

**Jeter v Rodriguez**

2021 NY Slip Op 31177(U)

March 21, 2021

Supreme Court, Kings County

Docket Number: 512292/17

Judge: Genine D. Edwards

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At an IAS Term, Part 80 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 21st day of March 2021.

P R E S E N T:

HON. GENINE D. EDWARDS,  
Justice.

-----X  
JASMINA JETER, as Administratrix of the Estate of  
LORETTA JETER, Deceased,

Plaintiff,

- against -

CARLOS RODRIGUEZ, M.D.,  
JUAN CARLOS FUENTES-ROSALES, M.D.,  
CARLOS CABALLERO, M.D.,  
AKUA PREITO BROWN, M.D.,  
and WYCKOFF HEIGHTS MEDICAL CENTER,

Defendants.

-----X  
WYCKOFF HEIGHTS MEDICAL CENTER,

Third-Party Plaintiff,

- against -

YASSER EL-HENNAWY, M.D.,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

Notice of Motion, Affirmation (Affidavit), and  
Exhibits Annexed \_\_\_\_\_  
Affirmations (Affidavits) in Opposition and  
Exhibits Annexed \_\_\_\_\_  
Reply Affirmations \_\_\_\_\_

NYSCEF No.:

170-192  
195-200, 202, 203-206  
207, 210

In this action to recover damages for wrongful death and medical malpractice, third-party defendant Yasser El-Hennawy, M.D. (Dr. El-Hennawy), moves for summary judgment, pursuant to CPLR 3212, dismissing the third-party complaint. Defendant/ third-party plaintiff Wyckoff Heights Medical Center (Wyckoff) and plaintiff Jasmina Jeter, as the administratrix of the estate of Loretta Jeter, deceased (plaintiff), separately oppose Dr. El-Hennawy's motion.

### *Background*

On Sunday, Feb. 14, 2016,<sup>1</sup> less than 24 hours after her discharge from Wyckoff's internal medicine (IM) service with a diagnosis of a myocardial infarction,<sup>2</sup> Loretta Jeter (the patient) died at home after experiencing a re-infarction. The day prior, Saturday, Feb. 13<sup>th</sup>, the patient's discharge was approved by IM attending Dr. El-Hennawy who was on call and was present at Wyckoff. During the relevant time, Dr. El-Hennawy was working for nonparty Wyckoff Medical Service, P.C. (the PC) as an independent contractor pursuant to a written agreement, dated Apr. 16, 2014 (the PC contract). The PC, in turn, was providing the services of Dr. El-Hennawy, among other physicians, to Wyckoff pursuant to the Professional Services Agreement, effective Jan. 21, 2005 (the PS agreement).

In the subsequently commenced action by the patient's daughter, plaintiff herein, principally against Wyckoff and its attending consulting cardiologist, Carlos Rodriguez, M.D. (Dr. Rodriguez), for wrongful death and medical malpractice, she asserted no direct claims against Dr. El-Hennawy. Wyckoff impleaded Dr. El-Hennawy, in his capacity as an independent contractor furnished to it by the PC,<sup>3</sup> for contribution and common-law indemnification.<sup>4</sup>

After discovery was completed and a note of issue was filed, Dr. El-Hennawy moved for summary judgment dismissing the third-party complaint. As noted, Wyckoff and plaintiff oppose Dr. El-Hennawy's motion.

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<sup>1</sup> All year references are to 2016, unless otherwise indicated.

<sup>2</sup> The technical term is "Non-ST elevation MI," abbreviated as "NSTEMI" in Wyckoff's chart.

<sup>3</sup> See Wyckoff's Response to Amended Demand for a Verified Bill of Particulars, dated Oct. 4, 2019, ¶ 12 ("Third-Party Plaintiff makes no claim as to vicarious liability.").

<sup>4</sup> Dr. El-Hennawy's PC contract with Wyckoff, to the extent included in the record, contains no contribution or indemnification provisions. Although the PC agreement contains (in § 5.08 thereof) an indemnification provision, that provision obligates the PC itself (rather than its employees or contractors) to indemnify Wyckoff.

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*Discussion*

(1)

As a threshold matter, this Court rejects Dr. El-Hennawy's contention that, because plaintiff has asserted no direct claims against him, she lacks standing to submit evidence in opposition to his summary judgment motion. CPLR 3212 (b) specifically provides that "the [summary judgment] motion shall be denied if *any* party shall show facts sufficient to require a trial of any issue of fact" (emphasis added). See *Mendez v Union Theological Seminary in City of New York*, 26 AD3d 260, 809 NYS2d 77 [1st Dept 2006]; *Way v George Grantling Chemung Contr. Corp.*, 289 AD2d 790, 736 NYS2d 424 [3d Dept 2001]).<sup>5</sup> Dr. El-Hennawy's reliance on the decisions in the context of appellate standing in the context of CPLR article 5 is misplaced.

Next, although Wyckoff's submission of an affirmation instead of an affidavit by its chief medical officer, Gustavo Del Toro, M.D. (Dr. Del Toro), was improper pursuant to CPLR 2106 (a), under the circumstances of this case, this defect is merely a technical procedural irregularity that did not prejudice Dr. El-Hennawy and may be disregarded by the Court to permit a decision on the merits. See CPLR 2001; *Board of Managers of Ocean Terrace Towne House Condominium v. Lent*, 148 A.D.2d 408, 538 N.Y.S.2d 824 (2d Dept., 1989), *lv. denied* 75 N.Y.2d 702, 551 N.Y.S.2d 906 (1989).

(2)

"Common-law indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Kingsbrook Jewish Med. Ctr. v. Islam*, 172 A.D.3d 1342, 99 N.Y.S.3d 670

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<sup>5</sup> To the extent, as is the case here, there is no binding precedent from the Court of Appeals or the Second Judicial Department, the decisions of the other Judicial Departments govern. See *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dept., 1984).

(2d Dept., 2019).<sup>6</sup> “Consistent with the equitable underpinnings of common-law indemnification, . . . case law imposes indemnification obligations upon those actively at fault in bringing about the injury.” *Id.* Therefore, “summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties.” *Id.*

In the medical malpractice context, “[a] defendant physician seeking summary judgment . . . bears the initial burden of establishing, prima facie, *either* that there was no departure from good and accepted medical practice *or* that any alleged departure did not proximately cause the plaintiff’s injuries.” *Bowē v. Brooklyn United Methodist Church Home*, 150 A.D.3d 1067, 56 N.Y.S.3d 180 (2d Dept., 2017) (emphasis added). The opposing parties, in turn, “must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden.” *Id.*

Here, Dr. El-Hennawy established his prima facie entitlement to judgment as a matter of law by submitting expert affidavits (one by internist Vincent Garbitelli, M.D., and the other by cardiologist William Slater, M.D.) collectively opining that: (1) the patient was stable from both the IM and the cardiologic perspectives during her two-day hospitalization at Wyckoff from Feb. 11<sup>th</sup> to Feb. 13<sup>th</sup>; (2) there was no urgency to perform an in-patient angioplasty/stent placement before her discharge on Saturday, Feb. 13<sup>th</sup>; (3) Dr. El-Hennawy properly relied on Dr. Rodriguez’s recommendation to discharge the patient to be followed by an outpatient angioplasty/stent placement at Lenox Hill Hospital the following week; and (4) nothing Dr. El-Hennawy did (or failed to do) proximately caused, or was a substantial factor in bringing about, the patient’s injuries and death. Thus, the burden shifted to Wyckoff and plaintiff to raise a triable

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<sup>6</sup> Quotes from the *Kingsbrook* decision omit the internal quotation marks and citations.

issue of fact as to: (1) whether Dr. El-Hennawy departed from good and accepted medical practice as an internist overseeing the patient's overall care at the time of her discharge (the departure element); and (2) if so, whether such departures were a proximate cause of the patient's injuries and death (the causation element). *See Reustle v. Petraco*, 155 A.D.3d 658, 63 N.Y.S.3d 111 (2d Dept., 2017).

Wyckoff's opposition addresses solely the departure element of its third-party claim (it is silent as to the causation element), whereas plaintiff's opposition expressly adopts Wyckoff's claimed departures and, in addition, addresses the causation element.<sup>7</sup> Significantly, plaintiff's opposition, standing on its own, fails to address the departure element.<sup>8</sup> In so doing, plaintiff joins Wyckoff in staking the viability of the third-party claim on the strength of the opinion of Wyckoff's expert, Dr. Del Toro. This Court finds that Dr. Del Toro's brief opinion as to the departure element, as reproduced in full in the margin,<sup>9</sup> is insufficient to raise a triable issue of material fact because it is limited to Dr. El-Hennawy's undisputed, and now substantively immaterial, omission to document

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<sup>7</sup> See Plaintiff's Affirmation in Opposition, e-filed Sept. 11, 2020 (NYSCEF #203), ¶ 4 ("As a threshold matter, Plaintiff adopts defendant [Wyckoff's] argument that [third-party] defendant [Dr. El-Hennawy] departed from the accepted standard of medical practice herein and submits further opposition to establish that his departure from the accepted standards of medical practice is a substantial factor in causing [the patient's] pain, suffering and death.").

<sup>8</sup> Compare *Macancela v. Wyckoff Heights Med. Ctr.*, 176 A.D.3d 795, 109 N.Y.S.3d 411 (2d Dept., 2019) (where the expert for the plaintiffs in the principal action "raised a triable issue of fact as to whether [the third-party defendant] deviated from good and accepted practice . . . , and whether that deviation was a proximate cause of the decedent's injuries and death").

<sup>9</sup> In particular, Dr. Del Toro opines that:

"Dr. El-Hennawy deviated from standard of care and [Wyckoff's internal] protocol by discharging the patient without documenting the chart with the rationale behind his decision to discharge the patient. Thus, his basis for discharge is not evident as it is not documented and Dr. El-Hennawy has no recollection of this patient or seeing this patient."

Dr. Del Toro's Affirmation, dated Aug. 20, 2020 (NYSCEF #196), ¶ 8.

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his discharge of the patient from the IM service. More particularly, Dr. Del Toro's opinion is wholly irrelevant to the substance of the third-party claim which hinges on whether the patient's overall condition – in light of her hypertension, hyperlipidemia, obesity and, most importantly, her recent myocardial infarction caused by her two-vessel heart disease – warranted Dr. El Hennawy, as the IM attending on call in charge of her overall care, to approve her discharge from the IM service on Saturday afternoon Feb. 13<sup>th</sup>, rather than to continue stabilizing her at Wyckoff over the remainder of the weekend and to arrange for her transfer to Lenox Hill Hospital (or to another full-service facility) for an in-patient angioplasty/stent placement to be performed as early as the following Tuesday. *See Bowe*, 150 A.D.3d 1067, 56 N.Y.S.3d 180. Thus, this Court concludes that Wyckoff (as well as plaintiff by adopting Wyckoff's position on the departure element) failed to raise a triable issue of material fact as to the departure element of the third-party claim against Dr. El-Hennawy.

### *Conclusion*

Based on the foregoing and after oral argument, it is

ORDERED that third-party defendant Dr. El-Hennawy's motion for summary judgment is *granted*, and the third-party complaint is dismissed in its entirety without costs or disbursements; and it is further

ORDERED that Dr. El-Hennawy's counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

ENTER,

Hon. Genine D. Edwards