

Estate of Morchy v Brisson
2021 NY Slip Op 30855(U)
March 5, 2021
Supreme Court, New York County
Docket Number: 805298/2017
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

**ESTATE OF STEVEN R. MORCHY
BRAD BAKER, EXECUTOR,**

**INDEX NO. 805298/2017
MOTION DATE
MOTION SEQ. NO. 3**

Plaintiff(s),

- against-

ORDER

**PAUL M. BRISSON, MD
NEW YORK PRESBYTERIAN/LOWER
MANHATTAN HOSPITAL, FARZAN FILSOUFI,
M.D., MOUNT SINAI HOSPITAL,**

Defendants.

The following papers, numbered 1 to ____ were read on this motion for/to

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Answer — Affidavits — Exhibits _____
- Replying Affidavits

PAPERS NUMBERED

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Cross-Motion: Yes X No

Defendant Paul M. Brisson, MD (“Dr. Brisson”), moves to dismiss the Complaint pursuant to CPLR 3211(a)(1). Specifically, Dr. Brisson contends that there is documentary evidence that disproves Plaintiff’s cause of action against him and therefore the Complaint should be dismissed as to him. Plaintiff opposes.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

“[T]o succeed on an action to recover damages for wrongful death, the plaintiff must prove the following elements: (1) the death of a human being born

alive; (2) a wrongful act, neglect or default of the defendant by which the decedent's death was caused, provided the defendant would have been liable to the deceased had death not ensued; (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent; and (4) the appointment of a personal representative of the decedent.” (*Hubler v Lefland*, 2012 N.Y. Slip Op. 30850[U] [N.Y. Sup Ct 2012]).

Plaintiff alleges a wrongful death cause of action against Dr. Brisson. The Complaint alleges that Dr. Brisson was negligent in his performance of spinal fusion surgery on Decedent on December 23, 2014, at New York Presbyterian/Lower Manhattan Hospital, and in the subsequent postoperative care and treatment rendered to the Decedent. Plaintiff alleges that as a result of the malpractice, Decedent suffered the onset of Methicillin Sensitive Staphylococcus Aureus and died.

As the purported documentary evidence, Dr. Brisson submits records from the Chief Medical Examiner of the City of New York. Specifically, Dr. Brisson submits a certified copy of the Report of Autopsy for Decedent dated August 13, 2015. (Exhibit H). The Report lists as “Final Diagnoses” the following:

- I. ASPHYXIA BY ASPIRATION OF FOOD BOLUS (SEE CASE NOTES, INVESTIGATION REPORT, AND AMBULANCE CALL REPORT).
 - a. SEE ALSO TOXICOLOGY REPORT
 - b. SEE ALSO MICROSCOPIC REPORT.
- II. REMOTE SPINAL HARDWARE PLACEMENT FOR TREATMENT OF ANTIRETROVIRAL DRUG-RELATED BONE DEGENERATION (DATE UNKNOWN; SEE CASE NOTES).
 - A. SYSTEMIC STAPH INFECTION (ANAMNESTIC; SEE CASE NOTES)
 - 1. AORTIC VALVE REPLACEMENT FOR TREATMENT OF ENDOCARDITIS (03/21/2015).
 - a. RIGHT MIDDLE CEREBRAL ARTERY STROKE.
 - b. PICC LINE INFECTION (ANAMNESTIC; SEE CASE NOTES).
 - c. RENAL INFARCT.
 - d. SPLENIC AND PULMONARY ABSCESSSES.
 - e. PERICARDIAL AND RIGHT PLEURAL ADHSIONS.
- III. HYPERTENSIVE CARDIOVASCULAR DISEASE.
 - A. CARDIAC HYPERTROPHY (410 GM).

- B. SEE ALSO CARDIAC PATHOLOGY REPORT.
- C. RENAL ARTERIOLAR SCLEROSIS.
- IV. HEPATIC FIBROSIS (2120 GM).
- V. SCROTAL LIPOSARCOMA.

The cause of death listed is “Asphyxia by Aspiration of Food Bolus.” The report lists as “other significant contributors” the following: “STROKE FOLLOWING AORTIC VALVE REPLACEMENT FOR TREATMENT OF ENDOCARDITIS DUE TO STAPHYLOCOCCAL INFECTION.” As for the “manner of the death,” the Report states, “ACCIDENT (SEE ABOVE).”

Dr. Brisson also provides: (1) The Forensic Toxicology Request Form which describes “57 year old man choked on food” under the case details; and (2) the NYC Office of Chief Medical Examiner Investigation Report which states under “Case Synopsis” that on August 12, 2015 Decedent “became unresponsive today at home after choking on pizza. 911 was called EMS/NYPD responded and EMS began CPR/ACLS protocol. After no response, EMS shield #6056 pronounced the decedent dead at 1651 hrs, August 12, 2015.” The Investigation Report also describes the following under “Subjective Findings:”

The decedent, according to his domestic partner, has been in and out of the hospital for the past 4months suffering from severe arthritic back pain due to lumbar disc disease and vertebral spondylolisthesis. The decedent underwent corrective surgery in March 2015 which initially went well. Wound infection, acute intermittent parylization, sepsis and weight loss complicated the course of illness. According to the domestic partner, Brad Baker 917-863-9644 the HIV/AIDS status was fine with a CD4 count of 800, non-detectable serology. The decedent was compliant with medications and routine doctor visits. The decedent was an avid body builder and suffered from an arthritic illness prompting surgical intervention to manage severe back pain. **Today while eating pizza, the decedent began to choke on food and rapidly became hypoxic then unresponsive. The domestic partner began CPR as instructed by the 911 operator. The CPR was taken over by the EMS crew upon arrival. (Bolded section is what Dr. Brisson quotes).**

Dr. Brisson also submits the Medical Examiner's Case Notes which identify an incoming call on 8/12/15 at 17:13 and describes, "He was eating pizza with his partner & started choking." Dr. Brisson also cites to the portion of the Case Notes where Dr. Roman documents:

8/13/201 After playing 'phone tag,' I was able to speak with the decedent's partner, Brad Baker. He provided me with a tremendous amount of information. He was present when Steven Morchy was eating and had turned his back for a moment to retrieve a beverage, and when he faced the decedent again, he was blue and 'not there at all.' With the help of the 911 operator, Mr. Baker attempted the Heimlich and a mouth sweep and retrieved nothing, but told me that when EMS arrived, they pulled food out of the decedent's airway. The decedent had developed degenerative changes in his spine following long term treatment with antiretroviral medication, and had hardware placed in his neck and lower back. He then developed a staph infection from that, with a large open defect on the back that was treated with packing and allowed to heal by secondary intention, and endocarditis. For treatment of the endocarditis, the decedent received an aortic valve replacement (bovine) at Mount Sinai Hospital. While following he had a large stroke, resulting in left sided deficits and difficulty swallowing. He also developed a PICC line infection which made the deficits worse. I explained to Mr. Baker how I planned to certify the death, given this information. I also told him that I had retained the decedent's heart for examination by a cardiac pathologist ... We talked a bit about how it was a quick death and that it occurred at home in the presence of a loved one, a pet, and while eating food that the decedent was fond of, and how that was note the worst way to die. I gave my phone number to Mr. Baker, should he have questions about the case later. **(Bolded section is what Dr. Brisson quotes).**

Plaintiff argues that the Report of Autopsy "is a summary medical record containing hearsay statements and incomplete records," Dr. Roman "diagnosis" is an opinion and can be contradicted by other medical opinions, and Dr. Roman's diagnosis was based on her telephone conversation with Mr. Baker who disputes the

facts as documented by Dr. Roman in an affidavit that is submitted in opposition to the motion. Plaintiff argues that as shown in the affidavits of Patricia Baker and Mr. Baker, there are issues of fact that require additional discovery.

The Report of Autopsy and the other documents submitted by Dr. Brisson do not “flatly contradict the legal conclusions and factual allegations of the complaint” that Dr. Brisson’s negligent performance of surgery and post surgery care caused Plaintiff’s death. The Report of Autopsy itself states several diagnoses other than asphyxiation and other contributors of the cause of death.

Difficulty swallowing following stroke following aortic valve replacement for treatment for endocarditis due to staphylococcal infection, where the level of staphylococcal infection is alleged to have resulted from alleged negligence, sets out a chain of events which a jury may conclude caused death from choking, assuming that it is supported by medical evidence or opinion at trial. Thus, the autopsy conclusion that the choking was the cause of death does not flatly contradict the allegations in the complaint.

Wherefore it is hereby

ORDERED that Defendant Paul M. Brisson, MD’s motion to dismiss the Complaint is denied.

Dated: MARCH 5, 2021

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION