

Agosta v Nercessian
2013 NY Slip Op 33662(U)
April 10, 2013
Sup Ct, Bronx County
Docket Number: 305112/08
Judge: Douglas E. McKeon
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PART 19A

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

Case Disposed
 Settle Order
 Schedule Appearance

-----X
 AGOSTO, AMILDA

Index No. 0305112/2008

-against-

Hon. DOUGLAS MCKEON

NERCESSIAN, OHANNES A.
 -----X

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **August 24 2011** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed decision and order.

So ordered.

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 4 / 10 / 13

Hon. 
DOUGLAS MCKEON, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
AMILDA AGOSTO, as Administratrix of the
Estate of CECILIA ROSADO RODRIGUEZ,
Deceased,

Plaintiff(s),

- against -

INDEX NO:305112/08

OHANNES A. NERCESSIAN, DOUGLAS D.
NOWAK, and NEW YORK PRESBYTERIAN
HOSPITAL,

DECISION/ORDER

Defendant(s)
-----X

HON. DOUGLAS E. MCKEON

Motion by defendant, Ohannes Nercessian, for summary judgment and an order dismissing all claims against him on the grounds that he provided good and acceptable medical care and treatment to the decedent is denied at this time.

This is a medical malpractice action wherein plaintiff initially presented to moving defendant on October 30, 2006 for a consultation regarding knee pain. The doctor took the decedent's prior medical history noting high blood pressure and diabetes. After testing, Dr. Nercessian advised that decedent's left knee required a total knee replacement and further explained the risks, complications and benefits of the procedures. The surgery was made contingent on the medical clearance from decedent's doctor. On January 17, 2007 decedent returned to Dr. Nercessian and advised that she wanted to proceed with the total knee replacement. Pursuant to the

doctor's requirement for pre-operative cardiac clearance, decedent underwent a round of testing including cardiac evaluation and a stress test. No evidence of ischemia was found. The cardiologist recommended that the knee replacement could proceed and the procedure was performed on February 9, 2007. Following surgery, the doctor advised decedent that he would be leaving town to attend an annual American Academy of Orthopedic Surgery meeting but assured decedent that she would be taken care of by a remaining physician and the two residents who had assisted with her surgery. The remaining physician was Dr. Kiernan and the two residents were Dr. Nowak and Dr. Cadet.

Post-operatively, the decedent complained of abdominal pain and constipation which were noted to be common for post-operative patients. The decedent was eating half of her meals and did have a bowel movement on February 12th following administration of an enema. Decedent was discharged on February 13th. It seems she was discharged despite a fever and continuing complaints of stomach pain. After her discharge decedent continued to complain of pain. She did not call a medical provider although she had been provided with a phone number at the time of discharge. Plaintiff and decedent retired to bed that night to separate bedrooms. In the morning, plaintiff found her mother unresponsive on the floor. The decedent was taken by ambulance to Jacobi Hospital where she was pronounced dead. The cause of death was ischemic bowel complication.

In support of his motion for summary judgment, plaintiff provides his own

affirmation in which he opines that he acted in accordance with accepted standards of medical practice in the care and treatment of decedent. Movant also argues that Dr. Nercessian's medical care was not a proximate cause of the decedent's alleged injuries and death. He argues that he properly performed the knee replacement and cared for decedent post-operatively. He claims that the development of ischemic bowel was not the result of the operative and post-operative services he provided. Decedent was visited by movant two times post-operatively. Then he advised her that he would be attending the out of town meeting and that she would be cared for by a remaining physician. He claims that after the meeting he left the hospital to attend the convention and that decedent's care was entrusted to New York Presbyterian staff. He never received phone calls from the residents regarding any complaints by decedent until he heard about her death and did not participate in any aspect of decedent's discharge.

In opposition, plaintiff has provided the Court with the expert affirmation of a Board certified general surgeon. The expert argues that Dr. Nercessian mismanaged decedent's post-operative care and effectively abandoned his patient when he left for his medical conference without insuring proper medical care. His expert opines that had decedent received proper radiological studies and consults her bowel ischemia would have been diagnosed and she would have survived. The doctor further opines that the bowel ischemia was exacerbated by her diet and blood pressure lowering medications. The Court notes that blood pressure lowering

medications were medications that decedent was on prior to her knee replacement surgery which were continued by Dr. Nercessian. The plaintiff further argues that the motion must be denied as defendant has failed to make a *prima facie* showing of entitlement to summary judgment in that the affirmation submitted by the movant/defendant fails to provide facts or evidence that he adequately transferred his care of Ms. Rosado Rodriguez to another physician on February 10, 2007 when he departed for the medical conference.

The instant motion is denied at this time. The Court agrees that defendant has failed to show that moving defendant adequately transferred his care of decedent to another physician on February 10, 2007. The Court notes that movant advised decedent that in his absence she would be cared for by the one remaining physician, Dr. Kiernan, and hospital residents Dr. Nowak and Dr. Cadet. However, it seems that during the admission, Dr. Kiernan never personally saw or treated decedent nor did he supervise the residents treating her. From the time of her admission to the time of her discharge, defendant Nercessian is listed in the hospital records as the only attending physician in charge of decedent's care. Plaintiff's expert opines that these records evidence the movant's failure to transfer decedent's medical care to another physician. The expert goes on to note that despite complaints of fever, unresolved symptomatology and her stomach complaints, decedent was discharged from the hospital on February 13th. He claims that prior to discharge no radiological studies nor consultations were ordered. In spite of her

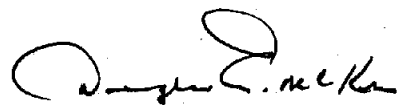
symptoms and complaints medications based on Dr. Nercessian's prior orders were administered throughout her admission. Further, the approximate 450 pages of medical records generated by this hospital admission list defendant Nercessian as the only attending physician and there are no other entries by any other attending physician. The Court agrees that defendant Nercessian has failed proffer sufficient evidence to make a showing that he transferred his care of Ms. Rosado Rodriguez to another physician on February 10, 2007. He relies only on his affirmation which states he was not responsible for her medical care after he left town. However, the Court is not made aware of any hospital procedures in place at the time regarding the transfer of care. The Court also does not know if Dr. Kiernan was notified about this patient. The movant argues that a physician who is unable to care for a patient does not depart from the standard of care so long as he or she arranges to transfer the care of the patient to another well qualified physician. Brown v. Bauman, 42 A.D.3d. 390 (1st Dept. 2007). Although movant goes on to argue that it is clear from the probative evidence including medical records and deposition testimony that Dr. Nercessian did not abandon the decedent, the Court finds that there is no evidence that another doctor assumed her care. The Court agrees that Dr. Nercessian advised the decedent and the plaintiff that he would be attending the academy meeting and that a physician named Dr. Kiernan would assume her care. Dr. Nercessian goes on to say that, in fact, Dr. Kiernan assumed decedent's care. However, there is nothing in the records to indicate that Dr. Kiernan did, in fact,

assume her care. The Court, at this time, has no proof that Dr. Nercessian properly transferred decedent's care to a covering attending so that he was not responsible for her nor had a duty to her once he left the hospital premises to attend the medical conference.

The instant motion is denied. Movant may renew this motion upon a proper showing that he transferred the care of decedent to another attending physician.

So ordered.

Dated: 4/10/13



Douglas E. McKeon, J.S.C.