

Nabet v Stein

2019 NY Slip Op 34785(U)

April 25, 2019

Supreme Court, Nassau County

Docket Number: Index No. 608214/2016

Judge: Anna R. Anzalone

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SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

_____ X
**ELIZABETH NABET as Executor of the Estate of
EDWARD NABET, Deceased and ELIZABETH NABET,
Individually,**

TRIAL/IAS, PART 18

NASSAU COUNTY

Plaintiff,

- against -

Motion Seq# 2

**PHILIP STEIN, M.D., MICHAEL SUSSMAN, M.D.
and CARDIOVASCULAR MEDICAL ASSOCIATES,
P.C.,**

Index No.608214/2016

Defendants.

_____ X
The following papers read on this motion:

Defendant’s Notice of Motion.....1

Plaintiff’s Affirmation in Opposition.....2

Defendant’s Reply Affirmation.....3

The instant action stems from medical malpractice and wrongful death. Plaintiff alleges that Defendants failed to properly diagnose and treat Edward Nabet’s (“Edward”) coronary artery disease.

Beginning in 2010, Edward Nabet was getting medical care and treatment from Defendant Cardiovascular Medical Associates, P.C. (“Medical Associates”); he was being treated by Defendant, a rheumatologist, James Sullivan, M.D. for rheumatoid arthritis. Edward returned to

Dr. Sullivan for reevaluation and follow up for severe degenerative arthritis on May 17, 2010, August 19, 2010, November 18, 2010, and on February 3, 2011.

On February 3, 2011, Dr. Sullivan noted that Edward planned to start seeing Defendant Dr. Philip Stein, a cardiologist at Medical Associates. Dr. Sullivan noted that Edward's blood pressure was elevated. On March 7, 2011 Dr. Sussman rendered a nuclear stress test to rule out prognostically important inducible myocardial ischemia which is a disorder that is usually caused by a coronary artery obstruction or coronary artery disease. Edward also underwent an echocardiogram. Both the nuclear stress test and echocardiogram were considered normal.

Edward first visited Dr. Stein on May 20, 2011, and on September 30, 2011 Dr. Stein noted that Edward had high blood pressure and high cholesterol. Over the next two years Dr. Stein saw Edward on three occasions and treated Edward for high blood pressure and high cholesterol. Edward was followed up by Dr. Sullivan for his degenerative arthritis over the next few years.

On March 27, 2014 Edward visited Dr. Stein and made complaints of shortness of breath and fatigue with minimal exertion. Dr. Stein noted that Edward had high blood pressure, high cholesterol and arthritis. Dr. Stein ordered a repeat echocardiogram and exercise stress test and ordered blood tests.

On September 26, 2014 Edward presented to Dr. Stein for an office visit and complained of shortness of breath, fatigue and occasional chest discomfort. Edward's blood pressure was elevated so Dr. Stein added a blood pressure medication. Dr. Stein also ordered a nuclear stress test and echocardiogram.

On October 1, 2014 Edward underwent a stress test performed at Medical Associates, which was interpreted by Dr. Sussman which showed that there was a small area of moderate fixed defect in the inferoapical wall, however the wall motion was normal. Nuclear imaging was negative for infarct or ischemia. On October 7, 2014, Edward underwent an echocardiogram at Medical Associates which was interpreted by Dr. Alice Cavanagh which showed that the chamber of the left ventricle was mildly dilated.

On October 23, 2014 Edward was evaluated by Dr. Sullivan. It was noted that Edward underwent cardiac evaluation with Dr. Stein and did well with the testing. Dr. Sullivan noted that Edward had degenerative arthritis which was widespread and severe in his lower back.

On November 14, 2014 Edward suffered a cardiac arrest, was taken to St. Joseph's Hospital where he was pronounced dead. An autopsy was performed, and the cause of death was hypertensive and atherosclerotic cardiovascular disease.

In support of their motion Defendants submit their expert, Malcolm Phillips, M.D. who reviewed the documents and medical records, bill of particulars and deposition testimony. Dr. Phillips concluded that Dr. Sussman appropriately interpreted the nuclear portion of the stress test showing a small area of moderate fixed defect in the inferoapical wall, but wall motion interpretation was normal. Under these circumstances, the impression or conclusion that nuclear stress testing was negative for infarct or ischemia was appropriate and conformed to the standard of care. This information was appropriately and timely communicated to Dr. Stein. Dr. Phillips also opined within a reasonable degree of medical certainty that the subsequent findings on the autopsy do not reflect that the nuclear stress test was interpreted incorrectly.

Dr. Phillips also concluded that it was reasonable for Dr. Stein to conclude that no further workup was immediately necessary to evaluate the small area of moderate fixed defect in the inferoapical wall. The manner in which a cardiologist determines the cause of a fixed defect on nuclear stress test is based on the wall motion of the heart. A normal wall motion is inconsistent with ischemia or prior infarct. Additionally, the EKG performed during the stress test did not show ischemic changes. Dr. Phillips opined that there was no evidence of coronary artery disease prior to Edwards death. It was Dr. Phillips opinion within a reasonable degree of medical certainty, that it was reasonable for Dr. Stein to rely on the result of these two important tests (echocardiogram and stress test) to conclude that Edward's complaints were not due to ischemic cardiac disease as opposed to referring Edward for further evaluation with cardiac catheterization, angiogram or CT angiogram.

In opposition to defendant's motion for summary judgment, Plaintiff's submitted their expert's un-redacted Physicians Affirmation for the Court's in camera inspection. Dr. X prepared his affirmation after review of the medical records from Medical Associates, the chart of St. Josephs' Hospital, the autopsy report, the depositions, and the physician affirmation submitted by the Defendants in support of their motion. It was Dr. X's opinion, stated with a reasonable degree of medical certainty, that the Defendants Philip Stein, M.D., and Michael Sussman, M.D. deviated and/or departed from the accepted standards of medical care and treatment in failing to recommend

a CT angiogram and/or cardiac catheterization for Edward given his family history, risk factor, symptomology and findings on the stress test. Specifically, it is Dr. X's opinion that the findings on the October 1, 2014 nuclear stress test and the findings on the October 7, 2014 echocardiogram warranted a recommendation and/or order for a CT angiogram/ and or cardiac catheterization, and failure to do so contributed to Edwards death; these would have been diagnostic of the blockages lending to life-saving interventions. Dr. X concluded that it was his opinion with a reasonable degree of medical certainty that deviations from the accepted standards of care committed by Drs. Stein and Sussman, including the failure to order and/or recommend a CT angiogram and/or cardiac catheterization in light of Edwards high risk for coronary artery disease and the results of the nuclear stress test, as well as the failure to appropriately control the patient's severe hypertension caused and/or contributed to the development of the left ventricular hypertrophy, coronary artery disease, occlusions in the aorta, occlusions in the coronary vessels, and Edward's untimely death at the age of sixty-four.

The proponent of a summary judgment motion must make some *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. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1968). To make some *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. *Id.* Once some *prima facie* showing has been made, the burden shifts to the party 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. *Id.*; *see also Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 59 (1980).

The drastic remedy of summary judgment should be granted only if there are no triable issues of fact. *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist"; *see Dykeman v Heht*, 52 AD3d 767, (2008). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. *see Brown v Outback Steakhouse*, 39 AD3d 450, 833 NYS 2nd 222, (2007).

The two essential elements of a medical malpractice claim are a deviation or departure from accepted practice and evidence that such departure was a proximate cause or injury or

damage. *Taylor v. Nyack Hospital*, 18 AD3d 537, 795 NYS2d 317, 2nd Dept. (2005). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980); *Prete v. Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 2d Dept. (1996). A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish *prima facie*, either there was no departure or that any departure was not a proximate cause of the injuries. *Aronov v. Soukkary*, 104 AD3rd 623, 960 NYS2d, 462 2 nd Dept. (2013)

To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury *see, Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980); *Prete v. Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 2d Dept. (1996). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury. *Fiore v. Galang*, 64 N.Y.2d 999, 489 N.Y.S.2d 47, 478 N.E.2d 188(1985); *Lyons v. McCauley*, 252 A.D.2d 516, 675 N.Y.S.2d 375, 2d Dept., (1998), *app denied* 92 N.Y.2d 814, 681 N.Y.S.2d 475, 704 N.E.2d 228, *Bloom v. City of New York*, 202 A.D.2d 465, 609 N.Y.S.2d 45 2d Dept. (1994).

To rebut a *prima facie* showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff. *Lifshitz v. Beth Israel Med. Ctr-Kings Highway Div.*, 7 A.D.3d 759, 776 N.Y.S.2d 907. 2d Dept. (2004); *Domaradzki v. Glen Cove OB/GYN Assocs.*, 242 A.D.2d 282, 660 N.Y.S.2d 739, 2d Dept. (1997).

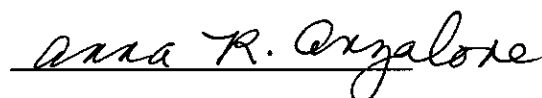
“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury”. *Bengston v. Wang*, 41 A.D.3d 625, 839 N.Y.S.2d 159, 2d Dept. (2007). Based upon the foregoing and the conflicting medical expert opinions, defendant’s motion pursuant to CPLR §3212 granting summary judgment in favor of defendants is denied. Any matters not addressed in this motion are deemed denied.

Counsel for Defendant shall file and serve a copy of the within order with notice of entry upon Plaintiffs within twenty (20) days from the date of this Order. The parties shall appear as scheduled in Central Jury, 100 Supreme Court Drive, Mineola, NY on June 6, 2019 at 9:30.

This constitutes an Order and Decision of the Court

DATED: April 25, 2019

ENTER



HON. ANNA R. ANZALONE

J.S.C.

ENTERED

MAY 08 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE