

Bosco v New York Univ. Hosps. Ctr.

2009 NY Slip Op 31318(U)

June 16, 2009

Supreme Court, New York County

Docket Number: 117029/06

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 29

MARILYN BOSCO, as Administratrix of the
Goods, Chattels and Credits of BENNET
BOSCO, and MARILYN BOSCO, Individually,

INDEX NO. 117029/06

Motion Sequence No.: 1

FILED

Plaintiffs,

-v-

JUN 18 2009

NEW YORK UNIVERSITY HOSPITALS
CENTER, NORMAN RISINGER, ROBERT
ROTHBERG and SUZETTE A. GAROFANO,

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

The following papers, 1- 57, were read on this motion by defendant Norman Risinger, M.D., s/h/a Norman Risinger for summary judgment dismissing the complaint; and cross-motion by defendants New York University Hospitals Center, Robert Rothberg and Suzette A. Garofano for summary judgment dismissing the complaint.

Notice of Motion - Affidavits - Exhibits
Notice of Cross-Motion - Affidavits - Exhibits
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation -
Replying Affirmation -

<u>Papers Numbered</u>	
1-21	_____
22-32	_____
33-52	_____
53-56	_____
57	_____

Cross-Motion: Yes No

Plaintiffs commenced a medical malpractice action against defendants New York University Hospitals Center, Norman Risinger and Robert Rothberg with the filing of a summons and complaint on or about November 14, 2006. Thereafter, with the filing of a summons and complaint on or about October 1, 2007, plaintiffs commenced a medical malpractice action against defendant Suzette A. Garofano. These two medical malpractice actions have been consolidated. Plaintiffs allege that defendants were negligent in failing to timely address the signs and symptoms of decedent, Bennet Bosco's, pulmonary embolism, which resulted in and caused Mr. Bosco's untimely death. The respective complaints also contain causes of action for lack of informed consent, loss of services and wrongful death. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendant Norman Risinger, M.D., s/h/a Norman Risinger presently moves for summary judgment dismissing the complaint, as asserted against him, pursuant to CPLR §3212. Similarly,

the remaining defendants, *i.e.*, New York University Hospitals Center, Robert Rothberg and Suzette A. Garofano, have cross-moved for summary judgment dismissing the complaint, as asserted against them.

SUMMARY OF FACTS

Mr. Bosco presented to defendant Dr. Risinger, a cardiologist, on June 28, 2005, with complaints of shortness of breath and chest pain.¹ An x-ray was performed and showed that Mr. Bosco was suffering from pneumonia. Dr. Risinger admitted Mr. Bosco to defendant New York University Hospitals Center that day. On July 1, 2005, Mr. Bosco underwent surgery to excise pericardial tissue for biopsy and to withdraw pleural fluid from his lungs for cytological evaluation. The pleural fluid cytology was positive for renal cell cancer. Following this procedure, Dr. Risinger placed Mr. Bosco on Heparin (a blood thinner) and ordered CT scans of Mr. Bosco's head, abdomen and pelvis as staging studies for the cancer. The CT scans were to be performed on a routine basis.

In the early morning hours of July 5, 2005, prior to 9:00 a.m., Dr. Risinger examined Mr. Bosco, who was experiencing shortness of breath and pain in his left shoulder. Mr. Bosco's blood pressure was 130/80, his heart rate was 100 and his oxygen saturation was 94% on two liters of oxygen. Dr. Risinger testified that a pulmonary embolism was not within his differential diagnosis of Mr. Bosco, in connection with his shortness of breath. As per Dr. Risinger's testimony, Mr. Bosco's oxygen saturation was slightly below normal at that time, however, he attributed this to the fact that Mr. Bosco was post-operative and had a chest tube in place. Dr. Risinger was also of the opinion that Mr. Bosco was hemodynamically stable. Dr. Risinger's plan was to have the CT scans of Mr. Bosco's head, abdomen and pelvis completed. Dr. Risinger did not have any further interaction with Mr. Bosco following this examination. It is noted that Nurse Yona Cohen and Nurse Practitioner Mary Boland, both employees of New York University Hospitals Center, were involved in the care, treatment and monitoring of Mr. Bosco during the morning hours of July 5, 2005 and at various points throughout the course of the day.

At approximately 10:20 a.m., Dr. Malik, a resident at New York University Hospitals Center, examined Mr. Bosco, along with Nurse Practitioner Mary Boland. It is noted in the medical records that, at that time, Mr. Bosco's oxygen saturation levels remained at an abnormally low level. It was further noted in the medical records that the CT scans of Mr. Bosco's head, abdomen and pelvis were to be held off until the situation relating to Mr. Bosco's oxygen

¹ In and around October 2004, Mr. Bosco was diagnosed with renal cell carcinoma (kidney cancer) in his right kidney. At that time, Mr. Bosco came under the treatment of Dr. Risinger, for the purpose of performing a pre-operative workup with respect to the removal of his kidney. Shortly thereafter, in December 2004, Mr. Bosco had a pacemaker inserted by Dr. Risinger to address a "heart block" that was causing fainting spells. It appears that Mr. Bosco followed up with Dr. Risinger on January 3, 2005 and January 14, 2005, at which Dr. Risinger prescribed Altace for cardiomyopathy and referred Mr. Bosco to an infectious disease physician. It is noted that, according to Dr. Risinger, Mr. Bosco had pericardial effusion (an abnormal accumulation of fluid in the pericardial cavity) in both October of 2004 and January of 2005. Dr. Risinger did not have any interaction with Mr. Bosco from January 14, 2005 through June of 2005.

saturation was resolved. At approximately 1:30 p.m., Mr. Bosco was examined by Dr. Garofano, a pulmonologist. According to Dr. Garofano's deposition testimony, she examined Mr. Bosco to assess his general pulmonary status, and was not specifically examining the patient to assess signs and symptoms of pulmonary embolism. Dr. Garofano was aware that Mr. Bosco was experiencing shortness of breath, and his oxygen saturation was low. Dr. Garofano testified that there were many reasons why Mr. Bosco may have been out of breath, including post-operative complications, improperly functioning chest tubes, and possibly the re-accumulation of fluid around his heart and lungs. Dr. Garofano reviewed a chest x-ray performed earlier that day on Mr. Bosco, which did not give any explanation for his shortness of breath. Dr. Garofano recommended that a further chest x-ray be performed. She did not recommend any other diagnostic tools to assess the reason for Mr. Bosco's shortness of breath.

At 3:57 on July, 5, 2005, Dr. Malik ordered that a spiral chest CT scan be performed to rule out pulmonary embolism. Despite intending to have the CT scan performed immediately, Dr. Malik failed to order the CT scan to be performed "STAT", and simply ordered that the scan be performed "today." It is noted that on July 5, 2005, two CT scanners used in connection with the care and treatment of inpatients at New York University Hospitals Center were not operating. As a result, the CT scanners located in the emergency department were needed for inpatients requiring CT scans. It appears that because Mr. Bosco's chest CT scan was ordered as routine, coupled with the high volume of emergency department patients requiring CT studies that day, Dr. Rothberg, the Emergency Department Site Director of New York University Hospitals Center, delayed the performance of Mr. Bosco's chest CT scan until approximately 10:30 p.m. Mr. Bosco arrested prior to undergoing the chest CT scan, sometime between 10:00 p.m. and 11:00 p.m., on July 5, 2005. He expired shortly thereafter. An autopsy was not performed.

MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "the proponent of a summary judgment motion 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 Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

Defendant Dr. Risinger presently moves for summary judgment dismissing the complaint, as asserted against him, pursuant to CPLR §3212. Dr. Risinger argues that no act or omission on his part caused any injury sustained by Mr. Bosco, and that the care and treatment which he rendered to Mr. Bosco was within the standard of care. In support of his motion, Dr. Risinger

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relies upon, *inter alia*, the expert affidavit of a physician, who is board certified in internal medicine and cardiology. Dr. Risinger's expert opines at the outset that no act or omission of Dr. Risinger caused any injury sustained by Mr. Bosco, and that the care and treatment which Dr. Risinger rendered to Mr. Bosco was within the standard of care. Dr. Risinger's expert sets forth that when Mr. Bosco presented to Dr. Risinger's office on June 28, 2005, he was suffering from pneumonia. The expert further states that Dr. Risinger appropriately admitted Mr. Bosco to the hospital, and ordered the appropriate tests and treatment, as well as requested the appropriate consultations. Following Mr. Bosco's surgery to drain the effusion from around his pericardial sac on July 1, 2005, Dr. Risinger, according to this expert, timely and appropriately ordered CT scans for staging purposes to exclude the possible reoccurrence and spread of renal cancer. Dr. Risinger's expert also sets forth that there was no basis to evaluate Mr. Bosco for pulmonary embolism on July 5, 2005, which according to the affidavit, is evidenced by the fact that Dr. Garofano, a pulmonologist, did not believe Mr. Bosco required a work-up for a possible pulmonary embolism when she examined Mr. Bosco later that day.

With respect to causation, Dr. Risinger's expert sets forth that:

"it is my opinion to a reasonable degree of medical certainty the cause of plaintiff's death was not a pulmonary embolism, but acute pneumonia with end stage metastatic renal cell cancer. The diagnosis of pneumonia is supported by the plaintiff's shortness of breath, fever, tachycardia, decreased oxygen saturation level and confirmed by the chest x-ray finding of pulmonary infiltrate. The combination of acute pneumonia, end stage metastatic renal cell cancer and pulmonary embolism as the cause of death would be exceedingly unlikely. Thus, the ordered chest CT-scan would not have changed the course or outcome, that is, the plaintiff's subsequent death."

The remaining defendants herein, *i.e.*, New York University Hospitals Center, Dr. Rothberg and Dr. Garofano, who have cross-moved for summary judgment, also rely upon the expert affidavit submitted by Dr. Risinger in support of his motion. These defendants argue that based upon this expert's opinion, Mr. Bosco did not, as contended by plaintiffs, die from a pulmonary embolism. Therefore, they argue, that any negligent acts and omissions in connection with the alleged failure to perform a timely CT-scan on July 5, 2005, were not the cause of Mr. Bosco's death.

In opposition to the instant motion and cross-motion, plaintiffs submitted, *inter alia*, the expert affidavit of a physician, who is board certified in internal medicine and cardiology. According to plaintiffs' expert, given Mr. Bosco's age, medical history, signs and symptoms of cardiopulmonary distress, and planned hospital treatment for pneumonia, Mr. Bosco had an increased risk of suffering a pulmonary embolism. Plaintiffs' expert opines that given these aforementioned factors, Dr. Risinger should have administered Heparin (a blood thinner) prophylactically upon his admission to NYU, and should have maintained the administration of this drug throughout Mr. Bosco's hospitalization, with the exception of when bleeding risks were elevated perioperatively. The expert states that Dr. Risinger belatedly administered Heparin to Mr. Bosco on July 1, 2005, following his pericardial surgery. In the opinion of plaintiffs' expert, "[t]he failure of Dr. Risinger to institute prophylactic Heparin therapy between June 28, 2005 and decedent's surgery of July 1, 2005 constitutes a departure from the standard of care, and caused or contributed to the fatal pulmonary embolism suffered by decedent on July 6, 2005."

Plaintiffs' expert further opines that "[t]he physicians and staff members who treated Mr. Bosco on July 5, 2005, including Dr. Risinger, Dr. Garofano, resident Dr. Malik, Nurse Cohen and Nurse Practitioner Boland failed to timely address the signs and symptoms of Mr. Bosco's pulmonary embolism, which resulted in and caused decedent's untimely death." According to plaintiffs' expert, in the morning hours, between approximately 8:00 a.m. and 10:20 a.m., of July 5, 2005, Dr. Risinger, Nurse Cohen and Nurse Practitioner Boland became aware that Mr. Bosco was experiencing shortness of breath, as well as difficulty breathing, coughing, and pains in his chest and shoulder. Despite exhibiting these signs and symptoms, nothing was done to evaluate Mr. Bosco for pulmonary embolism. Plaintiffs' expert further sets forth that by approximately 10:20 a.m., Nurse Practitioner Boland and Dr. Malik were aware that Mr. Bosco's oxygen saturation levels dropped to an abnormal low level of 83%. Nothing was done to evaluate Mr. Bosco for pulmonary embolism at this time. The expert further states in the affidavit that by approximately 1:30 p.m. on July 5, 2005, Dr. Garofano was aware of Mr. Bosco's clinical picture and the distress that he had exhibited, and should have been aware that the morning's x-ray results showed that Mr. Bosco's lungs were clear, excluding all other differential diagnoses. Notwithstanding, Dr. Garofano took no steps to evaluate Mr. Bosco for pulmonary embolism. In the opinion of plaintiffs' expert, "the failure to act by the above individuals deprived Mr. Bosco of a substantial opportunity to fully recover from his pulmonary ailments and brought about Mr. Bosco's untimely death."

Additionally, specifically with respect to the treatment provided by Dr. Risinger, plaintiffs' expert notes that Dr. Risinger, who was primarily responsible for the care of Mr. Bosco, deviated from accepted standards of medical care by not properly noting in the hospital records a treatment plan to address Mr. Bosco's respiratory distress, or documenting a suspicion of pulmonary embolism. The expert sets forth that had Dr. Risinger documented a suspicion of pulmonary embolism and ordered an immediate contrast to investigate such suspicion, the pulmonary embolism would have been identified, Mr. Bosco would have received an immediate full dose of Heparin, and the pulmonary embolism that ultimately caused Mr. Bosco's untimely death would have been prevented. The expert further opines that:

"[t]o a reasonable degree of medical certainty, standard of care mandates that when a healthcare practitioner has a suspicion of pulmonary embolism, that practitioner must take immediate steps to diagnose and treat it, given the high mortality rate associated with pulmonary embolism. Defendant Risinger departed from the standard of care by failing to take appropriate action to urgently diagnose and treat pulmonary embolism following his examination of decedent just prior to 9:00 a.m. on July 5, 2005. He was required to but failed to order an immediate spiral chest CT with contrast to confirm the diagnosis. He was required to but failed to even note his suspicion of pulmonary embolism for the benefit of future healthcare providers reviewing Mr. Bosco's chart, which would have prompted one of them to order an immediate chest CT scan with contrast. Because he failed to take these necessary steps to diagnose the pulmonary embolism, Mr. Bosco's condition was not identified timely, and therefore was not treated timely, which caused and contributed to Mr. Bosco's death from pulmonary embolism."

Furthermore, with respect to the spiral chest CT scan that was eventually ordered by Dr. Malik at 3:57 p.m. on July 5, 2005, plaintiffs' expert states that despite intending to have the CT scan done immediately, Dr. Malik failed to order the CT scan to be performed "STAT," and simply ordered that the scan be performed "today." In the expert's opinion, "[t]hat failure to properly

enter the order for the urgently needed CT scan contributed to the failure to diagnose and treat decedent's pulmonary embolism." Plaintiffs' expert adds that a further delay in the performance of the spiral chest CT scan resulted because New York University Hospitals Center's "ED Medical Director" improperly limited patient access to the only available CT scanner on July 5, 2005. Plaintiffs' expert states that this departure on the part of the "ED [Emergency Department] Medical Director" prevented the timely carrying out of Dr. Malik's already late order for the spiral chest CT scan. Moreover, according to plaintiffs' expert, given the limited access to the CT scanner at this time, Dr. Malik and/or Dr. Risinger should have taken further action to address the suspected pulmonary embolism. The expert opines that the standard of care required the administering of protective, therapeutic full-dose Heparin, and that a failure to provide this treatment proximately caused Mr. Bosco's death.

With respect to causation, plaintiffs' expert sets forth that contrary to the opinion of Dr. Risinger's expert, Mr. Bosco's death was not caused by acute pneumonia with end stage metastatic renal cell cancer. According to plaintiffs' expert, the medical records indicate that Mr. Bosco's pneumonia had improved over the course of his admission to New York University Hospitals Center, and was resolving by July 5, 2005. Plaintiffs' expert further states that there is no evidence in the record that Mr. Bosco's renal cell cancer was ever staged, and, thus, there is no way to ascertain how advanced that cancer was. Plaintiffs' expert opines that despite Dr. Risinger's expert's "baseless and fatalistic characterization" of Mr. Bosco suffering from end stage metastatic renal cell cancer, "Mr. Bosco's cancer was likely a micro-metastasis of renal cell cancer, and approximately 50% of such patients respond to treatment."

Dr. Risinger submitted a further affidavit from his expert physician in reply to plaintiffs' opposition, which addressed the aforementioned opinions set forth by plaintiffs' expert. At the outset Dr. Risinger's expert notes that plaintiffs' expert is not an expert in diseases of the respiratory system, including pulmonary embolism.² Thereafter, this expert states there is no medical evidence to substantiate the claim that Mr. Bosco's death was caused by a pulmonary embolism. Dr. Risinger's expert reiterates in this affidavit that the care and treatment that Dr. Risinger rendered to Mr. Bosco was within the standard of care, and that the cause of Mr. Bosco's death was acute pneumonia with end stage metastatic renal cell cancer, as well as a weakened heart.

Based upon the conflicting expert affidavits submitted, this Court finds that issues of fact and credibility exist in connection with whether Dr. Risinger, Dr. Garofano, Dr. Rothberg and New York University Hospitals Center, through the acts and omissions of its employees, departed from good and accepted medical practice in their treatment of Mr. Bosco, and whether such departures were the proximate cause of his death. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). With respect to plaintiff's informed consent cause of action, Dr. Risinger's expert entirely failed to address this cause of action in the expert affidavit submitted in support of the motion. As a result, Dr. Risinger, as well as the cross-moving defendants, who simply relied on the affidavit of Dr. Risinger's expert in support

² It is noted that plaintiffs' expert need not be a specialist in diseases of the respiratory system to qualify as an expert and to offer an opinion herein (see Farkas v. Saary, 191 A.D.2d 178 [1st Dept. 1993], citing Kletnieks v. Brookhaven Memorial Ass'n, Inc., 53 A.D.2d 169 [2d Dept. 1976]).

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of their motion, has failed to make a *prima facie* showing of entitlement to judgment as a matter of law as to such cause of action (see Bradley v. Soundview Healthcenter, supra). Accordingly, the instant motion and cross-motion are denied.

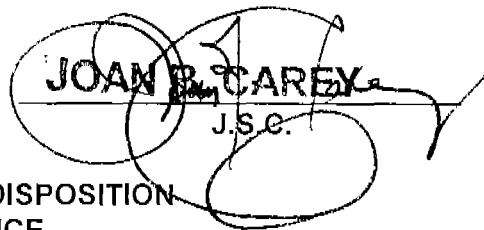
Based on the foregoing, it is hereby

ORDERED that the motion by defendant Norman Risinger, M.D., s/h/a Norman Risinger for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross-motion by defendants New York University Hospitals Center, Robert Rothberg and Suzette A. Garofano for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on June 18, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 6/16/2009


JOAN B. CAREY
J.S.C.

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