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| Lupton v New York-Presbyt. Weill Cornell Med. Ctr. |
| 2021 NY Slip Op 30597(U) |
| January 29, 2021 |
| Supreme Court, Queens County |
| Docket Number: 706162/2018 |
| Judge: Peter J. O'Donoghue |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

1/29/2021
10:50 AM

Present: HONORABLE PETER J. O'DONOGHUE
Justice

IA Part MD

COUNTY CLERK
QUEENS COUNTY

VIDALLA LUPTON, as Administrator of the Estate of,
ROBERT LUPTON, and VIDALLA LUPTON Individually

Index
Number 706162 2018

-v-

Motion
Date November 18, 2020

NEW YORK-PRESBYTERIAN WEILL CORNELL
MEDICAL CENTER, et. al

Motion Seq. No. 3

_____ X

The following papers read on this motion by defendants New York and Presbyterian Hospital s/h/a New York-Presbyterian Weill Cornell Medical Center (hospital) Leonard Girardi, M.D., Sheida Tabaie, M.D., Jeffrey L. Port, M.D. and David Wan, M.D., for an order dismissing the complaint with prejudice; directing the entry of judgment dismissing the complaint with prejudice; and severing the moving defendants from this action and deleting their names from the caption.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion-Affirmations--Exhibits..... | EF 38-60 |
| Opposing Affirmation-Affidavits-Exhibits | EF 63-66 |
| Reply Affirmation..... | EF 68 |

Upon the foregoing papers the motions is determined as follows:

That branch of defendants' motion which seeks summary judgment dismissing the complaint with prejudice, is denied as to defendant Leonard Girardi, M.D.. Triable issues of fact exist as whether Dr. Girardi departed from the acceptable standards of care, including but not limited to the failure to document his findings on admission, the failure to write or countersign any notes in the medical records pertaining to the history, examination and care of the plaintiff's decedent Robert Lupton, and the failure to formulate a plan of care, including delaying surgery to repair and

replacement of the aorta, and whether the alleged departures were the proximate cause of his injuries, including his death.

That branch of the motion which seeks summary judgment dismissing the complaint with prejudice as to defendant New York and Presbyterian Hospital s/h/a New York-Presbyterian Weill Cornell Medical Center is denied. As Dr. Girardi is an employee of the hospital it may be vicariously liable for his alleged malpractice. Furthermore, a triable issue of fact exists as to whether the hospital negligently failed to enforce policies to ensure that the Cardiothoracic Surgery Service and Dr. Girardi, the admitting service, documented the course and plan during the patient's hospital stay, and whether such failure was a proximate cause of Mr. Lupton's injuries, including his death.

That branch of the motion which seeks summary judgment dismissing plaintiff's claim for lack of informed consent is granted. It is noted that the complaint does not allege a cause of action for lack of informed consent. The bill of particulars alleges a failure "to give proper informed consent including the risks of surgery vs not performing surgery of the mycotic aneurysm of the aortic arch". A claim of lack of informed consent does not apply to a claim that defendant Girardi 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]) or where there is no "unconsented-to affirmative violation of the plaintiff's physical integrity" is alleged (*Hecht v Kaplan*, 221 AD2d at 103; *see Ellis v Eng*, 70 AD3d at 892; *Martin v Hudson Valley Assocs.*, 13 AD3d at 420). Plaintiff's expert in opposition has failed to adequately address this issue.

That branch of the motion which seeks summary judgment dismissing the complaint with prejudice is granted as to defendants Sheida Tabaie, M.D., Jeffrey L. Port, M.D. and David Wan, M.D. Said defendants have established their prima facie entitlement to summary judgment through the submission of the pleadings, Bill of Particulars, medical records, relevant deposition testimony and their expert's affirmation. Plaintiffs' expert in opposition does not address the claims against these defendants.

That branch of the motion which seeks to sever the action against defendants' Tabaie, Port and Wan and to delete their names from the caption is granted and the new caption shall read as follows:

(S E E N E X T P A G E)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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VIDALLA LUPTON, as Administrator of the Estate of,
ROBERT LUPTON, and VIDALLA LUPTON Individually,

Plaintiffs,

Index No. 706162 2010

-against

NEW YORK-PRESBYTERIAN WEILL CORNELL
MEDICAL CENTER, and LEONARD GIRARDI, M.D

Defendants.

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Defendants’ further seek summary judgment dismissing the second cause of action for wrongful death and the third cause of action for loss of services. As the moving party defendants are required to show their entitlement to summary judgment as a matter of law. As a general rule, a party meets this burden by affirmatively demonstrating the merits of its claim or defense, not by pointing to gaps in the opponent’s proof (*see Cox v Consol. Edison, Inc.*, 125 AD3d 923, 924 [2d Dept 2015]; *L & D Serv. Sta., Inc. v Utica First Ins. Co.*, 103 AD3d 782, 783 [2d Dept 2013]; *Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]).

In an action to recover damages for wrongful death, the measure of damages includes “fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought” (EPTL 5–4.3[a]). “[T]he essence of the cause of action for wrongful death in this State is that the plaintiff’s reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent’s death” (*Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]). Loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death, are injuries for which damages may be recovered” (*id.* at 668; *see also Johnson v Richmond Univ. Med. Ctr.*, 101 AD3d 1087, 1089 [2d Dept 2012]).

Plaintiff states in her pleadings that she and the decedent were married on February 23,1982, and testified that they resided in the same apartment, together with their daughter

Kimberly and her parents-in-laws, for over 20 years. Plaintiff and her husband were not living together for a few months prior to his death. However, defendants' assertion that there were no plans to reconcile is not supported by the evidence presented herein. Plaintiff testified that she visited her husband every day at the defendant hospital; that on September 8, 2017, in their presence of their daughter, her husband asked her to move back to their apartment and that she agreed to do so upon his discharge; and that she intended to care for him and put aside their prior disagreement which led to the temporary separation (Tr 101-103). Plaintiff also testified that she borrowed money from her sister-in-law to pay for her husband's funeral expenses and later repaid her from the proceeds of a life insurance policy.

Plaintiff further stated that their adult daughter Kimberly is legally blind and suffers from a seizure disorder and has not been able to work for a number of years. She stated that the decedent regularly gave Kimberly money for shopping and paid the daughter's credit card bill. Contrary to defendants' assertions, Kimberly's status as an adult does not, in itself, preclude recovery on her behalf (see e.g. . *Gonzalez v New York City Hous. Auth.*, 77 NY2d at 668-669; *Rose v Conte*, 107 AD3d 481, 484 [1st Dept 2013]; *Zygmunt v Berkowitz*, 301 AD2d 593, [2d Dept 2003]).


However, as there can be no recovery for loss of consortium in a wrongful death action, plaintiff may not seek to recover damages for loss of "comfort.... guidance...counsel and spousal companionship" as alleged in the complaint (see, *Gonzalez v New York City Hous. Auth.*, 77 NY2d at 667-668; *Liff v Schildkrout*, 49 NY2d 622 [1980]; *Settembrini v St. Joseph's Med. Ctr.*, 167 AD2d 530, 532 [2d Dept 1990]). Accordingly, her claims in this regard are dismissed. However, to the extent that plaintiff seeks to recover damages for pecuniary loss, defendants' request to dismiss the remainder of the second cause of action for wrongful death is denied.

The third cause of action for loss of services seeks to recover damages for loss of services, society and consortium. Loss of consortium is a claim specific to married persons. "Consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception ..., not upon some guarantee that the martial partners are free of any preexisting latent injuries ..." (*Anderson v Eli Lilly & Co.*, 79 NY2d 797, 798 [1991] [citations omitted]). Loss of consortium includes not only loss of support or services, but elements of love, companionship, affection, society, sexual relations, solace and more (*Millington v Southeastern Elevator Co.*, 22 NY2d 498, 502 [1968]). An action for loss of consortium lies for the period prior to a spouse's death (*Maidman v Stagg*, 82 vAD2d 299 [2d Dept 1981]; *Hertz v Curry Chevrolet Sales & Servs.*, 46 AD2d 800 [2d Dept 1974]; *Osborn v Kelley*, 61 AD2d 367, 370 [3d Dept 1978]).

Defendants' have not established, prima facie, that they are entitled to summary judgment dismissing the third cause of action for loss of services. It is undisputed that the

plaintiff and the decedent were married at the time of the alleged malpractice and his death. Plaintiff testified that when she visited her husband in the hospital she assisted him with his personal hygiene; that she intended to care for him when he was discharged to their home; and that she had also assisted him during a prior illness. Contrary to defendants' assertions, the nature and duration of plaintiff's marital relationship are merely factors to be considered by the trier of fact in determining the amount, if any, to be awarded on this derivative claim (see e.g., *Lowe v State*, 194 AD2d 898 [3d Dept 1993]; *Karagiannis v New York State Thruway Authority*, 187 AD2d 1009 [4th Dept 1992]). Plaintiff's loss of services claim, however, is limited to the period of his hospitalization until the date of his death.

Dated: January 29, 2021


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J.S.C.

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