

**Fox v Lubin**

2016 NY Slip Op 30065(U)

January 12, 2016

Supreme Court, New York County

Docket Number: 805145/13

Judge: Alice Schlesinger

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X  
CHRISTINA FOX and GREGORY FOX,

Plaintiffs,

Index No.805145/13

Motion Seq. No.001

-against-

AVIVA LUBIN, LENOX HILL HOSPITAL, EDWARD  
YATCO, MANHATTAN MINIMALLY INVASIVE AND  
BARIATRIC SURGERY, P.C., and SODEXHO  
AMERICA, LLC,

Defendants.

-----X  
SCHLESINGER, J.:

In June 2012, Christina Fox, the plaintiff in this medical malpractice action met with surgeon, Dr. Edward Yatco, a defendant. Since she was at that time morbidly obese, she wanted information regarding weight loss surgery. After receiving the desired information and after providing Dr. Yatco with her own medical history and after discussing the various risks and complications of this procedure, Mrs. Fox elected to undergo a laparoscopic sleeve gastrectomy and umbilical hernia repair. She was 37 years old at the time.

The operation was scheduled for September 4, 2012 at Lenox Hill Hospital, another defendant in this action. It went well, without complications and she was discharged on September 6, 2012, after being given detailed food and vitamin guidelines to assist her in her recovery. Mrs. Fox saw Dr. Yatco on September 19, 2012. She was having no pain at the time and informed the doctor that she was following the nutritional guidelines and vitamin protocols. Two days later, the plaintiff had her nutritional follow-up where she repeated that she was following the multivitamin protocol.

Mrs. Fox returned to work on or soon after October 9, 2012, after Dr. Yatco had given his clearance for her to do that. Around the second week of October, she stated and testified to at her deposition, she began vomiting, both solid food and fluids. Since she had been told this could happen in the post recovery period, she was not immediately concerned. However, after five to seven days of this inability to keep food down because of continued vomiting, she contacted Dr. Yatco. He assured her this was part of the abdominal healing and advised her to keep drinking small amounts of fluid. He also told her to contact him again if the situation continued. It did. In fact, her vomiting became progressively worse over the next five days. Therefore, she called Dr. Yatco and reported what was happening.

The doctor, concerned about her becoming dehydrated, advised her to report to the hospital. On November 1, 2012, she did this and Lenox Hill admitted her and began administering IV fluids. Several days later, on November 5, Mrs. Fox underwent a Esophagogastroduodenoscopy by a Dr. Shah, not a party, to understand what was causing this difficulty. He noted a moderate stricture which he tried to remedy on November 8, 2012 by placing a stent in the relevant area. Dr. Shah believed this would allow her to eat. But she continued to experience nausea and vomiting in the days following. Therefore the IV remained, followed by clear liquids.

Mrs. Fox did not improve. On November 13, 2012, a neurologist, Dr. Aviva Lubin, a defendant, was called in for a consultation as the patient had become dizzy and confused. He recommended hydration and a B-12 replacement and Folate. Also, he advised that if Mrs. Fox did not respond, cerebral imaging should be considered. And she did not respond. In fact, she got worse and on the evening of November 14, 2012, became disoriented and confused with worsening dizziness and an inability to concentrate as well

as gait ataxia. Another doctor, Dr. Andrew Brownlee then examined her, finding that she had beating nystagmus with decreased lower extremity sensation and cerebellar ataxia. He placed an order for sodium chloride along with a "banana bag" which contained 100 mg of Thiamine, 1mg Folic Acid, 1 ampule of IV multivitamin and 3mg of Magnesium Sulfate, to be infused over 6 hours.

Further testing was done. On November 15, Mrs. Fox had CT scans of her head and neck. On November 16, she was given a Venous Doppler of her lower extremities. Also an MRI of the thoracic spine was performed on that day. All of these tests were essentially normal. But finally on the 16<sup>th</sup>, an MRI of the brain was performed and it revealed findings that were highly suspicious for Wernicke's Encephalopathy or Thiamine deficiency. Dr. Lubin made this diagnosis and continued her IV Thiamine treatment.

On November 20, Mrs. Fox left Lenox Hill and transferred to Weill Cornell Medical Center. She was at that time in stable condition. She remained at the hospital until November 27, receiving IV Thiamine 500mg daily. She had begun improving, eating solid foods and walking and gaining strength and balance with the help of physical therapy. On the 27<sup>th</sup>, she was transferred to Cornell Baker 17, an acute rehab center where she continued to receive physical and occupational therapy six days a week.

The motion before this Court is one for summary judgment by Sodexo America, LLC, a defendant added to this action after it was commenced. It exclusively concerns an employee, Ms. Heather Davis, a registered dietician. While Mrs. Fox was a patient at Lenox Hill, Ms. Davis saw and interacted with her on five occasions, November 2, November 7, November 12, November 15 and November 20, almost her entire

confinement at Lenox Hill Hospital.<sup>1</sup>

Ms. Davis was deposed and in the course of that examination explained her interaction with the patient. She was called in to assess Mrs. Fox's nutritional needs and make recommendations in this area. She herself was not allowed to prescribe. Nor could she even input into the computer. Rather, she would make notes of her assessments and recommendations and would call Mrs. Fox's treating physician or someone on the medical team and communicate her opinions. But as she made clear, it was not in her power to determine whether her recommendations would be implemented. Here, after recording the patient's risk level and relevant medical history, she did assess and recommend multivitamin supplements as well as Pro Stat Protein supplements.

In support of this motion are two statements from experts. The first, an affidavit, is from Suzette Smookler, a Registered Nurse, and Certified Dietician Nutritionist. This is dated April 24, 2015. Since 2009, she has been Director of the Clinical Nutrition and Education Services at Stony Brook University Medical Center. The second, an affirmation is from Dr. Alex Barkan, a board certified general surgeon, now affiliated with Winthrop University Hospital in Mineola, New York.

Nurse Smookler opines as to the standards of care for practitioners like Ms. Davis and also whether Ms. Davis had met them in her care of Mrs. Fox. Dr. Barkan speaks to issues of causation.

Ms. Smookler begins her opinion by stating that Heather Davis did not depart from acceptable standards of care. Further, she states that her opinions are all being given within a reasonable degree of nutritional and dietetic certainty. She then reviews

---

<sup>1</sup>Ms. Davis is not herself a named defendant.

Ms. Davis' interaction with Mrs. Fox during their five interactions. This nurse notes that Ms. Davis properly made nutritional assessments and recommendations after recording the patient's risk level. Ms. Davis recommended multivitamin supplements, B-12 supplements and Pro Stat protein supplement to meet her malnutrition. These were reasonable recommendations. Further, she adds that it was reasonable to recommend a multivitamin with Thiamine. Finally, Ms. Smookler points out that Ms. Davis was not in a position to render a medical diagnosis or treat any neurological condition.

Dr. Barkan takes off from there. He states clearly that there simply is no causal link between anything Ms. Davis did or didn't do and the injuries suffered by Mrs. Fox. Here he notes significantly that Dr. Yatco, Mrs. Fox's admitting surgeon, did not believe that his patient had a severe vitamin deficiency. (This seemed to be in error) and therefore Dr. Yatco did not place the order for Ms. Davis' supplement recommendations. So she did not get what Heather Davis believed she should have gotten. In fact, in this regard, Dr. Yatco testified he saw her recommendations in the chart. But, Dr. Barkan asserts, and no one disputes this, that clinical dieticians such as Ms. Davis, are not permitted by law to write, or order prescriptions. They can only render recommendations. Therefore, since her case was limited to the dispensing of advice, which Dr. Yatco did not follow, Ms. Davis should not be held liable for anything that Mrs. Fox went through meaning her significant injuries.

The above opinions seem reasonable to this Court and clearly make out a prima facie case in Sodexho's favor.

I have opposition papers primarily from the plaintiff and Dr. Lubin. Dr. Yatco and his PC rely on the arguments made by Dr. Lubin. Both provide affidavits from experts in the field of nutrition and diet. Plaintiff improperly omits that person's name and identifying

information. But the expert for Dr. Lubin is named. She is Alissa Rumsey, a registered dietician, who works with post bariatric surgery patients. She has been a supervisor of Clinical Nutrition at New York Presbyterian Hospital. The plaintiff's registered dietician also relates that she/he is the Director of Nutritional Services for the Bariatric Surgical Program at an unnamed institution. Simply insufficient information. Finally this expert fails to give her opinions with a reasonable degree of nutritional and dietetic certainty, or words to that effect. But Ms. Rumsey does.

Both opposition experts opine that there were a series of departures by Ms. Davis. They include her failure to appreciate Mrs. Fox's clinical history upon admission, failure to appreciate that plaintiff was thiamine deficient, failure to identify the nature of this thiamine deficiency, and failure to make proper recommendations to her medical team. The plaintiff's expert then supposes that the team would have acted upon Davis' warnings and recommendations if she had proffered them. Not only is this opinion purely speculative but it is contrary to the facts since Dr. Yatco knew about Ms. Davis' recommendations and disregarded them.

Further, this expert disapproves of Ms. Davis' recommendation of insufficient dosages by mouth in light of Mrs. Fox's inability to keep anything down. This person offers that "there is no reason to believe the team would have disregarded what would be life saving information for the plaintiff." Perhaps one could say this in hindsight but again the fact is the doctors did disregard Ms. Davis' recommended treatment.

Further, Ms. Davis is criticized for not documenting her appreciation of the risk of thiamine deficiency. And in that regard states that it was up to her, a nutritionist, to point out to Mrs. Fox's treating surgeon that she probably had a thiamine deficiency and this

person continues, if Ms. Davis had done this, there is every reason to believe Dr. Yatco would have realized this was correct and placed an immediate order.

These opinions are not only speculative, they border on the ridiculous in light of what actions Dr. Yatco took in regard to Ms. Davis' recommendations, which was that he disregarded them even though her recommendations included giving the patient some thiamine.

Counsel for the plaintiff then urges that Sodexo America failed to meet their initial burden. As already indicated, I disagree. Finally, they argue Dr. Barkan was not qualified to give opinions about nutritional issues. But, in fact he was giving opinions on the issue of causation, pointing out, correctly I believe, that based on the facts of this case, it is clear no doctor followed Ms. Davis' recommendations and therefore her actions or inactions had nothing to do with Mrs. Fox getting sicker and sicker.

As for Dr. Lubin's opposition papers with Ms. Rumsey opining, these also detail all of the alleged failures by Ms. Davis in her care and treatment of this patient. They include failure to take an appropriate history and make appropriate recommendations. Also, she should have urged alternate methods of vitamin intake. Further she failed to effectively communicate to the medical team the severity of Mrs. Fox's inadequate nutritional intake. Ms. Rumsey then opines that other members of the team had the right to rely upon this registered dietician to evaluate the patient's nutritional and vitamin status. After all, she was the team's expert.

Finally, counsel for Dr. Lubin argues that various laws and regulations cited by the movant of New York State Department of Health and the Center for Medicine and Medicaid are irrelevant to the circumstances here. The ones cited make it clear that it is the medical

practitioner who is responsible for the care of his patient and that therapeutic diets also shall solely be prescribed by the responsible practitioner and that nutritional needs must be met in accordance with the orders of the practitioner. I disagree that these are irrelevant. Rather, these laws and regulations are further evidence as to who here had the ultimate responsibility for Mrs. Fox's care.

In Reply, moving counsel submits a supplemental affidavit and affirmation from their experts. Both point out, what seems obvious from the records here, that the doctors would not have done anything different from whatever Ms. Davis had urged. It is also pointed out that both sets of opposition papers say nothing on the issue of causation here or rather the lack of causation by Ms. Davis for Mrs. Fox's injuries. In this regard, they point out, if there had been opinions offered on causation, they would have had to have come from a physician.

Their expert, Dr. Barkan points out what seems to be the obvious conclusions to be drawn from the facts here, which relate to the role of Dr. Yatco. He was Mrs. Fox's doctor/surgeon. He saw her constantly. He was acutely aware of all of her complaints, risk factors and past medical history. He knew these things independent of anything Ms. Davis might have told him. And most important, it was Dr. Yatco who was obliged to make the decisions about her care and did so.

The motion by Sodexho is in all respects granted. As stated earlier, Sodexho does in the first instance make out a prima facie case. The burden then shifted to the opposing parties. But the opposition fails to show how Ms. Davis, the dietician with no disrespect intended, the individual on the lowest rung of the ladder of responsibility for the care of Mrs. Fox, should be held accountable for what the doctors were obligated to do. This is

particularly the case when recommendations regarding vitamins and thiamine were disregarded by the physician in charge.

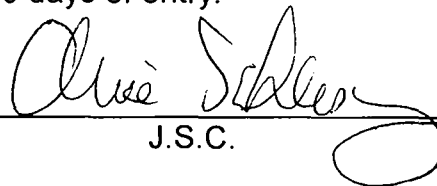
Finally, this Court recognizes that Mrs. Fox, who had undiagnosed Wernickes' Encephalopathy, has suffered a great deal. And perhaps, certain professionals responsible for her care, should have noted this earlier and responded appropriately. But that is no reason to hold Ms. Davis and her employer responsible.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Sodexho America, LLC is granted in its entirety, and therefore the complaint as against this entity is dismissed with prejudice. The Clerk shall enter judgment in the favor of Sodexho America, LLC accordingly without costs or disbursements. Counsel for Sodexho shall serve a copy of this decision and order with notice of entry within 20 days of entry.

Dated: January 12, 2016

**JAN 12 2016**

  
\_\_\_\_\_  
J.S.C.

**ALICE SCHLESINGER**