

**DeBiase v Jay Mbeng Nfonoym**

2011 NY Slip Op 30000(U)

January 3, 2011

Sup Ct, Richmond County

Docket Number: 100235/2009

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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VICTOR DeBIASE and CYNTHIA DeBIASE,

Plaintiff(s),

-against-

JAY MBENG NFONOYM, M.D., YOGENDRA R.  
PATEL, M.D., UNIVERSITY PHYSICIANS GROUP,  
P.C., THOMAS FORLENZA, M.D., ANNE MARIE  
BARATTA, R.N., and RICHMOND UNIVERSITY  
MEDICAL CENTER,

Defendant(s).

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DCM Part 5

Present:

Hon. Judith N. McMahon

DECISION AND ORDER

Index No. 100235/2009

Motion Nos. 001, 002, 003

The following papers numbered 1 to 7 were considered on these motions this 14th day of December, 2010:<sup>1</sup>

Notice of Motion [001][Defendants Patel](Affirmations in Support) .....	1
Notice of Motion [002][Defendant Forlenza](Affirmation in Support) .....	2
Notice of Motion [003][Defendants Nfonoy, Baratta and RUMC](Affirmation In Support) .....	3
Affirmation in Opposition [Plaintiff] .....	4
Reply Affirmation [Defendant Patel] .....	5
Reply Affirmation [Defendant Forlenza].....	6
Reply Affirmation [Defendants Nfonoy, Baratta, RUMC] .....	7

On or about January 20, 2009, the plaintiffs commenced this action against defendants after they allegedly failed to, *inter alia*, properly intubate/extubate and administer morphine. The Court notes that the plaintiff has discontinued the action against defendants University Physicians Group, Jay Mbeng Nfonoy, M.D., and Anne Marie Baratta, R.N. In addition, the plaintiff does not oppose the motion by defendant Thomas Forlenza, M.D., seeking summary judgment (Motion 002) or the portion of the defendants' motions which seek summary judgment on the second cause of action for

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<sup>1</sup>As the Court indicated at oral argument, held December 14, 2010, it will not consider sur-reply affidavits by any party.

informed consent. As a result, the second cause of action for informed consent will be dismissed, as will the case, in total, against Dr. Forlenza. The remaining defendants, namely, Yogendra R. Patel, M.D. and Richmond University Medical Center, are both separately moving for summary judgment on the plaintiff's remaining causes of action.

The allegations in the complaint arose after the plaintiff, Victor DeBiase, suffered a fall at his home on November 9, 2007, and was found unconscious. Mr. Debiase was intubated at his home by the emergency medical responders. He was then brought to defendant Richmond University Medical Center [hereinafter "RUMC"] and admitted under the care of defendant Dr. Yogendra R. Patel. Mr. Debiase has a history of heavy smoking, cancer, cardiac problems and had been treated with Oxycodone and Fentanyl. On November 10, 2007, Dr. Patel directed extubation of plaintiff and prescribed 2mg of morphine. The RUMC staff performed the orders. Soon thereafter the plaintiff suffered a heart attack which resulted in permanent brain damage.

The plaintiffs commenced this action alleging that defendants Dr. Patel and RUMC deviated from accepted medical practice by directing extubation of Mr. Debiase and failed to properly administer morphine which caused the plaintiff's heart attack and subsequent brain damage. The defendants, Dr. Patel and RUMC, contend they did not deviate from accepted medical standards and practice by properly administering morphine and extubating Mr. Debiase.

It is well settled that a "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

Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

Here, the defendant Dr. Patel has presented sufficient evidence to establish summary judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Dr. Patel has provided the expert report of Dr. Richard S. Blum, board certified in internal medicine, who opines that Dr. Patel did not deviate from accepted medical practice in her decision to extubate and administer 2mg of morphine to the plaintiff. Specifically, Dr. Blum “state[s] with a reasonable degree of medical certainty that if DR. PATEL’s resident had not prescribed morphine 2 mg, this man would have gone into narcotic withdrawal” and further, that “it makes no difference whether MR. DEBIASE received a 2mg of morphine when he was intubated or extubated”.

Defendant RUMC also has met its burden in establishing entitlement to summary judgment as a matter of law (id.). RUMC has provided the expert report of Dr. Joseph Jeret, board certified in neurology, who opined the RUMC residents did not deviate from accepted medical practice in extubating the patient and administering 2 mg of morphine. Further, Dr. Jeret opined that RUMC and staff properly extubated the plaintiff and

administered the morphine appropriately.

In opposition, the plaintiff has raised several triable issues of fact as to both Dr. Patel and RUMC (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The plaintiff provided the expert report of Dr. Bruce Charash, board certified in internal medicine and cardiology, who opined that Dr. Patel and RUMC staff deviated from accepted medical practice and care by failing to “keep this patient intubated for at least 48 hours after admission”. As a result, questions of fact exist with respect to whether Dr. Patel and RUMC staff properly intubated/extubated the patient and administered the morphine in accordance with generally accepted medical practice and therefore, summary judgment is inappropriate (id.).

Accordingly, it is

ORDERED that the motion (001) of defendant Yogendra R. Patel, M.D., is hereby denied, and it is further

ORDERED that the motion (002) of defendant Thomas Forlenza, M.D., is hereby granted without opposition, and it is further

ORDERED that the complaint is dismissed as against defendant Thomas Forlenza, M.D., only, and it is further

ORDERED that the motion (003) of defendant Richmond University Medical Center, is hereby denied, and it is further

ORDERED that plaintiff’s second cause of action for informed consent is hereby

**dismissed without opposition, and it is further**

**ORDERED that the caption is amended to reflect the only remaining defendants, namely, Yogendra R. Patel, M.D., and Richmond University Medical Center, and it is hereby**

**ORDERED that this case proceed immediately to trial.**

**THIS IS THE DECISION AND ORDER OF THE COURT.**

**Dated: January 3 2011**

**E N T E R,**

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**Hon. Judith N. McMahon  
Justice of the Supreme Court**