

Cordero v Salomon

2011 NY Slip Op 32029(U)

July 20, 2011

Supreme Court, New York County

Docket Number: 104790/09

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Moises Cordero

INDEX NO. 104790/09

MOTION DATE 7/12/11

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Guy Salomon

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-13

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and order

Dated: 7/20/11

JBL
J.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
NEW YORK COUNTY

-----X
MOISES CORDERO, as Administrator of the Estate of
ISABEL MATOS, deceased,

Plaintiff,

Index No. 104790/09

-against-

**Decision, Order, and
Judgment**

GUY SALOMON, KONSTADINOS PLESTIS, MT.
SINAI MEDICAL CENTER,

FILED

Defendants.

JUL 21 2011

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Guy Salomon, M.D., s/h/a Guy Salomon, Konstadinos Plestis, M.D., s/h/a

Konstadinos Plestis, and the Mount Sinai Hospital s/h/a Mt. Sinai Medical Center ("Mt. Sinai")
move by order to show cause for an order, pursuant to C.P.L.R. Rule 3212, granting them summary
judgment dismissing this matter in its entirety. This motion was adjourned from its initial return
date of April 26, 2011 to May 24, 2011 and, again to July 12, 2011 after this court issued a decision
and order allowing plaintiff's counsel to withdraw. (See decision and order dated May 24, 2011).
The May 24, 2011 decision and order explicitly directed plaintiff to file opposition to the summary
judgment, whether she had new counsel or not, by July 12, 2011 and that her failure to appear could
result in the dismissal of her case. Plaintiff failed to appear on July 12, 2011 or submit opposition
to the motion. Plaintiff is currently unrepresented and is proceeding pro se.

In this case sounding in medical malpractice and lack of informed consent, plaintiff
alleges that defendants negligently perforated plaintiff's decedent Isabel Matos' lower esophagus
while using a transesophageal echocardiogram probe ("TEE probe") or a nasogastric tube ("NG
tube") to aid in the performance of emergency heart surgery and subsequently failed to timely detect

the perforation while Ms. Matos was in the intensive care unit ("ICU"). Dr. Plestis performed the surgery. Dr. Salomon was the anesthesiologist. Mt. Sinai is sued both for its alleged independent acts of malpractice regarding treatment at the ICU and on the basis of vicarious liability for Drs. Plestis and Salomon. Defendants argue that there are no issues of fact that their treatment comported with the standard of care and did not proximately cause Ms. Matos' injuries or death. The motion is supported by two expert affirmations.

Eugene Grossi, M.D., a board certified cardiothoracic surgeon, provides the first affirmation and maintains that the emergency cardiac surgery was required to save Ms. Matos' life. Dr. Grossi sets forth that defendant Dr. Plestis, as the cardiothoracic surgeon, cannot be held liable for the perforated esophagus, because it is "not in any way near or involved in" the heart surgery. Dr. Grossi admits that the perforation could have been caused by the TEE probe or the NG tube, but sets forth that Dr. Plestis was not involved in the placement of either of these devices. Dr. Grossi further asserts that the perforation was timely diagnosed and treated.

Manual Fontes, M.D., a board certified anesthesiologist, provides the second affirmation and sets forth that a TEE probe is a "safe and effect[ive] diagnostic tool in cardiac surgery." Dr. Fontes maintains that perforations caused by TEE probes and NG tubes are rare but known complications of the devices and not evidence of malpractice. He asserts that there is no evidence that the TEE probe was placed with excessive force nor contraindicated, and that, "even with the most gentle application" of a TEE probe can cause a perforation. Dr. Fontes maintains that the perforation was diagnosed as soon as it was apparent that bilious fluid was coming from Ms. Matos' chest tubes, and that the perforation could not have been detected any sooner because Ms.

Matos was “hemodynamically stable.”

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations of the essential allegations in the bill of particulars. Id. A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered, and “that a reasonably prudent patient would not have declined to undergo the [procedure] if he or she had been informed of the potential complications[.]” Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Public Health Law § 2805-d(1).

Defendants have met their prima facie burdens for summary judgment on the medical malpractice claims. As to the lacked of informed consent claim, there is adequate evidence that TEE probes and NG tubes are used for routine patient management and are relatively risk free. Furthermore, defendants have shown that given Ms. Matos’ need for emergency heart surgery, no reasonable patient would forgo the use of these devices. There being no opposition from plaintiff, it is hereby

ORDERED that counsel for defendants shall serve a copy of this order with notice

of entry upon plaintiff at her last known address by regular and certified mail; and it is further

ORDERED that motion for summary judgment is granted upon defendants' filing of proof of compliance with the aforesaid condition and the Clerk of the Court is directed to enter judgment accordingly in favor of Konstadinos Plestis, Guy Salomon, and the Mount Sinai Hospital s/h/a Mt. Sinai Medical Center, dismissing the complaint in its entirety.

Dated: July 21, 2011



JOAN B. LOBIS, J.S.C.

FILED

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