

Verdile v Tucker

2014 NY Slip Op 32958(U)

November 6, 2014

Supreme Court, Suffolk County

Docket Number: 27685/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Holly Verdile and Thomas Verdile, individually,
and as the Natural Parents of Maria Gloria Verdile,
and Holly Verdile and Thomas Verdile, as
Administrators of the Estate of Maria Gloria
Verdile,

Plaintiffs,

-against-

Betty Tucker, Registered Nurse, and;
Exchange Ambulance Corp. of the Islips,
its employees, officers, agents, and servants,
and; Southside Hospital, its employees, officers,
agents and servants; and Hunter EMS, Inc., its
employees, officers, agents, and servants, and;
Good Samaritan Hospital Medical Center, its
employees, officers, agents, and servants, and;
Jane Doe (Resident, Good Samaritan Hospital,
name yet unknown) individually, and; Dr. Laura
Nimkoff-Merola, individually,

Defendants.

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Attorneys [See Rider Annexed]

Motion Sequence No.: 014; MG ✓
Motion Date: 4/30/14
Submitted: 9/17/14

Motion Sequence No.: 015; MD ✓
Motion Date: 4/30/14
Submitted: 9/17/15

Motion Sequence No.: 016; MD ✓
Motion Date: 5/12/14
Submitted: 9/17/14

Motion Sequence No.: 017; MD ✓
Motion Date: 5/12/14
Submitted: 9/17/14

Motion Sequence No.: 018; MG ✓
Motion Date: 5/12/14
Submitted: 9/17/14

Upon the following papers numbered 1 to 79 read upon these motions to dismiss: Notice of Motion and supporting papers (014) 1 - 12; (015) 13 - 19; (016) 20 - 31; (017) 32 - 47; (018) 48 - 59; Answering Affidavits and supporting papers, 60 - 66; Replying Affidavits and supporting papers, 67 - 69; 70 - 74; 75 - 79; it is

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ORDERED that motion (014) by defendant Southside Hospital pursuant to CPLR 3216 for an order dismissing the complaint for failure to comply with the 90-day notice is granted; and it is further

ORDERED that motion (015) by defendant Hunter EMS, Inc. pursuant to CPLR 3216 for an order dismissing the complaint for failure to comply with the 90-day notice is denied; and it is further

ORDERED that motion (016) by defendant Betty Tucker, R.N. pursuant to CPLR 3216 for an order dismissing the complaint for failure to comply with the 90-day notice is denied; and it is further

ORDERED that motion (017) by defendant Good Samaritan Hospital Medical Center pursuant to CPLR 3216 for an order dismissing the complaint for failure to comply with the 90-day notice is denied; and it is further

ORDERED that motion (018) by defendant Dr. Laura Nimkoff-Merola pursuant to CPLR 3216 for an order dismissing the complaint for failure to comply with the 90-day notice is granted; and it is further

ORDERED that the caption of the action is amended accordingly, as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

-----X
 Holly Verdile and Thomas Verdile, individually, and as the
 Natural Parents of Maria Gloria Verdile, and Holly Verdile
 and Thomas Verdile, as Administrators of the Estate of
 Maria Gloria Verdile,

Plaintiffs,

-against-

Betty Tucker, Registered Nurse; Exchange Ambulance
 Corp. of the Islips, its employees, officers, agents, and
 servants; Hunter EMS, Inc., its employees, officers, agents,
 and servants; Good Samaritan Hospital Medical Center,
 its employees, officers, agents, and servants; and Jane
 Doe (Resident, Good Samaritan Hospital, name yet
 unknown) individually,

Defendants.

-----X

In this action premised upon the alleged negligence and medical malpractice of the defendants, plaintiffs seek damages for personal injury, loss of consortium, and severe emotional distress for the alleged wrongful death of the decedent, Maria Gloria Verdile. On February 18, 2007, Betty Tucker, R.N. provided nursing care of the twelve year old decedent at 75 South Saxon Avenue, Bay Shore, New York. While under the care of Ms. Tucker, the decedent was found to be in distress. CPR was employed while the decedent was transported by defendant Exchange Ambulance to Southside Hospital. Upon arrival to Southside Hospital, the decedent received care and treatment, and was then transported to Good Samaritan Hospital Medical Center by Hunter EMS and Dr. Amrita Waingankar, also referred to as Dr. Amrita Wangankar and Dr. Amrita Waingancar. However, there was about an hour delay in transporting the decedent, who remained in the ambulance under the care of Hunter EMS technicians and Dr. Waingankar. The decedent was admitted to Good Samaritan Hospital and treated by Dr. Laura Nimkoff-Merula. Maria Gloria Verdile died on February 18, 2007.

By order dated March 2, 2011 (Tanenbaum, J.), the motions by defendants Hunter EMS, Inc, Exchange Ambulance Corp. of the Islips, Southside Hospital, Good Samaritan Hospital, and Betty Tucker for an order pursuant to CPLR 3211 (a) (5) and EPTL 5-1.1 (1) dismissing the wrongful death claims as barred by the applicable two-year statute of limitations were granted. Plaintiffs' cross-motion was also granted, however, and plaintiffs were given leave to file and serve an amended complaint upon the defendants within 90 days of service of a copy of the order with notice of entry. A preliminary conference was conducted on March 12, 2012, at which the parties stipulated to conduct depositions and respond to all outstanding discovery. A compliance conference was thereupon scheduled for May 14, 2013.

By order dated August 13, 2012, (LaSalle, J), defendants' multiple motions for dismissal were determined and plaintiffs were directed to provide discovery, including authorizations and other documents. Since some of the defendants' demands were overbroad, however, defendants were directed to serve new demands for authorizations for records of various health care providers, identifying the addresses of the health care providers set forth on the demands. Defendants now again seek dismissal of the complaint premised upon plaintiffs' alleged failure to provide discovery.

For an action to be dismissed for want of prosecution pursuant to CPLR 3216 (b), three requirements must be satisfied: (1) issue must have been joined; (2) one year must have elapsed following joinder; and (3) the court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand (*Michaels v Sunrise Building and Remodeling*, 65 AD3d 1021, 885 NYS2d 110 [2d Dept 2009]). Issue was joined by the moving defendants in this action by service of answers in 2009 and 2010 and, thus, more than one year has elapsed since joinder as to each defendant. On November 13, 2013, defendant Southside Hospital served a 90-day notice pursuant to CPLR 3216 by certified mail upon the plaintiffs and all co-defendants. Good Samaritan Hospital served a 90-day notice upon plaintiff and all parties on November 26, 2013. On December 16, 2013, defendants Hunter EMS, Inc., and Dr. Laura Nimkoff-Merola each served a 90-day notice. On December 2,

2013, Betty Tucker, R.N. served a 90-day notice and a demand for authorizations upon the plaintiff.

With the exception of Southside Hospital, all 90-day notices were served by regular mail. The failure to serve a CPLR 3216 demand by registered or certified mail “is a procedural irregularity and, absent a showing of prejudice to a substantial right of a plaintiff, courts should not deny, as jurisdictionally defective, a defendant’s motion to dismiss for neglect to prosecute” (*Balancio v American Optical Corporation*, 66 NY2d 750, 751, 497 NYS2d 360 [1985]). Here, plaintiffs acknowledge receipt of the 90-day notices and do not assert that they were prejudiced in any way (*S.C.E.F. Realty Corp. v DeVerna, Jr.*, 175 AD2d 118, 571 NYS2d 813 [2d Dept 1991]). Thus, the three prongs iterated in *Michaels v Sunrise Building and Remodeling, supra*, are deemed to have been met.

To avoid the dismissal of the action, the plaintiffs are required to demonstrate a reasonable excuse for their failure to comply with the 90-day notices as well as the existence of a potentially meritorious cause of action (*see Sicoli v Sasson*, 76 AD3d 1002, 908 NYS2d 100 [2d Dept 2010]). A meritorious claim may be demonstrated by submitting an affidavit from a medical expert which is specific, which details the procedures that should have been followed, and which renders an opinion that the care rendered to the decedent deviated from accepted medical practice, was medically negligent and was the cause of the decedent’s passing (*see Byers v Winthrop Univ. Hosp.*, 100 AD3d 817, 955 NYS2d 105 [2d Dept 2012], *citing Mosberg v Elahi*, 80 NY2d 941, 590 NYS2d 866 [1992]).

Upon receipt of a 90-day notice, a plaintiff is required either to serve and file a timely note of issue or to move pursuant to CPLR 2004, prior to the default date, to extend the time within which to serve and file a note of issue (*King v Dobriner*, 106 AD3d 1053, 966 NYS2d 162 [2d Dept 2013]). It has been recognized, however, that law office failure may be accepted by the Court as an excuse for a plaintiff’s failure to comply with 90-day notices (*see, e.g., Bischoff v Hoffman*, 112 AD3d 659, 976 NYS2d 406 [2d Dept 2013]). Here, the plaintiffs admittedly neither filed a timely note of issue nor timely moved to extend the time within which to serve and file a note of issue. Thus, to avoid dismissal, the plaintiffs are required to demonstrate a justifiable excuse for their failure to comply, and must also demonstrate the existence of a potentially meritorious cause of action by submission of an affidavit of merit from a medical expert competent to attest to the meritorious nature of the cause of action alleging medical malpractice (*see King v Dobriner, supra* at 106 AD3d 1054).

Counsel for plaintiffs opposes defendants’ applications to dismiss the complaint on the basis that she moved her office twice due to floods in her offices; her last move was on December 13, 2013. Counsel for plaintiffs averred that she prepared a request for an extension of time in which to file the note of issue, but such request was not timely submitted due to the move. Counsel also contends that she was unable to file the note of issue as a result of the defendants’ refusal to comply with the order dated August 13, 2012 (LaSalle, J.), which directed defendants to provide the addresses for those health care providers for whom defendants sought authorizations. Thus, while counsel for plaintiffs contends that defendants’ demands for authorizations were not mailed to the

correct address due to her moving twice, she did receive those demands for authorizations but the demands did not identify the addresses of the health care providers for whom authorizations were requested. Counsel for the plaintiffs maintains that because the authorizations were not provided to the defendants, the defendants refused to continue the examination before trial of Holly Verdile. In *Garcia v North Shore Long Island Jewish Forest Hills Hospital*, 98 AD3d 644, 949 NYS2d 781 (2d Dept 2012), the Court held that the plaintiff's contention that the defendants engaged in dilatory conduct in responding to discovery demands did not constitute a reasonable excuse for the plaintiff's failure to respond to the 90-day notices. As the Court also found that the plaintiff failed to demonstrate the existence of a potentially meritorious malpractice cause of action against defendants, the complaint was dismissed.

In the instant action, it is determined that neither the plaintiffs nor defendants have demonstrated that they complied with the directives set forth in the order of August 13, 2012, (LaSalle, J), and this Court accepts plaintiffs' claim that authorizations were not provided as a result of defendants' failure to identify the addresses for the healthcare providers. Given the two floods experienced by counsel for the plaintiffs, and the failure of the defendants to comply with the aforementioned directives, this Court finds reasonable excuse for plaintiffs' counsel's failure to file the note of issue or to timely move for an extension of the time in which to file the note of issue pursuant to the 90-day notices served by defendants.

Counsel for the plaintiffs contends that the plaintiffs have a meritorious claim and the reports of plaintiffs' experts have been submitted. In a medical malpractice action, however, expert medical opinion evidence is required to demonstrate merit, except as to matters within the ordinary experience and knowledge of lay persons (*Byers v Winthrop Univ. Hosp.*, *supra* at 100 AD3d 818). Instead of submitting affidavits of merit from their experts, plaintiffs submitted unsworn reports. In furtherance of the general policy of disposing of cases on the merits (*see Bogoff v Mt. Sinai Hospital*, 85 AD2d 581, 445 NYS2d 456 [1st Dept 1981]), however, this Court will consider the reports to avoid further delay in prosecuting this action. It is noted that plaintiffs' experts have not reviewed the entirety of the decedent's medical records, as the experts do not indicate that pediatric records were reviewed.

Plaintiffs submitted the report of Dr. C. Warren Adams, who is licensed to practice medicine in Colorado and California. He is certificated in surgery and thoracic surgery, with an added qualification in vascular surgery. He sets forth his education and training, as well as his medical experience in his *curriculum vitae* and he also indicates the medical records he reviewed. The opinions he sets forth in his report are stated to be with a reasonable degree of medical certainty. Upon reviewing the decedent's medical records, he determined that the decedent was a 12-year-old female with a history of congenital spinal muscular atrophy, Type II, who was under the care of pediatrician Dr. Timothy George. Registered nurse Betty Tucker provided independent home care to the child, who lived at home with her mother. Dr. Adams stated that the decedent suffered respiratory arrest at home on February 18, 2007, and subsequent pulmonary arrest during transport to Southside Hospital, where she was admitted and recovered from a hemodynamic standpoint. She was transferred that same morning by Drs. Brown and Rudman, physicians in the emergency room

at Southside Hospital, to the service of attending physicians Dr. Catherine Caronia and Dr. Laura B. Nimkoff-Merola at Good Samaritan Hospital. However, the decedent remained in the parking lot at Southside Hospital in the Hunter EMS ambulance for a sustained period of time, while under the supervision of the transporting physician, Dr. Amrita Waingankar from Good Samaritan Hospital. During that delay in transporting the decedent, she sustained a repeat cardiopulmonary arrest. Upon arrival to Good Samaritan Hospital, the decedent was in full cardiovascular collapse, and after unsuccessful resuscitation attempts, she died at 9:23 a.m.

With regard to the treating physicians at defendant Southside Hospital, Dr. Adams opined that he does not find a deviation from the standard of care with regard to the decedent's initial treatment. Drs. Brown and Rudman, he stated, treated the decedent in the emergency room at Southside Hospital, continued her intubation, and restored her vital signs. He does not set forth any departures from the standard of care with regard to the care and treatment rendered by Dr. Brown or Dr. Rutman. Dr. Adams indicated that the decedent suffered a repeat cardiopulmonary arrest in the Hunter EMS ambulance while in the parking lot of Southside Hospital and while under the supervision of Dr. Amrita Waingankar when the decedent was being transported for admission to Good Samaritan Hospital. Dr. Adams stated that he is critical of the inaction by Drs. Brown and Rutman, whom he stated had the responsibility to see that the decedent be transported safely from Southside Hospital to Good Samaritan Hospital, but the expert did not set forth any specific departures from the accepted standard of care. Furthermore, Dr. Adams does not comment upon proximate cause of any injuries suffered by the decedent due to any care and treatment rendered by Southside Hospital employees, including Dr. Brown and Dr. Rudman.

Johanna D. Evans Budge, R.N., plaintiff's nursing expert, stated that the staff at Southside Hospital would have been aware that the decedent remained in the parking lot at Southside Hospital for one hour after the decedent was placed in the ambulance. She does not indicate that the records reveal such awareness, however, or that any staff from Southside Hospital provided care and treatment to the decedent after her discharge from Southside Hospital to the care and treatment of Dr. Amrita Waingankar from Good Samaritan Hospital.

Based upon the foregoing, no meritorious cause of action has been demonstrated as to defendant Southside Hospital. Accordingly, the motion by defendant Southside Hospital is granted, the complaint as asserted against Southside Hospital is dismissed, and Southside Hospital is severed from the action.

With respect to Hunter EMS, Inc., which transported the decedent from Southside Hospital to Good Samaritan Hospital, Dr. Adams was critical of the equipment and care provided by Hunter in that they permitted the decedent to remain for an extended time in the ambulance with either faulty equipment or inadequate means to measure effective ventilation in the intubated patient. Although a physician was present, critical monitoring of ventilation and perfusion was not at the standard of care and the decedent became hypoxic. Based upon the foregoing, plaintiff has demonstrated a meritorious claim as against Hunter EMS. Accordingly, the motion by Hunter EMS is denied.

Turning to the report by Dr. C. Warren Adams with regard to defendant Betty Tucker, Dr. Adams opines within a reasonable degree of medical certainty that Betty Tucker, R.N., departed from the accepted standard of care by assessing that the child had tachycardia and elevated temperatures, but she did not notify the pediatrician supervising the child's care. He continued that these sentinel clinical symptoms were a prelude to an impending cardiorespiratory event. It is determined, however, that Dr. Adams' opinion is conclusory. He does not set forth the basis for this opinion, nor does he set forth that the actions of defendant Tucker were the proximate cause of the child's injuries.

Johanna D. Evans Budge, R.N., plaintiff's nursing expert, states the decedent's disease process placed her at high risk for respiratory complications, and defendant Tucker was required to exercise heightened vigilance in monitoring, observing, and caring for the decedent. Nurse Budge continues that the infant's mother overheard sounds over the monitor and went to see her daughter, and found defendant Tucker outside her daughter's room, not in attendance with the decedent. Nurse Budge opines that defendant Tucker was required to be present and to make a call device available to the decedent, and that she failed to communicate to the physician that the decedent had continued fevers and increased respiratory secretions in addition to her underlying spinal muscular atrophy. Nurse Budge opines that had defendant Tucker timely reported the adverse findings and assessment of increased respiratory compromise to the treating physician, the outcome of respiratory failure and death could have been avoided. It was noted that defendant Tucker reported that at approximately 3:00 a.m. on February 18, 2007, the decedent requested suctioning and then "became unresponsive." An Ambu bag-valve with oxygen was employed and 911 was called. The decedent regained consciousness, started to talk, then became unresponsive again. An external defibrillator was initiated and the decedent was transported to the Southside Hospital. Nurse Budge was unable to read parts of the EMS ambulance run sheet, but ascertained that a code blue/CPR was in progress in the ambulance. Nurse Budge has not demonstrated qualifications to provide expert opinion with regard to the EMT staff and physicians who subsequently treated the decedent. Based upon the foregoing, a meritorious cause of action has been sufficiently demonstrated as to defendant Betty Tucker. Accordingly, the motion to dismiss the complaint against defendant Tucker is denied.

With regard to the plaintiffs' claims against Good Samaritan Hospital, the delay in transporting the decedent to Good Samaritan Hospital via transport by Hunter EMS, Inc. following her discharge from Southside Hospital was, according to Dr. Adams, "inappropriate in [*sic*] a patient who was successfully previously resuscitated." In the opinion of Dr. Adams, Dr. Waingankar failed to ensure rapid transport of the decedent from Southside Hospital to Good Samaritan Hospital and she failed to provide adequate ventilation and oxygenation, continuously and without interruption, causing the decedent to arrive at Good Samaritan Hospital where she was pronounced dead from full cardiopulmonary arrest. Based upon the foregoing, a meritorious cause of action has been demonstrated as against Good Samaritan Hospital and, accordingly, its motion is denied.

Dr. Adams opined that he found no deviations in the standard of care and treatment provided by Dr. Laura Nimkoff-Merola, the attending physician at Good Samaritan Hospital, or her associate, Dr. Catherine Caronia. As plaintiffs have failed to demonstrate that they possess a meritorious

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cause of action against Dr. Nimkoff-Merola, the complaint is dismissed as against Dr. Nimkoff-Merola and the action is severed and shall continue against the remaining defendants.

Dated: 11/6/2014


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION

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