

Daniels v Jerome

2019 NY Slip Op 33907(U)

April 9, 2019

Supreme Court, Kings County

Docket Number: 47476/2003

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 9th day of April, 2019.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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RACHELLE DANIELS, As Administratrix of the Goods, Chattels and Credits of DUKE DANIELS, Deceased,

Plaintiff,

Index. No. 47476/2003

-against-

DECISION/ORDER

ERIC L. JEROME, M.D. and
NEPHRO-CARE, INC.,

Defendants.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation.....	1-2
Affirmation in Opposition.....	3-6
Reply Affirmation.....	7-8

In this action for wrongful death and medical malpractice, defendants Eric Jerome M.D., and Nephro-Care, Inc. separately move for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motions.

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Factual and Procedural Background

Beginning in February of 1998, decedent Duke Daniels (“Daniels”) began receiving dialysis treatment, thrice weekly, from Nephro-Care, Inc. (“Nephro-Care”). Daniels received dialysis treatment via an arteriovenous graft (“AV graft”).¹

Defendant Eric L. Jerome, M.D. (“Dr. Jerome”) was a consultant at Nephro-Care and was Daniels’ physician. As needed, he recommended hospitalizations for Nephro-Care patients.

On December 18, 2001, Daniels appeared at Nephro-Care for a regularly-scheduled dialysis appointment, during which he began bleeding from his AV graft site. Dr. Jerome was advised of Daniels’ bleeding and sent him to Interfaith Medical Center (“IMC”)², where he was admitted under Dr. Jerome’s care. Dr. Jerome ordered a surgical consult to assess Daniels’ AV graft. Thereafter, Daniels received two hours of dialysis treatment, after which he was given an antibiotic. The following morning, a surgeon at IMC, performed a surgical consult and noted no active bleeding at Daniels’ AV graft site. Subsequently, Dr. Jerome suspended Daniels’ dialysis treatment. On December 20, 2001, Daniels experienced an episode of bleeding and lost a significant amount of blood. In response, Dr. Jerome ordered a blood transfusion. Dr. Jerome contends that he called two surgeons at IMC and requested an immediate surgical intervention. Plaintiff argues that no such call occurred. The surgical intervention did not happen. The next morning Daniels was taken to the dialysis unit at IMC, within minutes of arrival Daniels exsanguinated from his AV graft and died.

¹ An AV graft is a man-made tube that is inserted into an arm to connect an artery to a vein.

² IMC was severed from this action due to bankruptcy.

This action for wrongful death and medical malpractice was commenced on December 11, 2001. Plaintiff asserted, *inter alia*, that from September to December of 2001, defendants failed to make a differential diagnosis of infection from the arteriovenous graft and that this deviation, amongst others, caused plaintiff's death.

Defendants moved for summary judgment. Nephro-Care contends, through its medical expert, that it did not deviate from the standard of care nor proximately cause Daniels' injuries. Dr. Jerome contends that he is entitled to summary judgment because there are no material facts in dispute, he did not deviate from the standard of care and he had a right to rely upon the specialists and hospital staff.

Discussion

On a motion for summary judgment, the movant has the burden of establishing, *prima facie*, either that there were no deviations or departures from the applicable standard of care or that any alleged departures did not proximately cause the plaintiff's injuries. *Shashi v. South Nassau Communities Hosp.*, 104 A.D.3d 838, 961 N.Y.S.2d 307 (2d Dept. 2013). Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative value. *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 754 N.Y.S.2d 195 (2002). An expert's failure to address conflicting evidence in the record precludes making a *prima facie* showing. *Abakpa v. Martin*, 132 A.D.3d 924, 19 N.Y.S.3d 303 (2d Dept. 2015). Further, a failure to address the specific factual allegations of medical malpractice set forth in plaintiff's bill of particulars precludes entitlement to judgment as a matter of law. *Berkey v. Emma*, 291 A.D.2d 517, 738 N.Y.S.2d 250 (2d Dept. 2002).

Nephro-Care

Nephro-Care opined that it neither deviated from the standard of care nor proximately caused Daniels' injuries. However, that contention is belied by the record, which is devoid of any treatment plans, progress notes, lab results, and doctor's notes from September to November of 2001. Nephro-Care's contention that it did not deviate from the standard of care is conclusory and unsupported by the record as it made no reference to the medical records which presumably formed the basis for opining on the care provided to Daniels' during the relevant period. *See Couch v. County of Suffolk*, 296 A.D.2d 194, 746 N.Y.S.2d 187 (2d Dept. 2002); *Yaegel v. Ciuffo*, 95 A.D.3d 110, 944 N.Y.S.2d 601 (2d Dept. 2012). Defendant's prima facie showing is severely lacking. *Berkey*, 291 A.D.2d 517; *See Terranova v. Finklea*, 45 A.D.3d 572, 845 N.Y.S.2d 389 (2d Dept. 2007).


Dr. Jerome

Dr. Jerome's medical expert stated, "even if Dr. Jerome failed to include infected AV graft in his differential diagnosis, such failure did not proximately cause any injury to the patient." This opinion is blatantly conclusory and fails to address the conflicting evidence in the record. *See Kandel v. Kurzman*, 24 A.D.3d 613, 808 N.Y.S.2d 339 (2d Dept. 2005). Namely, the autopsy lists Daniels' cause of death as "exsanguination from infected AV graft." Consequently, Dr. Jerome failed to establish entitlement to summary judgment. *Abakpa*, 132 A.D.3d 924.

Conclusion

Accordingly, defendants' motions for summary judgment are denied.

This constitutes the Decision/Order of this Court


 Hon. Genine D. Edwards, J.S.C.

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 CLERK