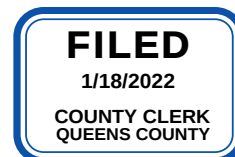


Vaughan-Gooding v St. Francis Hosp.
2020 NY Slip Op 35435(U)
December 9, 2020
Supreme Court, Queens County
Docket Number: Index No. 710373 2017
Judge: Peter J. O'Donoghue
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE
JusticeIA Part MD

MICHELLE VAUGHAN-GOODING, as Administratrix
of the Estate of
CECELIA VAUGHAN, and HARCOURT VAUGHAN

Index
Number 710373 2017

-against-

Motion
Date October 7, 2020

ST. FRANCIS HOSPITAL, AASHA GOPAL,
M.D., GEORGE PETROSSIAN, M.D., MARIA
FEDOSEEVA, M.D., DOINA GLODAN, M.D.,
JONATHAN HENESCH, M.D., NASSAU CHEST
PHYSICIANS, P.C. and ALEXANDER
NOVOGRUDSKY, M.D.,
Defendants.

Motion Seq. No. 7 and 8

_____ X

The following papers read on this motion by defendant George Petrossian M.D. for an order granting summary judgment dismissing the complaint with prejudice. Defendants Jonathan Henesch, M.D. and Nassau Chest Physicians, P.C., (Nassau) separately move for summary judgment dismissing this action with prejudice as to them; directing the Clerk of the Court to enter Judgment on behalf of these defendants; and deleting the name of these defendants from the caption of the action.

Papers
Numbered

Motion Sequence No. 7

Notice of Motion-Affirmations--Exhibits.....	EF 225-248
Opposing Affirmations- Affidavit- Exhibits	EF 309-327
Reply Affirmation-Exhibit.....	EF 350-351

Motion Sequence No. 8

Notice of Motion-Affirmations-Exhibits-Affidavit of Service..... EF 250-298

Opposing Affirmations-Exhibits-Affidavit of Service..... EF 328-346

Reply Affirmation-Exhibit..... EF 347-349

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and order and are determined as follows:

On October 27, 2015, plaintiff's decedent Cecelia Vaughan, then 79-year-old, experienced leg swelling and shortness of breath on exertion. She had a history of coronary artery disease, hypertension, hyperlipidemia and diabetes, and was seen by her primary care physician earlier that day. An EKG showed a new onset of atrial fibrillation and she was sent to the hospital. At St. Francis Hospital, an EKG showed atrial fibrillation with a rapid ventricular response; a chest x-ray showed bilateral pulmonary vascular congestion (fluid in the lung). The emergency room physician discussed the case with the hospitalist, Dr. Fedoseeva, who admitted Mrs. Vaughan to the inpatient unit. She was also placed on Heparin, Cardizem, and Lasix to treat the problems caused by atrial fibrillation.

On October 29, 2015, Cecelia Vaughan the patient underwent a cardiac catheterization performed by Dr. Petrossian, her primary cardiologist, who is also an invasive cardiologist. A physician's assistant noted that day that the family reported that the decedent had dysphagia with solid foods. She was evaluated by gastroenterologist Dr. Novogrudsky and she was admitted to the hospital. The decedent was scheduled to have Transesophageal Echocardiography (TEE) to evaluate her heart's structure and function but required an upper endoscopy first to evaluate for any possible strictures or other problems with the esophagus.

On October 30, 2015, at 10:30 a.m. Cecelia Vaughan underwent the upper endoscopy performed by Dr. Novogrudsky. The esophagus appeared normal but a small gastric ulcer was found in the gastric antrum. Dr. Novogrudsky cleared the patient for the TEE. The TEE was done at 5 p.m. that night by Dr. Gopal, a cardiologist. Later that night, Mrs. Vaughan developed upper chest pain and pressure and was coughing up blood. Dr. Petrossian testified at his deposition that he received a call from a nurse on October 30, 2015, between 10:00 p.m. and 11:00 p.m.; that tests has been ordered, including a further test of her PTT level, to assess the degree of anticoagulant effect of Heparin. He requested that he be notified in the event of changes in her condition, if the tests results showed elevated PTT levels, or if she continued to cough up blood. He stated that he continued the Heparin at this time due to the risk of stroke.

The tests performed late that night revealed that Cecelia's PTT level was somewhat elevated beyond a therapeutic level, and according to her daughter Heather, her mother

continuously coughed up blood through the night. Dr. Petrossian, however, was not called during the night, and was only notified on the morning of October 31, 2015 of a change in the patient's condition. He testified that when he arrived in the ICU, Cecelia Vaughan was already in cardiac arrest and that he did not participate in the code called by Dr. Henesch.

A nursing note states that at 7:55 a.m. on the morning of October 31, 2015, indicates that Cecelia Vaughan again was coughing up bright red blood and Heparin had been stopped by Dr. Petrossian. The nurse also called the GI specialist Dr. Novogrudsky who agreed with the plan to stop Heparin. Mrs. Vaughan then developed respiratory distress and was transferred to the ICU and a critical care consult was called. Dr. Henesch was the critical care physician who saw Ms. Vaughan on the morning of October 31, 2015, at approximately 8:30 a.m. Dr. Henesch discussed with Heather Vaughan the need for her mother to be intubated with an endotracheal tube (ETT) so that she could be connected to a mechanical ventilator to support her breathing.

Dr. Henesch testified at his deposition that on his first attempt to intubate Cecelia Vaughan, he intubated the esophagus in error, noting that "bright red blood immediately rushed through the ETT" and that her abdomen had become distended. He stated that he removed the ETT and ambu-bagged the patient to 100% saturation, and then intubated her in the trachea. After intubation, Mrs. Vaughan went into cardiac arrest and ACLS protocol was initiated with Dr. Henesch as the code leader. Mrs. Vaughan regained consciousness and a pulse. Dr. Gecelter, a surgical consult then saw her and recommended an emergency exploratory laparotomy due to the abdominal distention and concern for a perforated viscus. The surgery was performed that day by Dr. Gecelter, along with PEG placement with the assistance of gastroenterologist Dr. Novogrudsky. Dr. Gecelter reported that during this procedure he found a breach of the right piriform fossa (a perforation of the mucosa/pharyngeal). Mrs. Vaughan never regained consciousness after the surgery and remained on a ventilator until her death on November 22, 2015, after her family requested she be removed from the ventilator and ETT.

Plaintiffs alleges four causes of action against all defendants for medical malpractice, lack of informed consent, wrongful death, and loss of services and consortium. The fifth cause of action is asserted only as to defendant St. Francis Hospital. Issue has been joined as to all defendants. The complaint has been dismissed against defendants Novogrudsky, Gopal and Glodan pursuant to separate orders each dated October 19, 2020.

Defendants Petrossian and Henesch each separately move for summary judgment dismissing the complaint against them. This court notes that the reply affirmation submitted on behalf of defendant Petrossian was e-filed under motion sequence number 8. However, plaintiff's counsel e-filed a letter to the court with respect to said reply affirmation under

motion sequence number 7, said reply affirmation will be considered as if properly e-filed under said sequence number as there has been no prejudice to the plaintiff.

A defendant moving for summary judgment in a medical malpractice action “ ‘has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby’ ” (*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 550 [2d Dept 2018], quoting *Leavy v Merriam*, 133 AD3d 636, 637 [2d Dept 2015]). Where a defendant meets its prima facie burden as to both the departure element and the proximate cause element, “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” (*Stukas v Streiter*, 83 AD3d 18, [2d Dept 201]; see *Roizman v Stomer*, 185 AD3d 978, 980 [2d Dept 2020]; *Simpson v Edghill*, 169 AD3d 737 738 [2d Dept 2019]; *Swanson v Raju*, 95 AD3d 1105, 1107 [2d Dept 2012]). In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on “specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; see *Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287, 1290 [2d Dept 2014]).

Defendant George Petrossian M.D. (Motion Sequence Number 7)

Defendant George Petrossian M.D., a cardiologist board certified in medicine, cardiology and interventional cardiology, has established his prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action asserted against him by submitting a detailed expert affirmation from Dr. Malcolm C. Phillips, a physician licensed to practice in New York who is board certified in internal medicine and cardiovascular disease. Dr. Phillips’s affirmation , based upon the pleadings, medical records, and deposition testimony, demonstrates that Petrossian did not depart from good and accepted medical practice in his treatment of the decedent, and that any alleged departures were not a proximate cause of the decedent’s injuries, including her death (see *Brinkley v Nassau Health Care Corp.*, 120 AD3d at 1289; *Rivers v Birnbaum*, 102 AD3d 26, 43 [2d Dept 2012]; *Lahara v Auteri*, 97 AD3d 799, 799 [2d Dept 2012]).

Plaintiffs in opposition submit a named-redacted affirmation from a physician licensed to practice in New York who is board certified in anesthesiology. Plaintiffs’ expert opines that defendant Petrossian departed from the acceptable standards of care and that his departures were a substantial cause of the decedent’s injuries. Defendant Petrossian’s counsel in his reply affirmation, among other things, raises objections to the plaintiffs’ expert affirmation on the grounds that he or she has not established that he or she is qualified to offer an opinion as to the standard of care of a cardiologist.

“While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*Samer v Desai*, 179 AD3d 860, 862-63 [2d Dept 2020], quoting *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [3d Dept 2004], [citations and internal quotation marks omitted]; see *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d 1077, 1079–1080 [2d Dept 2019]; *Galluccio v Grossman*, 161 AD3d 1049, 1052 [2d Dept 2018]). “Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered” (*Lavi v NYU Hosps. Ctr.*, 133 AD3d 830, 831 [2d Dept 2015]; see *Samer v Desai*, 179 AD3d at 862-63; *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d at 1080; *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d at 895).

Here, plaintiffs’ expert, who specializes in anesthesiology, has not indicated whether he or she had any special training or expertise in cardiology, including the administration of Heparin. Furthermore, he or she has failed to set forth how he or she was, or became, familiar with the applicable standards of care in this specialized area of practice (see *Samer v Desai*, 179 AD3d at 862-63; *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d at 1080; *Galluccio v Grossman*, 161 AD3d at 1052; *Lavi v. NYU Hosps. Ctr.*, 133 AD3d at 831). Under the circumstances presented here, as plaintiffs’ expert failed to lay the requisite foundation for his or her asserted familiarity with cardiology and the management of hemoptysis in an anticoagulated patient, who has recently undergone the cardiac procedures involved here, the affirmation of plaintiffs’ expert lacks probative value, and will not be considered.

Plaintiffs’ claim that defendant Petrossian’s expert failed to consider contradictory evidence is without merit. Although plaintiffs assert that the decedent Cecelia Vaughan experienced multiple episodes of hemoptysis overnight on October 30, 2015 and October 31, 2015, there is no evidence that Dr. Petrossian was notified of any such incidents. Dr. Petrossian testified that on October 30, 2015, he was notified by a nurse that his patient Cecelia Vaughan had an episode of bleeding from the mouth; that the bleeding was moderate; that certain tests had been ordered including a P IT to test the current level of anticoagulation; that she was stable; and that there had been no changes in her vital signs. He stated that told the nurse that he should be contacted if the bleeding persisted, if Mrs. Vaughan’s condition worsened or if the P IT results demonstrated that the heparin level was elevated. Dr. Petrossian stated that he was first was informed of a change in Cecelia Vaughan’s condition on October 31, 2015, sometime after 6:00 a.m., at which time he ordered the heparin be stopped. When he arrived at the hospital, Mrs. Vaughan had been moved to the ICU, a code had been called, and he did not assist in the code.

Plaintiffs' assertion that defendant's expert failed to address multiple episodes of hemoptysis (bleeding from the mouth) that was "confirmed" by Cecelia Vaughan's daughter Heather Vaughan and Dr. Glodan, is without merit. Heather testified that when she and her mother arrived at St. Francis Hospital on the evening of October 27, 2015, she saw Dr. Petrossian in the hallway and briefly spoke with him, and that the next conversation she had with Putrescine was at a palliative care meeting on November 12, 2015. Ms. Vaughan stated that on October 30, 2015, sometime after her mother underwent a TEE and returned to her room she coughed up a clot of blood and continuously coughed up blood the rest of that night and into the early hours of October 31; that she informed the nurse on an hourly basis that her mother was coughing up blood; that the nurse made a call to Dr. Petrossian; that the nurse checked her mother's condition three times during the night/early morning; and at approximately 4:00 a.m. her mother was transferred to the CCU and that the Heparin was stopped. The medical records do not contain multiple episodes of hemoptysis on October 30, 2015 and into the early hours of October 31, 2015, and differs with Heather's testimony as to the time the Heparin was stopped and her mother was transferred to the ICU on October 31, 2015. A nurse's note for 7:55 a.m. on October 31, 2015, that Cecelia Vaughan was again coughing up bright red blood and that heparin was stopped by Dr. Petrossian. However, any conflict between Ms. Vaughan's testimony and the medical records is insufficient to warrant a denial of defendant Petrossian's motion for summary judgment as there is no evidence that Petrossian was made aware of multiple episodes of hemoptysis throughout the night of October 30, 2015 and into the early hours of October 31, 2015.

Contrary to plaintiffs' assertion, Dr. Glodan's deposition testimony does not "confirm" Heather Vaughan's testimony that her mother had multiple episodes of hemoptysis throughout the night of October 30, 2015 and into the early hours of October 31, 2015. Dr. Glodan, a hospitalist, testified that she worked from 8:00 a.m. to 4:00 p.m.; that she did not document or observe several episodes of hemoptysis; that she did not have any knowledge as to how many episodes of hemoptysis the patient had (Tr 111); and that with respect to Dr. Henesch's note of October 31, 2015, it was not her understanding that hemoptysis continued through the night (Tr 101). She was also not present when plaintiff's decedent went into cardiac arrest in the ICU following intubation.

Accordingly, as plaintiffs have failed to raise a triable issue of fact, that branch of defendant Petrossian's motion which seeks summary judgment dismissing the claim for medical malpractice is granted. That branch of defendant Petrossian's motion which seeks to dismiss the cause of action for wrongful death based upon medical malpractice is granted.

That branch of Petrossian's motion which seeks to dismiss the claim of lack of informed consent is granted, as plaintiffs' do not oppose dismissal of this cause of action. Furthermore, to the extent that plaintiffs assert that Petrossian failed to electively intubate

plaintiff's decedent, lack of informed consent does not apply to a claim that a defendant failed to undertake a procedure or postponed a procedure (*see Samer v Desai*, 179 AD3d at 864 [2d Dept 2020]; *Ellis v Eng*, 70 AD3d 887, 892 [2d Dept 2010]; *Martin v Hudson Valley Assoc.*, 13 AD3d 419, 420 [2d Dept 2004]; *Hecht v Kaplan*, 221 AD2d 100, 103–104 [2d Dept 1996]).

That branch of defendant Petrossian's motion which seeks to dismiss the derivative causes of action for loss of services and loss of consortium is granted.

In view of the foregoing, the complaint against defendant George Petrossian, M.D., is dismissed in its entirety with prejudice.

Jonathan Henesch M.D. and Nassau (Motion sequence No. 8)

On October 31, 2015, defendant Jonathan Henesch, M.D., was an employee of Nassau. At the time he treated the decedent in the hospital's ICU, he was a critical care physician (intensivist) and was Board Certified in medicine. Defendants Henesch and Nassau have established their prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action asserted against them by submitting a detailed expert affirmation from Dr. Steve H. Salzman, a physician licensed to practice in New York who is board certified as a specialist in pulmonary diseases, critical care medicine and sleep medicine as well as internal medicine. Dr. Salzman's affirmation, based upon the pleadings, medical records, and deposition testimony, demonstrates that Henesch and Nassau did not depart from good and accepted medical practice in their treatment of the decedent, and that any alleged departures were not a proximate cause of the decedent's injuries, including her death (*see Brinkley v Nassau Health Care Corp.*, 120 AD3d at 1289; *Rivers v Birnbaum*, 102 AD3d 26, 43 [2d Dept 2012]; *Lahara v Auteri*, 97 AD3d 799, 799 [2d Dept 2012]).

Plaintiffs in opposition submit a named-redacted affirmation from a physician licensed to practice in New York who is board certified in anesthesiology. Plaintiffs' expert opines that defendant Henesch departed from the acceptable standards of care and that his departures were a substantial cause of the decedent's injuries. Defendant Henesch's counsel in his reply affirmation, among other things, raises objections to the plaintiffs' expert affirmation on the grounds that he or she has not established that he or she is qualified to offer an opinion as to the standard of care of a critical care specialist, or that he or she has even performed intubations.

“While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it

can be assumed that the opinion rendered is reliable” (*Samer v Desai*, 179 AD3d 860, 862-63 [2d Dept 2020], quoting *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [3d Dept 2004], [citations and internal quotation marks omitted]; see *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d 1077, 1079–1080 [2d Dept 2019]; *Galluccio v Grossman*, 161 AD3d 1049, 1052 [2d Dept 2018]). “Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered” (*Lavi v NYU Hosps. Ctr.*, 133 AD3d 830, 831 [2d Dept 2015]; see *Samer v Desai*, 179 AD3d at 862-63; *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d at 1080; *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d at 895).

Here, plaintiffs’ expert, who specializes in anesthesiology, has not indicated whether he or she had any special training or expertise in critical care. Furthermore, he or she has failed to set forth how he or she was, or became, familiar with the applicable standards of care in this specialized area of practice (see *Samer v Desai*, 179 AD3d at 862-63; *Noble v Kingsbrook Jewish Med. Ctr.*, 168 AD3d at 1080; *Galluccio v Grossman*, 161 AD3d at 1052; *Lavi v NYU Hosps. Ctr.*, 133 AD3d at 831). In addition, although plaintiffs’ expert is an anesthesiologist, he or she has failed to state whether he or she had performed intubations. Under the circumstances presented here, as plaintiffs’ expert failed to lay the requisite foundation for his or her asserted familiarity with critical care and intubation, the affirmation of plaintiffs’ expert lacks probative value, and will not be considered.

This court finds that even if the affirmation of plaintiffs’ expert had a proper foundation, it contains statements that are inaccurate at best, and are not supported by the evidence, including the medical records, and therefore is insufficient to raise a triable issue of fact.

The court further finds that plaintiffs’ counsel’s statements and speculations pertaining to a code sheet are insufficient to raise a triable issue of fact. Dr. Henesch testified that he did not create a code sheet and this is generally created by a nurse. There is no evidence that Dr. Henesch has any knowledge as to the actual existence of a code sheet. Plaintiffs demanded that defendant St. Francis Hospital produce the code sheet and counsel for the co-defendants, in letter dated February 19, 2020, stated that no code sheet exists for the code involving Cecelia Vaughan. It is noted that plaintiffs have not moved for an order compelling discovery or for spoliation with respect to the code sheet.

Accordingly, that branch of defendants Henesch and Nassau’s motion which seeks summary judgment dismissing the claim for medical malpractice is granted. That branch of said defendants’ motion which seeks to dismiss the cause of action for wrongful death based upon medical malpractice is granted.

That branch of defendants Henesch and Nassau's motion which seeks to dismiss the claim of lack of informed consent, is granted, as plaintiffs' do not oppose dismissal of this cause of action. That branch of defendants Henesch and Nassau's motion which seeks to dismiss the derivative causes of action for loss of services and loss of consortium is granted.

That branch of the motion which seeks to delete defendants Henesch and Nassau from the caption is granted, and the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

MICHELLE VAUGHAN-GOODING, as Administratrix
of the Estate of CECELIA VAUGHAN and HARCOURT
VAUGHAN,

Plaintiffs,

-against

Index Number 710373 2017

ST. FRANCIS HOSPITAL,, and
MARIA FEDOSEEVA, M.D.

Defendants.

In view of the foregoing, the complaint against defendants Henesch and Nassau is dismissed in its entirety with prejudice. The clerk of the Court shall enter judgment accordingly.

Dated: December 9, 2020

.....
J.S.C.

