

Noble v Kingsbrook Jewish Med. Ctr.
2016 NY Slip Op 31775(U)
June 20, 2016
Supreme Court, Kings County
Docket Number: 501942/12
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of June, 2016.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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DERMOT NOBLE AS ADMINISTRATOR OF,
THE ESTATE OF LOUISA E. MITCHELL,
Plaintiff,

Index No. 501942/12

- against -

KINGSBROOK JEWISH MEDICAL CENTER AND ELI
BRYK, M.D.,

Defendant.

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The following papers numbered 1 to 4 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

Papers Numbered

1-2 3-4

Opposing Affidavits (Affirmations)_____

Reply Affidavits (Affirmations)_____

_____ Affidavit (Affirmation)_____

Other Papers_____

Upon the foregoing papers defendants Kingsbrook Jewish Medical Center (Kingsbrook hospital) and Eli Bryk, M.D. (Dr. Bryk) seek summary judgment, pursuant to CPLR 3212, dismissing the complaint against them (MS#2-3). The motions are unopposed.

Plaintiff Dermot Noble, as administrator of the Estate of Louisa E. Mitchell, commenced this action on or about July 16, 2012 alleging that Kingsbrook hospital and Dr.

Bryk departed from the accepted standard of medical care in their treatment of Louisa E. Mitchell (decedent) following her right knee replacement surgery on July 30, 2010. Plaintiff contends that as a result of this malpractice the decedent developed a deep vein thrombosis (DVT) which resulted in her death on August 4, 2010.

The complaint alleges, *inter alia*, that the defendants failed to prescribe appropriate medication in the proper dosage, prescribe prophylaxis to prevent deep vein thrombosis, prescribe Lovenox in an appropriate dosage based upon the decedent's weight, adequately consider the decedent's symptoms and medical history, perform necessary tests, timely diagnose a DVT, consult with the appropriate specialists, and properly supervise and monitor the decedent.

In support of its motion for summary judgment Kingsbrook hospital supplies a copy of the pleadings, the transcript of the examination before trial of Dr. Bryk, the decedent's medical records from Kingsbrook hospital and the affirmation of Dr. Jeffrey Dermksian. Dr. Dermksian, who is a physician board certified in orthopedic surgery, opines that all care and treatment rendered by Kingsbrook hospital was medically appropriate and in accordance with the accepted standards of care. He notes that on July 30, 2010, following the total right knee replacement surgery, Dr. Bryke appropriately prescribed Lovenox 30 mg post-operatively, twice a day, as an prophylactic anticoagulant. On August 4, 2010 at 11:30AM the decedent suffered a pulmonary embolism (PE) as a result of a DVT and died. Dr. Dermksian maintains that there were no documented clinical signs of problems in the lower extremities – such as

pain or warmth —, that Kingsbrook hospital staff appropriately administered the prescribed dosage of Lovenox to the decedent, and that no acts of any of the employees or staff of Kingsbrook hospital proximately caused injury to the decedent. Moreover, Dr. Dermksian avers that the decedent was a patient of Dr. Bryk, her private attending, and that, therefore, Dr. Bryk was responsible for the decedent's care and treatment, which included the prescription of medication post-operatively.

In support of his motion for summary judgment Dr. Bryk supplies, *inter alia*, a copy of the pleadings, the Report of Autopsy dated August 5, 2010, and the affirmation of Dr. Howard Luks, a physician who is board certified in orthopedic surgery. Dr. Luks notes that the decedent received a medical clearance for knee surgery¹ on July 26, 2010 from Dr. Mehra, which included a medical history of hypertension, anemia, and smoking. Dr. Luks contends that neither hypertension, a history of smoking or osteoarthritis are risk factors for a DVT or PE. Dr. Luks indicates that the defendant performed a total right knee arthroplasty on July 30, 2010 without complication and started the decedent on 30 mg of Lovenox every 12 hours to prevent a DVT. Dr. Luks opines that, in 2010, the standard dose of Lovenox was 30 mg every 12 hours, as a prophylaxis following knee replacement surgery. He asserts that an increased dosage, based upon body weight, was not the standard of care. He maintains that the decedent was closely monitored each day following her surgery, that she did not exhibit any symptoms of a DVT or a PE until 11:26 A.M. on August 4, 2010, when she began to have

¹Due to severe osteoarthritis with varus deformity of both knees.

difficulty breathing and became unresponsive. The autopsy report lists the cause of death as DVT of lower extremities with pulmonary thromboembolism following right knee replacement for osteoarthritis. Dr. Luks avers that DVT is an accepted and recognized risk of knee replacement surgery and, as in this case, often occurs without warning. Further, he contends, that Dr. Bryk's treatment of the decedent was consistent with the accepted standard of care at all times and did not cause or contribute to the decedent's death.

DISCUSSION

A defendant moving for summary judgment has the initial burden of establishing that he or she did not depart from good and accepted practice, or that, if there was a departure, it was not a proximate cause of the plaintiff's injuries (*Zito v Jastremski*, 84 AD3d 1069, 1070 [2011]; *Dien v Seltzer*, 116 AD3d 910, 911 [2014]). "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2009]). Where the defendant doctor makes a prima facie showing that there was no departure and that any departure was not a proximate cause of plaintiff's injury, the burden then shifts to the plaintiff to rebut such showing by raising a triable issue of fact as to both the departure and causation (*Stukas v Streiter*, 83 AD3d 18 [2011]). A failure to establish prima facie entitlement to summary judgment, however, requires a denial of the motion, regardless of the sufficiency of the

opposition (*DeGiorgio v Racanelli*, 136 AD3d 734, 738 [2016]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Here, Dr. Jeffrey Dermksian establishes *prima facie* that Kingsbrook hospital, by its staff, did not depart from the standard of care in its treatment of the decedent. Specifically, the affirmation of Dr. Dermksian demonstrates that the decedent was under the care of Dr. Bryk and that the hospital staff properly treated the decedent according to Dr. Bryk's instructions (*Pink v DeAngelis*, 117 AD3d 894 [2nd Dept 2014]; *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

However, the opinion of Dr. Luks that Dr. Bryk's treatment of the decedent was consistent with the accepted standard of care and did not contribute to the decedent's death is conclusory and, therefore, insufficient to establish *prima facie* entitlement to summary judgment as a matter of law. Significantly, Dr. Luks does not address the plaintiff's allegations, contained in her bill of particulars, that Dr. Bryk failed to prescribe appropriate and necessary deep vein thrombosis prophylaxis (*Hutchinson v Bernstein*, 22 AD3d 527, 527 [2nd Dept 2005]; see *Wasserman v Carella*, 307 AD2d 225 [1st Dept 2003]). Here, plaintiff's claim is not explicitly limited to prescription prophylaxis, yet Dr. Luks does not comment on whether non-drug related DVT prophylaxis were required and, if so, implemented, or whether the lack of such other prophylaxis measure was not a proximate cause of injury to the decedent. In addition, while Dr. Luks addresses the significance of the decedent's hypertension, history of smoking and osteoarthritis, he fails to discuss the

decedent's history of anemia as it relates to the need for DVT prophylaxis. Finally, the expert's contention that a DVT occurred herein without any signs or symptoms, does not support a finding that Dr. Bryk took all appropriate steps to prevent a DVT, which is the gravamen of the plaintiff's claim (see *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Terranova v. Finklea*, 45 Ad3d 572 [2007]). Accordingly, it is

ORDERED, that the motion of Kingsbrook Medical Center for summary judgment is granted (MS#2), the claims against Kingsbrook Medical Center are dismissed and such party is severed from the action; and it is further

ORDERED, that the motion of Eli Bryk, M.D. is denied (MS#3), and it is further

ORDERED, that the caption is amended to read as follows:

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DERMOT NOBLE AS ADMINISTRATOR OF
THE ESTATE OF LOUISA E. MITCHELL,
Plaintiff,

- against -

ELI BRYK, M.D.,
Defendant;
-----X

ENTER

J. S. C.

HON. GLORIA M. DABIRI
J.S.C.