

Silver v Yee

2010 NY Slip Op 32551(U)

September 15, 2010

Supreme Court, New York County

Docket Number: 115153/08

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16

PRESENT: _____

Index Number : 115153/2008

SILVER, DAVID

vs
YEE, BARRY

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *by defendant*

Barry Yee for summary judgment is granted in accordance with the accompanying memorandum decision.

FILED

SEP 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

SEP 15 2010
SEP 10 2010

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

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
DAVID SILVER, as executor of the ESTATE OF
MARJORIE SILVER and DAVID SILVER, Individually,

Plaintiff,

Index No. 115153/08

- against -

Motion Seq. No. 004

BARRY YEE, THE NEW YORK HOSPITAL MEDICAL
CENTER OF QUEENS, SKENDER MURTEZANI,
and ALLAN SWERDLOFF,

Defendants.

FILED
SEP 17 2010
NEW YORK
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-----X
SCHLESINGER, J:

Before the Court is a motion for summary judgment by defendant Dr. Barry Yee. All discovery has occurred and the trial is scheduled to begin on October 4, 2010. Dr. Yee, during the time at issue, was affiliated with Silvercrest Center for Nursing and Rehabilitation ("Silvercrest"). Marjorie Silver was a patient at that facility at various times, but for purposes of this motion was a patient under Dr. Yee's care from December 20, 2006 through February 16, 2007.¹

Dr. Yee's motion is accompanied by his own affidavit (Exhibit B) and also by an affirmation from Dr. Frederick A. Smith (Exhibit A). Dr. Smith states that he has "long experience in geriatric medicine including one year as Medical Director in charge of the North Shore University Hospital Acute Geriatric Unit". He is also board certified in Internal Medicine and in Hospice and Palliative Care Medicine.

Dr. Yee first makes it clear that he only provided medical attention to Mrs. Silver from December 20, 2006 until February 16, 2007, when she was transferred to a ventilator unit at

¹Silvercrest had been a defendant in this action but settled with the plaintiff. There are three remaining defendants in addition to Dr. Yee, two physicians and a hospital.

Silvercrest. He states also that he was not involved with her Care Plan which was developed by the nursing staff. Additionally, he says that his role of attending physician did not include the choice of a bed. He further states that there was a wound care specialist, a nurse practitioner who was to assess patients with bedsores, and she was involved with this patient's care.

Dr. Yee explains that he visited Mrs. Silver twice on monthly assessments and made four separate bedside visits, the first on December 22, 2006. At that time, he did not note any break in the skin of her heels, but did note a sacral decubitus ulcer. With regard to this, he made orders, first with medication and beginning on December 27 with a wound vacuuming dressing system. The latter was discontinued on January 31, 2007 for lack of effectiveness.

Dr. Smith supplements Dr. Yee's affidavit by describing the very critical condition Mrs. Silver was in during the year 2006. He then gives his opinion that Yee in all ways met the standard of good and accepted medical practice in his care and treatment of Mrs. Silver.

Marjorie Silver first arrived at Silvercrest on June 26, 2006. She came from New York Presbyterian Hospital following an admission for a myocardial infarction and subsequent intraventricular hemorrhages. When she first arrived at the facility, she was comatose. Between June 26 and December 20, 2006, she had been transferred to New York Hospital Medical Center of Queens on three occasions and back to Silvercrest.

The thrust of the complaint against Dr. Yee centers around Mrs. Silver's decubitus ulcer. This ulcer, in the area of the sacrum measured 8 cm x 15 cm x 4 cm on December 20, 2006. Dr. Smith points out that pursuant to the facility's records, though there had been ulcers on other parts of her body, including her heels, by December 20, the only one left was this large sacral one. This was her status, along with redness on her chest and scabs

on her heels, when Dr. Yee first took over. Significantly, Dr. Smith points to the substantial reduction in this sacral ulcer during Dr. Yee's care. Though it still remained a stage four when Dr. Yee's care came to an end, it had been reduced in size to 4.1 cm x 9.2 cm x 4.3 cm.

Dr. Smith opines that many of the allegations against Dr. Yee are not proper because they address nursing functions. He enumerates what those are. But as to the care provided by Dr. Yee, it was appropriate and successful, to the extent that the one ulcer got smaller and no new ones developed.

Dr. Smith also states that Dr. Yee properly documented his multiple visits with the patient, phone conversations he had with her husband David, as well as observations of her status. Finally, he states he sees no evidence that Dr. Yee failed to fulfill any obligations to this patient pursuant to the New York Public Health Law. This reference is relevant because the plaintiff claims that Dr. Yee violated §2801-d of the Public Health Law. For reasons which I will discuss later, this would not apply to someone in Dr. Yee's position.

I find in the first instance that Dr. Yee as the moving doctor, via his own affidavit and more important the opinions expressed by his expert Dr. Frederick Smith, has succeeded in establishing a prima facie case entitling him to summary judgment. This means that the burden shifts to the plaintiff to show that genuine factual issues exist as to Dr. Yee's alleged malpractice.

The plaintiff has attempted to meet that burden. In opposition, counsel submits a ten-page affidavit from Dr. Bernard Schayes who is certainly knowledgeable in the care of geriatric patients. He has served as an attending physician at Kateri Residence, a Skilled Nursing and Rehabilitation Center, from 1986 through 2008.

First, he discusses the Braden Scale, which is a system for predicting the risk for pressure ulcers. Mrs. Silver had a Braden score of "10" and "11". Dr. Schayes states that any number less than 14 indicates that the patient is at a high risk of sustaining bedsores. But frankly even without such a test, clearly Mrs. Silver's situation, wherein she was at first comatose and then critically ill and immobile, certainly could be characterized as high risk for such a condition.

This doctor then takes serious issue with Dr. Yee and the latter's characterization of his role vis-a-vis that of the nursing staff. Dr. Schayes believes the attending physician is in charge of making sure that all of his patient's needs are met. That, he says is the standard of care.

This expert then details a number of places where he felt Dr. Yee failed to adequately attend to Mrs. Silver or at least failed to document that he did. For example, on the subject of a urinary tract infection that she developed, it was not good enough, according to Dr. Schayes, to simply prescribe antibiotics; it was necessary to change her diaper as she was incontinent, every hour so that she would not sit in her feces. As pointed out, however, in Reply, there is nothing in the record to show that she was suffering from diarrhea to warrant such surveillance.

Though Dr. Schayes acknowledges that the one decubitus ulcer Mrs. Silver had under Dr. Yee's watch did decrease in size, he still concludes that if the defendant had done all the things he had enumerated, such as ordering a special kind of bed, her condition would not have deteriorated and more likely than not, she would not have required a return to the ventilator unit.

In Reply, counsel first argues that the statutes which plaintiff claims Dr. Yee violated, 42 CFR §483.20(k)(2) and Public Health Law §2801-d, only apply against facilities and not physicians. In this regard, it is urged that Judge Stanley Sklar in *Morissette v. Terence Cardinal Cooke Health Care Center*, 8 Misc 3d 506 Supreme Court, NY Co. (2005), kept the doctor in as a defendant in an early stage of an action because of his role as Medical Director and the Center's Administrator, whose duties included adherence to Federal and State Laws by the facility. On this point, I agree with defendant that *Morissette* is not precedent for holding Dr. Yee in as a defendant under the circumstances here.

Also, counsel points out that the records support Dr. Yee's statement as to his multiple visits with Mrs. Silver. There is also a reply from Dr. Smith. He takes issue with many of Dr. Schayes opinions as to the patient's improvement with Dr. Yee and the causes of her urinary tract infection ("UTI"), as well as her return to the ventilator unit. In these regards, he specifically opines that the UTI was most likely caused by the use of a Foley catheter, which was chronic and indwelling. As to the need for a ventilator, he believes her increased respiratory distress was her susceptibility to mucous plugs due to a weakened respiratory system. He points out here that Mrs. Silver was on a ventilator before becoming Dr. Yee's patient and was on 35% oxygen when she arrived at Silvercrest on December 20.

I am granting the motion. My reason for doing this is the plaintiff's inability to show, despite the lengthy affidavit from Dr. Schayes, that issues exist either as to the defendant's negligence in the care he provided and/or that anything he did or failed to do led to her return to a ventilator. She had only one decubitus ulcer while under Dr. Yee's care and it improved substantially but did not go away. The latter fact could not be a basis for malpractice when the

patient was so sick and completely immobile.

Further, during the less than two months that Dr. Yee looked after her, the only deterioration in her condition was the return to a ventilator. There is nothing in the plaintiff's papers to show any causal connection between Dr. Yee's care and that unfortunate event. No other injury is claimed. Therefore, Dr. Yee is entitled to be let out of this action. Under the law and applicable facts, he is entitled to a dismissal.

Accordingly, it is hereby

ORDERED that the motion of defendant Barry Yee, D.O., s/h/a Barry Yee for summary judgment dismissing the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, without costs and disbursements; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the remaining parties shall appear in Room 222 on October 4, 2010 for trial.

Dated: September 15, 2010

SEP 15 2010


J.S.C.
ALICE SCHLESINGER

FILED
SEP 17 2010
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