

Shirley v Falkovsky

2019 NY Slip Op 34336(U)

August 1, 2019

Supreme Court, Nassau County

Docket Number: Index No. 602852/17

Judge: James P. McCormack

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.



**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 21 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

_____ X

**RICCARDO SHIRLEY, deceased, by the
Administrator of the Estate FLORENCE
BALAY SHIRLEY,**

Index No.: 602852/17

Plaintiff(s),

Motion Seq. No.: 003

-against-

Motion Submitted: 5/28/19

XXX

**ALEXANDER FALKOVSKY, M.D. and
EAST MERRICK MEDICAL, P.C.,**

Defendant(s).

_____ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition (Co-Defendant).....X
Reply Affirmation.....X

Defendants, Alexander Falkovsky, M.D. (Dr. Falkovsky) and East Merrick Medical, P.C., move this court for an order granting them summary judgment pursuant to CPLR §3212. Plaintiff, Riccardo Shirley (Riccardo), deceased, by the Administrator of the Estate, Florence Balay Shirley (Florence), opposes the motion.

This wrongful death and medical malpractice action was commenced by service of a summons and complaint dated April 3, 2017. Issue was joined by service of an answer dated May 22, 2017. Defendant, East Merrick Medical, P.C., interposed an answer also on May 22, 2017.¹ The matter certified ready for trial on November 1, 2018 and a note of issue was filed on January 18, 2019.

Riccardo died on April 16, 2015 while at work. The autopsy indicated the cause of death was related to significant coronary artery disease. At the time of his death, Riccardo was a patient of Dr. Falkovsky, who was his general practitioner. Riccardo had been a patient of Dr. Falkovsky for the previous six years, and was being treated for various ailments including, but not limited to, high blood pressure, high cholesterol, kidney disease and gout.

On Riccardo's first visit in 2009, Dr. Falkovsky performed an EKG and noticed possible damage to one wall of Riccardo's heart. A referral was made to Dr. Daniel Levy, a cardiologist. Dr. Levy performed an echocardiogram, among other testing, and while an abnormality existed in the wall of Riccardo's heart, he had "normal left ventricular systolic function". Dr. Falkovsky referred Riccardo back to Dr. Levy in 2012 based upon some symptoms Riccardo described, including reflux. Dr. Levy performed another echocardiogram and other testing, but Dr. Levy found that Riccardo's cardiovascular health had remained stable.

¹There was another Defendant who has since been let out of the case.

Other than Dr. Levy, Dr. Falvosky referred Riccardo to other specialists to address Riccardo's other issues, including Dr. Mario Marotta, a nephrologist and Dr. Barry Dorf, a gastroenterologist. On March 3, 2015, Riccardo saw Dr. Falkovsky complaining of loss of taste and appetite, unintentional weight loss and episodes of dizziness. However, Riccardo did not have chest pain, nausea, heartburn, difficulty swallowing, weakness, sleep changes, change in bowel habits or blood in his stool. The episodes of dizziness resolved on their own after a time. There was nothing abnormal with the rhythm of his heart, and he did not show signs of edema. Based upon these findings, Dr. Falkovsky was concerned about neoplasm, a form of cancer, and thought a colonoscopy and a GI evaluation should occur. He referred Riccardo to Dr. Dorf again.

Dr. Dorf performed an evaluation and scheduled Riccardo for an upper endoscopy. On March 17, 2015, Riccardo returned to Dr. Falkovsky to discuss, *inter alia*, his laboratory results. The results indicated significant anemia, which led Dr. Falkovsky to continue to consider neoplasm. However, Dr. Falkovsky noted that his lungs were clear, his heart rhythm was regular and an abdominal examination was within normal limits. Dr. Falkovsky again referred Riccardo to Dr. Dorf for a colonoscopy and to Dr. Marotta. Dr. Falkovsky did not see Riccardo again before he died. Defendants now move for summary judgment arguing there were no departures in the treatment of Riccardo.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med.*

Center, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, *supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

“ ‘In order to establish the liability of a physician for medical malpractice, a

plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries' ” (*DiGeronimo v Fuchs*, 101 AD3d 933, 935 [2d Dept 2012], quoting *Stukas v Streiter*, 83 AD3d 18, 23[(2d Dept 2011]; see also, *Klein v Argoff*, 101 AD3d 1090 [2d Dept 2012]). Therefore, “[i]n an action sounding in medical malpractice, a defendant physician moving for summary judgment must establish, *prima facie*, **either** that there was no departure from accepted medical practice, **or** that any departure was not a proximate cause of the plaintiff's injuries (emphasis added)” (*LeMaire v Kunchman*, 102 AD3d 659 [2d Dept 2013], citing *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]; *Stukas v Streiter*, *supra* at p. 24; see also, *Klein v Argoff*, *supra*; *DiGeronimo v Fuchs*, *supra*). “ ‘In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's [complaint and] bill of particulars (citations omitted)’ ” (*Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]).

“Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by the plaintiff in his or her complaint and bill of particulars are insufficient to make a *prima facie* showing that a defendant physician is entitled to judgment as a matter of law (citations omitted)” (*Bendel v Rajpal*, *supra*, at p. 663).

Once a defendant physician has made the requisite showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact with respect to the

issues on which the defendant met the *prima facie* burden (*LeMaire v Kunchman, supra*, at p. 659 [citation omitted]). “ “[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant’s motion for summary judgment (citations omitted)’ ” (*Bendel v Rajpal, supra*, at p. 189, quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]).

Furthermore, “ “[i]n a [medical] malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not’ that the defendant’s deviation was a substantial factor in causing the injury (citations omitted)’ ” (*Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881 [2d Dept 2005]; *see also, Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], *lv denied*, 92 NY2d 818 [1999]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, ‘as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury (citations omitted)’ ” (*Goldberg v Horowitz, supra*, at p. 694, quoting *Alicea v Ligouri*, 54 AD3d 784 [2nd Dept 2008] [internal quotation marks omitted]).

In the bill of particulars, Plaintiff alleges Defendants committed the following departures: 1) Failing to enter into a differential diagnosis of cardiac causes on March 3 and March 17, 2015; 2) failing to consider past medical history; 3) failing to consider past medical history of heart attack, valve disease, sleep apnea, high cholesterol and hypertension; 4) failing to recognize the past medical history and current complaints put Riccardo at risk for myocardial infarction; 5) failing to perform a proper physical examination on March 3 and March 17, 2015, 6) failing to detect pitting edema on March 3 and March 17, 2015; 7) failing to consider nausea, vomiting, weight loss, loss of taste and loss of appetite were related to cardiac issues; 8) failing to refer Riccardo to a cardiologist on March 3 and March 17, 2015; 9) failing to “take any steps whatsoever” to investigate the heart as the cause of his symptoms on March 3 and March 17, 2015; 10) failing to detect Riccardo was suffering from atherosclerosis and 11) failing to give Riccardo the opportunity to cure.

In support of their motion, Defendants submit, *inter alia*, the expert affirmation of Dr. Philip Sumner a physician Board Certified in Internal Medicine. Dr. Sumner opines that Riccardo’s death from coronary artery disease was not foreseeable based upon his presentation to Dr. Falkovsky. While there was the irregular EKG during the first visit in 2009, Dr. Falkovsky did refer Riccardo to a cardiologist at that time, and all subsequent EKGs performed by Dr. Falkovsky showed no changes from the first one. After Riccardo saw Dr. Levy for a second time in 2012, Dr. Levy found that Riccardo was stable from a

cardiovascular perspective, but Dr. Levy did recommend Riccardo return see him on a yearly basis, a recommendation Riccardo did not follow.

During the March 17 visit with Dr. Falkovsky, Riccardo did not complaint of shortness of breath, chest pain, sweats and there was no fever. Dr. Sumner notes that an evaluation of his chest during this visit indicated that “the lungs were clear, there were no rales, no rhonchi, no wheezes, and that the heart had regular rhythm, with no murmurs, no rubs and no gallops.” Dr. Sumner further notes that in between the two March visits with Dr. Falkovsky, Riccardo saw Dr. Dorf, and two days after the second March visit, Riccardo saw Dr. Marotta. Neither of those doctors interpreted Riccardo’s symptoms to be related to cardiac issues. Dr. Marotta did refer Riccardo for a renal sonogram which revealed a right renal cyst and possible angeomyolipoma. On March 25, 2015, Riccardo saw Dr. Dorf again for an upper endoscopy.

Dr. Sumner rejects the allegation that Dr. Falkovsky should have entered a differential diagnosis of cardiac causes of his symptoms because the symptoms were not indicative of cardiac issues, particularly being that the lungs and heart were “entirely within normal limits”. The complaints consisted of unexplained weight loss, anorexia, together with a finding of anemia, all of which were more consistent with neoplasm than cardiac issues. Next, Dr. Sumner opines that the fact that Dr. Marotta noted peripheral edema was an indication of cardiac issues is without merit. There is no evidence in the record that Riccardo was suffering from edema when he visited Dr. Falkovsky, and Dr. Marotta, who did see the edema, did not find it related to cardiac issues. Further, Dr.

Dorf also did not see any evidence of edema and testified that if it did exist, there could be countless causes for it. According to Dr. Sumner, lower peripheral edema is consistent with kidney disease, from which Riccardo suffered.

Similarly, Dr. Sumner rejects the notion that Dr. Falkovsky should have ordered an EKG on March 5, March 19 of both, because none of his symptoms were consistent with cardiac issues. Finally, Dr. Sumner opines that there was no reason for Dr. Falkovsky to order an echocardiogram, but even if he had, nothing would have changed. An echocardiogram could have confirmed that Riccardo suffered from mitral valve disease, but valve disease did not cause Riccardo's death. Riccardo died from coronary artery disease, something an echocardiogram could not diagnose.

Based upon the foregoing and Defendants' other exhibits, the court finds Defendants have established entitlement to summary judgment as a matter of law. The burden shifts to Plaintiff to raise an issue of fact requiring a trial of the action.

In opposition, Plaintiff submits, *inter alia*, the redacted affirmation of their expert and Florence's deposition transcript. The expert is Board Certified in internal medicine with a subcertification in cardiovascular disease.

The expert first opines that Dr. Falkovsky should have recognized loss of taste and appetite, weight loss and dizziness as signs of heart failure based upon Riccardo's history. However, the expert does not address that Dr. Falkovsky specifically noted the other signs, such as shortness of breath, fatigue and irregular heartbeat were not present. He also speculates that because Dr. Falkovsky wrote "PF" in his notes, this was proof that

Riccardo was having shortness of breath, despite the fact that the rest of the record indicates otherwise. Further, the expert does not explain why the other two doctors who saw Riccardo during this time did not note shortness of breath. Nor does the expert acknowledge that the symptoms Riccardo was complaining about were also consistent with neoplasm, and perhaps more consistent than with a cardiac condition in light of the symptoms Riccardo was not having.

The expert next finds that Riccardo was experiencing lower extremity edema on the March 17 visit, because Dr. Marotta noted it two days later. This is rank speculation. The expert does not address whether it is possible for the edema to have begun after March 17.

In a conclusory manner, the expert next asserts that it was a departure for Dr. Falkovsky to fail to “a) consider cardiac causes of his signs and symptoms; b) refer Mr. Shirley to a cardiologist; c) order an echocardiogram that can determine muscle wall thickening and ejection fraction diminution; d) perform an EKG that can determine if there is left ventricle thickening; e) order blood work and check his laboratory values such as sodium, potassium, albumin, creatinine levels and certain biomarkers which can help diagnose heart failure and predict outcome; and f) order a chest x-ray that can determine if there is an enlarged heart and fluid build up in the lungs.”

Regarding (a) and (b), the expert has already opined that some of Riccardo’s complaints could have been consistent with heart failure, but he never addresses the reasonableness of Dr. Falkovsky finding those symptoms, and the absence of other

symptoms such as shortness of breathe and fatigue, being more consistent with neoplasm. Regarding (c) and (d), the expert fails to address Dr. Sumner's assertion that an echocardiogram would not have diagnosed coronary artery disease, and that muscle wall thickening and ejection fraction diminution were not related to the cause of death, and therefore would not have made a difference under the facts of this case. As for (e) and (f), Dr, Falkovsky did review laboratory results and did make a referral as a result, and he testified that he listened to the lungs and they were clear.

Regarding Florence's deposition, she testified about meeting with Riccardo shortly before his death. He looked thin, was limping, was complaining about pain in his left arm, swelling of his feet and legs, and that he was nauseous and had been vomiting. The court is uncertain as to the relevancy of her observations. There is no evidence Riccardo ever told Dr. Falkovsky, Dr. Dorf or Dr. Marotta that he had left arm pain, and that his legs were swollen. While Plaintiff's expert opines that Dr. Falkovsky should have examined Riccardo's lower extremities, the court has determined that the expert has not established that his symptoms, as described by Riccardo, would have led a doctor to do so. This is supported by the fact that neither Dr. Falkovsky, nor doctors Marotta and Dorf did so.

According to Florence, she and Riccardo both believed his symptoms were related to a gout flare-up. As for the nausea and vomiting and other symptoms, Riccardo did express those to Dr. Falkovsky, and they were consistent with neoplasm.

In light of the foregoing, the court finds Plaintiff is unable to raise an issue of fact.

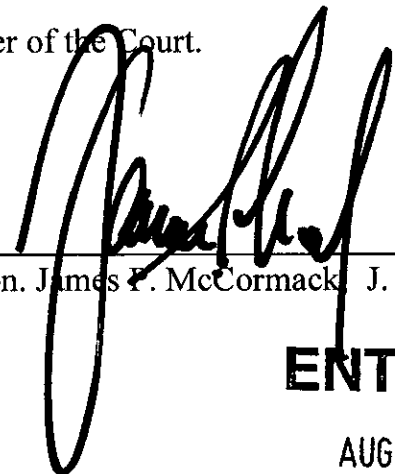
Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is **GRANTED**. The complaint is dismissed.

The court has considered the other arguments raised by the parties and finds them to be without merit.

This constitutes the Decision and Order of the Court.

Dated: August 1, 2019
Mineola, N.Y.



Hon. James F. McCormack J. S. C.

ENTERED

AUG 13 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**