

Losquadro v Sabbatini
2010 NY Slip Op 31846(U)
July 15, 2010
Supreme Court, New York County
Docket Number: 107887/07
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

ALICE SCHLESINGER

Index Number : 107887/2007

PART **IA** PART 16

LOSQUADRO, LINDA

vs

SABBATINI, PAUL

INDEX NO. _____

Sequence Number : 003

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

for summary judgment is granted as to defendant Jakob Dupont, M.D., but denied as to all other defendants in accordance with the accompanying memorandum decision

FILED

JUL 22 2010

NEW YORK COUNTY CLERK'S OFFICE

JUL 15 2010

Dated: July 15, 2010

Alice Schlesinger

ALICE SCHLESINGER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
LINDA LOSQUADRO, as Representative of the
Estate of MARGARET McGAHY, deceased;
LINDA LOSQUADRO, as Representative of the
Heirs and Distributees of MARGARET McGAHY,
deceased; and WILLIAM McGAHY, individually,

Plaintiffs,

-against-

PAUL SABBATINI, M.D.; JAKOB DUPONT, M.D.;
RUTH PATRICK, R.N.; and MEMORIAL-SLOAN
KETTERING CANCER CENTER,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 107887/07
Mot. Seq. No. 003

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On June 8, 2005 Margaret McGahy was clearly suffering from the end stages of ovarian cancer. She had been under the care of Memorial Sloan Kettering Cancer Center ("Memorial") for several years, in addition to receiving care from physicians in Florida where she lived. Mrs. McGahy was 64 years old when she was diagnosed with Stage III-C ovarian cancer in October 2000. She received six courses of chemotherapy up until May 4, 2001. Unfortunately, her cancer recurred in March 2002, and a CT scan taken on March 19, 2002 suggested a small lesion in the right lobe of her liver which raised the possibility of an early metastatic disease. In the ensuing years until April 2005, she was treated with many different chemotherapy agents, but clearly the cancer was spreading.

The issue in this case is whether Mrs. McGahy was destined to die on June 8, 2005 as a result of her end-stage ovarian cancer, or rather, whether her death at 12:20 a.m. on June 8 was hastened or precipitated by the actions and/or inactions of Memorial and the doctors and nurses who work there.

Before me is a motion by all the defendants for summary judgment. Counsel emphasizes in his moving papers that the basis for the motion is causation; in other words, defendants assert that no action or inaction by Memorial or its staff caused the death. Counsel also insists that the Court should not be considering standard of care issues; in other words, he argues that consideration of the standard of care and whether or not it was breached is not relevant to the motion before the Court. Plaintiff disagrees.

Some background is necessary here. On May 27, 2005, Mrs. McGahy presented to Memorial's Urgent Care Center with a complaint of fever. A CT scan of her abdomen and pelvis and the base of her lungs was taken on May 29. The test showed bilateral pleural effusions, discrete nodule opacities in the lung bases, and a significant increase in the number and size of diffuse metastatic lesions in both lobes of her liver as compared to a June 2004 study. There was also evidence of ascites, an accumulation of excess fluid in the abdominal area. Clearly, the decedent's condition had worsened. On May 30, it was noted by Dr. Jason Konner that Mrs. McGahy's liver lesions had become more severe, even in relation to a recent CT scan of May 12, 2005. Further, Dr. Paul Sabbatini, one of her treaters and a defendant here, noted that the disease was progressing vis-a-vis the ascites condition and the edema in her extremities. Dr. Sabbatini also found, as of the end of May as well as on June 1 and 2, that there were diminished breath sounds at her lung bases and there was a new complaint of pleuritic chest pain.

What happened on June 3 is significant regarding the ultimate issues in this case, although defense counsel might argue not significant to the motion. On June 3, according to the decedent's daughter Linda Losquadro, the plaintiff here, a family meeting was to take place with a treating physician in attendance. Ms. Losquadro says that the family did

in fact convene (she along with her sister, her brother-in-law and her father) at Mrs. McGahy's bedside, but no doctor appeared, though a social worker named "Matt" from the hospital did appear. The plaintiff recalls that the family decided to use the time to have a serious discussion about the decedent's future, even without the doctor being present. The ensuing discussion included matters such as where Mrs. McGahy would be buried and what kind of mass she wanted. Most significant, Ms. Losquadro says that she recalls that her mother made it absolutely clear that she in fact wanted to be resuscitated in the event it was warranted.

However, on June 3 at 9:40 a.m., Dr. Sabbatini executed a "Do Not Resuscitate" order (DNR) on Mrs. McGahy's behalf. That DNR document was never signed by the decedent, although it was allegedly witnessed by another doctor. The hospital records indicate that from that time on the DNR order was constantly referred to in her chart. However, Ms. Losquadro states that the family never learned of this order until the day following her mother's death.

On the night of June 7, 2005, the plaintiff relieved her sister from her duties at their mother's bedside at approximately 8:00 p.m. It should be noted that the plaintiff has testified that she and her family were with Mrs. McGahy at all times; in other words, 24 hours per day, 7 days a week.

On the night of June 7, Mrs. McGahy was receiving oxygen, as well as morphine which she regulated by the use of a pump. At approximately 8:00 pm on June 7 her pain was categorized as 5/10 and was described as "acceptable". Some time before midnight, Mrs. McGahy indicated that she was having trouble breathing, and the nurse turned up the oxygen from a 3 to a 5. However, Ms. Losquadro indicates that, at some time between

midnight and 12:20, because her mother was again having trouble breathing, she requested additional oxygen for her mother. The defendant Nurse Ruth Patrick, who was on duty then, refused to give Mrs. McGahy additional oxygen, but instead allegedly turned the oxygen off, while indicating that she was going to get a better oxygen mask. But, before leaving the room and after turning off the oxygen, she flattened Mrs. McGahy's bed so that she would be in a prone position. Shortly thereafter, according to the plaintiff, her mother stopped breathing.

Ms. Losquadro said that it was evident to her that her mother was suffering. When Nurse Patrick came back into the room and was asked to help Mrs. McGahy by draining the fluid from her lungs, the nurse said she would not do that. The plaintiff then insisted that a doctor be called, and one did come but also refused to suction the fluid from Mrs. McGahy's lungs. No code was ever called. The decedent had not been placed in intensive care. Mrs. McGahy died at 12:20 a.m. on June 8. The death certificate reads that the immediate cause of death was "respiratory arrest, due to or as a consequence of ovarian cancer."

In support of the defendants' motion, counsel submitted a twenty-page affirmation from Dr. Alan Astrow, Board Certified in Internal Medicine, Hematology and Medical Oncology. He is also the Director of the Division of Hematology/Medical Oncology at Maimonides Hospital. In essence his opinion is that, more likely than not, efforts at resuscitation would have been unsuccessful under these circumstances and even if they were successful, in light of the seriousness of the decedent's cancer, she would have only lived for perhaps a few more hours or at most a day, probably under heavy sedation. He also opines, without any elaboration, that no acts or omissions by the hospital staff would

have made a difference here with regard to the time of the death or the manner in which Mrs. McGahy died.

The opposition from plaintiff's counsel includes an affidavit from Linda Losquadro, as well as an affirmation from an unnamed doctor identified as being Board Certified in Gynecologic Oncology. His position is that Mrs. McGahy was treated as if she had executed a "Do Not Resuscitate" order. He also opines that "had she been resuscitated, she had a substantial chance of survival, although for a very short period of time."

Thus, it is the plaintiff's position, citing cases which the Court will discuss in a moment, that the DNR order and its existence cannot truly be separated from the events of June 8 which immediately preceded Ms. McGahy's death at 12:20 that morning. In this regard, counsel, his expert and the plaintiff all state that there was a refusal on the part of the hospital to give additional oxygen to the patient when it was requested, and that affirmative acts, witnessed by and testified to by the plaintiff, of flattening Mrs. McGahy's bed and turning off the oxygen, precipitated her death within moments of those events.

In *McCahill v. NY Transportation*, 201 NY 221 (1911), there was a taxicab accident wherein the driver was clearly negligent. The decedent was thrown about twenty feet from the location where he had been hit and was taken to a hospital where he died on the second day from delirium tremens. The doctor who testified at the trial opined that the injury had precipitated the decedent's attack of the delirium tremens, but had not induced it. Based on the doctor's explanation that the injuries sustained by the decedent had "hurried up" the delirium tremens, the Court of Appeals said (at p 223): "There can be no doubt that the negligent act directly set in motion the sequence of events which caused death at the time it occurred". The Court further stated as follows (at p 224):

The principle is also true, although less familiar, that one who has negligently forwarded a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility, even though the disease probably would have resulted in death at a later time without his agency. It is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense.

Though the events in question in *McCahill* and in the case before this Court happened almost 100 years apart, the same legal principles can be applied. If the plaintiff here is to be believed, then the jury could find that the actions or inactions of the hospital in the early morning hours of June 8, 2005 set in motion the sequence of events that caused the death of Mrs. McGahy at the time it occurred.

In *Dunham v. Village of Canisteo*, 303 NY 498 (1952), the decedent died of terminal bronchial pneumonia due to fractures of his right hip and elbow sustained from falling on a sidewalk. He was found lying on the floor of a fire station and then taken to the City Jail. Eighteen hours lapsed before he was taken from the jail to a hospital for medical attention. The lawsuit, sounding in wrongful death, was brought against the Village and the Police Chief for failing to provide the decedent with medical care during this period of time.

The defendants in *Dunham*, similar to the defendants here, argued that the delay in providing medical attention was not a competent producing cause of the pneumonia that caused the death six days later. The doctor who testified on behalf of the decedent's estate there said that he believed that the eighteen-hour delay did contribute to the death because early treatment in injury cases is important. However, he also said that even if the decedent had been given the best medical treatment immediately, he might still have developed pneumonia and died from it.

Similar to the opinion proffered by the defense expert here, the defendant in *Dunham* argued that the doctor's testimony was not sufficiently definite to allow for a finding of causation as to the death. But the Court, citing *McCahill*, disagreed, stating (at p 506) that it "is enough that he [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred."

That appears to be the situation here. Certainly, the decedent was destined to die shortly, and her death would have been caused by the advanced stage of ovarian cancer from which she was suffering. But the sworn testimony of the plaintiff as to the events of June 8, 2005, as well as the acknowledgment by Dr. Astrow that resuscitation may have been successful and that Mrs. McGahy may have lived for an additional period of time, make it clear to this Court that there are legitimate issues as to whether or not the events occurring in the early morning hours of June 8, 2005 were a proximate cause of Ms. McGahy's death. Therefore, summary judgment must be denied, except with respect to Dr. Jakob Dupont because there is no opposition by the plaintiff to that part of the motion made on his behalf.

Accordingly, it is hereby

ORDERED that the motion by defendant Jakob Dupont, M.D. for summary judgment is granted, and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of defendant Jakob Dupont, M.D.; and it is further

ORDERED that the motion for summary judgment on behalf of the remaining defendants Paul Sabbatini, M.D., Ruth Patrick, R.N., and Memorial-Sloan Kettering Cancer Center is denied, and the action is severed and continued against those defendants.

This constitutes the decision and order of this Court.

Dated: July 15, 2010

JUL 15 2010



J.S.C.

ALICE SCHLESINGER

FILED
JUL 22 2010
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