

Steinberg v Matalon

2011 NY Slip Op 30283(U)

February 3, 2011

Sup Ct, NY County

Docket Number: 108988/06

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Sharon Steinberg, Et Al.

INDEX NO. 108988/06

- v -

MOTION DATE _____

MOTION SEQ. NO. 4

Albert Matalon, M.D., Et Al.

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 *for summary judgment* by defendant *New York University Medical Center* is granted in accordance with the accompanying memorandum decision.

FILED

FEB 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 03 2011

Alice Schlesinger
ALICE SCHLESINGER s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
SHARON STEINBERG, AS EXECUTOR OF THE
ESTATE OF ALAN PFEFFER, AND SHARON
STEINBERG, INDIVIDUALLY,

Plaintiffs,

Index No. 108988/06
Motion Seq. Nos. 004, 005 & 006

-against-

FILED

ALBERT MATALON, M.D., GARY HORBAR, M.D.,
AND NEW YORK UNIVERSITY MEDICAL CENTER,

FEB 07 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
SCHLESINGER, J.:

In this action, which sounds in medical malpractice as well as in common law torts, the events of August 22, 2005 through September 5, 2005, when Alan Pfeffer died provide the factual predicate. But as in most actions, for a fuller understanding of the events on these days, particularly the four days from August 22 through August 25, one must be acquainted with background information.

The plaintiff has brought these complaints in a dual capacity. First, as the executor of her deceased husband's estate and second, individually. She has sued Dr. Albert Matalon, a nephrologist, but more significantly, Mr. Pfeffer's nephrologist; Dr. Gary Horbar, an internist and both Mr. Pfeffer's and Ms. Steinberg's long-time primary care physician, and New York University Medical Center, the hospital where Mr. Pfeffer spent his last days.

All discovery was completed and a note of issue was filed on July 6, 2010. Following this, all defendants have made timely motions for summary judgment.¹ All of these motions have merit. All have been inadequately opposed by plaintiff. Therefore, all

¹Drs. Matalon and Horbar have also asked for costs and sanctions, including attorney's fees, pursuant to 22 NYCRR 130-1.1.

are granted and the action, in its entirety, is dismissed with prejudice.

Now for the background leading to the events in August. Dr. Gary Horbar was Alan Pfeffer's treating physician since 1983. He last saw Mr. Pfeffer on the morning of August 20, 2005, when he was called to Lenox Hill Hospital. Mr. Pfeffer had come to the hospital, later joined with Ms. Steinberg, in the early morning hours of August 20, from the Terence Cardinal Cook Nursing Home, where he had gone upon discharge from Lenox Hill on August 11, 2005.

The Lenox Hill admission, which ended on August 11, involved major surgery that occurred on June 16, 2005. Specifically, this surgery resulted in the amputation of Mr. Pfeffer's left leg as well as fingers from both hands. The August 20 visit, which lasted less than one day because Mr. Pfeffer left the hospital against medical advice, was for infected ulcers and sepsis.

The fact is that Alan Pfeffer in 2005 was a very sick man. His poor health was the result of a number of co-morbidities from which he suffered. These included diabetes, morbid obesity, hypertension, peripheral vascular disease, past cardiac and peripheral bypass surgeries, high cholesterol and renal failure requiring dialysis beginning in 2001. In 2003, he also had undergone gastric banding and in 2004 he had angioplasty and later in that year, an amputation of his right foot.

Mr. Pfeffer, was gravely ill in 2005, as well. In fact, in April of that year, while in Dr. Horbar's waiting room with Ms. Steinberg and a private aide, he went into cardiac arrest. His life was saved on that occasion by Dr. Horbar, who rushed out to his patient and gave him CPR. Soon after this, at Lenox Hill, Mr. Pfeffer told Dr. Horbar "You did exactly what I wanted you to do. Do everything possible in every way to keep me alive".

What must be emphasized, and as expressed in the decedent's words to Dr. Horbar on April 5th, is that Alan Pfeffer, throughout April, May and June 2005, while at Lenox Hill Hospital, where he was admitted on May 22, 2005, and discharged on August 11, 2005, always expressed a strong desire to live, no matter what the conditions he would be living under. He repeatedly told his doctors to keep him alive.

When Dr. Horbar spoke to Mr. Pfeffer about the June surgery, which was necessary to his survival because at that point he had developed gangrene and sepsis, he advised him about the seriousness of the surgery, the aftermath of the surgery, and the fact that in light of all his co-morbidities, he might die on the operating table. Yet Mr. Pfeffer signed onto it because he emphatically wanted to live. Dr. Horbar, in speaking to his patient about his options regarding this surgery, told Mr. Pfeffer that he did not have to continue with dialysis and have the surgery. Instead he could be simply given morphine and be allowed to die without pain. But Mr. Pfeffer wanted to live and wanted the operation, saying on June 16 before the surgery, "I cannot live like this, the pain is too much. I want the surgery."

It was shortly before this May 22 admission, on May 17, 2005, that the decedent executed a health care proxy designating his wife, Ms. Steinberg, as his agent in the event he was not able to make decisions.

All of the above is in no way challenged by Ms. Steinberg. However, during the emergency visit to Lenox Hill on August 20th, there is a conflict between herself and Dr. Horbar as to a conversation Dr. Horbar insists he had with Mr. Pfeffer before the doctor left the hospital. With regard to this conversation, which plaintiff says never happened, despite Dr. Horbar not documenting it on August 20, four days later, on August 24, in the course of testifying by telephone before the Ethics Committee at NYU, Dr. Horbar states

he related it. Here is the exchange and what preceded it, according to the doctor. First, Dr. Horbar described Mr. Pfeffer as alert and aware of his serious condition. Mr. Pfeffer, while understanding this, still said that there was no point in staying in the hospital over the weekend. He wanted to go home until his next dialysis treatment. But, he agreed to remain in the hospital to receive intravenous antibiotics, which he did from 9:45 a.m. to 10:45 a.m. He told Dr. Horbar that on Monday, when he came back for dialysis, he would get another antibiotic dose. Mr. Pfeffer also said he was going to contact Dr. Matalon after the Sabbath on Saturday night to schedule his next dialysis. Dr. Horbar was thus reasonably satisfied but still concerned about "his patient and friend". So he visited Mr. Pfeffer right before he, Dr. Horbar, left the hospital

I asked him, "Do you intend to go home to die?"
He said "No". "Do you intend to overdose on morphine lollipops?" He said "No".
Do you intend to discontinue dialysis? Mr. Pfeffer said, "I'm not that stupid".²

Nothing of consequence to this lawsuit happened³ after the couple left the hospital on August 20, 2005 or on the following day, except that Mr. Pfeffer did not call Dr. Matalon to schedule dialysis. However, on August 22, Dr. Horbar received a phone call from Sheila Karp, Mr. Pfeffer's sister, telling him that her brother had not made arrangements for dialysis and asked him what to do. Dr. Horbar insists he told Ms. Karp nothing about the

²According to Dr. Horbar, his first written documentation of the above was on November 9, 2005, two months after Mr. Pfeffer's death. He related the conversation in Ms. Steinberg's chart (she was also his patient) and added that on that day, she accused him of knowing that her husband was lying in his responses to Dr. Horbar.

³It is certainly possible that Ms. Steinberg may have had conversations with her husband in that period regarding his future. And it is certainly possible that he told her he was ready to die. But, if this occurred, it is clear, no one told the defendant doctors.

events of August 20th (no one refutes this) and merely provided her with several options. These were that she could call Adult Protective Services (APS), or 911 or Dr. Matalon.

Meanwhile, also that afternoon, Dr. Matalon stated that he received a call at about 4:00 p.m. from an Esther Mandlebaum, a close friend and neighbor of Mr. Pfeffer, who he knew had participated in very personal conversations regarding Mr. Pfeffer's past health care options. She told him that Mr. Pfeffer had left the Nursing Home. This led Dr. Matalon to call Dr. Horbar, who did relate the events and conversations of August 20. Dr. Matalon told Dr. Horbar that he was going to call APS to make sure Mr. Pfeffer was dialyzed, if that was what he wanted.⁴

However, and what is important to note, both doctors state in their affidavits that, before calling for outside help, they each made two phone calls to the Pfeffer/Steinberg home. On each occasion, the woman answering the phone (not Ms. Steinberg) refused to allow the doctors to speak to Mr. Pfeffer or Ms. Steinberg and hung up the phone.

After this, Dr. Matalon did call APS to express his concerns, but he was told they could not act that fast and that he should call 911 to get emergency medical care. Dr. Matalon did this and agreed to meet EMS (and the Police) at Mr. Pfeffer's apartment. Later, at around 4:45, Dr. Matalon called Dr. Horbar to tell him that EMS was arranging for Mr. Pfeffer to be brought to NYU for emergency dialysis.

⁴A few days earlier, Dr. Matalon had been contacted by Mr. Pfeffer's personal nurse who expressed concern about Mr. Pfeffer and asked him if he could visit Mr. Pfeffer at TCC, which he did. (This aide was then fired by Ms. Steinberg). Dr. Matalon, in his affidavit accompanying his motion, relates a somewhat ugly exchange with Ms. Steinberg at Mr. Pfeffer's bedside. Ms. Steinberg, in her affidavit, describes Dr. Matalon as being so rude on that day that she asked him to leave. So clearly there was no love lost between these two.

The scene at the plaintiff's home after the Police and EMS and Dr. Matalon arrived, as described, must have been a raucous one. Ms. Steinberg relates being threatened by the Police if she intervened, though she said she tried to do that and show her health care proxy. But no one would look at it. Dr. Matalon described Mr. Pfeffer as being critically ill, non-responsive and receiving no medical support. He believed him to be delirious and unable to answer questions. He was feverish with low blood pressure. Dr. Matalon directed EMS to take him to NYU.

After Mr. Pfeffer was taken away and brought to NYU, Dr. Matalon who accompanied him, arranged for the patient to bypass the Emergency Room and go straight to the Dialysis Unit for treatment, including medication for his infection.

When Ms. Steinberg got to the hospital later with her lawyer, only the latter was allowed to see Mr. Pfeffer. At 7:31 p.m., while Mr. Pfeffer was still connected to the dialysis machine, he and Dr. Matalon were seen by a social worker. There, the doctor related what had occurred earlier in the day and his concerns that Ms. Steinberg was acting in a way that was adverse to her husband's welfare. Mr. Pfeffer, probably due to sepsis, continued to be non-responsive.

The next day, August 23rd, the patient was transferred to Intensive Care, where he continued to be nonresponsive. Ms. Steinberg did not come to the hospital that day.

On the 24th of August at 4:00 p.m., the Ethics Committee at the Hospital held a meeting to ascertain the situation and decide how to proceed. Dr. Matalon testified in person and Dr. Horbar did so by phone. Ms. Steinberg, who was at the hospital that day, was invited to appear, but declined, she says on advice of counsel. At that meeting, Dr. Matalon related his interactions with Mr. Pfeffer since 2002 when their relationship

began. Included in this was Mr. Pfeffer's determination to live at any cost. The Ethics Committee advised that treatment should be continued and that the Hospital would go to Court to annul the Health Care Proxy.

Meanwhile, later on the 24th, at about 9:45 p.m., Dr. Matalon had a conversation with Mr. Pfeffer in the presence of Dr. David Schwartz, an ICU attending physician and Sandra Burke, Director of Social Services. Mr. Pfeffer, who was now responsive, told them he wished to continue receiving aggressive medical care. He said that this included intubation, if necessary, but not cardiac resuscitation.

The following day, August 25th, the Ethics Committee held a second meeting which Ms. Steinberg did attend with her attorney. Certain information was related that led to the members visiting Mr. Pfeffer in ICU. The patient at that time appeared alert and oriented. He said that he now wanted no further aggressive care, which included dialysis. So it was stopped. He remained at the hospital, where he received medication to keep him comfortable. He died on September 5th.

It is on the basis of these unfortunate and sad events that Sharon Steinberg commenced this lawsuit. Before doing so, however, and presumably while contemplating doing it, on November 9, 2005, during a lengthy phone conversation between herself and Dr. Horbar, which he made note of the following day, he states that Ms. Steinberg related that her intent in bringing an action would be "to destroy the professional reputation of the people responsible for taking Alan out of the house". She said she realized there would be no damages because he was a dead man, but it would not cost her anything because

a lawyer would take it on contingency.⁵

The suit was brought asserting nineteen causes of action. The first two on behalf of herself and Mr. Pfeffer asserted trespass (allegedly on August 22), and the third and fourth causes of action allege assault on behalf of the two. Five and six sound in battery, again for both. Seven and eight allege false imprisonment, again related to both. Nine through twelve speak of intentional and negligent infliction of emotional distress. Thirteen asserts a violation of confidentiality and HIPAA. Fourteen sounds in lack of informed consent. Fifteen and sixteen discuss the defendant's failure to honor the health care proxy. Seventeen is Ms. Steinberg's derivative claim. Eighteen and nineteen relate to medical malpractice and asks for punitive damages.

The dispositive motions are all accompanied by affirmations from physicians. Both doctors' motions are supported by comprehensive statements from Dr. Malcolm C. Phillips, who is Board Certified in Internal Medicine with a subspecialty in cardiovascular disease. He recounts, in a detailed fashion, the relevant events of August 20 through the time of Mr. Pfeffer's death and then opines as to the care and treatment given by each defendant doctor. He also opines us to standards of care regarding their ethical obligations.

His conclusions, first with regard to Dr. Horbar, are as follows: that on August 20, 2005, while at Lenox Hill, the doctor thoroughly assessed Mr. Pfeffer's condition and thoroughly explained the risks to him of leaving against medical advice, that there was no need to call for a psychiatric evaluation, and that the doctor fully and adequately documented Mr. Pfeffer's chart. In this regard, he opines there was no medical reason to

⁵In Ms. Steinberg's lengthy affidavit in opposition to the motions, she does not challenge this account.

relate their final conversation of that day, and he adds that at no time did the doctor improperly disclose confidential information, including on August 22 during his conversation with Mr. Pfeffer's sister, Sheila Karp. He further opines that it was appropriate for Dr. Horbar to discuss Mr. Pfeffer's condition with Dr. Matalon, as they were both his treating physicians who, under the circumstances, had a right to be concerned, and that Dr. Horbar gave honest and appropriate testimony to the Ethics Committee. With regard to the removal of the patient to NYU for emergency dialysis and his continued stay there, Dr. Phillips points out that Dr. Horbar had nothing to do with this, except for appropriately talking to Dr. Matalon on the 22nd, and that finally the claims relating to infliction of emotional distress are likewise ridiculous vis-a-vis Dr. Horbar, who again had virtually nothing to do with the NYU admission. Certainly, he was not the cause of any traumatic event.

As to Dr. Matalon, he concludes his own affidavit with this statement, (at ¶36):

At all times, I acted in accordance with my good conscience, the oaths I took to become a physician and concern for the well being of my patient, Alan Pfeffer.

Dr. Phillips, in evaluating Dr. Matalon's actions, goes even further. He believes that Dr. Matalon's actions "were heroic". Specifically, he opines that on August 22 and continuing, Dr. Matalon's care and actions were entirely within standards of good medical care and were in no manner a cause of any injury to Ms. Steinberg or her husband. Mr. Pfeffer always expressed his desire to persevere and to undergo medical treatment, including dialysis. Dr. Matalon's calls to APS and to the Police were appropriate expressions of concern for his patient, who he had unsuccessfully tried to contact. The

concerns were legitimate in light of his discussions with a concerned friend, Ms. Mandelbaum, and with Dr. Horbar, together with Ms. Steinberg refusal to take his calls.

On the informed consent issue relating to the emergency hospitalization and dialysis, Dr. Phillips opines that Dr. Matalon was acting properly in dispensing and continuing treatment until his patient was lucid and able to tell him to stop, which he did on August 25th. All aggressive treatment was then discontinued.

As to NYU's motion, it is supported with an affidavit from Dr. Arthur Heller, a Board Certified Internist. He states that the actions of the hospital and Dr. Matalon were at all times and in all ways in accordance with accepted standards of care. Mr. Pfeffer was Dr. Matalon's patient and NYU acted properly in providing aggressive care to him in accordance with the doctor's orders and until the patient was able to communicate what he wanted. To the extent that these orders included the exclusion of Ms. Steinberg from seeing her husband on the night of August 22, the hospital acted properly in following this instruction and there was a good reason for it, as Mr. Pfeffer was receiving emergency care.

With regard to a transfer to home/hospice care, Dr. Heller points out that in the first place, the patient was too ill to leave the hospital. Then on August 29th, a note indicates that this matter was to be discussed. In opposition on this point, the plaintiff fails to show by anyone connected with a hospice that any plan for Mr. Pfeffer was in place.

In fact, in all ways the opposition is paltry, lacking any real evidentiary value and totally unconvincing as well. First, there is no competing affirmation(s) from a physician, which leaves Dr. Phillips and Dr. Heller's opinions unrebutted. Therefore, the medical malpractice claims, the one sounding in lack of informed consent, the ones dealing with

health care proxies and patient confidentiality and HIPAA are all dismissed.

Those other common law torts, assault and battery and trespass, are not made out by Ms. Steinberg, particularly in light of the legitimate concerns of Dr. Matalon for his patient which he related to the Police and EMS, who acted in reliance on those concerns. I see nothing here supporting such causes of action.

I also fail to see how false imprisonment was made out vis-a-vis either Steinberg or Pfeffer. Further, there is no evidence presented to support a violation by either doctor of disclosing confidential information. No affidavits from anyone suggest this. And certainly, the physicians had a right, in fact a duty, to discuss their common patient so that care could be coordinated and dispensed. Intentional and/or negligent infliction of emotional harm? I cannot imagine any set of facts which so completely dispose of such claims. Far from being outrageous actions designed to harm, they were reasonable and conscientious actions designed to help and to heal.

Finally, I believe a good case could be made out for characterizing this action as frivolous, perhaps one even brought in bad faith. Such a conclusion could lead to sanctions. I prefer, however, not to make such a case or conclude the worst. I would rather believe that Ms. Steinberg was traumatized by the last months and the last days of Alan Pfeffer's life, and that she suffered emotionally along with him from the pain and limitations his illnesses caused him. These things may have clouded her good judgment. Also, as discussed in footnote 3, Ms. Steinberg, on August 20th and going forward, may have had reason to believe that her husband wished to die. She states in her affidavit that at TCC, Mr. Pfeffer had cut off his dialysis treatments before they had finished.

But, having said this, I believe very strongly that the action has no merit. I find that all of the professionals involved here acted competently, with intelligence, compassion, and in accord with the highest standards of medicine.

Accordingly, it is hereby

ORDERED that the motions for summary judgment by Albert Matalon, M.D., Gary Horbar, M.D., and New York University Medical Center, are granted to the extent of dismissing with prejudice all claims against the defendants, but without costs, disbursements, or sanctions; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of the three defendants.

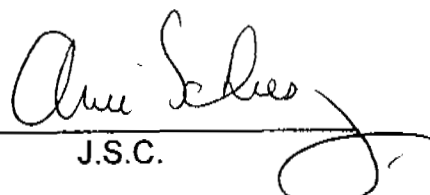
Dated: February 3, 2011

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