

Ryer v Waldman

2013 NY Slip Op 33752(U)

October 29, 2013

Supreme Court, Westchester County

Docket Number: 50759/2011

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 10/30/2013 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER PRESENT: HON. SAM D. WALKER, J.S.C.

-----X LEAH RYER, as Administrator of the Goods, Chattels and Credits of the Estate of JACK RAYWID (a/k/a JACOB RAYWID) and RITA ANN RAYWID, individually

Plaintiffs,

-against-

Index No. 50759/2011 Decision & Order Motion Sequence 1

JILL SLATER WALDMAN, M.D., JAMES KIERAN DWYER, M.D., NIRAV MISTRY, M.D., JESSICA DIANE O'BRIEN-RABINOWITZ, P.A., HOSPITALIST EMO OF NEW YORK, P.C., NYACK EMERGENCY MEDICAL ASSOCIATION, PLLC, KATHY GREENE, R.N., KIMBERLY MAUREEN BREGA, R.N. and THE NYACK HOSPITAL,

Defendants.

-----X

Defendants Nyack Hospital, Kathleen Greene, R.N. and Kimberly Brega, R.N. move this Court for an Order pursuant to CPLR §3212 for summary judgment. The following papers were received and considered in deciding the present motion:

PAPERS

NUMBERED

- Notice of Motion/Affirmation in Support/Exhibits A-T 1-3
Affirmation in Opposition/Exhibit A 4-5
Affirmation in Reply/Exhibit 1 6-7

FACTUAL AND PROCEDURAL BACKGROUND

In this medical malpractice and wrongful death action, Defendants seek judgment as a matter of law and dismissal of Plaintiff's complaint as asserted against Defendants Nyack Hospital, Kathleen Greene, R.N. and Kimberly Brega, R.N. (Hereinafter "Defendants"). On May 20, 2009, patient Jack Raywid (the decedent), presented to the offices of Digestive Disease Associates of Rockland, P.C. with complaints of increasing constipation. Mr. Raywid had not had a bowel movement in three weeks. Mr. Raywid underwent an x-ray of the abdomen at Ramapo Diagnostic Imaging which revealed moderate fecal material in the ascending colon and no dilated loops of bowel were identified. Upon further observation it was recommended that Mr. Raywid have a CT scan of the abdomen and pelvis without contrast and advised to return for a flexible sigmoidoscopy with Dr. Moccia. When Mr. Raywid appeared for his CT scan at Hudson Valley Radiology Associates, he was informed that the scan showed an obstruction (dilated bowel loops) and advised him that he needed to be admitted to the hospital for further evaluation. Dr. Moccia then advised Mr. Raywid to go to co-Defendant Nyack Hospital. Mr. Raywid presented to the emergency room and was treated by both Jessica O'Brien, P.A., and Dr. James Dwyer. A surgical consult by Dr. Ibrahim determined that surgery was not necessary at that time. Dr. Moccia recommended that Mr. Raywid be admitted to the hospital for medical management.

At 7:30 a.m. the next morning, Mr. Raywid's vital signs were stable. At 8:00 a.m. Mr. Raywid ambulated to the bathroom and was noted to be alert and oriented to time, place and manner. He denied nausea, and voided clear yellow urine and was assisted back to bed. At 8:10 a.m. the patient was found unresponsive with no pulse or respirations. Vomit was noted on

the patients chest. The oral pharynx was suctioned and CPR was initiated. Despite resuscitative measures, Mr. Raywid was pronounced dead at 8:30 a.m.

The underlying action was commenced by the filing of a summons and complaint on or about May 5, 2011. Plaintiff then filed an Amended Summons and Amended Verified Complaint on August 22, 2011. On September 22, 2011, Defendants interposed Verified Answers along with a Demand for Bill of Particulars. The parties appeared for depositions, and the Note of Issue was filed on December 12, 2012, and Defendants timely filed the present motion.

DISCUSSION

On a motion for summary judgment in a medical malpractice action, the moving party/defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby. *Stukas v. Streiter*, 83 A.D.3d 18, 23-24 (2nd Dept. 2011). In opposition, the plaintiff must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of triable issue of fact. *Id.* If the defendant establishes only that he or she did not depart from good and accepted medical practice, the plaintiff is only required to raise a triable issue of fact as to whether such a departure occurred. *Id.*

Co-Defendant Nyack Hospital

Plaintiff contends that co-Defendant Nyack Hospital is not vicariously liable for the acts of the co-Defendants, as they were Plaintiff's private attending physicians. "Generally, a hospital

cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee” *Quezada v. O’Reilly–Green*, 24 A.D.3d 744, 746 (2nd Dept. 2005). Here Defendants assert that Plaintiff’s decedent was sent to Nyack Hospital under the direction of his private physician Dr. Moccia. As such, Defendants contend that there is no reasonable basis to hold a hospital vicariously liable when a patient is admitted to a hospital under the care of his private attending physician and the patient is then referred to another physician.

The cases cited by Defendants are clearly distinguishable from the facts of this case. Here, Plaintiff’s decedent was referred to the emergency department for admission and treatment. As noted, *supra*, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee, however, “an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing.” *Salvatore v. Winthrop Univ. Med. Ctr.*, 36 A.D.3d at 888; see *Christopherson v. Queens–Long Is. Med. Group, P.C.*, 17 A.D.3d at 394, 792 N.Y.S.2d 608; *Orgovan v. Bloom*, 7 A.D.3d at 771, 776 N.Y.S.2d 879 (Defendant hospital established its prima facie entitlement to judgment as a matter of law by demonstrating that the treating doctors were private, attending doctors to whom the plaintiffs were referred through their usual pediatrician and neurologist). Here, however, Plaintiff was referred to the emergency room of Nyack Hospital for further observation and treatment. At no point does Plaintiff or Defendant state that Mr. Raywid was specifically referred to a particular treating physician, or that the treating physician was not a Nyack Hospital employee. As such, Defendant has not sustained its prima facie burden to establish its entitlement to judgment as a matter of law.

Co-Defendants Kathleen Greene, R.N. and Kimberly Brega, R.N.

Defendants also argue that they are entitled to judgment as a matter of law in regards to nurses Greene and Brega. In support, Defendants offer expert testimony which opined that the nurses actions did not proximately cause plaintiff's-decedent's injuries.

Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause. *Lyons v. McCauley*, 252 A.D.2d 516, 517(2nd Dept. 1998). Here, Defendants offer the affidavit of Colin J. Powers, M.D., a board certified general surgeon. In his affirmation, Dr. Powers opined that the treatment rendered to Mr. Raywid by Nyack Hospital, Kathleen Green, R.N. and Kimberly Brega, R.N., was not the proximate cause of the Plaintiff's-decedent's injuries. Dr. Powers notes that Nurse Greene appropriately obtained a full and thorough medical history from Mr. Raywid and performed a proper and thorough examination. Dr. Powers similarly finds that Nurse Brega acted at all times in accordance with good and accepted standards of medical and nursing practice.

In opposition, Plaintiff has raised a triable issues of fact by submitting the affidavit of a physician board certified in internal medicine. Plaintiff's expert opines that Mr. Raywid's untimely death was the result of the hospital staff's failure to follow established practice management guidelines for the non-operative management of small bowel obstruction. The expert notes that Nurse Greene's observations of Mr. Raywid's condition upon admission is in sharp contrast to and inconsistent with Dr. Mistry and co-Defendant Physicians Assistant (PA) O'Brien's conclusion that the patient was stable and did not require a nasogastric tube. Further, the expert notes that Nurse Brega's notes and medical records are inconsistent and inaccurate. The expert further opines that the conclusion to be drawn from the medical records given the

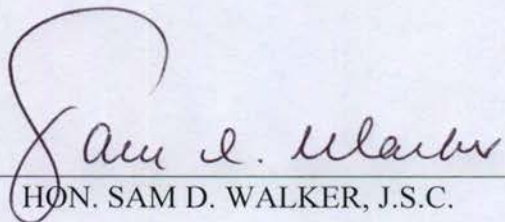
observation that when Mr. Raywid was discovered in his room he was unresponsive with a vomitous chest, is that the patient vomited shortly after being administered oral medications, despite Nurse Brega's assertion that she did not administer Plaintiff's-decedent oral medication.

Summary judgment is not suitable in a medical malpractice action where the parties offer conflicting medical expert opinions. A jury can only resolve such credibility issues. *Hayden v. Gordon*, 91 A.D.3d 819, 821 (2012). Here the experts have offered sufficiently contradictory opinions to raise a question of fact. As such, Defendants are not entitled to the relief they seek.

Accordingly, Defendant's motion for summary judgment is DENIED. The parties are directed to appear before the Settlement Conference Part, SettlementConferenceWestchester@courts.state.ny.us, 914-824-5350, on January 6, 2014 at 9:30am in Courtroom 1600. To the extent any relief requested in Motion Sequence 1 was not addressed by the Court, it is hereby deemed denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
October 29, 2013


HON. SAM D. WALKER, J.S.C.