

Meade v Vu
2020 NY Slip Op 31799(U)
June 9, 2020
Supreme Court, Kings County
Docket Number: 516949/17
Judge: Ellen M. Spodek
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At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of June, 2020.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

-----X

WELDON MEADE and SHEREENE MEADE,

Plaintiffs,

-against-

Index No.: 516949/17

THOMAS VU, MD and BROOKDALE UNIVERSITY HOSPITAL
AND MEDICAL CENTER,

Defendants,

-----X

The following papers read herein:

Papers:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations)

Annexed _____

1-2

Opposing Affidavits (Affirmations) _____

3

Affidavits/ Affirmations in Reply _____

4¹

Defendants' Memorandum of Law in Support of the Motion

5

Upon the foregoing papers, defendants, Thomas Vu, MD (Vu) and Brookdale University Hospital and Medical Center (Brookdale) move in motion sequence (mot. seq.) four for an order, pursuant to CPLR 3212 (a), (b), and (e), granting defendants

¹ The unauthorized sur-reply (NYSCEF Doc 114) and letter in response (NYSCEF Doc 115) were not considered in rendering this decision.

summary judgment, dismissing the plaintiffs Weldon Meade's (Weldon) and Shereene Meade's (Shereene) complaint. Plaintiffs oppose, arguing that triable issues remain.

Background Facts and Procedural History

Weldon Meade took ill on the evening of November 22, 2016 and was taken by ambulance to Brookdale for treatment. Per the Prehospital Care Report Summary contemporaneously generated by the FDNY responders, Weldon was conscious and sitting in a chair when they arrived at his uncle's home. He provided his medical history, including previous cardiac issues, and was found to be alert and his pupils reactive to light. Per the documentation, Weldon made complaints of weakness (listed therein as the "Chief Complaint" and "Provider Impression"), nausea, and vomiting and was very sweaty (diaphoretic). EKGs were done and showed no significant anomalies. His blood pressure appeared elevated. Contrary to his deposition testimony, there is no record that he complained of severe headaches, blurry vision, and/or poor balance.

Upon arrival at Brookdale's emergency department, triage was performed. Weldon's blood pressure, while still elevated, was lower than when first measured by EMS. Laboratory tests² and an EKG were ordered. Weldon was placed in an examination area and, shortly thereafter, Vu took over his care. Per Weldon's chart³, his

² While Shereene testified that no blood work was done and Weldon stated that he does not recall such testing, Brookdale's records show that a variety of tests were performed.

³ There are numerous differences between the recollections of Vu, Weldon, and Shereene as to what was said and done during Vu's treatment of Weldon. This Court relies primarily upon the contemporaneously created medical records. While Vu states that there is some variance as to when he completed his charting depending on how busy the emergency room was, the (cont.)

chief complaints were weakness and dizziness. Vu also noted that associated symptoms included nausea and vomiting but that there was no chest pain, diarrhea, fever, or shortness of breath and that Weldon denied any chest pain, shortness of breath, headache, blurry vision, or recent illness (this is again contrary to plaintiffs' assertion that he complained of headaches and blurry vision to Vu). Vu's physical exam reflected normal cardiovascular rate and rhythm, no respiratory distress, and that Weldon was alert. While not detailed in the records, Vu attests to his general practice of assessing neurological health via a conversation with the patient, shaking hands with, and observing the patient during the examination. He states that he would have detailed abnormal results in his notes but would not detail everything that was normal. Though Weldon's ICD⁴ had not shocked him, Vu initially believed that the problem might be a possible arrhythmia or, less likely, intraabdominal or neurologic pathology. After receiving Weldon's blood work and chest x-ray, Vu concluded that arrhythmia was unlikely and noted that Weldon might be in the early stages of flu or viral illness. As insufficient information was available to rule out an issue with his ICD, Vu provided Weldon with the option of staying in the hospital until morning to have it checked by Medtronic, to wait for the hospital to get further information regarding it, or to be discharged and follow up on his own. He elected to return home. A hospital employee, Kevin Hamilton, recorded that Weldon was stable and ambulatory when he was discharged (Weldon and Shereene

timecodes on Brookdale's records reflect that in this case he entered his notes prior to discharging Weldon.

⁴ Implantable Cardioverter Defibrillator.

contest this, stating that he was involuntarily discharged with his symptoms unaddressed and had to be virtually carried out by Shereene).

A day later, an ambulance was again called to transport Weldon to a hospital. Per Senior Care 911's Patient Care Report, Weldon told the responding EMTs that he had a headache and had felt weak since Tuesday when he had been hospitalized and released due to normal bloodwork. This time, he was transported to Kings County Hospital Center (Kings). He presented with dizziness and unsteady gait and was deemed to be a fall risk. Kings' records reflect, however, that he was alert and oriented and in no acute distress. Preliminary findings were that Weldon was suffering from cardiomegaly with mild vascular congestion and/or volume overload suggestive of early CHF exacerbation. There were no "cerebellar signs." However, as he presented with gait instability and a dilated left pupil, a head CT with contrast was done to rule out intracranial pathology. A subacute infarction of indeterminate age was found. The radiologist also noted that there was a mass effect on the fourth ventricle and on the periencephalic cistern. Upon further evaluation, Weldon was found to have suffered a cerebellar stroke.

By summons and complaint dated August 31, 2017, plaintiffs commenced the instant action against Vu and Brookdale. The complaint alleged that Vu and other Brookdale employees committed medical malpractice and/or negligence by failing to timely diagnose and treat Weldon's stroke. More specifically, plaintiffs alleged that Vu failed to properly assess Weldon in light of his symptoms and risk factors, failed to seek a neuro consult and/or order a CT scan of Weldon's head, and failed to timely evaluate

whether Weldon was a candidate for the administration of tPA⁵ (and, if he were, to administer it). Plaintiffs also asserted a derivative claim for lack of consortium and monetary damages to Shereene. Vu and Brookdale timely answered denying liability and asserting a variety of affirmative defenses.

Discussion

On a motion for summary judgment to dismiss a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries (*see Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287 [2d Dept 2014]); *Stukas v Streiter*, 83 AD3d 18, 24-26 [2d Dept 2011]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Stukas*, 83 AD3d at 24). The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing (*see Stukas*, at 30). However, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions [as s]uch credibility issues can only be resolved by a jury” (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). Further, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where

⁵ Tissue Plasmatic Activator is a drug used for the treatment of certain types of stroke.

conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010]), quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

In support of their motion, defendants submit the affirmation of Gregory I Mazarin, MD, a physician specializing in emergency medicine licensed to practice in the State of New York. In Dr. Mazarin's opinion, Vu timely and properly assessed and treated Weldon. He notes that the examinations performed by FDNY EMS did not reveal any neurological deficits and reflect that Weldon did not exhibit any signs or symptoms of a stroke. Likewise, Dr. Mazarin opines, when Weldon was triaged upon arrival at Brookdale, his vital signs were stable and did not warrant any intervention. Setting out the typical signs and symptoms of stroke and noting their absence, he further states that there was no reason for the triage personnel to activate a stroke code. As to Vu, Dr. Mazarin opines that a full medical history was adduced, an adequate and appropriate neurological exam performed, and that the records reflect that Weldon did not reflect neurological deficits consistent with a stroke and, thus, that a stroke call was unwarranted. Under the circumstances, Dr. Mazarin concludes, that it was medically reasonable for Vu not to suspect a cerebellar stroke and that a head CT and neuro consult were not indicated. He also notes that Weldon's blood pressure trended downward, and his glucose levels were reasonable based on when he last ate. As there were no complaints that could only have been addressed in a hospital setting, discharge was warranted. Finally, he posits, even if, assuming for the sake of argument, there were a

deviation from the standard of care, it was not the proximate cause of Weldon's injuries as the administration of tPA would not have been indicated since the risks of doing so would have outweighed the potential benefit.

Defendants also submitted the affirmation of Joseph S Jeret, MD, a physician specializing in neurology, licensed to practice in the state of New York. Dr. Jeret states, to a reasonable degree of medical certainty, that the care and treatment rendered at Brookdale by Vu and others did not depart from good and accepted standards of medical care and did not proximately cause the injuries suffered by Weldon. Dr. Jeret opines that a CT scan would not have shown the existence of a cerebellar stroke as such infarctions are typically not visible on a CT for six to eight hours after the start of symptoms. Further, Dr. Jeret posited that Weldon was not a candidate for the administration of tPA as his National Institute of Health Stroke Scale would have, per the medical records, been significantly too low. As such, Dr. Jeret concludes that there was no departure from the standard of care and, even if there were, it was not the proximate cause of Weldon's injuries.

Defendants, thus, met their initial burden of demonstrating via expert testimony that there was no departure from the accepted standard of care and that the alleged departures were not the proximate cause of Weldon's injuries. The burden shifted to plaintiff to rebut both prongs (*see Rosenthal v Alexander*, 180 A D3d 826, 827 [2d Dept 2020] ["Where a defendant physician makes a prima facie showing on both elements,

‘the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element’”).

In opposition, plaintiffs submitted the affirmation of a board-certified physician specializing in emergency medicine and licensed to practice in the State of Massachusetts.⁶ The doctor opines, to a reasonable degree of medical certainty, that Vu deviated from the standard of care by failing to perform a proper neurological exam and failing to consider a cerebellar stroke in the differential diagnosis in light of Weldon’s symptoms. In reaching such conclusions, however, the ER doctor fails to set out the standard of care that he alleges was violated. He also ignores the medical records and testimony of Vu, relying primarily upon the materially inconsistent deposition testimony of Weldon and Shereene. His conclusory affidavit based upon an unspecified standard of care is insufficient to raise an issue of fact (*Bongiovanni v Cavagnuolo*, 138 AD3d 12, 20 [2d Dept 2016]; *Snyder v Simon*, 49 AD3d 954, 956 [2d Dept 2008]).

Plaintiffs also submitted the affirmation of a board-certified physician specializing in neurology and licensed to practice in the States of New York and Connecticut. While he presents opinions regarding the appropriateness of the emergency medical care provided to Weldon, that is outside of his specialization and he lays no foundation tending to support the reliability of the opinion rendered. Those portions of the affidavit are thus insufficient to demonstrate a breach of the appropriate standard of care (*Shectman v Wilson*, 68 AD3d 848, 849, 850 [2d Dept 2009]). The neurologist further

⁶ His affidavit is notarized in MA without a certificate of conformity (CoC). That defect, in this case, is not fatal (*see Midfirst Bank v Agho*, 121 AD3d 343 [2d Dept 2014]).

fails to address Dr. Jeret's assertions that a CT scan would generally not show evidence of a cerebellar stroke until six to eight hours after the onset of symptoms and that Weldon was not a candidate for tPA due to a low NIHSS score. His assertion that a neurologist would have discovered the stroke, would have administered tPA, and would have more than likely prevented permanent brain damage and neurological deficits is conclusory and speculative and as such, cannot raise a triable factual question (*see Donnelly v St. Agnes Cathedral Sch.*, 106 AD3d 773, 774 [2013]).

After oral argument and a review of the papers, the Court finds that defendants have established their prima facie entitlement to judgment as a matter of law by submitting evidence that there were no departures from good and accepted medical standards and that if, solely for the sake of argument, there were any alleged departures, such were not the proximate cause of Weldon's injuries. In opposition, plaintiffs failed to sustain their burden to demonstrate the existence of a triable issue of fact (*see Alvarez*, 68 NY2d at 324; *Stukas*, 83 AD3d at 24). Moreover, as Shereene's claims are derivative, they cannot stand in the absence of a viable cause of action for negligence and must also be dismissed.

CONCLUSION

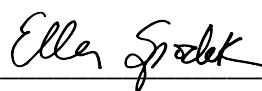
Accordingly, it is hereby

ORDERED that Vu and Brookdale's motion for summary judgment, dismissing the plaintiffs' complaint is granted and the action is dismissed.

The court, having considered the plaintiff's remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision, order and judgment of the Court.

ENTER:

A handwritten signature in black ink, appearing to read "Ellen Spadek", is written above a horizontal line.

J.S.C.