

Lind v Greenspan

2009 NY Slip Op 31271(U)

June 2, 2009

Supreme Court, New York County

Docket Number: 112223/2006

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Lind

INDEX NO. 12223/06

- v -

Wolf

MOTION DATE _____

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECISION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 6/2/09

L. York
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
KAREN LIND, ELLEN HAYA and DAVID
GREENSPAN, as Preliminary Executors
of the ESTATE OF EZRA M. GREENSPAN,
a/k/a EZRA GREENSPAN, and KAREN LIND,
ELLEN HAYA and DAVID GREENSPAN,
individually,

Plaintiffs, Index #112223/2006

-against-

EDITH WOLF GREENSPAN and MARCIA
GORDON,

Defendants.

-----x

YORK, J.:

In this action for wrongful death, defendant, Edith Wolf Greenspan (Greenspan), moves for summary judgment dismissing this action commenced against her by her second husband Dr. Ezra Greenspan's (Dr. Greenspan) adult children from a prior marriage. They assert, in essence, that Greenspan caused Dr. Greenspan's conscious pain and suffering and death and must therefore forfeit any right to share in his estate.

Background

Dr. Greenspan, who was formerly an oncologist, married Greenspan, who also had children from a prior marriage, in 1981.

The couple signed an antenuptial agreement which provided that they relinquished any rights as widow/widower. After the marriage, the couple moved into Greenspan's apartment.

Thereafter, the couple purchased, as joint tenants, a country home, allegedly both contributing to the purchase price. In 1982 Greenspan changed title to the apartment to make Dr. Greenspan a joint tenant with survivorship rights. In 1989 the couple executed a post-nuptial agreement, which provided that if either sold any property, including jointly held property, half the net proceeds would be paid over to the estate of the predeceasing spouse. That agreement was cancelled the following year.

In 2000 Dr. Greenspan executed a will. In May 2002, Dr. Greenspan and his wife entered into an agreement involving their apartment and country home, which provided that, in the event Dr. Greenspan outlived his wife, he would have a life estate in such properties, but that on his death they would pass to her children. The agreement further provided that Dr. Greenspan would execute a codicil to his will or a new will which would state that the properties were to be devised as provided in his wife's will. Later that year, Dr. Greenspan executed a codicil and new will, drafted by his wife's attorney.

Meanwhile, Dr. Greenspan grew ill, suffering from, among other things, rheumatoid arthritis, that caused him to use a

walker and eventually a wheelchair, Parkinson's disease, high blood pressure, diabetes and coronary artery disease, and retired from his medical practice in 2001. For several years before his death at the age of 85 on September 3, 2004, he had several home healthcare attendants, including Richard Knapp, and then, at the time of his death, Marcia Gordon, who was named as a defendant in this case but never served.

It is claimed, in the verified complaint, that Greenspan neglected bedsores that her husband had developed in 2003, resulting in his physician, Dr. Marvin Goldstein, persuading Dr. Greenspan to be hospitalized, causing his condition to improve. Complaint at 9-13. It was further alleged that during the weekend of August 28-29, 2004, Lind's sister and coplaintiff, Ellen Haya, called her father and heard screaming in the background, and that when she inquired of her father as to what was going on, he was evasive. *Id.* at 14. When she told her father that she would see him that Monday, he replied, "If I live until then." *Ibid.*

It is further alleged in the complaint that Haya met her father at a restaurant, allegedly observed bruises on her father's arms, shoulders and neck and called Lind, and asked her father how he got bruised. He replied that he had annoyed his wife. Lind then bought a camera at a nearby store and took photos of her father's bruises. The complaint further alleges that day, Lind called Greenspan's son, Steven Wolf, and told him of her father's

bruises. Wolf allegedly said that he was aware of that. Lind then claims that she told Wolf that she was planning to take legal action, and that if he did not do anything about his mother, she would. Lind aff. ¶ 9. Lind maintains, and defendant does not dispute, that Steven Wolf confirmed at his deposition that this conversation occurred. *Id.* at ¶ 10. Later that day, Greenspan was admitted to Lenox Hill Hospital, allegedly because, she was drinking too much. *Id.* at ¶ 10. Lind further alleges that Greenspan had previously kicked and/or slapped her on November 17 and 18, 2003 during her father's hospitalization for bedsores. Lind reported the first alleged incident to a hospital social worker on afternoon of November 18 at 4:00 p.m. Aff. in opp., exh. 1.

During Greenspan's hospitalization at Lenox Hill Hospital, Dr. Greenspan remained at home with Gordon, who allegedly administered his medications and rendered care. While she was hospitalized, Greenspan communicated with Gordon. On the afternoon of September 2, 2004, Dr. Greenspan, accompanied by Gordon, met Lind, her daughter and Haya for lunch at a restaurant. According to Lind, her father "appeared to be in better health," (Complaint at 21), had no trouble talking, engaged his daughter in conversation, was not short of breath and was optimistic about the future (Lind aff. at ¶ 7). That evening at about 6:00 p.m. Gordon called Dr. Goldstein, allegedly because Dr. Greenspan was having

respiratory difficulties. At about 9:00 p.m. that night, Dr. Greenspan called a close personal friend, Gilbert Millstein, and left a message on his cell phone. At about 11:00 p.m. that night Gordon called EMS after Dr. Greenspan collapsed. Dr. Greenspan was brought to Lenox Hill Hospital, where unsuccessful attempts were made to revive him. He died early on the morning of September 4, 2004.

An autopsy was conducted on September 4 by Dr. Barbara Sampson of the New York City Medical Examiner's office. Before the autopsy was conducted, she was advised by Lind that Dr. Greenspan may have been recently abused or assaulted. Wolfe aff. of 6/30/08 at 12-14. After toxicology results were returned, Dr. Sampson concluded that the cause of death was hypertensive cardiovascular disease, that Amantadine intoxication and diabetes mellitus were "significant conditions contributing to death but not resulting in the underlying cause [hypertensive cardiovascular disease]," and that the manner of death was "therapeutic complication," rather than a homicide, or accident (aff. in opp., exh. G, item 8). *Id.* at exh. C. The decedent was noted to have "nephrosclerosis, marked." Wolfe aff. of 6/30/08, exh. C. Ecchymoses (essentially, black and blue marks) on the right and left arms were noted as "consistent with attempts at venous access." *Ibid.*

The toxicology report showed a high Amantadine level in the

decedent's blood. The autopsy results revealed the presence of Amantadine in the decedent's gastric contents in an amount less than one 100 mg. tablet. In addition to wrongful death, the complaint alleges a forfeiture action and seeks punitive damages.

The Instant Motion

In support of her motion for summary judgment, defendant asserts that she did not beat her husband, neglect his medical care, provide him with an overdose of Amantadine or cause anyone else to overdose him. In addition, she asserts that her husband did not die of any beating or bedsores. Besides relying on her own affidavit, she relies, among other things, on portions of deposition testimony of Dr. Goldstein, Gilbert Millstein, and Dr. Sampson.

Dr. Goldstein, who treated Dr. Greenspan for about fourteen years, never saw anything during his examinations of the patient that suggested any physical abuse, and was never informed by the patient's children or by the patient of any abuse. In addition, there was nothing which suggested to him that the patient may have been overdosed on Amantadine, and he had no knowledge of any claim that Greenspan intentionally administered a high dose of that medication to her husband. He also had no knowledge of any claim that Greenspan's neglect led to the development of bedsores or that she prevented her husband from receiving care for his bedsores.

Millstein, who knew Dr. Greenspan since 1978 and was one of his closest friends, testified that over the last two years of Dr. Greenspan's life, after Dr. Greenspan stopped working, he visited and had dinner with him, with "few exceptions," every Tuesday night at his home. Millstein ebt at 39-40. On those occasions Greenspan was usually present, but after dinner the two men would spend time talking alone. Before Dr. Greenspan retired, Millstein spent time with the couple at their apartment, country home and at dinners elsewhere. Millstein at his deposition estimated that he had been together with the couple "[h]undreds and hundreds" of times. Dr. Greenspan never told Millstein that his wife had abused him. However, within the last eight months of his life he observed bruises on Dr. Greenspan's body, which he asked him about. Dr. Greenspan, allegedly replied that he bruised easily and got knocked about when he was maneuvering his wheelchair through doorways. Millstein noted that he once did that to Dr. Greenspan.

Dr. Sampson, who as previously noted was aware of the family's suspicions before the autopsy, testified that the most likely explanation for the bruises was that they resulted from attempts to draw blood or to put in intravascular lines, and that there was no reason to believe that the bruises "were part of a general pattern of abuse." Wolfe aff. of 6/30/08 at 17. She further testified that physical abuse did not contribute to the

decedent's death. Dr. Sampson stated that she had found one shallow bed sore, which also did not contribute to Dr. Greenspan's death.

Regarding the Amantadine, Dr. Sampson concluded that Dr. Greenspan's death was not the result of criminal violence. She stated that the high level of Amantadine in the decedent's blood reflected his taking the usual amount of the drug "but being unable to clear it properly," rather than his having "been overdosed either intentionally or otherwise." Specifically, she testified that Dr. Greenspan had diabetes and hypertension, two conditions that she believed caused Dr. Greenspan's significant kidney impairment, as reflected in his "very high" BUN and creatinine levels and his nephrosclerosis. Because of his impaired kidney function, which Dr. Sampson characterized as significant. Dr. Greenspan's kidney (he had one large horseshoe-shaped kidney, rather than the usual two kidneys) could not effectively clear out Amantadine, thereby causing it to build up to a toxic level. When asked about the final autopsy report's inclusion of Amantadine intoxication, Dr. Sampson stated that that meant the level of Amantadine was too high. When asked what the difference was between that and an overdose, she explained that "[a]n overdose implies ... that someone intentionally or inadvertently received too much of the drug," and that the evidence that she had did not indicate that. Dr. Sampson further

testified that if someone takes an overdose, whether intentionally or accidentally, the expectation would be to see a very high level of the drug in the gastric level, reflecting the ingestion of a large number of pills. *Id.* at 23. However, Dr. Sampson noted that in the case of Dr. Greenspan, there was less than one pill present in his gastric contents. *Id.* at 23, 28. So, that was part of what Dr. Sampson used to determine the manner of Dr. Greenspan's death. *Ibid.*

Plaintiffs oppose the motion. They concede that any beating or bedsores did not result in Dr. Greenspan's death. They maintain that those allegations were placed in the complaint to show Greenspan's mistreatment of her husband and to support the conscious pain and suffering cause of action, which they assert is premised on the pain the decedent experienced as a result of the alleged beatings and bedsores. As to the beatings, they rely on the affidavit of Jaclyn Silverman, who asserts based on hearsay derived from alleged conversations with Joan Milgrim in 2002-2004, that Greenspan was heavily drinking and was hitting and screaming at Dr. Greenspan. Milgrim, a close friend of both Dr. and Mrs. Greenpan, and according to Lind's husband (Lind aff. of 8/7/08 at ¶ 11), Greenspan's employee, was deposed in this case, and neither her affidavit nor her deposition transcript has been provided to back up these alleged conversations. Defense counsel asserts in his reply affidavit (at ¶23) that Milgrim testified that there was

no physical abuse of Dr. Greenspan, and this was not refuted by plaintiffs in their subsequent papers.

Plaintiffs, to show that Dr. Greenspan was given an excessive amount of Amantadine, rely on some Boghen Pharmacy printouts and parts of the deposition testimony of a Joseph Gennardo, who was deposed on behalf of Boghen. It appears that a Dr. Altschuler first prescribed Amantadine on January 14, 2004. That prescription was for a three-month supply of 100mg. pills to be taken three a day. Three refills were allowed. A new prescription with a different prescription number was evidently phoned in on June 11, 2004 for fifteen 100 mg. pills to be taken three a day. That prescription provided for three refills. See Wolfe aff. of 11/19/08, exh. I; Gennardo ebt at 55. It appears, however that ten refills of fifteen pills each were issued by the pharmacy, including the refill of September 2, 2004.

Gennardo testified that every prescription and refill by law had to be authorized by a licensed physician. *Id.* at 61-62. When a prescription was up, the pharmacy would call the prescribing physician to see if they would give a refill or new prescription, but if that was refused, they would call the patient to see if there was another physician available to prescribe the medication, or if the patient were a physician, they would ask the patient if he or she would prescribe it. Gennardo ebt at 22. If a prescription were phoned in, the pharmacy was only allowed to

dispense a five-day supply. *Id.* at 20. Gennardo testified that the usual procedure would have been to call Dr. Altschuler to either write a new prescription or give his oral authorization, but he did not have any records indicating whether or not this was done. Nor, did he know whether his pharmacy called back the patient to see if there was another physician who would prescribe the drug. When asked what the authority was to refill the second prescription after it expired, Gennardo replied that either Dr. Altschuler authorized it or Dr. Greenspan "may have authorized it himself." *Id.* at 61. He then indicated that he did not know if Dr. Greenspan authorized the refills. *Id.* at 62.

Based on the foregoing, plaintiffs and their expert, Dr. Werner Spitz, conclude that the Amantadine was provided without a prescription from a licensed physician, and thus was not medically authorized. Dr. Spitz, who does not claim that Dr. Altschuler should never have prescribed Amantadine, that the dose prescribed by him was inappropriate or that had Dr. Altschuler authorized the refills that that would have constituted malpractice, asserts that Dr. Greenspan, during the last seven weeks of his life received more than 100 unauthorized pills, and concludes, without explanation, that the patient received "excessive amounts of Amantadine." Dr. Spitz, without specifically addressing Dr. Sampson's findings regarding the decedent's high BUN and creatinine levels, nephrosclerosis and significantly impaired

kidney function, conclusorily asserts that the Amantadine intoxication can be "partially, but not completely, explained by a gradual buildup of the drug that was not adequately excreted in the urine." Spitz aff. at 9. Dr. Spitz does not address the finding of less than one pill in Dr. Greenspan's gastric contents or Dr. Sampson's reliance on that to support her conclusion that excessive amounts of the drug were not ingested.

Plaintiffs also claim that summary judgment is premature (CPLR 3212 [f]) because they have two unresolved discovery motions ... specifically, one related to March 2008 interrogatories which were aimed at locating Gordon and another which sought disclosure of Greenspan's records relating to her August 30, 2004 hospitalization so as to ascertain why she was hospitalized and to corroborate the allegations of physical abuse. Those motions were denied by me in May 2008 in light of a discovery conference pending in the related Surrogate's Court case. Plaintiffs, who do not indicate what transpired in the Surrogate's court with respect to the discovery issues, assert that the discovery is outstanding because they have filed a notice of appeal from my May 2008 orders.

Plaintiffs, who have since November 2004 been aware that Gordon might be difficult to find, claim that she is a "critical eyewitness" and that she has never been served in this case "[d]espite diligent efforts." Lind asserts that Dr. Goldstein

told her in the emergency room on September 2, 2004 that Gordon had called him at 6:00 p.m. that evening and that he told Gordon not to give Dr. Greenspan any more medication and suggested that she call 911. Gordon allegedly declined to call 911 at that time, but agreed to call later if Dr. Greenspan's condition worsened. Lind aff. at 17. Dr. Goldstein, who was deposed, had no recollection of such a conversation. See Wolfe aff. of 8/22/08, fn. 17. Lind, in an effort to establish that Dr. Goldstein's conversation with her was an excited utterance, asserted that when Dr. Goldstein told her this, he was excited and blurted it out. Interestingly, the complaint (¶ 22), verified by Lind, merely states on this topic that "on information and belief ... Marcia Gordon called Dr. Goldstein."

In reply, Greenspan asserts that plaintiffs' opposition is replete with hearsay, that Dr. Spitz has failed to rebut the showing that Dr. Greenspan's death was not attributable to his wife, that the evidence, including testimony from another home healthcare aid, Richard Knapp, shows that Greenspan did not beat her husband, and that discovery requests are not outstanding since they were denied, and that in any event plaintiffs have failed to demonstrate that they timely and diligently pursued further discovery regarding Gordon's whereabouts. Defense counsel notes that during her August 2007 deposition, Greenspan testified that Gordon had called her, she supposed, within the last year to keep

in touch, that she did not know where Gordon lived, but believed that it was not in New York. Defense counsel further observes that plaintiffs never attempted to have Gordon served via publication.

Plaintiffs' counsel responds that, even absent Gordon's testimony, the evidence is sufficient to support the conclusion that Dr. Greenspan received an overdose on the day of his death. Because he was feeling fine at lunch, the Amantadine was renewed and delivered that day. Gordon allegedly refused to call EMS, and Dr. Greenspan died early the next day with a toxic level of Amantadine in his blood. See R. Lind aff. of 12/3/08 at 8-9. Plaintiffs do not indicate why if Gordon was allegedly conspiring to overdose Dr. Greenspan, Gordon would call his physician and eventually EMS.

Greenspan's motion is granted to the extent that all causes of action, except for the second, sounding in conscious pain and suffering, are dismissed. Greenspan prima's facie established, particularly through the deposition testimony of Dr. Sampson, that the decedent's death was not attributable to an accidental or intentional overdose of Amantadine, but rather, was caused by his significant kidney function impairment, as demonstrated by his nephrosclerosis and elevated BUN and creatinine levels, as well as by presence of less than one pill in his gastric contents. Dr. Spitz's affidavit, which is rife with conclusory allegations made

"without specific analysis," and fails to address the factual bases for Dr. Sampson's conclusions, is inadequate to raise an issue of fact warranting the denial of the branches of the motion which seek to dismiss the wrongful death and forfeiture causes of action, and hence any claim for punitive damages. *Abalola v Flower Hospital*, 44 AD3d 522 (1st Dept 2007); *Rebozo v Wilen*, 41 AD3d 457 (2d Dept 2007); *Feliz v Beth Israel Medical Center*, 38 AD3d 396 (1st Dept 2007); *Chance v Felder*, 33 AD3d 645 (2d Dept 2006). In any event a claim for punitive damages is not a separate cause of action. *Racanova v Equitable Life Assur. Soc.*, 83 NY2d 603 (1994). In addition, Dr. Spitz' assertion that the refills were unauthorized is based on mere speculation. Plaintiffs do not provide Dr. Altschuler's affidavit on this issue. Also the complaint does not allege that Greenspan improperly obtained the Amantadine. See *Abalola*, 44 AD3d 522. Rather, it asserts an improper administration of the medication. Further, plaintiffs' papers are replete with hearsay. No affidavits are provided from, among others, Dr. Goldstein, Haya, Det. Ahern or the unidentified persons who allegedly told Lind that Greenspan was over-medicating her father. Accordingly the first, third and fourth causes of action are dismissed.

Nonetheless, the branch of the motion which seeks to dismiss the second cause of action, sounding in the decedent's conscious

pain and suffering, is denied. There is at least an issue of fact as to whether Greenspan beat her husband and caused him injury. While Dr. Sampson believed that the most likely explanation for the bruises was venous access, the undisputed claim that, after Lind spoke to Greenspan's son and threatened his mother with legal action, Greenspan was immediately hospitalized for a drinking problem, is sufficient to warrant the denial of this branch of Greenspan's motion. That Dr. Greenspan did not inform his physician or friend of any assaultive behavior is not necessarily dispositive, because spousal abuse often goes unreported, whether because of embarrassment or because of other reasons. In addition, Joan Milgrim denied that Greenspan inflicted physical abuse on her husband is not necessarily true, here where it was alleged that she was employed by Greenspan and thus may be considered an interested witness. See PJI 1:92. Finally, assuming that there were no witnesses to any abuse, whether there was any abuse would be wholly within Greenspan's knowledge, thereby rendering summary judgment inappropriate. *Kindzierski v Foster*, 217 AD2d 998 (4th Dept 1995); *Vasquez v Gonzalez*, 143 AD2d 413 (2d Dept 1988).

In conclusion, Greenspan's motion is granted to the extent of dismissing the first (wrongful death), third (punitive damages) and fourth (forfeiture) "causes of action," but is denied as to the second (conscious pain and suffering) cause of action.

