J.S.C.