

Iulo v Staten Is. Univ. Hosp.

2011 NY Slip Op 33323(U)

October 20, 2011

Supreme Court, Richmond County

Docket Number: 14053/02

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 14053/02
Motions No.: 9 & 10**

**ANTHONY JOSEPH IULO, as Administrator of the Estate of
JOSEPH IULO, Deceased; and
ANTHONY JOSEPH IULO, Individually**

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**STATEN ISLAND UNIVERSITY HOSPITAL;
DR. WARCHOL, M.D.; and
DR. ARMEN KASBIAN, M.D.**

Defendants

The following items were considered in the review of the following motions for Summary Judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3, 4, & 5
Notice of Motion and Affidavits Annexed	6
Answering Affidavits	7
Replying Affidavits	8 & 4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions for Summary Judgment is as follows:

The defendants, Staten Island University Hospital (“SIUH”) and Armen Kasabian, MD, sued here as Dr. Armen Kasabian, MD (“Dr. Kasabian”), move for Summary Judgment against the plaintiffs Anthony Joseph Iulo, as Administrator of the Estate of Joseph Iulo, Deceased, and Anthony Joseph Iulo, individually. The motion by SIUH and Dr. Kasabian is denied in its entirety. The defendant, Andrew J. Warchol, MD, sued here as Dr. Warchol, MD (“Dr. Warchol”) moves for Summary Judgment against the plaintiffs. The motion made by Dr. Warchol is granted in its entirety.

Facts

The plaintiff Joseph Iulo, was born September 4, 1961. He had an extensive medical history including morbid obesity, Type II diabetes, pulmonary disease, cardiac arrhythmia and coronary atherosclerosis. An ambulatory recording of the plaintiff's cardiac rhythm was performed in 1997 and showed sinus pauses, ventricular ectopic beats, and ventricular and supra-ventricular tachy-arrhythmia. In October 1998, the plaintiff suffered an inferior wall myocardial infarction. Following this heart attack, he underwent heart catheterization that showed single vessel right coronary artery disease. As a result, a coronary artery stent was placed into the plaintiff.

In August 1999, plaintiff who was thirty-eight years old, underwent gastric bypass surgery. His weight before the surgery was said to have been 450 pounds on April 15, 1999. As a result of the gastric bypass surgery, his weight fell to about 191 pounds in about a year. After his weight loss, the plaintiff went to Dr. Kasabian, a plastic surgeon to have a prominent abdominal panniculus (an apron of overhanging skin and subcutaneous tissue) excised, and to have an incisional hernia repaired. The plaintiff initially saw another plastic surgeon, Dr. Feldman from Maimonides Medical Center. Dr. Feldman sent the plaintiff to Dr. Gianvito, the plaintiff's primary care provider, for pre-operative clearance, and sent the plaintiff to Dr. Warchol, the plaintiff's cardiologist, for cardiac clearance. Dr. Feldman could not do the requested surgery as quickly as the plaintiff wanted. The plaintiff was then seen by Dr. Kasabian, but it is not known whether this was self referral or referral by another. The plaintiff brought the reports from his clearing doctors to Dr. Kasabian for his information.

Dr. Warchol reviewed the results of a two-day radio-nucleotide stress Tetrafosim technetium-99 scan performed October 17-18, 2000. The interpretation of this scan reported ischemic changes, infarct and ischemia in the left anterior descending coronary artery, and abnormal motion and thickening in the apical region. This was associated with ischemic

electrocardiographic changes demonstrated by 1.5 millimeter down-sloping ST segment depression. Dr. Warchol had not anticipated this result and requested a stress echo-cardiogram test. In a letter dated October 30, 2000, Dr. Warchol informed Dr. Gianvito that the stress echo-cardiogram showed the anticipated chronic inferior wall changes without exercise induced changes, moderate left ventricular and atrial dilation, trace aortic valve insufficiency, mild tricuspid regurgitation, and mild to moderate mitral valve regurgitation. An intra-atrial septal aneurysm was also noted. An electro-cardiogram performed concomitantly with the stress echo-cardiogram showed 1.6 millimeters of horizontal and down-sloping ST depressions.

On November 30, 2000, a letter was addressed to Dr. Gianvito with a copy to Dr. Kasabian. This letter stated, "I did advise the patient that he may proceed with the surgery. He would have to continue his atenolol 50 mg o.d. Aspirin may be discontinued prior to the procedure." In a later letter dated January 4, 2001, Dr. Warchol wrote to Dr. Gianvito to the pre-operative testing department, and to the Anesthesiology Department. In his letter, Dr. Warchol recommended that the plaintiff continue his medications Atenolol and aspirin. Dr. Warchol defined the plaintiff's risk as "moderate". Dr. Warchol and Dr. Kasabian both state that the normal procedure for the preoperative testing department is to contact the pertinent physicians in order to reconcile problems that may arise. Dr. Warchol states that letters concerning a pre-operative patient are presented to the operating surgeon prior to surgery.

The plaintiff underwent repair of an abdominal incisional hernia and panniculectomy [the removal of redundant skin and subcutaneous fat from the anterior abdominal wall] on January 9, 2001. Following the surgery, he was taken to a recovery area at about 1:30 PM. That same afternoon, the plaintiff became unresponsive and cardiac monitoring showed sudden onset of ventricular fibrillation at 4:46 PM. Efforts to resuscitate the plaintiff terminated at 5:37 PM when he was declared dead. Upon autopsy, the cause of death was determined to be atherosclerotic and hypertensive cardiovascular disease with acute coronary thrombosis resultant from a therapeutic complication. Microscopic evaluation showed old myocardial infarct and ischemic heart disease. The plaintiff's stent, placed in 1998, had a thrombus, but could not be

sectioned for microscopy because it was a metal device.

Discussion

The elements for an action based on malpractice require “a deviation or departure from good and accepted medical practice and evidence that such departure was a proximate cause of [an] injury.”¹ Extensive medical records and an expert affidavit executed to a reasonable degree of medical certainty, may establish a defendant’s claim that there was no departure from an accepted standard of care, or that any such act or omission was not the proximate cause of an injury.²

The motion made by Dr. Kasabian and SIUH for Summary Judgment is denied.

Here, Dr. Kasabian and SIUH present extensive medical records and the affirmation of Lawrence A. Gordon, MD (“Dr. Gordon”). Dr. Gordon specifies that cardiac clearance was obtained from Dr. Warchol in a letter dated January 4, 2001. That letter states that the plaintiff should continue both aspirin and atenolol in the “perioperative” period. Dr. Gordon states that the panniculectomy was required in order to complete the indicated abdominal hernia repair. He states that the plaintiff was observed at appropriate intervals, but ventricular fibrillation suddenly occurred despite appropriate observation. Dr. Gordon states that the subsequent attempt to resuscitate the plaintiff was properly performed. Dr. Gordon concludes that there was no deviation from accepted medical or surgical practice and that any alleged acts or omissions were not the proximate cause of injury.

The plaintiff replies that Dr. Kasabian and SIUH failed to take necessary steps to prevent the plaintiff from developing emboli and thrombi. The plaintiff’s expert cardiologist’s

¹*Burgos v Rateb*, 64 AD 3d 530 [2d Dept 2009].

²*Id.* At 530 - 531.

affirmation states that SIUH should have adhered to the later recommendation to continue aspirin, abandoning the earlier recommendation to withhold aspirin from the plaintiff prior to surgery. The plaintiffs also present an additional expert affirmation by a plastic surgeon that draws upon the deposition of Dr. Warchol. The expert plastic surgeon states that Dr. Kasabian's failure to provide aspirin peri-operatively to the plaintiff was a departure from accepted medical practice by not adhering to the later recommendation from Dr. Warchol, and this departure was the proximate cause of the plaintiff's death. The expert affirmation also states that informed consent should have been obtained from the plaintiff regarding pre-operative discontinuance of aspirin.

In response, Dr. Kasabian and SIUH state that they never received the letter dated Thursday January 4, but relied on the letter of November 30, 2000. However, in a deposition appended to Dr. Kasabian's and SIUH's motion for Summary Judgment, Dr. Warchol states that the letter of January 4 was sent to Dr. Gianvito, the plaintiff's primary medical provider, and to both the SIUH anesthesiology department and the pre-operative testing unit. There is no evidence in admissible form that this letter was not sent. The plaintiff concludes that Dr. Kasabian should have also seen the Thursday January 4 letter in the pre-operative records of Tuesday, January 9. Dr. Kasabian and SIUH further respond that the letter of Thursday, January 4, 2001 was not in the medical record attested to as being complete five days later on Tuesday, January 9, 2001.

Therefore, the issues are whether SIUH and Dr. Kasabian failed to detect that the plaintiff was not taking aspirin peri-operatively and whether proceeding with surgery in the face of the plaintiff's not taking aspirin was a proximate cause of the plaintiff's injuries. The assertions made by opposing parties require reconciling conflicting versions of the facts and assessing credibility. Findings of fact, especially those that rely upon judging credibility, are best determined by a jury during a trial.³ Therefore, in the presence of disputed issues of fact, and

³*Kahen v. Blum*, 185 AD 2d 875 [2d Dept 1992]; quoting *Claridge Gardens, Inc. v. Menotti*, 160 AD 2d 544 [1st Dept 1990].

because of issues of credibility, summary judgment must be denied to Dr. Kasabian and SIUH.

Dr. Warchol's motion seeking Summary Judgment is granted.

Dr. Warchol submits extensive medical records and an affirmation in which he acts as his own expert. His opinion is that his care and treatment conformed with good and accepted standards of care. Specifically, he avers that he recommended that the plaintiff remain on aspirin up until the time of surgery. Dr. Warchol asserts that the plaintiff did not have mild peri-infarct ischemia in the left anterior descending artery as suggested by the technetium-99 scan. He states that he carefully reassessed the plaintiff's cardiac status including a stress echo-cardiogram and determined that the plaintiff was not a high risk for surgery. Dr. Warchol states he made every effort to prevent and treat the plaintiff's terminal ventricular tachycardia and fibrillation.

Dr. Warchol's first letter of November 30, 2000 advised continuing atenolol, discontinuing aspirin and stated that the plaintiff could have the intended surgery. However, Dr. Warchol asserts that first letter was not a formal pre-operative clearance. Dr. Warchol states that the first letter outlined his planned evaluation. According to Dr. Warchol, the actual clearance letter was the second letter of January 4, 2001, in which he advised continuing aspirin "peri-operatively." Dr. Warchol did not see the plaintiff after writing the letter of November 30, 2000. Instead, he based his recommendations and peri-operative instructions, contained in the January 4, 2001 letter, on the findings of tests performed on the plaintiff.

In response, the plaintiffs' expert opinion rendered by a cardiologist states that Dr. Warchol failed to properly inform the plaintiff's surgeon of the need to continue aspirin therapy and this omission was the proximate cause of stent occlusion, ischemia, and death. According to the plaintiff, the contradictory letters departed from accepted medical practice, were not timely delivered to the pertinent recipients, caused confusion, and that confusion proximately caused aspirin to be incorrectly withheld resulting in the plaintiff's death. Valid expert opinion advises the finder of fact on issues outside of common experience. Here, evaluating contradictory letters

the plaintiff asserts were untimely delivered, and causing confusion do not require expert medical opinion. Therefore, these opinions are not evidence in admissible form and are conclusory. The plaintiffs' expert further states that Dr. Warchol requested a stress echo-cardiogram instead of alternative testing that would have been more sensitive. According to plaintiffs' expert this was a deviation from accepted medical treatment. Dr. Warchol disputes this.

In actuality, the plaintiff's theory of the case is that the discontinuance of the plaintiff's daily aspirin was the proximate cause of the plaintiff's injuries. In fact, Dr. Warchol's documented final recommendation was to continue aspirin. Therefore, Dr. Warchol cannot be held liable in malpractice. Accordingly, the causes of action against Dr. Warchol are dismissed.

The disclosure of the plaintiff's expert witness was not untimely.

Dr. Warchol's counsel asserts that he did not have disclosure of the plaintiffs' expert witness until May 27, 2011, and that he was therefore not timely advised. Dr. Warchol further argues that Dr. Kasabian's and SIUH's alleged failure to receive the letter of January 4, 2001 is a new allegation. Consequently, Dr. Warchol's counsel states he is unfairly disadvantaged by this new allegation. But these issues are now moot. However, it should be noted that it is required that "[u]pon request, each party shall identify each person whom the party expects to call as an expert at trial."⁴ The Court Rules of Richmond County Supreme Court, DCM Part 3 state that the disclosure of expert witnesses must be in compliance with CPLR § 3101 (d) (i), or to make disclosure at least forty-five days before the date when the case is first listed for trial by the Assignment Judge.⁵ This action has not yet been listed for trial by an Assignment Judge. Pertinent Court Rules go on to explain that "[i]f evidence or expert testimony is intended to contradict or rebut evidence on the same subject matter identified by another party under CPLR § 3101 (d) (i) and (ii), the opposing counsel shall file an expert witness disclosure pursuant to

⁴CPLR § 3101 (d) (1) (i).

⁵Court Rules of Justice Joseph J. Maltese, Richmond County Supreme Court, DCM Part 3, *Trials Assigned to the Part* (1), effective April 1, 2011.

CPLR § 3101 (d) (i) and (ii) within 15 days after the other party’s disclosure, or at least 30 days prior to the first date set for trial by the Assignment Judge.” A date for trial has not been set by an Assignment Judge. Therefore, the plaintiffs’ expert witness exchange has been submitted well before the forty-five days before the first date of trial assignment required by Court Rules. Consequently, the expert witness exchange is not untimely. Moreover, the issue is now moot.

Accordingly, it is hereby

ORDERED, that the motion for Summary Judgment made by the defendants Dr. Armen Kasabian, MD, and Staten Island University Hospital against the plaintiffs Anthony Joseph Iulo, as Administrator of the Estate of Joseph Iulo, Deceased; and Anthony Joseph Iulo, individually, is denied in its entirety; and it is further

ORDERED, that the motion for Summary Judgment made by the defendant Andrew J. Warchol, MD against the plaintiffs Anthony Joseph Iulo, as Administrator of the Estate of Joseph Iulo, Deceased; and Anthony Joseph Iulo, individually, is granted in its entirety; and it is further

ORDERED, that the caption shall be amended to read as follows:

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

DCM PART 3

**Index No.: 14053/02
Motions No.:**

**ANTHONY JOSEPH IULO, as Administrator of the Estate of
JOSEPH IULO, Deceased; and
ANTHONY JOSEPH IULO, Individually**

Plaintiff

against

**STATEN ISLAND UNIVERSITY HOSPITAL; and
ARMEN KASBIAN, M.D.**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

and it is further

ORDERED, that the parties shall return to **130 Stuyvesant Place, Third Floor, DCM Part 3** for a **Pre-Trial conference on Monday, November 7, 2011 at 9:30 AM.**

ENTER,

DATED: October 20, 2011

Joseph J. Maltese
Justice of the Supreme Court