

Barry v Lee
2019 NY Slip Op 33825(U)
March 26, 2019
Supreme Court, Bronx County
Docket Number: Index No. 30461/2017E
Judge: Joseph E. Capella
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 23**

-----X
BARRY, MAMIDOU

Index No. **0030461/2017E**

-against-

Hon. **JOSEPH CAPELLA,**

LEE, M.D., CHRISTOPHER C.

Justice Supreme Court

The following papers numbered 1 to 3 Read on this motion, (Seq. No. 1) for **SUMMARY JUDGMENT DEFENDANT**, noticed on **January 09 2019**.

Notice of Motion Order to Show Cause Exhibits and Affidavits Annexed	No(s). <u>1</u>
Answering Affidavit and Exhibits	No(s). <u>2</u>
Replying Affidavit and Exhibits	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the memorandum decision annexed hereto.*

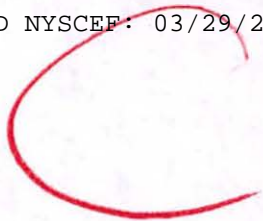
Motion is Respectfully Referred to Justice:
Dated:

Dated: 3/27/19

Hon. 
JOSEPH CAPELLA, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23**



-----X
MAMIDOU BARRY, as Administrator of the Estate of
MARIAMA BAH,

Index No.: 30461/17E

Plaintiff,

Decision/Order

-against-

CHRISTOPHER C. LEE, M.D. and BRONX-LEBANON
HOSPITAL CENTER,

Defendants.

-----X	
PAPERS	NUMBERED
Notice of Motion and Affidavit Annexed -----	1
Answering Affidavit and Exhibits -----	2
Replying Affidavit and Exhibits -----	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DECIDED AS FOLLOWS:

By notice of motion defendants, Christopher C. Lee, M.D. (Dr. Lee) and Bronx-Lebanon Hospital Center (Bronx-Lebanon), move for summary judgment (CPLR 3212) dismissal of plaintiff's complaint, which alleges that defendants failed to timely diagnose and treat the pulmonary embolus suffered by plaintiff's decedent, Mariama Bah (Ms. Bah), in the emergency department of Bronx-Lebanon on February 8, 2017. Plaintiff claims that defendants' negligence lead to the wrongful death of his wife.

According to the defendants' expert, Dr. Silberman, the care rendered to Ms. Bah at all times comported with good and accepted practice, did not deviate from the standard of care and was not a proximate cause of her death. Dr. Silberman opines that Dr. Lee's differential diagnosis of a pulmonary embolism was proper, as were the steps Dr. Lee took in order to confirm the presence of a pulmonary embolism before initiating treatment. Considering that Ms. Bah had no previous visits to Bronx-Lebanon and was hemodynamically stable, defendants' expert opines that it was appropriate for Dr. Lee to order STAT blood work, an EKG, and a chest x-ray prior to performing a CT angiogram. Dr. Silberman explains that it was necessary to have laboratory results to assess renal

function because the CT angiogram utilizes intravenous contrast and if renal function results are abnormal, the contrast can cause renal failure. Moreover, Dr. Silberman states that the period of time from when the blood work was ordered to when the results were returned was reasonable and without delay. Dr. Silberman indicates that it would not have been the standard of care to order a CT angiogram based solely on the D-dimer blood test results as kidney function needed to be assessed. Once kidney function and blood clotting factors were found to be normal, then and only then, was it appropriate to perform the CT angiogram which subsequently confirmed the formation of a pulmonary embolism.

Dr. Silberman further opines that the order for STAT Heparin following confirmation of a pulmonary embolism in a patient who was hemodynamically stable with multiple normal blood pressure readings, met the standard of care. Additionally, Dr. Silberman states that as Heparin takes days to weeks to dissolve clots, there would have been no difference in the outcome had the pulmonary embolism been diagnosed earlier or Heparin started earlier. Therefore, the approximately four-hour time period from when Ms. Bah presented to the emergency department, was properly worked-up with lab tests, had the pulmonary embolism confirmed by a CT angiogram, and then received Heparin was within the standard of care. According to Dr. Silberman, tissue Plasminogen Activator (tPA) was not indicated for decedent as she had a submassive pulmonary embolism with stable blood pressure and, therefore, carried a higher risk of death from tPA than from the pulmonary embolism. Finally, Dr. Silberman asserts that all treatment was timely and properly handled by the emergency department staff. Based on the aforementioned, the court is satisfied that defendants have met their burden of producing evidentiary proof in admissible form sufficient to establish an entitlement to summary judgment. (*Zuckerman v City of NY*, 49 NY2d 557 [1980].) The burden now shifts to plaintiff to submit proof in admissible form sufficient to create issues of fact to warrant a trial (*Sillman v Twentieth Century-Fox*, 3 NY2d 395 [1957]).

In opposition, plaintiff offers an expert affirmation from Dr. Diane Sixsmith, a physician board-certified in emergency medicine. The expert indicates that based on a

review of the Bronx-Lebanon medical records and deposition testimony, Dr. Lee departed from accepted standards of medical care in failing to timely: order STAT blood tests; administer tPA; obtain a CT angiogram; and administer Heparin. Dr. Sixsmith's opinions are premised on her interpretation of the term "Assessment" in the medical records to mean diagnosis. Dr. Sixsmith contends that the "Assessment," or diagnosis, of pulmonary embolism was made as of 12:13PM, when Dr. Lee completed his physical examination, and, thus, it was a departure to not immediately treat Ms. Bah for same. For support, Dr. Sixsmith refers to Dr. Lee's deposition transcript wherein he agrees that an assessment is similar to a diagnosis. Additionally, Dr. Sixsmith opines that Ms. Bah was hemodynamically unstable as evidenced by a consistently high heart rate and not at a high risk for bleeding and that, therefore, proper treatment was tPA, not Heparin.

While plaintiff's expert did properly raise specific issues of fact regarding departures from good and accepted standards of care with respect to whether Ms. Bah should have been administered Heparin or tPA and whether tests and treatment for pulmonary embolus were timely performed and administered, plaintiff's expert did not show that the alleged departures of care proximately caused Ms. Bah's death. (*Dallas-Stephenson v Weisman*, 39 AD3d 303, 307 [1st Dept 2007].) Even viewing the evidence in the light most favorable to plaintiff, his expert does not demonstrate how the injuries alleged in the bill of particulars would not have occurred absent defendants' departures. (*Pollicina v Misericordia Hospital*, 158 AD2d 194 [1st Dept 1990].) Accordingly, as plaintiff did not create a triable issue of fact as to causation, defendants are entitled to summary judgment as a matter of law. (*Fileccia v Massapequa General Hospital*, 63 NY2d 639 [1986].) Defendants' motion for summary judgment is granted and this action is dismissed in its entirety.

Defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. The county clerk is directed to enter judgment accordingly. This constitutes the decision and order of this court.

March 26, 2019
Dated


Hon. Joseph E. Capella, J.S.C.