

**Sheffield v North Shore-Long Is. Jewish Health Sys.,
Inc.**

2009 NY Slip Op 32714(U)

November 16, 2009

Supreme Court, New York County

Docket Number: 100239/07

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

GRAHAM SHEFFIELD as Administrator
of the ESTATE OF CAROLYN SHEFFIELD,
deceased, and GRAHAM SHEFFIELD,
individually,

INDEX NO.: 100239/07

Motion Sequence No.: 12

Plaintiffs,

-v-

NORTH SHORE-LONG ISLAND JEWISH
HEALTH SYSTEM, INC., FRANKLIN
HOSPITAL MEDICAL CENTER, PETER
CHANG, M.D., SCOTT KESCHNER, M.D.,
JOSEPH & DESROCHES, M.D., P.C.,
LIONEL DESROCHES, M.D. and ANTONIO
JOSEPH, M.D.,

Defendants.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

The following papers, 1- 52, were read on this motion by defendants North Shore Long Island Jewish Health Care, Inc. s/h/a North Shore-Long Island Jewish Health System, Inc. and Franklin Hospital s/h/a Franklin Hospital Medical Center for summary judgment, dismissing the complaint, as asserted against them; and a separate motion by defendants Joseph & Desroches, M.D., P.C., Lionel Desroches, M.D. and Antonio Joseph, M.D. for summary judgment, dismissing the complaint, as asserted against them.

Motion Sequence No. 1

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

Papers Numbered

1-13
14-20
20-28

Motion Sequence No. 2

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

Papers Numbered

29-45
46-50
51-52

Cross-Motion: Yes No

Decedent, Carolyn Sheffield was taken to Franklin Hospital¹ by ambulance on July 3, 2005, after complaining to family members that she was feeling ill. She was admitted to the hospital by her nephrologist, Antonio Joseph, M.D., who, with his partner, Lionel Desroches, M.D., had been monitoring and treating decedent's renal condition and hemodialysis treatment since 1997. It appears that Dr. Joseph called Peter Chang, M.D. for a consultation of decedent. Dr. Chang, a surgeon, had treated decedent on multiple occasions prior to her emergency room visit of July 3, 2005. During this hospital admission decedent underwent multiple surgical procedures, which were principally performed by Dr. Chang. These surgical procedures involved the placement and removal of catheters that provided venous access for decedent's required hemodialysis treatment. It appears that multiple placements and removals of catheters were required because decedent was developing infections at the placement sites. It is noted that the infectious disease department at Franklin Hospital was consulted with in connection with decedent's care during her admission to the facility.

On July 17, 2005, decedent underwent a procedure to remove the previously implanted infuse-a-port, and insert a Quinton catheter through the left internal jugular vein. It appears that after Dr. Chang removed the infuse-a-port, he was unsuccessful in his attempts to insert the Quinton catheter through the left internal jugular vein. Dr. Chang ultimately placed a triple lumen catheter through the left internal jugular vein. It appears that immediately following this surgery decedent suffered from ventricular tachycardia and cardiac arrest, and, as a result, expired. According to the autopsy report, decedent's death was caused by left hemothorax due to a perforation of the left pulmonary artery during insertion of the left internal jugular venous catheters.

Plaintiffs commenced a medical malpractice action against the above captioned defendants with the filing of a summons and complaint on or about January 8, 2007. Plaintiffs allege that defendants were negligent in the manner in which they provided medical care to the decedent during the subject hospitalization, including the alleged negligent performance of the surgery of July 17, 2005 by Dr. Chang, as well as the allegedly negligent surgical clearance provided by decedent's nephrologists, Drs. Desroches and Joseph. The complaint also contains causes of action for lack of informed consent, wrongful death and a loss of services cause of action asserted by decedent's husband, Graham Sheffield. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants North Shore Long Island Jewish Health Care, Inc. s/h/a North Shore-Long Island Jewish Health System, Inc. (hereinafter "North Shore") and Franklin Hospital s/h/a Franklin Hospital Medical Center (hereinafter "Franklin Hospital") presently move for summary judgment, dismissing the complaint, as asserted against them. Defendants Joseph & Desroches, M.D., P.C., Lionel Desroches, M.D. and Antonio Joseph, M.D. similarly move, by separate motion, for summary judgment, dismissing the complaint, as asserted against them.

¹ Franklin Hospital is a member of the North Shore-Long Island Jewish Health System.

Legal Analysis

“[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*.

North Shore and Franklin Hospital

Defendants North Shore and Franklin Hospital presently move for summary judgment, arguing that they, through the acts or omissions of their employees, did not depart from good and accepted medical practice in connection with the treatment rendered to injured plaintiff, nor proximately cause any of decedent's injuries. North Shore and Franklin Hospital further argue that they are not vicariously liable for the actions of private attending physicians Dr. Chang, Dr. Desroches and Dr. Joseph. These defendants also argue that there is no basis for plaintiffs' informed consent claim as asserted against them.

In support of their motion, North Shore and Franklin Hospital rely upon, *inter alia*, the expert affidavit of a physician who is board certified in surgery. At the outset, North Shore and Franklin Hospital's expert sets forth that the care rendered to decedent by the medical staff of North Shore and/or Franklin Hospital was within accepted standards of medical care in all respects. According to this expert Dr. Chang, a private attending physician, directed the surgical care of decedent by making all of the surgical decisions. Moreover, decedent's private treating nephrologists, Drs. Desroches and Joseph, monitored her renal condition and hemodialysis treatment, and provided pre-operative clearance in connection with the subject surgery. The deposition testimony of these physicians confirms that they are not employees of North Shore and/or Franklin Hospital.

In opposition to North Shore and Franklin Hospital's motion plaintiff argues, *inter alia*, that North Shore and Franklin Hospital are vicariously liable for the acts or omissions of Dr. Chang even if he is a private attending physician at North Shore and Franklin Hospital, under Mduba v. Benedictine Hospital, 52 AD2d 440 [3d Dept. 1976]. The principle of ostensible agency or agency by estoppel has been applied by New York Courts to hold a hospital or other medical treatment facility liable for the malpractice of a medical practitioner providing services at that facility, despite that practitioner's status as an independent contractor, where the treatment was sought by the plaintiff from the facility, as opposed to the particular practitioner (see Hill v. St. Clare's Hospital, 67 NY2d 72 [1986], citing Hannon v. Siegel-Cooper Co., 167 NY 244 [1901]; Malcom v. Mount Vernon Hospital, 309 AD2d 704 [1st Dept. 2003]; Soltis v. State of New York,

172 AD2d 919 [3d Dept. 1991]; Santiago v. Archer, 136 AD2d 690 [2d Dept. 1988]; Lanza v. Parkeast Hospital, 102 AD2d 741 [1st Dept. 1984]; Mduba v. Benedictine Hospital, *supra*). The aforementioned agency principle is applicable where the plaintiff reasonably believed that the medical practitioner was acting at the facility's behest (see Malcom v. Mount Vernon Hospital, *supra*; Soltis v. State of New York, *supra*).

The evidence submitted in connection with the instant motion indicates that decedent sought emergency treatment and was brought by ambulance to Franklin Hospital. Decedent was admitted to Franklin Hospital by one of her private treating nephrologists, Dr. Joseph. It appears that Dr. Joseph called Dr. Chang for a consultation of decedent. Although decedent had been treated by Dr. Chang on prior occasions, according to the affidavit of decedent's daughter, decedent was "never a private patient of [Dr. Chang]," "never treated with Dr. Chang at his offices," and "never sought the treatment of Dr. Chang." Decedent's daughter further sets forth in her affidavit that decedent "only received treatment from Dr. Chang when she was a patient of [North Shore and Franklin Hospital]," and that decedent believed that Dr. Chang was an employee of North Shore and Franklin Hospital.

Based on the foregoing, the Court finds that an issue of fact exists as to whether decedent reasonably believed that Dr. Chang was acting at the facility's behest, and, thus, whether North Shore and Franklin Hospital may be held vicariously liable for the acts or omissions of Dr. Chang. As North Shore and Franklin Hospital have not set forth any evidence relating to the adequacy of Dr. Chang's treatment of decedent their summary judgment motion with respect to plaintiffs' medical malpractice and wrongful death causes of action must be denied. Notwithstanding, plaintiffs' informed consent cause of action is dismissed. Although North Shore and Franklin Hospital established its *prima facie* entitlement to judgment as a matter of law by demonstrating that decedent signed an informed consent form relating to the performance of the subject procedure, plaintiffs' failed to submit any medical evidence, through the affidavit of their expert, to refute this *prima facie* showing (see Erlson v. Palleschi, 23 AD3d 608 [2d Dept. 2005]).

Joseph & Desroches, M.D., P.C., Lionel Desroches, M.D. and Antonio Joseph, M.D.

Defendants Joseph & Desroches, M.D., P.C., Lionel Desroches, M.D. and Antonio Joseph, M.D. (hereinafter collectively referred to as "Drs. Desroches and Joseph") presently move for summary judgment, arguing that they did not depart from good and accepted medical practice in connection with the treatment rendered to decedent. In support of their motion, Drs. Desroches and Joseph rely upon, *inter alia*, the expert affidavit of a physician who is board certified in Internal medicine and nephrology. This expert states that, in his opinion, Drs. Desroches and Joseph rendered care and treatment to the decedent within accepted standards of medical care. The expert further opines that the care rendered by Drs. Desroches and Joseph did not cause or contribute to decedent's alleged injuries.

Drs. Desroches and Joseph's expert sets forth that these defendants had no reason to perform venous testing prior to the catheterization of decedent on July 17, 2005. In the opinion of this expert, based upon the chest x-ray performed on July 17, 2005, there was no thrombosis in decedent's vein. The expert sets forth that the x-ray indicates "the presence of a left jugular catheter in the left innominate vein, suggesting that it was visualized on the x-ray and had been inserted into the vein prior to the x-ray." The expert adds that the operative report of July 17, 2005, does not indicate the presence of thrombosis as a source of catheter resistance. Based

upon the foregoing, the expert believes that decedent's vein was not thrombosed prior to the insertion of the catheter on July 17, 2007, and, thus, there existed no clinical reason to perform venous testing.

Drs. Desroches and Joseph's expert further states that these defendants were not involved in performance of decedent's surgeries during her July 2005 hospital admission. In this expert's opinion, the pre-operative care and treatment of decedent, including physical examinations performed and recommendations made, was all within the accepted standards of medical care. The expert sets forth that:

"[t]he patient was properly followed by Infectious Disease and Nephrology on a regular basis throughout her admission to the hospital. In my opinion, with a reasonable degree of medical certainty, Drs. Desroches and Joseph performed the proper examinations and used proper methodology in assessing the patient during her admission. Their consultations were complete and inclusive, and there were no additional medical studies which were warranted or required at that time."

Drs. Desroches and Joseph's expert also addresses any allegations that these defendants failed to keep complete records with respect to decedent's treatment, and that they failed to provide Dr. Chang, North Shore and Franklin Hospital with an accurate medical history. According to the expert, based upon a review of the hospital chart and all physician's notations, the physicians had all the appropriate information to properly assess and treat decedent. Lastly, this expert states that "[t]here is no nexus between plaintiff's allegations of incomplete medical history and records and the decedent's ultimate demise."

In opposition to defendants Drs. Desroches and Joseph's motion, plaintiffs rely upon, *Inter alia*, the expert affidavit of a physician, who specializes in anesthesiology/ cardiovascular anesthesiology. At the outset, plaintiffs' expert sets forth that

"it is my opinion, to a reasonable degree of medical certainty, that the medical care (pre and post July 2005 hospital admission) surgical clearance, medical record keeping, and a failure to offer diagnostic testing and/or referrals for diagnostic testing rendered and alternatively omitted by [Drs. Desroches and Joseph] departed from the standards of good and accepted medical practices and record keeping practices. In addition, the departures were the proximate cause of the plaintiff's decedent's pulmonary injury and her death."

With respect to the surgical clearance given by Drs. Desroches and Joseph, this expert states that the standard of care for dialysis patients requires the performance of Doppler Studies and/or venograms prior to insertion of catheters or guidewires, if a thrombosis is suspected. The expert noted in the affidavit that decedent had previously, in February of 2005, been diagnosed with a thrombosed left subclavian vein and/or innominate vein. According to the expert, a failure to perform such studies to rule out a thrombosis and clear a patient for surgery is a departure from good and accepted medical practice. Plaintiffs' expert further opines that it was a departure on the part of these defendants not to restrict the placement/insertion site of the catheter. According to the expert, the hospital chart should have been marked to restrict catheter insertion through the left subclavian and innominate vein. Plaintiffs' expert states that the above departures were a proximate cause of decedent's death by the perforation of the carotid artery, causing hemothorax.

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It is noted that Drs. Desroches and Joseph submitted a further affidavit from their expert physician in reply to plaintiffs' opposition, which addressed the aforementioned opinions set forth by plaintiffs' expert. Drs. Desroches and Joseph's expert reiterates in this affidavit that the care and treatment that these defendants rendered to decedent was within the standard of care, and also states that nothing these physicians did or did not do was a proximate cause of any injury to decedent. Drs. Desroches and Joseph's expert also states there is no medical evidence to substantiate that decedent's left innominate vein was thrombosed on July 15, 2005.

Based upon the conflicting expert affidavits submitted, this Court finds that issues of fact and credibility exist in connection with whether Drs. Desroches and Joseph departed from good and accepted medical practice (i) in clearing decedent for her July 17, 2005 surgery without ordering a Doppler study and/or venogram; or (ii) failing to document an accurate history of decedent in the hospital chart. Issues of fact and credibility also exist in connection with whether the aforementioned departures were the proximate cause of decedent's death. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, supra; Morris v Lenox Hill Hosp., supra). Accordingly, Drs. Desroches and Joseph's motion is denied.

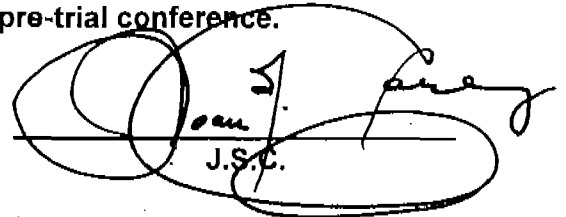
Based on the foregoing, it is hereby

ORDERED that the motion by defendants North Shore Long Island Jewish Health Care, Inc. s/h/a North Shore-Long Island Jewish Health System, Inc. and Franklin Hospital s/h/a Franklin Hospital Medical Center for summary judgment, dismissing the complaint, as asserted against them is granted only with respect to plaintiffs' cause of action for lack of informed consent, and the remainder of such motion is denied; and it is further

ORDERED that the motion by defendants Joseph & Desroches, M.D., P.C., Lionel Desroches, M.D. and Antonio Joseph, M.D. for summary judgment, dismissing the complaint, as asserted against them, is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on December 10, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 11/16/2009



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