

Barrera v Manhattan's Physician Group, P.C.

2009 NY Slip Op 30198(U)

January 27, 2009

Supreme Court, New York County

Docket Number: 108441/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 108441/2008
BARRERA, SALVADOR
 vs.
MANHATTAN'S PHYSICIAN GROUP
 SEQUENCE NUMBER : 001
 AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE 1/20/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7
8-9
10-13

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

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED

FEB 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/27/09

[Signature]
J.S.C.

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Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
SALVADOR BARRERA and MILAGROS SOTO
BARRERA,

Plaintiffs,

Index No. 108441/08

-against-

Decision and Order

MANHATTAN'S PHYSICIAN GROUP, P.C. and
EVELYN CHU, M.D.

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Plaintiffs move for an order, pursuant to Sections 1001 and 1003, and Rule 3025(b), granting leave to file an amended complaint to add a cause of action for wrongful death of behalf of Milagros Soto Barrera, the surviving spouse and distributee of plaintiff-decedent Salvador Barrera. Plaintiffs also seek to add individual causes of action for wrongful death on behalf of the parties' three children. Finally, plaintiffs seek an order amending the caption to reflect the appointment of the administratrix and the addition of the other plaintiffs.

This action was commenced on June 17, 2008. Plaintiffs allege that defendants failed to diagnose metastasized gastric cancer in plaintiff Salvador Barrera. Defendants served an answer and demand for a bill of particulars on or about July 2, 2008. Plaintiffs served their response to the demand for a bill of particulars on or about July 25, 2008. Salvador Barrera died on July 27, 2008. By order dated September 5, 2008, the Hon. Kristin Booth Glen appointed plaintiff Milagros Soto Barrera as the administratrix of her late husband's estate.

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Defendants do not oppose that portion of the motion to amend the caption to reflect the substitution of decedent's estate. Defendants do object, however, to that portion of the motion to add the three infants to the caption and to add individual and separate causes of action unless plaintiffs first provide birth certificates for the children. Annexed to the reply papers are copies of the birth certificates for two of the children. Salvador Antonio Barrera was born on April 5, 1989, and Nicolette Barrera was born on December 13, 1994. A birth certificate was not provided for the third child, but counsel for plaintiffs affirms that this child, Arizza Justina Barrera, is three years old. Counsel affirms that as soon as a copy is available, he will provide it to defendants. Subject to the production of this birth certificate, this court grants that portion of the motion to add a claim on behalf of the children for their pecuniary loss resulting from their father's death.

Defendants also oppose plaintiffs' attempts to amend the complaint to add a cause of action for wrongful death. Defendants assert that the physician's affidavit submitted by plaintiffs fails to set forth with sufficiency a causal connection between the alleged malpractice and decedent's death. Last year, in Lucido v. Mancuso, 49 A.D.3d 220 (2d Dep't 2008), the Second Department overruled a fifty-year-old line of cases which had required a competent showing of merit before a complaint could be amended to add a cause of action for wrongful death. The court noted that the standard until this point had required competent medical proof establishing the connection between defendant's conduct and the resultant death of plaintiff. The First Department, however, has yet to endorse the Second Department's new standard. In this Department, the standard remains that in order to add a cause of action for wrongful death, plaintiff must submit competent medical proof of the causal connection between the alleged malpractice and plaintiff's death. Brown v. Kamlet,

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N.Y.L.J., Aug. 13, 2008, at 26, col. 1 (Sup. Ct. N.Y. Co. 2008) (Carey, J.), citing, inter alia, Gambles v. Davis, 32 A.D.3d 224 (1st Dep't 2006).

With respect to a claim of failure to make a timely diagnosis that ultimately leads to the patient's death, Justice Carey noted in Brown v. Kamlet, supra, that the First Department requires an affidavit that "specifically addresses any causal connection between such departure and the death of the injured plaintiff." In Brown, Justice Carey found that the expert's affidavit was insufficient because it "fail[ed] to address whether defendants' alleged departure negatively effected [sic] [the decedent's] survival rate, thereby constituting a proximate cause of her death." Brown v. Kamlet, supra. Absent such statements, Justice Carey stated that the court can only speculate as to whether the decedent's outcome would have been any different if decedent had been diagnosed sooner.

Here, plaintiffs submitted the affidavit of Richard James Hirschman, M.D., a licensed physician who is board certified in internal medicine and who specializes in medical oncology. Dr. Hirschman recites the medical records he reviewed. He also avers that he examined Mr. Barrera on June 16, 2008. Dr. Hirschman states that the examination revealed that Mr. Barrera was suffering from incurable metastasized gastric cancer and had six months or less to live. In fact, Mr. Barrera died just eleven days after the examination. Dr. Hirschman sets forth his opinion, with a reasonable degree of medical certainty, that defendants departed from good and accepted medical practice and standards, which proximately caused Mr. Barrera's wrongful death. Specifically, the failure to diagnose the gastric cancer during the two-year period in which Mr. Barrera was being seen "allowed [the cancer] to progress from an early curable stage to an incurable stage when the diagnosis of gastric cancer was finally made on January 29, 2008, there by [sic] significantly reducing

Mr. [Barrera's] chances of survival or cure." The affidavit further states that the failure to conduct an endoscopy caused a delay in the treatment, which deprived the decedent of a substantial chance for a cure or survival, which led to his injuries and resulting wrongful death.

Defendants challenge the sufficiency of the affidavit, claiming that it is inadequate because Dr. Hirschman did not review the medical records of New York-Presbyterian Hospital, where the decedent died. The records reflect that the decedent was brought to the emergency department of New York Presbyterian on July 26, 2008, at approximately 10:30 p.m., complaining of shortness of breath. He was given morphine. A portable chest x-ray revealed bilateral pleural effusion. The decedent died on July 27, 2008 at 1:30 a.m. The records further reflect that the decedent had end-stage gastric cancer, which was noted on the chart as his primary final diagnosis. The secondary final diagnosis is "likely PE," for plural effusion. The chart further notes that the family did not want him intubated; there were both DNI and DNR orders on his chart.

Dr. Hirschman's failure to review the chart for this last hospitalization, which is for the time period encompassing approximately the last three hours of the decedent's life, is not fatal to the motion for leave to amend. Dr. Hirschman avers that he actually examined Mr. Barrera just eleven days before his death. Under the First Department standard, the affidavit is sufficient in that plaintiffs have submitted competent medical proof of a causal connection between the alleged medical departures and the negative effect on Mr. Barrera's survival rate. For these reasons, the motion for leave to amend is granted in its entirety.

Plaintiff is directed to serve and file an amended summons and amended complaint, in the form annexed to the motion papers, within twenty (20) days of the date of this decision and order. Plaintiffs shall also serve a copy of the amended complaint and a copy of this order on the Motion Support Office and the Trial Support Office. The Clerk of Court is directed to amend the caption to reflect the appointment of Milagros Soto Barrera and the Administratrix of the Estate of Salvador Barrera and the additional causes of action for wrongful death on behalf of Milagros Soto Barrera and the children/distributees. Defendants shall serve their answer to the amended complaint in accordance with the C.P.L.R. The preliminary conference scheduled for February 3, 2009, is adjourned until March 31, 2009 at 10:00 a.m.

This constitutes the decision and order of the court.

Dated: January 27, 2009



 JOAN B. LOBIS, J.S.C.

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