Palacino v Brogno
2015 NY Slip Op 30912(U)
February 17, 2015
Supreme Court, Orange County
Docket Number: 2907/2012
Judge: Catherine M. Bartlett

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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EMANUEL PALACINO, as Administrator of the Goods, Chattels and Credits which were of ETHEL PALACINO, deceased and EMANUEL PALACINO, Individually,

Plaintiff,

-against-

DAVID A. BROGNO, M.D., ALBERT H. ZUCKER, M.D., RICHARD L. ROTH, M.D., HUDSON HEART ASSOCIATES, PC and GOOD SAMARITAN HOSPITAL,

Defendants.

To commence the statutory time period 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.

Index No. 2907/2012
Motion Date: February 11, 2015

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The following papers numbered 1 to 9 were read on the motion of defendant GOOD SAMARITAN HOSPITAL for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavits (4) / Exhibits 1-6

Affirmation in Opposition / Exhibit - Affidavit 7-8

Reply Affirmation / Exhibits 9

Upon the foregoing papers, the motion is disposed of as follows:

This is an action for medical malpractice arising out of medical care rendered to Plaintiff's decedent, Ethel Palacino at Good Samaritan Hospital ("GSH") in 2010. During her GSH admissions, Mrs. Palacino was under the care of her private attending internist, defendant

Albert H. Zucker, M.D., and her private attending cardiologists from defendant Hudson Heart Associates, PC ("Hudson Heart"), including defendants David Brogno, M.D. and Richard L. Roth, M.D. and non-party David Ramos, M.D., none of whom were employees of GSH. GSH has established on this motion that (a) most of Plaintiff's allegations of malpractice relate to the care and treatment provided by Mrs. Palacino's private attending physicians, for which GSH as a matter of law is not vicariously liable; and (b) the care and treatment rendered by GSH nurses and technicians was consistent with accepted standards of medical care. Plaintiff has submitted neither evidence nor argument to the contrary, and GSH's co-defendants have not opposed the motion at all.

There remains only one contested allegation of malpractice by GSH, to wit, that it failed to properly communicate the results of an echocardiogram conducted on May 20, 2010 to Mrs. Palacino's treating physicians and to the hospital where she was transferred on May 27, 2010. The facts in summary are as follows.

Mrs. Palacino, 66 years of age in 2010, had a history of atrial fibrillation, COPD, hypertension, rheumatoid arthritis, and bio-prosthetic replacement of her aortic and mitral valves. She had been a patient of Dr. Zucker, Dr. Brogno, Dr. Roth and Hudson Heart since 2003. On May 18, 2010, she was admitted to GSH by Dr. Zucker for complaints of acute abdominal pain, nausea and vomiting. On May 19th, after she was noted to have atrial fibrillation and an elevated heart rate, Dr. Zucker ordered a cardiology consultation from Hudson Heart.

Dr. Roth from Hudson Heart saw Mrs. Palacino on May 19th and ordered an echocardiogram. He never saw her again and did not follow up for the results of the study. Dr. Brogno from Hudson Heart saw Mrs. Palacino on May 20th. He, too, never saw her again,

and did not obtain the results of the echocardiogram. Dr. Brogno testified that the particular Hudson Heart physician who saw the patient after the echocardiogram was completed and reported bore responsibility for checking the result of the study and acting on it.

A GSH technician performed the echocardiogram study on May 20th, and on May 21st, non-party cardiologist Barry Schair, M.D. read the echocardiogram and prepared his report. Through documentary evidence and the affidavits of GSH employees Vladimir Shir and Monique Wilson, GSH demonstrated that as of May 21st, Dr. Schair's report, along with the echocardiogram images, was stored on the GSH computer system where it was available to all medical personnel, including Mrs. Palacino's treating physicians, for review. However, after Dr. Brogno's visit on May 20th, no one from Hudson Heart saw Mrs. Palacino until David Ramos, M.D. came on May 27th. According to Dr. Ramos, the internist, Dr. Zucker, would have been monitoring Mrs. Palacino's cardiovascular status between May 20th and May 27th. Dr. Zucker saw Mrs. Palacino during that period, but did not review the echocardiogram report because he was relying on Hudson Heart, the ordering cardiologists, to do so.

Dr. Ramos did not review the echocardiogram results on May 27th. He testified that he believed that the results were not available for review at that time because he would customarily have documented a cardiovascular study of import, and that Dr. Schair's report would per his understanding not have been available until it was signed on June 7th. However, Dr. Ramos was not aware that Dr. Roth had ordered an echocardiogram, and testified that his review of the patient's chart would have been "predominantly" of the notes and not the orders.

Dr. Schair's recommendation, based on his interpretation of the echocardiogram, was "TEE [transesphogeal echocardiogram] if clinically indicated." Both Dr. Brogno and Dr. Ramos,

upon after-the-fact review of the echocardiogram study, testified that had they known the results of the study at the time Mrs. Palacino was under their care, it would not have affected the nature of the treatment they gave her. Dr. Ramos testified *inter alia* as follows:

Q On May 27th, 2010, do you have an opinion within a reasonable degree of medical certainty whether a TEE was clinically indicated for this patient?

A I do not believe it was clinically indicated.

Q And why do you believe a TEE was not clinically indicated for this patient?

A At that time, a summation of her hospitalization was that it revolved around an abdominal process. The specific question that I was encountering her for, which I determined to be vasovagal syncope, is a clinical diagnosis which would not have been aided by a transesophageal echo. So at that time I had no suspicion of a declining cardiovascular situation which would necessitate a transesophageal echo.

.....

Q [H]ad you been aware that the TTE was done on May 20th, based upon the clinical presentation of May 27th, would that have changed your opinion as to whether or not a TEE was required?

A It would not have changed my opinion.

Q Why would it not have changed your opinion?

A Because at the time of my evaluation, her predominant issue has been a vasovagal syncopal episode in the context of a hospitalization revolving around what at that point appeared to be an abdominal process. So I would not have been aided by this information because it wasn't in my differential for my consideration.

.....

A ....I had the opportunity to see the hospitalization where gastroenterology had been involved for most of that week and had determined that her abdominal discomfort appeared to be functional, that there was a HIDA scan that was abnormal suggesting a very dysfunctional gall bladder, that during that week she did not demonstrate any particular hemodynamic decline. She had negative blood cultures. So basically at the time I'm looking at her, I'm seeing a situation unfold where her cardiovascular status was actually pretty stable, all things being considered, and the predominant aspect of her admission was abdominal. And the

very question I was answering right then and there related to the syncopal episode the day prior.

.....

Q Well, did you have a differential diagnosis for this patient as to what was causing the fluctuations in her vital signs on May 27th, 2010?

A My differential diagnosis for her vasovagal syncope was the abdominal pain. The fluctuations of her blood pressure and pulse were related to the things I had just mentioned, her dehydration, changes in medical therapy, her varying degrees of abdominal pain. All of these payed a role.

Q Could a [TEE] have been ordered to help rule out any cardiac condition with respect to the fluctuations of the vital signs?

A No.

Q How about a [TTE]?

A No.

Q Was there any benefit that you see whatsoever for a [TTE] for this patient on May 27th, 2010?

A No.

.....

Q If you had known she had a history [of bacterial endocarditis] and you had these fluctuations of these vital signs, would you have ordered a TTE on May 27th?

A In this particular instance, the answer is no.

Q Why is that?

A First, the working differential is vasovagal syncope, which is not related to endocarditis. Second, we had blood cultures during the hospitalization which did not describe bacteremia, so there wasn't a clinical suspicion of endocarditis at that time.

.....

Q Did the TTE that you say you looked at the report for, show any leakage of any of the valves for May 20th, 2010?

A The report on the [TTE] that was presented to me having been...dictated on the 21st of 2010, describes severe bioprosthetic mitral valve stenosis, it describes a number of other findings, and it only describes mild regurgitation.

Q The stenosis, would that lead to atrial fibrillation or dehydration?

A Stenosis of the valve would lead to atrial fibrillation.

Q Back on May 27th, 2010, did you know that she had the stenosis?

A The report was not available to me, so the answer is no.

Q If you had the report, would that have changed your treatment as it relates to atrial fibrillation?

A No.

On May 27th, Mrs. Palacino was transferred from GSH to North Shore Long Island Jewish Medical Center ("LIJ"). LIJ records indicate that a TTE was ordered at the initial cardiology consultation on May 28th and performed on May 29th, and that a follow up TEE was ordered and performed on June 1st and/or June 2nd. Mrs. Palacino subsequently died on July 1, 2010 at the Long Island Jewish Medical Center as a result of septic shock and multiple organ failure due to complete heart block caused by pulmonary hypertension.

Based on the evidence of record, GSH's expert, George Brief, M.D., concluded that Plaintiff's claim that GSH committed malpractice in failing to communicate the results of the May 20, 2010 echocardiogram to Mrs. Palacino's treating physicians is without merit. Specifically, his affidavit states:

> 18. ...Dr. Schair made a timely and proper recommendation to the co-defendant cardiologists that a TEE be performed if they thought it clinically indicated. Dr. Schair timely and properly published his report. It then was within the purview of the co-defendant treating physicians' judgment and management decisions to follow or not follow the recommendation for a TEE. It is my opinion that it was [in] accordance with the standard of care for Dr. Schair to expect the ordering cardiologist to follow-up for the

results of the echocardiogram that they ordered. Indeed, it is common practice for treating cardiologists not to rely solely on a reading cardiologist's interpretation of a study such as an echocardiogram in order to prescribe further treatment for their patients. Rather, it is common for treating cardiologists themselves to review the echocardiogram images. Assuming that the testimony by the cardiologist is true and the results of the echocardiogram were not available until after the patient was discharged, in that event the standard of care places the responsibility upon the ordering physician to follow-up and obtain the result within a reasonable time after the test is completed. Not only is this the standard of care, but it is common sense, as is the expectation that a physician who orders a test to determine the etiology of the patient's condition will inquire of the status of the results of the test if for some reason it is not made available.

19. It is my opinion that GSH followed well-established, standard and proper hospital procedure for providing Mrs. Palacino's treating physicians with the results of the echocardiogram. GSH performed the echocardiogram pursuant to Dr. Roth's order. Dr. Zucker, Dr. Roth and Dr. Brogno were aware that the echocardiogram was performed. By virtue of the fact that they had privileges at GSH, all of these treating physicians had access to the computer system where the echocardiogram and its results were stored. Beginning on May 21, 2010 at 11:35 a.m., the report was available for the treating physicians to read on any computer at GSH. In addition, the actual images from the echocardiogram were available for the treating physicians to review from computers located in the SGH EKG and cardiac catheterization laboratories. Thus, there were two methods for obtaining the result of the echocardiogram available to Mrs. Palacino's treating physicians. Exhibit B [Affidavit of Vladimir Shir].

20. It is my opinion that it was appropriate for GSH to employ procedures in regular use at hospitals in New York State to provide physicians with the result of an echocardiogram.

Dr. Brief also concluded that GSH did not depart from good and accepted medical practice if it failed to forward the report of the echocardiogram report to LIJ with Mrs. Palacino. His affidavit states his opinion that:

21. ...LIJMC did not require the GSH echocardiogram to diagnose and treat Mrs. Palacino. The standard procedure is for a receiving hospital not to rely on an echocardiogram performed at another hospital, particularly when it is several days old. Rather, receiving hospitals perform their own echocardiograms in order to obtain a most current cardiac status of the patient.

Plaintiff's expert, whose identity is not disclosed, concurs with Dr. Brief that "it was a departure from good and accepted practice for the treating internist and cardiologists who treated the patient from May 20, 2010 to May 27, 2010 not to obtain a final report of the interpretation of the TTE." The expert goes on to state:

> 10. ...If the TTE was not read and reported – as Dr. Ramos opines – it was the hospital staff's duty and responsibility to ensure that the report was contained in the patient's chart. If the TTE was not in the chart, as Dr. Ramos asserts, then the defendant staff at Good Samaritan departed from the acceptable standard of care. Had the report been timely placed within the patient's chart, then the results should have led to a complete cardiac work-up, including transesophageal echocardiography, cardiac catheterization, and probably mitral valve replacement.
>
> .....
>
> 13. It is my belief that the failure of the cardiologists to see the report of the May 20 echocardiogram led to a continued lack of appropriate treatment for Ethel Palacino with regard to her cardiac condition. It is my belief, within a reasonable degree of medical certainty, that at least six days were wasted during which this patient continued to deteriorate and during which her cardiac status was not addressed appropriately.

The Standard Governing Summary Judgment In A Medical Malpractice Action

"A defendant seeking summary judgment in a medical malpractice action has the burden of establishing, prima facie, that the defendant did not depart from the applicable standard of care or that any such departure was not a proximate cause of injury to the plaintiff (*see Ahmed v. Pannone,* 116 AD3d 802, 805; *Stukas v. Streiter,* 83 AD3d 18, 24). In opposition, a plaintiff need only raise a triable issue of fact as to the prima facie showing that the defendant made (*see Ahmed v. Pannone,* 116 AD3d at 805-806; *Mitchell v. Grace Plaza of Great Neck, Inc.,* 115 AD3d 819, 819; *Stukas v. Streiter,* 83 AD3d at 25)." *Carioscia v. Welischar,* 124 AD3d 816 (2d Dept. 2015). "General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical

malpractice, are insufficient to defeat a defendant physician's summary judgment motion (*see Alvarez v. Prospect Hosp.*, 68 NY2d at 325...; *Thompson v. Orner*, 36 AD3d 791, 792...; *DiMitri v. Monsouri*, 302 AD2d 420, 421...)." *Myers v. Ferrara*, 56 AD3d 78, 84 (2d Dept. 2008).

Admissibility of Affidavits by GSH Employees Shir and Wilson

As a preliminary matter, Plaintiff contends that the court should disregard the affidavits of GSH employees Vladimir Shir and Monique Wilson, whereby GSH demonstrated with documentary evidence that as of May 21st, Dr. Schair's echocardiogram report, along with the echocardiogram images, was stored on the GSH computer system where it was available to all medical personnel, including Mrs. Palacino's treating physicians, for review.

Plaintiff references the court's Preliminary Conference Order, which directs that "All parties, on or before 30 days, shall exchange names and addresses of all witnesses...or, if none, provide an affirmation to that effect." Plaintiff's counsel states that "[a]fter a thorough review of the file maintained by this office, your affirmant was not able to find any witness exchange response made on behalf of defendant Good Samaritan Hospital", and claims that Plaintiff has been prejudiced by GSH's failure to disclose Mr. Shir and Ms. Wilson as witnesses during the course of discovery proceedings.

However, on or about November 3, 2014, Plaintiff's counsel filed and served a Note of Issue and Certificate of Readiness wherein he represented *inter alia* that all discovery proceedings known to be necessary had been completed, that there were no outstanding requests for discovery, that there was a reasonable opportunity to complete discovery proceedings, and –directly contrary to his present assertion – that there has been compliance with any preliminary conference order issued pursuant to Uniform Rules 202.12 and 202.56.

Plaintiff waived any objection to GSH's failure to comply with the Preliminary Conference Order by filing a note of issue and certificate of readiness without first moving for an order compelling disclosure or imposing sanctions. *See, Iscowitz v. County of Suffolk,* 54 AD3d 725 (2d Dept. 2008); *Brown v. Veterans Transportation Company,* 170 AD2d 638, 639 (2d Dept. 1991). Wholly distinguishable are those cases where witnesses *omitted* from a party's witness disclosure are precluded, for in that situation the opposing party has been misled to his detriment by what appears on its face to be a complete witness disclosure, and would have no grounds for a discovery motion prior to the belated appearance of the omitted witnesses. Here, Plaintiff was not misled, because GSH according to Plaintiff's counsel made no witness exchange at all, providing neither a list of witnesses nor the required affirmation that there were none. Hence, there is no excuse for Plaintiff's failure to move for compliance or sanctions prior to filing a note of issue.

Furthermore, any prejudice is of Plaintiff's own making. Plaintiff was or should have been well aware from the deposition testimony of Dr. Ramos that GSH's computer system lay at the very heart of Plaintiff's claim that GSH failed to disseminate the results of the echocardiogram ordered by Dr. Roth – notwithstanding which Plaintiff chose to waive GSH's deposition in this case. Having deliberately eschewed any inquiry of GSH concerning its computer system, Plaintiff cannot now be heard to claim prejudice when GSH comes forward not only with witness affidavits, but with documentary evidence establishing that the results of the echocardiogram were available for review by Plaintiff's treating physicians as of May 21, 2010.

The court will accordingly consider the affidavits of Vladimir Shir and Monique Wilson in determining the motion for summary judgment. Plaintiff's request that this evidence be precluded is denied.

Transmission of Echocardiogram Results to Plaintiff's Treating Physicians

Plaintiff's expert does not dispute GSH's expert's opinion that GSH met the acceptable standard of care if it timely placed the results of the echocardiogram in Mrs. Palacino's computer chart, and concurs that it was a departure from good and accepted practice for the treating internist and cardiologists not to obtain the results thereof in timely fashion.

GSH demonstrated *prima facie* that it did not depart from the applicable standard of care via documentary evidence that the echocardiogram results were posted to the computer chart on May 21st, the day after the test was conducted. Contrary to Plaintiff's assertion, Dr. Ramos' testimony fails to raise any genuine issue of fact on that score. He did not positively state that he checked for test results when he evaluated Mrs. Palacino on May 27th and found none. Indeed, he was unaware that Dr. Roth had ordered an echocardiogram, and acknowledged that his review of the patient's chart would have been "predominantly" of the notes and not the orders. Under the circumstances, his testimony that he would "customarily" have documented a cardiovascular study of import amounts to little more than a conclusory denial that he committed malpractice. Moreover, there is no factual foundation whatsoever for his purported "understanding" that the report would not have been available until it was signed on June 7th.

Even if there were a question as to when the echocardiogram results were available to the treating physicians on GSH's computer, the evidence shows that any failure by GSH in this regard was not a proximate cause of what Plaintiff's expert asserts was a delay of "at least six days...during which this patient continued to deteriorate and during which her cardiac status was not addressed appropriately." This is so for two reasons.

First, Mrs. Palacino's treating physicians alone, and not GSH, are responsible for any delay that occurred during the six days from May 21st, the first day on which the test results would have been available, through and including May 26th. This is because (1) Dr. Roth, who ordered the echocardiogram on May 19th, never followed up for the results; (2) Dr. Brogno, who saw Mrs. Palacino on May 20th and was aware of Dr. Roth's order, never followed up for the results; (3) Dr. Zucker, the internist, did not follow up for the results because he was relying on the cardiologists to do so; and (4) no cardiologist from Hudson Heart saw Mrs. Palacino on May 21, 22, 23, 24, 25 or 26.

Second, Dr. Ramos, who finally saw Mrs. Palacino on May 27th, testified that the results of the echocardiogram would not have changed his care and treatment in any respect, and explained in detail the reasons why this was so. While Dr. Ramos' testimony is self-serving (*see, Sacher v. Long Island Jewish-Hillside Medical Center,* 142 AD2d 567 [2d Dept. 1988]), Plaintiff's expert does not attempt to rebut it, but merely asserts in entirely conclusory fashion that "the results should have led to a complete cardiac work-up, including transesophageal echocardiography, cardiac catheterization, and probably mitral valve replacement." Under the circumstances, Plaintiff's expert affidavit is insufficient to raise a triable issue of fact on the issue of proximate cause. *See, Myers v. Ferrara, supra,* 56 AD3d 78 (2d Dept. 2008).

In *Myers,* the plaintiff died as a result *inter alia* of a significant delay in discovering that he had sustained an esophageal perforation. Defendant Dr. Sharma, a pulmonologist, evaluated the plaintiff and had concluded that esophageal perforation was one among three possible diagnoses when the plaintiff was transferred to the care of defendant Dr. Saltman, a cardio-thoracic surgeon. Plaintiff alleged that Dr. Sharma committed malpractice by failing to inform a

Dr. Saltman of his concern that the plaintiff might have suffered an esophageal perforation. Dr. Saltman testified that regardless of the possible diagnoses he would have performed an esophagoscopy, and that he looked for a perforation. The Second Department held that the plaintiff's expert's conclusory assertion that Dr. Saltman would have found the perforation had Dr. Sharma told him about his concerns was insufficient to raise a triable issue of fact on the issue of causation, writing:

> Significantly, Dr. Saltman's statement was not an opinion expressed in a battle of experts concerning what should have, or would have, happened; rather, it was a direct statement, by the doctor actually involved in the treatment, that knowledge of Dr. Sharma's concerns would have made no difference in what he did. Dr. Saltman's testimony that he would have done nothing differently had he known of Dr. Sharma's concerns – either by reading Dr. Sharma's notes, which he did not, or by speaking directly with him – renders the plaintiff's expert affidavit insufficient to raise a triable issue of fact on the issue of causation.

Myers, supra, 56 AD3d at 85-86.

Myers is on point here. Dr. Ramos, like Dr. Saltman, was the doctor actually involved in the plaintiff's treatment. Just as Dr. Saltman testified that Dr. Sharma's concerns would have made no difference in his treatment, Dr. Ramos testified that the echocardiogram results would have made no difference in his treatment of Mrs. Palacino. The testimony was in each case self-serving, as Dr. Saltman had not read Dr. Sharma's notes and Dr. Ramos had not obtained the echocardiogram results. Nevertheless, in such circumstances, as the Second Department held in *Myers*, a plaintiff's conclusory expert affidavit to the contrary is insufficient to raise a question of fact on the issue of causation.

In view of the foregoing, GSH is entitled to summary judgment dismissing Plaintiff's complaint insofar as it is based on the allegation that it failed to transmit the results of the echocardiogram to Mrs. Palacino's treating physicians.

Transmission of Echocardiogram Results to LIJ

On May 27th, Mrs. Palacino at the behest of her family was transferred from GSH to North Shore Long Island Jewish Medical Center. Plaintiff's expert does not dispute GSH's expert's opinion that GSH did not depart from good and accepted medical practice if it failed to forward the report of the echocardiogram to LIJ with Mrs. Palacino, since the receiving hospital did not require GSH's echocardiogram to diagnose and treat her. According to GSH's expert, "[t]he standard procedure is for a receiving hospital not to rely on an echocardiogram performed at another hospital, particularly when it is several days old. Rather, receiving hospitals perform their own echocardiograms in order to obtain a most current cardiac status of the patient." This statement, too, stands unrebutted, and it is confirmed by the LIJ hospital record: a TTE was in fact promptly ordered at the initial LIJ cardiology consultation on May 28th and performed on May 29th, and a follow up TEE was ordered and performed on June 1st and/or June 2nd.

In view of the foregoing, GSH is also entitled to summary judgment dismissing Plaintiff's complaint insofar as it is based on the allegation that it failed to transmit the results of the echocardiogram to LIJ.

It is therefore

ORDERED, that the motion of defendant Good Samaritan Hospital for summary judgment on all causes of action asserted against it is granted, and it is further

ORDERED, that Plaintiff's complaint as against defendant Good Samaritan Hospital is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: February 17, 2015 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE