

Delango v New York-Presbyt. Healthcare Sys.

2014 NY Slip Op 30715(U)

March 19, 2014

Sup Ct, New York County

Docket Number: 106815/10

Judge: Joan B. Lobis

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

PRESENT: _____
Justice

PART _____

Index Number : 106815/2010
DELANGO, JOAN
vs.
NEW YORK PRESBYTERIAN
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
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). 1

Answering Affidavits — Exhibits _____

No(s). ~~2~~ see n 157, p 3

Replying Affidavits _____

No(s). 5

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7

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

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

THIS MOTION IS GRANTED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER
& JUDGMENT

FILED

MAR 24 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/19/14

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: IAS PART 6**

-----X
JOAN DELANGO and DENIS DELANGO, as
Administrators of the Estate of Danielle M. Delango,
deceased, and ANDREW DENIS DELANGO, an infant
under the age of 14 years, by his Guardians, Joan and
Denis Delango,

Plaintiffs,

Index No. 106815/10

-against-

Decision, Order and Judgment

NEW YORK-PRESBYTERIAN HEALTHCARE
SYSTEM, LAWRENCE HOSPITAL CENTER,
DANIEL GEOFFREY DAVIS, D.O., ALLERGAN,
INC., AND BIOENTERICS CORPORATION, and
JOHN DOES 1-5,

Defendants.

FILED

MAR 24 2014

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

**COUNTY CLERK'S OFFICE
NEW YORK**

Plaintiffs Joan and Denis Delango sue on behalf of the estate of their daughter, Danielle Delango, who died following lap band surgery. Plaintiffs also sue as guardians for their grandson, Andrew Delango, who is Danielle's son. They allege that the remaining Defendant in this case, Lawrence Hospital Center, failed to provide proper pre-operative screening for Ms. Delango. Defendant Lawrence Hospital Center moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Defendant Daniel Geoffrey Davis, D.O., the gastric surgeon, also moved for summary judgment, but Plaintiffs discontinued the action against him while Dr. Davis' motion was pending. The motions, motion sequence numbers 6 and 7 respectively, are consolidated for the purposes of this decision and order. Former Defendant Davis's motion is dismissed as moot, and, for the following reasons, the motion of Defendant Lawrence Hospital Center is denied in part and granted in part.

Six weeks after undergoing lap band surgery at Lawrence Hospital Center, Danielle Delango, age 25, felt ill. She had been complaining of a toothache. She had also been having urgent bowel movements. It was the morning of February 26, 2008, and she had slept over her parents' house because they had left on vacation that morning with her two-year-old son, Andrew. Her younger sister, Deanna Delango, who lived with her parents, described Danielle as pale. Deanna further testified that Danielle was complaining that she had chills and that her hands and feet felt numb. Following a bath, Danielle rested in Deanna's bedroom. Within a few minutes, Deanna heard Danielle gasping for breath and saw her whole body shaking.

By the time paramedics arrived, Danielle was unconscious. She had no pulse and was not breathing. Although the paramedics were able to revive her, by the time she arrived at Lawrence Hospital Center, Danielle had sustained significant brain damage from the loss of oxygen. Her QT interval, which measures electrical activity of the heart, was prolonged at 544, and she had an exceptionally low level of magnesium. Hospital records showed a stat order for magnesium. The cardiology consultation report lists her as having suffered an "arrhythmic event," secondary to a "long QT." Danielle remained unconscious and intubated for several days. Early the next week, it was determined that Danielle was brain dead, and her parents consented to ending life support. Several of her organs were harvested for donation. Her Hospital discharge summary lists her cause of death as "[c]ardiac arrest most likely secondary to QT interval." An autopsy also concluded that she died from cardiac arrest.

Approximately a year and a half earlier, Danielle Delango had sought treatment for obesity. She was seen by a nurse practitioner, Dorothy Ferraro, at the Center for Advanced Surgery

(Center) on July 13, 2006, which has offices at Lawrence Hospital Center (Hospital). It was determined that Ms. Delango was not a candidate for bariatric surgery because her body mass index, 36.7, was too low.

Ms. Delango returned to the Center several months later on October 26, 2007. At that time, it was documented that her weight had increased to 240 pounds, and her body mass index was 40. She was found to be eligible for bariatric surgery, and preparations were begun for that surgery to be performed by Dr. Daniel Davis.

On October 30, 2007, Ms. Delango met with Staci Stone, a nutritionist, who worked at the Center. Ms. Stone provided Danielle with dietary counseling and a weight loss diet. Ms. Delango also had a pulmonary function analysis on that day.

Further pre-operative testing was conducted at the Hospital on January 3, 2008. At the appointment, Ms. Delango had a chest x-ray and blood taken. Dr. Davis also referred her for an electrocardiogram, which was performed by a technician with the initials, "EA." The test was interpreted by Dr. Sobha Gavani, who deemed Ms. Delango's QT interval, which measures electrical flow within the heart, as normal. Based on the results of the pre-operative tests, Ms. Delango was medically cleared for surgery.

Dr. Davis operated on Ms. Delango at the Hospital on January 15, 2008. Her procedure involved laparoscopic adjustable banding, which lasted under an hour. She was discharged the same day.

Three days after Ms. Delango's surgery, a nurse from the Hospital telephoned to ask about Danielle's progress. Ms. Delango's mother spoke with the nurse. The Hospital record indicates that Mrs. Delango reported that her daughter did not have any nausea, pain, bowel or bladder problems or infection.

Ten days after the procedure, on January 25, 2008, Nurse Practitioner Ferraro telephoned Danielle. At that time, she complained of constipation. She also reported that she had not had a bowel movement since the surgery. She was taking over-the-counter laxative medications, and Ms. Ferraro recommended adding an additional, over-the-counter laxative product. At her deposition, Ms. Ferraro, who was the Clinical Director of the Center, and an assistant professor of nursing at Columbia University, testified that Ms. Delango's lack of any bowel movement since the surgery was a concern.

Ms. Delango was seen after her surgery once, on February 1, 2008, seventeen days after the procedure. She did not meet with Dr. Davis, but rather, she was seen by the Center nutritionist, Ms. Stone, and the Center's Clinical Director, Ms. Ferraro. At that visit, Ms. Delango's constipation was again noted. It was also recommended that she transition from a post-operative liquid diet to soft foods. Ms. Delango's incisions were recorded as healing well; she was cleared for exercise and was reported to have weighed 221 pounds. She went for a second follow-up visit with Ms. Ferraro, but was not seen. Another visit with Ms. Ferraro was scheduled for February 29, 2008, but Ms. Delango suffered her cardiac arrest three days before that was to take place.

In May 2010, Danielle's parents sued as administrators of her estate. They claim, in

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pertinent part, that Lawrence Hospital Center's care and treatment was negligent. They also assert claims of lack of informed consent, wrongful death, and loss of consortium on behalf of Ms. Delango's son, Andrew. Plaintiffs' bill of particulars against Lawrence Hospital Center, dated October 26, 2010, contends, among other things, that the Hospital "fail[ed] to give adequate pre-operative screening." Additionally, Plaintiffs' bill of particulars against then-Defendant New York-Presbyterian Healthcare System, dated December 29, 2010, repeatedly alleged that the Hospital failed to conduct proper cardiac screening in preparing Ms. Delango for surgery and should have consulted with an independent cardiologist in advance of her surgery.¹

In moving for summary judgment, Lawrence Hospital Center contends that its employees did not engage in any independent acts of negligence and that Ms. Delango's medical care was managed by a private physician. Nor it claims is there a basis to support any contention of apparent or ostensible agency. It offers the expert affirmation of Dominick Gadaleta, M.D., a New York-licensed physician, who is board-certified in surgery and a specialist in bariatric surgery. Dr. Gadaleta contends that the Hospital was not responsible for obtaining Ms. Delango's informed consent. He further opines that it did not depart in its care for Ms. Delango or cause her death.

Plaintiffs oppose Lawrence Hospital Center's motion for summary judgment. They contend that the Hospital has failed to establish a prima facie case that it is not vicariously liable for the technician and physician involved with Ms. Delango's electrocardiogram (EKG). Alternatively, even assuming for the sake of argument that the Hospital were to have shown that these individuals

¹At the time that the bills of particulars were served, Plaintiffs were contending that New York-Presbyterian controlled Lawrence Hospital Center.

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were not employees, the Hospital failed to establish as a prima facie case that they were not apparent or ostensible agents of the Hospital, which provided Ms. Delango's pre-surgical work-up on January 3, 2008. There is nothing in the record, Plaintiffs note, that shows that Ms. Delango had any part in selecting the personnel who performed that work-up. The EKG print out is titled "Lawrence Hospital Center- Routine Record."

Plaintiffs further offer the opinion of an expert whose identity has been redacted pursuant to Section 3101(d)(1)(i) of the Civil Practice Law and Rules. Their expert is a New-York licensed physician, who is board-certified in internal medicine and cardiology. The expert contends that Lawrence Hospital Center departed from proper standards of care. Those departures, moreover, were substantial factors in causing Ms. Delango's death. Plaintiffs' expert opines that Ms. Delango's cardiac arrest was due to arrhythmia that was worsened by her gastric band surgery, but which condition went untreated.

Plaintiffs' expert points to the Hospital's role in performing Ms. Delango's pre-operative cardiac screening. Accordingly to the expert, Dr. Gavani misinterpreted Ms. Delango's electrocardiogram (EKG) as normal. The QT interval of 455 was not in the normal range but rather elevated.² A prolonged interval indicates electrical instability, which depending on the magnitude of prolongation can increase the risk of sudden cardiac death. While Ms. Delango's baseline elevation was "mild" and did not contraindicate surgery, Plaintiffs' expert contends that the elevation

²Prior to his discontinuance, Dr. Davis submitted the opinion of an expert in support of his motion for summary judgment, who also opined that Dr. Gavani departed in failing to report the abnormal reading.

merited closer monitoring. That monitoring was especially warranted given the medication that Ms. Delango was taking and the type of surgery that she had. For example, Ms. Delango was on the antidepressant, Wellbutrin, which, according to Plaintiffs' expert, is well known to be associated with prolonging QT intervals and to be increased in absorption following gastric band surgery. Moreover, bariatric surgery is known to cause metabolic changes that can prolong QT intervals and reduces a patient's ability to absorb magnesium, which contributes to heart health, from foods consumed.

Plaintiffs' expert points to missed opportunities for monitoring that are shown by this record. For example, on February 1, 2008, when Ms. Delango was first seen post-operatively, there was no testing of her electrolytes. Moreover, she was using laxatives, which can exacerbate loss of important minerals, including magnesium. The proper standard of care for Ms. Delango's elevated risk would have required a blood test to check her magnesium level to see if she needed supplements or additional testing, as well as a post-operative EKG. Also, Plaintiffs' expert opines that Ms. Delango should have been advised to return for additional magnesium testing were she to develop diarrhea. Danielle did have urgent bowel movements before her death, but that condition had not been conveyed to her treaters because her second follow-up appointment did not go forward, and she went into cardiac arrest before ever being seen again. Ms. Delango might also have needed to have her Wellbutrin dosage reassessed. In short, accordingly to Plaintiffs' expert, simple electrolyte restoration, with a potential reduction in Ms. Delango's antidepressant medication, was all that would have been needed to avoid Ms. Delango's death.

In reply, Lawrence Hospital Center contends that Plaintiffs are raising a new theory

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in their opposition to its motion for summary judgment. It complains that Plaintiffs never amended or supplemented their October 2010 bill of particulars. The Hospital notes that Dr. Gavani is not named in the bill of particulars or depositions, nor does the October 2010 bill of particulars mention cardiac testing, the electrocardiogram or QT waves. It argues, without citation, that Plaintiffs should have amended or supplemented their bill of particulars before filing the note of issue. It also claims that there has been no discovery on the issue.

This Court permitted Plaintiffs to submit a surreply to the Hospital's reply. Plaintiffs contend that their claim that the EKG was improper is within the scope of their October 2010 bill of particulars' allegation that the Hospital failed to give Danielle adequate pre-operative screening. They point out that the allegations contained in the bill of particulars arise from the Hospital's own records, and there can be no surprise or prejudice. They note that the bill of particulars against New York-Presbyterian included even more specifics about the Hospital's negligence relating to this test. Additionally, Plaintiffs offer to amend their bill of particulars against the Hospital to include more specifics regarding their contention, which the Hospital opposes.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is

established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer’s Estate, 93 A.D.2d 355 (1st Dep’t 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep’t of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a movant must demonstrate that the movant did not depart from accepted standards of practice or that, even if it did, the departure did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep’t 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from

accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court is not persuaded that the Defendant, Lawrence Hospital Center, has established a prima facie case of entitlement to summary judgment on Plaintiffs' medical malpractice claim and the claim for wrongful death flowing from that claim. Plaintiffs did, however, fail to oppose the Hospital's challenge to their claim of lack of informed consent. Accordingly, summary judgment on that claim is proper. Moreover, this Court, sua sponte, dismisses Plaintiffs' claim for loss of consortium on behalf of the decedent's child, since New York does not recognize that cause of action as a matter of law. See, e.g., DeAngelis v. Lutheran Med. Ctr., 84 A.D.2d 17, 25-26 (2d Dep't 1981).

On Plaintiffs' medical malpractice claim, this Court finds that the Hospital has failed to establish a prima facie case. Based on the pleadings in this case, this Court rejects the Hospital's claim that Plaintiffs have raised a theory of liability for the first time in their opposition. Cf. Abalola v. Flower Hosp., 44 A.D.3d 522, 522 (1st Dep't 2007) (improper to raise new theory of liability not set forth in complaint or bill of particulars). This Court finds that a misread EKG is within the scope of Plaintiffs' complaint's and amended complaint's challenge to pre-operative care and their bill of particulars' theory of liability challenging the adequacy of the Hospital's pre-operative screening. In addition, the Hospital does not even address the additional details of the Hospital's alleged negligence set forth in the December 2010 bill of particulars against former Defendant, New York-Presbyterian. The pleadings specifically allege failure to properly monitor Ms. Delango. Moreover, the defense expert opinion fails to address pre-operative screening as alleged in the bill of particulars in any particularity. 73 A.D.3d at 195.

This record, moreover, shows that Plaintiffs' theory was raised in disclosure. In its answer and amended answer, the Hospital admitted that it "managed and controlled certain aspects of the hospital, for the care of its patients, and others admitted to the hospital, which included" Ms. Delango. It further admitted that it "may have provided certain medical personnel to assist in" her care and treatment. At the deposition of Danielle's mother, Joan Delango, the attorney for the Hospital, who is the same affirrant in the motion for summary judgment before this Court, specifically discussed Danielle's prolonged QT in addressing potential causes of her death. At Dr. Davis's deposition, at which the same attorney appeared, the doctor expressly referred to deaths of lap band patients caused by underlying medical problems that put them at increased risk for the procedure, including "cardiac events." Moreover, the Lawrence Hospital Center records relating to Ms. Delango's preoperative screening on January 3, 2008, were reviewed. Cardiac testing and post-operative nutritional deficiencies also came up in the course of the non-party witness deposition of Dorothy Ferraro, the nurse practitioner who was the Clinical Director at the Center. Lawrence Hospital Center's attorney also attended that deposition, but declined to ask any questions.

To the extent that the Hospital failed to conduct disclosure on Plaintiffs' allegations of inadequate pre-operative screening, which arise from the face of the Hospital's own medical record of the January 3, 2008, electrocardiogram print out, Plaintiffs have offered to amend their bill of particulars against the Hospital to provide more detail. This Court grants that application for the limited purpose of that amendment only. See, e.g., C.P.L.R. 3043(c). The Hospital makes no showing that it challenged the adequacy of Plaintiffs' October 2010 response to its demand for a bill

of particulars. See id. R. 3042(c) (defendant may seek to compel compliance based on inadequate response). Moreover, it participated actively in the disclosure process, did not seek to vacate the note of issue, notwithstanding that document's certification that all necessary disclosure had been completed and that the case is ready for trial, and no further basis has been shown to warrant any additional disclosure beyond Plaintiffs' willingness to amend the bill of particulars as discussed above.

Plaintiffs also show genuine issues of material fact remain regarding the Hospital's care and treatment of Danielle Delango as raised in the pleadings in this action. Plaintiffs' expert, in a lengthy and detailed opinion amply sets forth the bases for Plaintiffs' claim that the Hospital failed to properly pre-screen Danielle and that improper screening was a substantial factor in her subsequent death by cardiac arrest. Accordingly, it is

ORDERED that motion sequence no. 7 by former Defendant Davis is dismissed as moot; it is further

ORDERED that the branch of Defendant Lawrence Hospital Center's motion seeking summary judgment on the claim of lack of informed consent is granted; the Clerk is directed to enter judgment accordingly; it is further


ORDERED that Plaintiffs' cause of action for loss of consortium is dismissed; the Clerk is directed to enter judgment accordingly; it is further

ORDERED that the remainder of Defendant Lawrence Hospital Center's motion for summary judgment is denied; and it is further

ORDERED that within thirty days Plaintiffs may amend their bill of particulars against the Hospital consistent with this decision and order, and the parties shall appear for a pretrial conference on April 29, 2014, at 9:30 am.

Dated: March 19, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

MAR 24 2014

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