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| Jackson v Rodriguez |
| 2019 NY Slip Op 34597(U) |
| June 27, 2019 |
| Supreme Court, Nassau County |
| Docket Number: Index No. 604993/17 |
| Judge: Jack L. Libert |
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SUPREME COURT - STATE OF NEW YORK

**PRESENT: HON. JACK L. LIBERT,
Justice.**

**KEVIN JACKSON, as Administrator of the Estate of
TRACY JACKSON, deceased and KEVIN JACKSON,
Individually,**

Plaintiffs,

-against-

**CARMEN RODRIGUEZ, M.D., ADIEL FLEISCHER,
M.D., MARCI OSTROFF, M.D., LONG ISLAND JEWISH
MEDICAL CENTER, NORTH SHORE-LONG ISLAND
JEWISH HEALTH SYSTEM, INC. and NORTHWELL
HEALTH, INC.,**

Defendants.

**TRIAL PART 23
NASSAU COUNTY**

**MOTION # 01
INDEX # 604993/17
MOTION SUBMITTED:
MARCH 22, 2019**

MD

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3**

Defendants, Adiel Fleischer, M.D., Marci Ostroff, M.D., Long Island Jewish Medical Center, Northwell Health, Inc. s/h/a North Shore-Long Island Jewish Health System, Inc. and Northwell Health, Inc. move pursuant to CPLR 3212 for summary judgment dismissing all claims with prejudice on the grounds that there are no triable issues of fact.

This is an action sounding in medical malpractice and wrongful death. Plaintiff's decedent was a patient admitted to the Manhasset hospital facility owned and operated by what is now known as Northwell Health, Inc. The facility is sued in this action as Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc. Plaintiff alleges that the malpractice of the moving defendants (the facility and its treating staff physicians) as well of the acts of the nonmoving defendants (independent

physicians that treated the decedent at the Northwell facility) caused decedent's death. Plaintiff alleges that the defendants deviated from accepted practices of medical care by failing to: properly assess decedent's level of risk for deep vein thrombosis (DVT); timely recognize her level of risk for venous thromboembolism (VTE); properly prevent the development of a deep vein thrombosis (DVT); and timely diagnose and treat Jackson's DVT. Plaintiff asserts that these deviations lead to a pulmonary embolism, respiratory arrest, cardiac arrest, and ultimately death.

Background

On September 8, 2015 the decedent was admitted to the labor and delivery department of LIJ by defendant Carmen Rodriguez, M.D., an attending obstetrician. She was 35 weeks pregnant with her first child and was admitted for hypertension noted to be due to pre-eclampsia or a hypertensive crisis. She also presented with morbid obesity, gestational diabetes, gallstones, and vomiting.

Defendant's Position

In support of their motion defendants submit the deposition testimony of: plaintiff; defendants Rodriguez, Fleischer, and Ostroff; Mary Anne Sullivan, RN and Sudhi Trye, M.D. Defendants also submitted affirmations of Sanford Lederman, M.D. and Craig Sherman, M.D. Defendant asserts that the pertinent medical records and deposition testimony, as well as the expert opinions set forth in the affirmations of doctors Lederman and Sherman, make a *prima facie* showing that no malpractice occurred in this matter and that the treatment rendered by the defendants was not the proximate cause of the decedent's injuries or death.

The expert opinions find no deviations from accepted medical practice in that all defendants appreciated that the decedent was at high risk of developing DVT and appropriately responded to this increased risk. The experts opine that the DVT preventative measures taken throughout the admission at issue, including heparin, sequential compression devices, elevation of the decedent's legs, and instruction to increase ambulation, indicates that defendants recognized the increased risk of DVT and they made every

appropriate effort to decrease the risk.

Plaintiff's Position.

Plaintiff asserts the existence of material issues of triable fact. In support of that position, plaintiff submitted two affirmations from expert physicians, each of which opines that the moving defendants committed departures from good and accepted medical practice, which departures were a substantial factor in the cause of death.

Plaintiff's OB/GYN expert opined that Dr. Ostroff, Dr. Fleischer and the other medical providers at LIJ, failed to recognize that Mrs. Jackson continued to display clinical symptoms of DVT although the incomplete doppler studies came back negative for DVT. As a result they improperly ruled out DVT. The OB/GYN expert also opined that decedent Jackson was not prescribed or administered the dosage of Heparin adequate to provide VTE prophylaxis in a high-risk DVT patient who has a BMI of 56.1. Plaintiff's expert opined that the standard low dose of Heparin given prophylactically did not factor in the patient's weight. In light of decedent's extremely elevated BMI, prophylactic Heparin dose must be based on a patient's weight. She required a higher dose of Heparin during her hospitalization in order to adequately reduce her VTE risk. Another deviation cited is the discharge home of the decedent without any further anticoagulation therapy, in light of decedent's risk factors and difficulty ambulating at the time of her discharge. Plaintiff's OB/GYN expert also opines that defendants deviated from accepted practice by failing to check decedent's blood pressure at or around the time of her discharge.

Plaintiff's radiology expert opines that the doppler studies deviated from the standard of care in that they did not visualize at all of the veins pertinent to ruling out DVT. In particular the radiologist opines that neither of the studies adequately visualized the right mid to distal superficial vein. Additionally, the radiologist notes that the affirmation of Dr. Sherman (defendant's expert) fails to address that due to Jackson's body *habitus* and swelling, the doppler studies were unable to fully compress Jackson's veins, without which compression made these imaging studies unreliable.

Discussion

(T)he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (citation omitted) ... Once this showing has been made, however, the burden shifts to the part opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action (Citation omitted) ... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician s summary judgment motion (Citation omitted) (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925 501 NE2d 572 [1986]).

A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the injuries. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (*see Gentile v. McFarlane–Johansson*, 108 A.D.3d 499, 969 N.Y.S.2d 118; *Sukhraj v. New York City Health & Hosps. Corp.*, 106 A.D.3d 809, 965 N.Y.S.2d 532; *Rivers v. Birnbaum*, 102 A.D.3d 26, 43, 953 N.Y.S.2d 232; *Swanson v. Raju*, 95 A.D.3d 1105, 945 N.Y.S.2d 101).

The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*Dimitri v. Monsouri*, 302 AD2d 420, 421). “Thus, on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Wexelbaum v. Jean*, 80 AD3d 756) If the defendant meets this burden, the plaintiffs are required to produce evidentiary proof in admissible form sufficient to rebut the movant’s *prima facie* showing in order to demonstrate the existence of a triable issue fo fact (*see Wexelbaum supra* at 758). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility

issues can only be resolved by a jury" (*Wexelbaum supra* at 758).

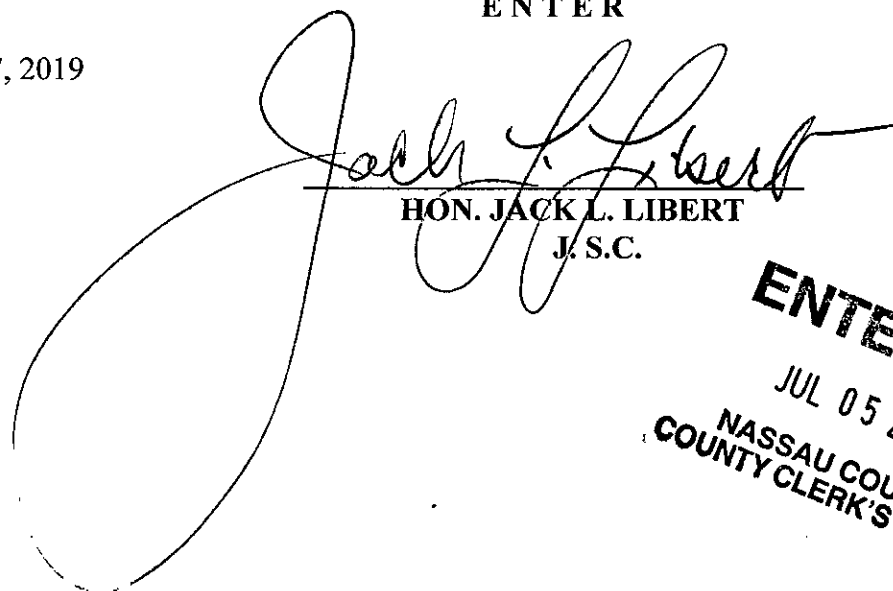
Triable issues of fact abound. To name a few: Was DVT improperly ruled out and if not ruled out was treatment proper? Were clinical decisions based upon incomplete doppler and MRI studies? Did the physicians properly evaluate the clinical symptoms taking into account plaintiff's co-morbidities? Were the studies properly interpreted in light of those co-morbidities? Was the patient's blood pressure adequately monitored up to the time of discharge? Was the decedent able to ambulate prior to her discharge? Was the decision to discharge the patient made in accordance with accepted standards?

Summary judgment is not at all warranted and the motion is in all respects denied.

This constitutes the decision and order of the court.

ENTER

DATED: June 27, 2019


HON. JACK L. LIBERT
J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE