

Destefano v Columbia Presbyt. Med. Ctr.

2013 NY Slip Op 31415(U)

June 18, 2013

Supreme Court, New York County

Docket Number: 112992/2007

Judge: Milton A. Tingling

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MON. MILTON A. TINGLING
J.S.C.
Justice

PART 44

Index Number : 112992/2007
DESTEFANO, GENNARO
vs.
COLUMBIA PRESBYTERIAN MEDICAL
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/7/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed decision.*

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

FILED

JUL 03 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/19/13

mat, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING

PART 44

GENNARO DESTEFANO and JOSEPH DESTEFANO, as
Administrators of the Estate of MARYANNE TOTO
Deceased,

INDEX NO. 112992/2007
MOTION DATE 1/7/2013

PLAINTIFF,

-v-

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
STATEN ISLAND UNIVERISTY HOSPITAL and
CLOVE LAKES HEALTH & REHABILITATION CENTER,
INC.,

DEFENDANTS.

FILED

JUL 03 2013

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is DENIED.

Defendant, STATEN ISLAND UNIVERSITY HOSPITAL, moves the court for summary judgment and dismissal of all claims. Defendant alleges it did not deviate from accepted nursing and medical practices and it was not the proximate cause of Plaintiff Maryanne Toto's death.

Plaintiff, Maryanne Toto, age 55, was admitted to Clove Lake Health Care and Rehabilitation Center, on January 13, 2007, for "restorative rehabilitation" following surgery at New York Presbyterian Hospital where she underwent a laparotomy sigmoidectomy with ileostomy (a surgical procedure where the sigmoid colon is dissected and a small opening is made by bringing the small intestine to the skin. A colostomy bag is then placed for collection of waste out of the body) for diverticulosis that was complicated by perforation. Her medical history included a bilateral lung transplant that occurred on March 3, 2006, but is not the subject of this litigation. Due to her bilateral lung transplant Plaintiff was on "anti-rejection" medication, which suppress the immune system, to prevent the body from rejecting the transplant. Plaintiff, Maryanne Toto, remained at Clove Lakes for two months.

On March 8, 2007, Plaintiff Maryanne Toto, was transferred to Staten Island University Hospital from Clove Lakes because of complaints of weakness, vomiting, poor appetite and shortness of breathe. When Plaintiff arrived at Staten Island University Hospital she was triaged and her heart rate, respiratory rate, and oxygen saturation were recorded. At 5:30 a.m., Plaintiff became unresponsive and suffered a cardiac arrest. She was intubated and cardiopulmonary resuscitation was performed. Plaintiff was revived, but remained intubated, in critical condition, and was admitted to Staten Island University Hospital. On March 11, 2007, Plaintiff was transferred to New York Presbyterian Hospital and was admitted with a diagnosis of septicemia, acute renal failure, septic shock, severe sepsis, pneumonia and malnutrition.

From March 11, 2007 until her death on May 8, 2007, Plaintiff remained in New York Presbyterian Hospital. While at New York Presbyterian Hospital Plaintiff, was extubated on multiple occasions before receiving a tracheostomy to help maintain her airway. In mid to late April of 2007, Plaintiff had a positive culture for ESBL *Klebsiella pneumoniae*. Plaintiff was given the antibiotic Tigecycline. Plaintiff's condition worsened and she went into septic shock. Plaintiff died on May 8, 2007. An autopsy was performed two days later. The autopsy states that cause of death was multiple complications following bilateral lung transplant for chronic obstructive pulmonary disease.

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra*. In a medical malpractice case the prima facie elements of a claim are (1) a deviation or departure from accepted practice and (2) evidence that such a departure was a proximate cause of the injury or

damage. *Amsler v. Verilli*, 501 N.Y.S.2d 411 (2nd Dept., 1986). “A doctor is charged with the duty to exercise due care, as measured against the conduct of his or her own peers—the reasonably prudent doctor standard.” *Nestorowich v. Ricotta*, 97 N.Y.2d 393, 398 (2002). Proximate cause is shown by evidence that “defendants diminished plaintiff’s chance of recovery or diminished the plaintiff’s chance of a better outcome or increased his injury.” *King v. St. Barnabas Hosp.*, 87 A.D.3d 238, 245 (1st Dept. 2011). In the instant case, defendant, Staten Island University Hospital, allege entitlement to summary judgment on the grounds that any actions taken by Staten Island University Hospital and/or its doctors did not deviate from accepted medical standards and were not a proximate cause of the Plaintiffs death. Defendant provides an expert medical affirmation of a Board Certified Internist, Dr. Ian Newmark. The defendant’s expert, Dr. Newmark opines that the medical care and treatment rendered to the Plaintiff at Staten Island University Hospital was in accordance with generally accepted standards of medical practices, and that no act and/or omission as alleged against Staten Island University Hospital proximately caused any of the alleged injuries or death to Plaintiff.

Once the movant has established a prima facie case that it is entitled to summary judgment, the burden shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a motion for summary judgment the court “must assume the truth of the allegations in the complaint and supporting affidavits.” *Lynch v. Bay Ridge Obstetrical & Gynecological Assoc., P.C.*, 72 N.Y.2d 632, 636 (1988). Plaintiffs oppose the defendant, Staten Island University Hospital’s, summary judgment motion. Plaintiffs submit an affirmation from, Dr. Diane Sixsmith, who alleges Staten Island University Hospital made several departures from accepted medical standards, including but not limited to failure to provide treatment for Maryanne Toto’s hypotension, acidosis, sepsis and kidney failure until after she suffered a cardiac arrest; failure to provide intravenous fluids upon presentation to the Emergency Department; and failure to timely administer broad spectrum antibiotic coverage. Dr. Sixsmith’s opinion is that these departures were a

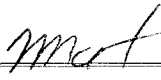
proximate cause of Maryanne Toto sustaining a cardiac arrest, being placed on a ventilator and suffering from multiple medical complications resulting in her death on May 8, 2007.

In a medical malpractice action, conflicting medical expert opinions present a triable issue of fact warranting denial of summary judgment. *Erdogan v. Toothsavers Dental Servs., P.C.*, 57 A.D.3d 314, 315 (1st Dept. 2008). The only facts that both parties agree to is that Plaintiff was admitted to Clove Lakes Health Care and Rehabilitation Center on January 13, 2007 following a laparotomy sigmoidectomy with ileostomy. She remained at Clove Lakes until March 8, 2007 when she was transferred to Staten Island University Hospital where she remained until March 11, 2007. She was then transferred to Columbia Presbyterian Hospital where she died on May 8, 2007. The facts being disputed by both parties and their experts relate to the care Maryanne Toto received at Staten Island University Hospital from March 8, 2007 until March 11, 2007. These conflicting issues present a triable issue of fact; therefore summary judgment does not lie.

Defendant's failed to show that there are no triable issues of fact and conflicting expert testimony mandates summary judgment does not lie. Defendant's motion for summary judgment is denied.

Dated: June 18, 2013

FILED
JUL 03 2013
COUNTY CLERK'S OFFICE
NEW YORK


Milton A. Tingling, J.S.C.
MON. MILTON A. TINGLING
J.S.C.