

Maruffi v Ciccone

2010 NY Slip Op 30413(U)

February 22, 2010

Supreme Court, Richmond County

Docket Number: 10849/2004

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 10849/04
Motion No.:005, 006**

**LISA MARUFFI, as Administratrix of the Estate of
MARIE MARUFFI, Decedent,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**DR. RALPH CICCONE,
DR. FRANK CARDELLO,
BABE NORMAN CRNA,
DR. SHERIF MALEK,
DR. KABEERDDUN HASHMI,
DR. MICHAEL A. CASTELLANO,
STATEN ISLAND PULMONARY ASSOCIATES, P.C.,
DR. OMAR ARNUK,
STATEN ISLAND UNIVERSITY HOSPITAL and
SILVER LAKE SPECIALIZED CARE CENTER,**

Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3
Replying Affidavits	4, 5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Dr. Kabeerddun Hashmi, (“Dr. Hashmi”) and Silver Lake Specialized Care Center, (“Silver Lake”), move pursuant to CPLR § 3212 for an order granting summary judgment in their favor, dismissing the plaintiff’s complaint as to them. The defendants’ motions are denied in their entirety.

Facts

This is an action to recover for the alleged personal injuries and death of the decedent, Marie Maruffi as a result of alleged acts of malpractice committed by the defendants. On November 10, 2001, at the age of 53, the decedent was admitted to Staten Island University Hospital (“SIUH”) for treatment for exacerbation of asthma. During that admission the decedent was treated with a battery of drugs that included steroids and antibiotics. On November 11, 2001 the decedent’s condition deteriorated, the defendant Dr. Ciccone recommended that the decedent be treated for possible pulmonary embolus with subcutaneous heparin and gastritis prophylaxis with Pepcid. On November 12, 2001 the decedent’s condition again worsened, to the point where she was admitted to the intensive care unit. At that time the decedent began a treatment with Nimbex, a paralyzing agent and was subsequently intubated. By November 24, 2001 it became evident that the decedent was unweanable from the ventilator and was discharged to Silver Lake for care on November 30, 2001.

Subsequent to her discharge to Silver Lake the decedent was returned to SIUH on December 12, 2001 as a result of a prolonged fever. During this admission it was noted that the decedent was ventilator dependent, utilized a Foley catheter to empty her bladder and utilized a feeding tube. Furthermore, SIUH documented that the decedent had a stage 3 decubiti on her right and left buttock. During this admission, the decedent was under the care of Dr. Hashmi. At this time Dr. Hashmi identified complete paralysis of the decedent’s lower body. Additionally, Dr. Hashmi called in consults in neurology, pulmonology and infectious diseases. During this admission, Dr. Hashmi ordered a sonogram of the decedent’s venous system to rule out deep vein thrombosis. On December 17, 2001 the decedent was once again discharged to Silver Lake.

From December 17, 2001 through January 20, 2002 the decedent received care at Silver Lake. According to Silver Lake, during this period the decedent was taken out of bed for six hours a day and placed in a wheel chair with a gel pad. Silver Lake further asserts that while the decedent was in bed she was turned every two hours to promote healing.

On January 20, 2002 the decedent was once again admitted to SIUH for treatment of pneumonia and enterococcus bacteremia. The decedent remained in SIUH until February 1, 2002 when she was once again readmitted to Silver Lake. During this admission, Dr. Hashmi did not treat the decedent.

Upon her February 1 readmission to Silver Lake, the decedent's stage 3 decubiti was treated with fresh dressings and cream. Additionally, she was placed on an air mattress and repositioned every two hours. Silver Lake continued to treat the decedent in this matter until she was discharged once again for treatment at SIUH for emphysema on February 8, 2002.

During this admission the defendant, Dr. Hashmi once again was the decedent's attending physician. Dr. Hashmi treated the decedent with a course of antibiotics and consulted with infectious disease and pulmonary specialists. The decedent was still immobile, Dr. Hashmi prescribed a deep vein thrombosis (DVT) prophylaxis of sub cutaneous Heparin. However, unlike the decedent's prior admission under the care of Dr. Hashmi, a sonogram was not taken of the decedent's extremities. On February 19, 2002, after consultation with the decedent's treating specialists, it was decided that she would return to Silver Lake.

On February 20, 2002, the decedent was once again admitted to Silver Lake and it was noted that a stage 3 decubitus existed on her left buttock. According to Silver Lake the decedent's treatment included regular dressing changes and cleaning of the decubiti, as well as repositioning every two hours and remaining on an air mattress. Silver Lake's records indicate that the decubitus on her right buttock resolved on or about March 16, 2002; and the decubitus on her left buttock was reduced to a stage 1 ulcer on or about March 30, 2002. On April 14, 2002, Ms. Maruffi died. The cause of death was attributed to deep venous thrombosis with pulmonary thromboembolism due to immobility.

The plaintiff alleges that the defendants committed acts of negligence that amounted to medical malpractice causing the decedent to be admitted to the SIUH on multiple occasions, the

development of decubiti and ultimately her death.

The defendants, Dr. Hashmi and Silver Lake move for summary judgment dismissing the plaintiff's complaint against them. Each movant submits expert affirmations to support their motions.

Silver Lake submits the expert affirmation of Dr. Vincent Marchello, ("Dr. Marchello") who is certified by the American Board of Internal Medicine with a sub-certification in Geriatric Medicine. Dr. Marchello avers that Silver Lake's care of the decedent was appropriate in all aspects. In particular, Dr. Marchello states that Silver Lake appropriately cared for the decedent and the medical record does not reveal any evidence that her admission to the SIUH on December 12, 2001 is a result of improper care of the decubiti. Dr. Marchello avers that ". . . she clearly received excellent care for her skin breakdown." However, Dr. Marchello does not address the care that the decedent received. He does state that because the decubitus ulcers were slowly resolving a ". . . water mattress, Stryker bed or multipad pressure sensors were unnecessary . . ."

Dr. Marchello, then addressed the decedent's admission at Silver Lake from December 17, 2001 through January 20, 2002. For that period of time, the Dr. Marchello avers that the decedent's treatment for her decubiti which included being taken out of bed for 6 hours a day and placed in a wheel chair with a gel pad; as well as repositioning every 2 hours while the decedent was in bed was appropriate treatment. Furthermore, Dr. Marchollo states that having the dressings changed and washing the area daily was appropriate treatment.

With respect to Silver Lake's actions to prevent deep vein thrombosis in the decedent, who was diagnosed as paralyzed, Dr. Marchello references a single scan conducted in December 2001. Dr. Marchello's affirmation also sought to address the plaintiff's allegations that the decedent did not receive proper nutritional consultations. The affirmation states that the decedent received consults, but fails to elaborate on the substance of those consults or the basis

for his opinion.

Finally, Dr. Marchello states that while the decedent was immobile and ventilator dependent during her final admission to Silver Lake preceding her death, there was no evidence to perform a work up to rule out a DVT or pulmonary embolism. Dr. Marchello bases this opinion on the fact that the ventilator dependent, paralyzed decedent did not report any pain or tenderness in her legs or calves prior to her death.

Dr. Hashmi submits the expert affidavit of Dr. Charles Bardes (“Dr. Bardes”), who is board certified in the field of internal medicine, to support his motion for summary judgment. The plaintiff alleges that Dr. Hashmi committed several acts of negligence which include: failing to properly treat the decedent for respiratory acidosis; improperly using the medication Nimbex prior to and during the attempts at intubating the decedent; failing to fully evaluate the etiology of the decedent’s paralysis; failing to treat the decedent’s emphysema; failing to prevent or avoid aspiration or pneumonia; failing to adequately and readily treat the decedent’s temperature of 107° F; failing to institute the use of Heparin or a substitute when Heparin was discontinued; and failing to prevent decubiti.

It is important to note that Dr. Hashmi did not treat the decedent during her first admission to SIUH and subsequently during her January 20, 2002 admission. As such, the plaintiff’s claims relating to improper use of the medication Nimbex is inappropriate as against Dr. Hashmi. The record indicates that Nimbex was used during the decedent’s initial admission to SIUH in November 2001.

Dr. Bardes’ affidavit states that Dr. Hashmi’s care of the decedent was within good and accepted standards of medical practice in that the appropriate tests were ordered and specialists consulted. Dr. Barde notes that Dr. Hashmi’s care of the decedent during her December 2001 admission that included a sonogram of both of the decedent’s legs to rule out the possibility of pulmonary embolism was appropriate treatment. Dr. Barde fails to state why Dr. Hashmi’s

decision not to order a sonogram of the decedent's legs during her February 8, 2001 admission was conversely appropriate.

In opposition, the plaintiff submits the expert affidavit of Dr. Robert Rubin ("Dr. Rubin"), who is board certified in cardiothoracic surgery. Additionally, Dr. Rubin is a fellow of the American College of Chest Surgeons, a diplomate of the American Board of Surgery, a diplomate of the American Board of Thoracic and Cardiovascular Surgery and a Fellow of the American College of Cardiology.

With respect to Silver Lake's motion for summary judgment, Dr. Rubin avers that there is evidence in the record which indicates that the decedent rested in her own feces for periods of time that caused and allowed the decedent's decubitus ulcers to remain open and act as a "portal for infection." Moreover, Dr. Rubin states that a patient in the decedent's condition which placed her at risk to develop deep vein thrombosis should have undergone monthly venous duplex tests, at a minimum. There is evidence that Silver Lake performed only one of these scans. Dr. Rubin asserts that this failure was a substantial factor in causing the patient's death due to pulmonary embolism. It is his position that had these tests been conducted with regularity the decedent could have been treated for deep vein thrombosis and the pulmonary embolism could have been prevented.

In the same vein, Dr. Rubin further avers that Silver Lake's failure to conduct a coagulation study during the decedent's final admission to Silver Lake from February 10, 2002 through April 14, 2002 constituted a departure from good and acceptable medical practices.

Dr. Rubin similarly critiques the care rendered by Dr. Hashmi. In particular, Dr. Rubin avers that Dr. Hashmi's failure to order a sonogram (Dopler study) during the decedent's February 8 - 20, 2002 admission constituted a deviation from good and accepted medical practices. Furthermore, Dr. Rubin states that Dr. Hashmi failed to prescribe the proper dosage of Heparin for prophylaxis prevention of deep vein thrombosis. As such, Dr. Rubin concludes that

these departures were substantial factors in causing the injuries and death of the decedent.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

In a medical malpractice action, “[o]n a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice,

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . .”⁶

Silver Lake’s Motion for Summary Judgment

Dr. Marchello’s affirmation in support of Silver Lake’s motion for summary judgment failed to meet the defendant’s burden going forward. In two specific instances Dr. Marchello failed to elaborate on the basis for his opinion that Silver Lake provided the decedent with appropriate care with respect to her diet; and also its role in the prevention of deep vein thrombosis with pulmonary embolism. In pertinent part Dr. Marchello stated that “Ms. Maruffi received almost daily dietary consultations during this admission. Accordingly, it is my opinion within a reasonable degree of medical certainty, that plaintiff’s allegations that Silver Lake failed to order proper nutritional consults are unfounded.” However, Dr. Marchello failed to evaluate the sum and substance of these consults to demonstrate that said consults were indeed proper.

Furthermore, Dr. Marchello stated that notwithstanding the immobility of the decedent, “. . . there was no evidence of the onset of a deep vein thrombosis and subsequent embolism” because, “the decedent did not report any pain or tenderness in her legs or calves” and therefore “. . . there was no reason to perform a work up to rule out a DVT or pulmonary embolism in the days leading up to her death.” This court finds these statements to be conclusory in nature and not sufficient to support the defendant’s burden.

Even assuming that Silver Lake had met its initial burden, the plaintiff’s expert, Dr. Rubin, averred that Silver Lake should have conducted monthly venous duplex scans, due to the decedent’s immobility, to prevent deep vein thrombosis. Furthermore, Dr. Rubin asserts that there is evidence in the record that seems to indicate that the decedent was caused to rest in her

⁶*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

own feces which caused her “. . . decubitus ulcers to remain open and a portal for infection.” These statements contained in Dr. Rubin’s expert affidavit would more than adequately demonstrate an issue of fact to be resolved at trial.

Dr. Hashmi’s Summary judgment motion

The expert affidavit of Dr. Charles Bardes, submitted by Dr. Hashmi in support of his motion for summary judgment, fails to satisfy the defendant’s burden going forward. In particular Dr. Bardes offers conflicting statements. At paragraph 12 of Dr. Bardes’ affidavit he offers the following statement concerning the decedent’s December 2001 admission to SIUH:

Dr. Hashmi took all appropriate measures, including requesting precautionary consults with neurologists, pulmonologists, infectious disease specialists and dieticians, ordering appropriate tests, ordering a sonogram of both of Marie Maruffi’s legs to rule out the possibility of a pulmonary embolism, administering appropriate medications and conducting an EMG/nerve conduction study.

But, at paragraph 16 of Dr. Bardes’ affidavit he states the following concerning the decedent’s February 2002 admission to SIUH:

Like the December 2001 admission, Dr. Hashmi’s care was entirely appropriate in all regards. Dr. Hashmi took all appropriate measures, including requesting precautionary consults with neurologists, pulmonologists, infections disease specialists and dieticians, administering appropriate medications and ordering appropriate tests including a chest x-ray and a CT scan of the lungs.

Dr. Bardes does not state why a sonogram of the decedent’s legs during the December 2001 admission was the proper standard of care, but it was not necessary during her February 2002 admission. The decedent’s immobility due to paralysis did not change from December

2001 to February 2002. This court finds that the Dr. Bardes' expert affidavit fails to meet the defendant's burden on summary judgment.

However, had Dr. Bardes' affidavit been sufficient, the plaintiff's expert, Dr. Rubin, raised Dr. Hashmi's failure to conduct a sonogram (Doppler study) of the decedent's lower extremities as being a departure from accepted standards of care. Dr. Rubin further stated that it was his belief that this departure was a substantial factor in causing the death of the decedent. This statement, contained in Dr. Rubin's expert affidavit, more than adequately demonstrates an issue of fact to be resolved at trial.

Conclusion

It is well established that in order to grant summary judgment it must be clearly demonstrated that no material issues of fact have been presented. Issue-finding rather than issue-determination is key to the procedure. Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issues or where the material issue of fact is "arguable," summary judgment must be denied. Moreover, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to it.⁷ As such, this court finds numerous issues of fact that must be determined at trial.

Accordingly, it is hereby:

ORDERED, that Silver Lake Specialized Care Center's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that Dr. Kabeerddun Hashmi's motion for summary judgment is denied; and it is further

⁷ *Museums at Stony Brook v. Village of Patchogue Fire Department*, 146 AD2d 572, [2d Dept 1989].

ORDERED, that the parties shall return to DCM Part 3 for a pre-trial conference on **Monday, April 5, 2010 at 9:30 A.M.**

ENTER,

DATED: February 22, 2010

Joseph J. Maltese
Justice of the Supreme Court