

**Kielb v Bascara**

2020 NY Slip Op 32826(U)

August 28, 2020

Supreme Court, Kings County

Docket Number: 519967/2018

Judge: Marsha L. Steinhardt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of August 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,  
Justice

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KAMIL KIELB, as Administrator of the Goods, Chattels, and Credits of LESZEK KIELB, deceased,

Plaintiffs,

**DECISION AND ORDER**  
Index No. 519967/2018

-against-

BAYANI BASCARA, M.D. and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_

Affirmation in Opposition \_\_\_\_\_

\_\_\_\_\_ 2 \_\_\_\_\_

Reply \_\_\_\_\_

\_\_\_\_\_ 3 \_\_\_\_\_

This is a motion, brought on by Defendants, for an Order granting Summary Judgment in their favor and dismissing Plaintiff’s complaint with prejudice. Plaintiff opposes the application.

This is an action sounding in medical malpractice. After fulfilling the Notice of Claim, condition precedent, requirement (February 6, 2018), the action was commenced on October 4<sup>th</sup> of the same year. Issue was joined, as to both Defendants, on December 6, 2018.

Mr. Kielb, a 61-year-old male, was brought to Coney Island Hospital, via ambulance at approximately 4:51 p.m. on February 2, 2018, complaining of severe back pain, radiating to his

groin and right leg. Vital signs, taken within a half hour of arrival, were all within normal limits. He was assigned an Emergency Department room at 5:22 p.m. and his acuity was listed as “Less Urgent”. At approximately 7:47 p.m., Mr. Kielb was seen by attending physician Dr. Bascara. Upon physical examination, Mr. Kielb’s cardiovascular and respiratory systems were noted to be normal. The only positive finding was a tenderness of Mr. Kiels’s lower back upon palpation. An x-ray of Mr. Kielb’s lower back revealed degenerative disc disease and arthritic changes. He was prescribed a pain killer (Toradol) and a muscle relaxer (Robaxin) and discharged from the Emergency Department at 11:12 p.m., with discharge instructions written in English and in Polish. For an unexplained reason, Mr. Kielb remained in the Emergency Department waiting room until the next day (February 3<sup>rd</sup>) when, at approximately 8:27 a.m., he was observed and appeared to be pale, poorly responsive and diaphoretic. He was brought inside, examined and transferred *post haste* to the Critical Care Zone. Heroic measures were taken to resuscitate and save him, but, sadly, he was pronounced dead at 9:46 a.m.

It is Plaintiff’s contention that the Defendants departed from acceptable medical standards by, among other things, being negligent in their supervision, monitoring, and management of the decedent; by allowing and permitting the decedent to suffer prolonged, progressively worsening myocardial infarction; in ignoring, overlooking and/or disregarding the decedent's presenting signs, symptoms and complaints, in failing to appreciate the significance and consequences of the symptoms presented by the decedent . . .; in failing to perform blood work and/or repeated electrocardiogram testing in view of the decedent's documented blood pressure of 90/59 and a pulse rate of 100; in negligently discharging the decedent from the hospital on February 2, 2018; *et. al.* In addition, Plaintiff alleges that Mr. Kielb was not offered the services of a Polish interpreter. Defendants, on the other hand, contend that Dr. Bascara and

the Hospital acted within acceptable medical standards, based on the facts and circumstances existing at the time of Mr. Kielb's visit to the Emergency Department.

In support of their motion, Defendants submit the affirmation of Dr. Mark Silberman, a physician board certified in Emergency Medicine, Critical Care Medicine, Pulmonary Medicine and Internal Medicine. In reviewing the medical records, Dr. Silberman notes that at no time did Mr. Kielb complain of chest pain, shortness of breath, sweating, or other signs that would be associated with cardiac distress. All of Mr. Kielb's complaints related to low back and leg pain. Nothing that transpired between Mr. Kielb and the medical staff (normal vital signs, patient's complaints) would call for a cardiac work-up. That the musculoskeletal complaints were appropriately and adequately dealt with – x-rays confirming low back symptoms, pain killer and muscle relaxer medication. That in his deposition Dr. Bascara, the Emergency Department physician who treated Mr. Kielb, stated had no difficulty understanding the decedent, and that communications went smoothly. That Mr. Kielb was discharged sometime after eleven o'clock in the evening; that upon discharge he was no longer a patient and that, for some unknown reason, he chose to spend the night in the waiting room of the Emergency Department. He was observed by hospital personnel during the night and found to be fine. He did not seek further medical assistance. When, in the morning, he was discovered to be in distress he was rushed back into the ED where a work-up and heroic measures were performed. The expert further opines that Dr. Bascara visualized Mr. Kielb's scar from prior cardiac surgery and was therefore aware of a prior coronary condition. Poor documentation does not translate to poor medical care and, based on Mr. Kielb's presenting systems, would not have affected the diagnosis, care and treatment he received. It is Dr. Silberman's opinion that Dr. Bascara and Coney Island Hospital

(New York Health and Hospitals Corporation) did not depart from acceptable standards of medical care.

In opposition, Plaintiff submits a redacted affirmation from a physician board certified in Emergency Medicine. The doctor sets forth a lengthy list of medical departures, including, but not limited to, inappropriately triaging Mr. Kielb to fast track; in failing to utilize a Polish interpreter; in failing to elicit a history of cardiac disease and cardiac surgery; in failing to properly conduct and record a physical examination which would have revealed prior cardiac surgery; in failing to work up the decedent's tachycardia and low blood pressure; in failing to consider that the decedent's back pain was a symptom of an inferior wall myocardial infarction (heart attack); in failing to order an EKG, troponins, and cardiac enzymes; in inappropriately and prematurely discharging the decedent; and in neglecting the decedent while he remained in the emergency room waiting room for an eight hour period. The expert does not explain nor elaborate as to how the alleged departures contributed to Mr. Kielb's demise. He does not indicate what a cardiac work-up would have indicated, nor does he explain how, had same been done, it would have prevented the heart attack suffered by Mr. Kielb. There is no indication that a Polish interpreter on the scene would have made communication between Mr. Kielb and hospital personnel, including defendant doctor, clearer. Nor does the expert indicate how Mr. Kielb was "ignored" during his "stay" in the waiting room. Although observed during the night by hospital personnel he was no longer a patient. It is undisputed that he was brought back to the ER when he was discovered to be in distress.

In reply, Dr. Silberman refutes and explains each of Plaintiff's expert's opinions. In particular, he clearly states that Mr. Kielb's heart rate and blood pressure were within normal limits during the period of time that Mr. Keilb was under Defendants care. Nothing contained in

Mr. Kielb's vital signs would indicate to a reasonable physician that a cardiac workup was needed. His complaint of back pain was confirmed by radiographic studies (x-rays) and clinical exam (palpation). He was treated appropriately based on the signs and symptoms he presented with and discharged at the conclusion of the treatment.

“[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” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact” (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324). “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” (*Alvarez v. Prospect Hosp.*, 68 NY2d at 325).

This Court finds that the Defendant has met its burden of making out a *prima facie* case, showing entitlement to judgment as a matter of law. The expert affirmation submitted by Plaintiff in opposition to Defendants' request for relief does not fulfill the requirements necessary to defeat the motion. It is this Court's opinion that the expert affirmation submitted by Plaintiff is vague, conclusory and fails to raise a triable issue of fact. “[E]xpert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact” (*Feng Xie v. New York City Health and Hospitals Corporation*, 2020 N.Y. Slip Op. 00403 [2d Dept 2020], quoting *Lowe v. Japal*, 170 AD3d 701, 702 [2d Dept 2018]). Plaintiff's expert was speculative and conclusory (*see Feng Xie v. New York City Health and*

*Hospitals Corporation*, 2020 N.Y. Slip Op. 00403). In addition, Plaintiff's expert affirmation did not adequately controvert the opinion asserted by Defendant's expert (*see id.*).

Accordingly, Defendants' motion is granted in its entirety and the above action is dismissed.

This constitutes the opinion, decision and order of this Court.

ENTER,



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HON. MARSHA L. STEINHARDT  
J.S.C.