

Moskovics v NYU Med. Ctr.
2021 NY Slip Op 32181(U)
July 9, 2021
Supreme Court, Kings County
Docket Number: Index No. 510341/15
Judge: Ellen M. Spodek
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At an IAS Term, Part 63 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 9th day of July, 2021.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

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ELYA MOSKOVICS, as Administrator of the Estate of HENYA MOSKOVICS, Deceased, and ELYA MOSKOVICS, Individually,
Plaintiffs,

- against -

Index No. 510341/15

NYU MEDICAL CENTER, NICHOLAS GAVIN, M.D., MARK FORAN, M.D., TINA WU, M.D., NEW YORK PRESBYTERIAN HOSPITAL, MATERNAL FETAL MEDICINE ASSOCIATES, P.L.L.C., and MICHAEL SILVERSTEIN, M.D.,
Defendants.

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

58-59, 61, 81-83,

109-111

122, 123

Upon the foregoing papers, defendant The New York Presbyterian Hospital, s/h/a New York Presbyterian Hospital (Presbyterian), moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it; or, in the alternative (2) pursuant to CPLR 3212 (e) & (g), granting partial summary judgment as to any claim or theory of liability as to which the court finds that defendants have

failed to demonstrate the existence of an issue of fact (motion sequence number 3). By way of a separate motion, defendants Maternal Fetal Medicine Associate, P.L.L.C., (MFMA) and Michael Silverstein, M.D., (collectively referred to as the Silverstein Defendants) move for the same relief in their favor (motion sequence number 4).

Background

Plaintiffs Elya Moskovics, As Administrator of the Estate of Henya Moskovics, deceased, and Elya Moskovics, individually, allege, as is relevant to the instant motions, that medical malpractice by Dr. Silverstein in failing to administer a flu vaccine to decedent Henya Moskovics, and medical malpractice by Presbyterian in its care and treatment of pneumonia and other related conditions arising from the flu contracted by Mrs. Moskovics, were a proximate cause of her death on March 16, 2014.

On March 3, 2014, Henya Moskovics, believing she was pregnant, went to the MFMA's offices with her husband, Elya Moskovics, to see Dr. Silverstein, an Obstetrician/Gynecologist who is a partner with MFMA. After Dr. Silverstein used an ultrasound to confirm that Mrs. Moskovics was approximately 10 weeks pregnant, Mr. Moskovics, according to his deposition testimony, asked Dr. Silverstein if Mrs. Moskovics should have a flu shot. In reply to Mr. Moskovics, Dr. Silverstein told them that we do not recommend the flu shot until the 20th week. In his own deposition testimony, Dr. Silverstein stated that, while he had no specific recollection regarding

what he told Mrs. Moskovichs regarding the flu shot, his custom and practice would have been to recommend that a patient get a flu shot. Dr. Silverstein conceded that MFMA's records relating to Mrs. Moskovichs contain no documentation regarding such a recommendation.

The history portion of the medical records indicate that Mrs. Moskovichs first noted symptoms of a dry cough, sore throat, and low grade fever on or around March 10 or 11, 2014, although Mr. Moskovichs testified that he believed that these symptoms were first apparent on March 12, 2012. These symptoms persisted, and Mrs. Moskovichs presented to Arnold Berlin, M.D., her primary care doctor at ODA on March 13, 2014. Dr. Berlin found no concerning symptoms during the physical examination, diagnosed her as having the flu, recommended that Mrs. Moskovichs drink fluids, and suggested that she take Tylenol for the discomfort. Mrs. Moskovichs returned to ODA on March 14, 2014, with additional complaints of chest pain associated with the cough, and a different ODA doctor diagnosed Mrs. Moskovichs as having acute bronchitis and prescribed Prednisone.

When the pain in her chest area worsened, Mrs. Moskovichs was taken by ambulance to the emergency room at defendant NYU Medical Center (NYU), arriving at 7:49 p.m. on March 14, 2014. At NYU, blood work showed that Mrs. Moskovichs' white blood count was normal, an x-ray showed her lungs to be clear, and the urinalysis was normal. The NYU staff concluded that Mrs. Moskovichs likely had a viral illness, gave her Tylenol for the pain, administered Maalox and Pepcid, gave her an IV infusion of sodium chloride, and then discharged her at around 11:00 p.m.

At 2:00 a.m. on March 15, 2014, Mrs. Moskovichs returned to NYU's emergency room via ambulance because she was experiencing worsening shortness of breath. A flu panel was performed and came back positive, and her temperature reached 101.1 degrees. However, Mrs. Moskovichs' oxygen saturation stayed in the 99 to 100 percent range while she was at NYU, and a breathing assessment found that her breathing was unlabored. NYU staff gave Mrs. Moskovichs medication for her pain and discharged her to her home at 8:08 a.m. with a diagnosis of acute upper respiratory infection.

Mrs. Moskovichs was then transported by ambulance from her home to Presbyterian at 2:35 p.m. on March 15, 2014. Upon arrival at Presbyterian, Mrs. Moskovichs' heart rate was found to be elevated and her oxygen saturation level was at 92 percent on room air. Labs taken at 3:44 p.m. showed that her white blood cell count was very low, at 1.1 and that her platelet count was low. Labs taken at 8:28 p.m. showed that her white blood cell count had dropped to .5 and that the platelet count remained low. Subsequent labs and blood work showed that the white cell count and platelet levels remained low and that other levels remained out of range. An x-ray taken at 5:20 p.m. showed conditions consistent with multifocal pneumonia, and later chest x-rays showed her worsening lung condition. During her admission, Mrs. Moskovichs' oxygen saturation levels continued to fall, and she progressed from a nasal cannula, which had been placed at 2:35 p.m., to a non-rebreather mask at around 7:24 p.m., to BiPAP (bilevel positive airway pressure) at around 10:00 p.m., to intubation at sometime between 4:28 a.m. to 4:48 a.m. on March 16, 2014. While Mrs. Moskovichs' oxygen saturation levels

had initially improved with each increased step of breathing assistance, the oxygen saturation levels ultimately continued to decline. Mrs. Moskovics respiratory rate remained elevated, and she had tachycardia, with her heart rate ranging from the 120s to the 160s. The treatment provided by Presbyterian included antibiotics to address infection, supportive care in the form of IV fluids, administration of pain medication for chest pain, and the above noted escalation of breathing assistance.

By 7:46 AM on March 16, 2014, Mrs. Moskovics' heartrate was 158. A little later, Moskovics had successive episodes of cardio-pulmonary arrest, but was revived. After transfer to Presbyterian-Columbia, where she was placed on ECMO (extracorporeal membrane oxygenation - which pumps blood outside the body to a heart-lung machine for oxygenation) she had another cardiopulmonary arrest, and died at 3:30 p.m. The Presbyterian's records identified the immediate cause of death as cardiopulmonary arrest due to influenza B, with contributing conditions including acute respiratory syndrome (ARDS), sepsis and multiorgan failure.

Discussion

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider 'departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries'" (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]; see *Hutchinson v New York City Health & Hosps. Corp.*, 172

AD3d 1037, 1039 [2d Dept 2019]). A defendant moving for summary judgment dismissing a medical malpractice action must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries (*see Hutchinson*, 172 AD3d at 1039; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2d Dept 2013]). "Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (*Schmitt*, 121 AD3d at 1088; *see Hutchinson*, 172 AD3d at 1039; *Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

Presbyterian's Motion

In moving for summary judgment, Presbyterian submits an affirmation from Harry Steinberg, M.D., a pulmonary medicine and critical care physician. Dr. Steinberg asserts that - regardless of any of the alleged departures, which primarily relate to the failure to give Mrs. Moskovics antibiotics and the failure to intubate her earlier - Mrs. Moskovics arrived at Presbyterian "with such an aggressive pneumonia, septic shock, and deteriorated so quickly, that no actions or inactions of [Presbyterian's] staff would have changed the outcome" (Dr. Steinberg, Aff. at ¶ 36). Dr. Steinberg notes that sepsis "is an inflammatory response and associated organ dysfunction caused by the body's response to an infection" (Dr. Steinberg, Aff. at ¶ 37), and that patients with severe sepsis have a mortality rate of 25 to 30 percent, and that those with septic shock have a

mortality rate of 40 to 70 percent. The low white blood cell count, referred to as neutropenia, and reduced platelet levels, referred to as thrombocytopenia, are, according to Dr. Steinberg, indications that a body is unable to fight off an infection, and “are each independent risk factors for mortality in a patient who develops septic shock” (Dr. Steinberg, Aff. at ¶ 40). Although Mrs. Moskovic was afebrile upon arrival, and her breathing rate was initially normal, given the rate with which she decompensated, as evidenced by her elevated heart rate, respiration rate, hypoxia, and lab blood levels, Dr. Steinberg opines that her body was already unable to fight off the infection, and that she was in irreversible septic shock (Dr. Steinberg, Aff. at ¶¶ 39-43).

Mrs. Moskovic was unable to maintain adequate oxygen saturation even after the institution of more aggressive oxygen support, including BiPAP and intubation. Dr. Steinberg opines that an earlier institution of more aggressive measures (which were not called for by her vital signs) would not have made a difference in view of the extensive pneumonia shown on chest x-rays, which prevented Mrs. Moskovic from adequately oxygenating. According to Dr. Steinberg, Mrs. Moskovic’s ability to oxygenate would not have improved until the infection was cleared from her lungs. Further, the earlier administration of broader spectrum antibiotics would not have made a difference because it takes 24 to 48 hours for such antibiotics to take effect and clear the lungs of the infection, and Mrs. Moskovic passed away within that time frame (Dr. Steinberg, Aff. at ¶ 44). As such, Dr. Steinberg concludes that, given how quickly Mrs. Moskovic deteriorated, her death was inevitable on her admission (Dr. Steinberg, Aff. at ¶ 45).

Plaintiffs assert that Presbyterian's arguments with respect to causation are "woefully conclusory." However, since Dr. Steinberg explains his opinions and points to facts in the medical record that support his assertions, Presbyterian's causation arguments cannot be rejected as wholly conclusory (*see Goldschmidt v Cortland Regional Med. Ctr.*, 190 AD3d 1212, 1215 [3d Dept 2021]; *Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 425 [1st Dept 2015]; *see also Rosario v Our Lady of Consolation Nursing & Rehabilitation Care Ctr.*, 186 AD3d 1426, 1427-1428 [2d Dept 2020]). As such, based on the affirmation from Dr. Steinberg, the deposition testimony in the record and the medical records, Presbyterian has demonstrated its prima facie entitlement to summary judgment dismissing the action based on a showing that any departures by Presbyterian were not a proximate cause of Mrs. Moskovics' deterioration and death (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova v Westerman*, 109 AD3d 965, 966 [2d Dept 2013]; *Mitchell v Lograno*, 108 AD3d 689, 692-693 [2d Dept 2013]). Since Dr. Steinberg's affidavit did not specifically address the allegations of malpractice set forth in the complaint and bills of particulars, Presbyterian has not demonstrated its prima facie entitlement to summary judgment on the ground that there were no departures from accepted medical practice (*see Kogan v Bizekis*, 180 AD3d 659, 660-661 [2d Dept 2020]; *Stukas*, 83 AD3d at 30). However, in view of the Presbyterian's prima facie showing with respect to causation, the burden has shifted to plaintiffs to demonstrate the existence of a factual issue with respect to causation.

In opposition, plaintiffs have submitted an affirmation from a board certified anesthesiologist who, as part of his or her clinical experience, has been an attending doctor in numerous cases involving patients suffering from pneumonia, respiratory compromise, and ARDS. In this affirmation, plaintiffs' anesthesiologist asserts that he or she is familiar with the standard of care at issue with respect to Presbyterian's care of Mrs. Moskovics and he or she asserts that Presbyterian departed from accepted standards of care by: (1) failing to intubate Mrs. Moskovics by 3:00 a.m. on March 16, 2014; (2) in failing to call in an anesthesiologist to perform the intubation after the first attempt had failed; (3) in taking too long to successfully intubate Mrs. Moskovics once it was decided to intubate her; and (4) by in causing trauma to the airway during the intubation attempts (Plaintiffs' anesthesiologist aff. ¶¶ 69-79). These non-conclusory assertions by plaintiffs' anesthesiologist are undoubtedly enough to demonstrate factual issues with respect to the existence of a departure from the standard of care of Mrs. Moskovics by Presbyterian if Presbyterian had made such a showing.

With respect to causation, the issue addressed by Dr. Steinberg, plaintiffs' anesthesiologist states:

"If her path was irreversible and her outcome was going to lead to her demise no matter what treatment was given, this cannot explain the following: (1) it cannot explain why she was only triaged at an ESI level of 3; (2) it cannot explain why she was alert and oriented, able to communicate and

articulate her history to her providers well into the evening and the early hours of March 16; and (3) it cannot explain why she was stable enough to be on nasal cannula, a non-rebreather mask, and a BIPAP for 14 hours before she was intubated; and (4) it cannot explain why a decision was made to aggressively treat Mrs. Moskovichs and intubate her (rather than classifying her as a non-viable 'DNR.' (do not resuscitate))" (Plaintiffs' anesthesiologist aff. ¶ 80).

In making these assertions, plaintiffs' anesthesiologist fails to address Dr. Steinberg's assertion that some patients bypass exhibiting abnormal vital signs or address his assertions that Mrs. Moskovichs' ability to oxygenate would not have improved until the infection was cleared from her lungs. Nor does plaintiffs' anesthesiologist address the lab values relied upon by Dr. Steinberg or address her hypotension. The fact that Presbyterian assigned Mrs. Moskovichs an ESI level of 3 when she was triaged demonstrates very little because this number was assigned at 2:50 p.m. on March 15, 2014, which was before the receipt of the blood work showing the disturbing white blood cell counts, before the chest x-ray showing the signs consistent with pneumonia was taken, and when her oxygen saturation level was still 92% on room air. Plaintiffs' anesthesiologist fails to explain why being alert and oriented is inconsistent with Mrs. Moskovichs' being in decline. The assertion that she was stable on non-rebreather masks and BiPAP for 14 hours appears to be inconsistent with the assertion by plaintiffs'

anesthesiologist that Mrs. Moskovics should have been intubated by 3:00 a.m. because her oxygenation levels were dropping. Finally, the decision to aggressively treat Mrs. Moskovics can be explained by her being a 26-year-old otherwise healthy woman and by the fact that the course the septic shock was taking may not have been apparent as it was happening.

In sum, since plaintiffs' anesthesiologist has failed to address the specific assertions made by Dr. Steinberg (*see Scopelliti v Westmed Med. Group*, 193 AD3d 1009, 1010-1011 [2d Dept 2021]; *Iodice v Giordano*, 170 AD3d 971, 972-973 [2d Dept 2019]; *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017]; *DiLorenzo v Zaso*, 148 AD3d 1111, 1114 [2d Dept 2017]), and has otherwise failed to address the issue of causation in other than a conclusory manner (*see Elstein v Hammer*, 192 AD3d 1075, 1078-1079 [2d Dept 2021]; *Marsh v City of New York*, 191 AD3d 973, 974 [2d Dept 2021]; *Tsitrin*, 154 AD3d at 996-997), the affirmation from plaintiffs' anesthesiologist fails to demonstrate the existence of a factual issue that would warrant denial of Presbyterian's motion.

Dr. Silverstein and MFMA's Motion

With respect to the Silverstein Defendants' motion, Dr. Silverstein, in his own deposition testimony conceded that a failure to recommend a flu shot to a pregnant woman like Mrs. Moskovics would constitute a departure from accepted medical practice. Additionally, plaintiff's testimony, which is attached to the Silverstein Defendants motion papers demonstrates that there is a factual issue as to whether Dr.

Silverstein recommended that Mrs. Moskovichs get a flu shot. As such, the Silverstein Defendants have not made prima facie showing with respect to whether Dr. Silverstein complied with the standard of care.

Nevertheless, the Silverstein Defendants have submitted an affirmation from Lisa Moreno, M.D., who is board certified in allergy and immunology, and who asserts that a failure to give the flu shot was not the proximate cause of Mrs. Moskovichs' injury and death. Specifically, Dr. Moreno opines that, even if Mrs. Moskovichs had received the flu shot on March 3, 2014, it would not have provided protection against the influenza virus until two weeks later. Since Mrs. Moskovichs started developing flu like symptoms March 10, 2014 to March 12, 2014, Dr. Moreno asserts that the flu vaccine would not have provided any significant protection to her exposure to the flu, which would have been between March 6, 2014 and March 11, 2014. Dr. Moreno attaches a copy of an article that states that it takes two weeks after vaccination to develop an immune response to the flu, and a copy of CDC Guidelines stating the same. These assertions in the article and by the CDC, however, are conclusory statements made without discussion of studies/testing that led to such conclusions. Nevertheless, Dr. Moreno's discussion of her education, training and experience in the field of immunology provides sufficient grounds to support her assertions regarding the effectiveness of the vaccine at the time Mrs. Moskovichs was exposed to the flu (*see Bell v Ellis Hosp.*, 50 AD3d 1240, 1241-1242 [3d Dept 2008]; *cf. Romano v Stanley*, 90 NY2d 444, 452 [1997]). Dr. Moreno also asserts that Mrs. Moskovichs' condition was also complicated by the fact that

she had also contracted Coronavirus 229E (not to be confused with Covid-19), and attaches some articles addressing Coronavirus 229E.

Accordingly, based on the affirmation from Dr. Moreno, the deposition testimony in the record and the medical records, the Silverstein Defendants have demonstrated their prima facie entitlement to summary judgment dismissing the action based on a showing that any departure by Dr. Silverstein in failing to give the flu shot was not a proximate cause of Mrs. Moskovics' deterioration and death (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693). The burden thus shifted to plaintiffs to demonstrate an issue of fact with respect to causation.

In opposition, plaintiffs have submitted an affirmation from a doctor, who is board certified in infectious diseases, and who claims familiarity with the epidemiology of influenza and the flu vaccine at issue. Plaintiffs' doctor asserts that a flu shot given on March 3, 2014 would have allowed the development of sufficient antibodies to prevent Mrs. Moskovics from contracting the flu, or at least allowed the development of sufficient antibodies to prevent the worst complications suffered by her that led to her death. Plaintiffs' doctor discounts the impact of Coronavirus 229E on Mrs. Moskovics' condition, and asserts that the articles about Coronavirus 229E relied upon by Dr. Moreno do not support her assertions. Despite plaintiffs' failure to attach copies of the studies referred to in the affirmation relating to the development of antibodies, the opinion of plaintiffs' doctor is still sufficient to demonstrate the existence of a factual issue given his or her area of expertise, especially since the article and the CDC

guidelines relied upon by Dr. Moreno only address the issue in conclusory fashion (see *Mehtvin v Ravi*, 180 AD3d 661, 663-664 [2d Dept 2020]; *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 544-546 [2d Dept 2017]; *Leto v Feld*, 131 AD3d 590, 592 [2d Dept 2015]; *Polanco v Reed*, 105 AD3d 438, 441-442 [1st Dept 2013]; *Olgun v Cipolla*, 82 AD3d 1186, 1187 [2d Dept 2011]; *Bell*, 50 AD3d at 1241-1242; cf. *Romano*, 90 NY2d at 452). As such, the Silverstein Defendants' motion must be denied.

The Court also denies the Silverstein Defendants' alternative request that a hearing be held pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]). The Silverstein Defendants made this request for the first time in their reply papers (see *DB v Montefiore Med. Ctr.*, 162 AD3d 478, 479 [1st Dept 2018]), and they have failed to demonstrate that the assertions of plaintiffs' doctor are based on a novel theory that would require a *Frye* hearing (see *Sadek v Wesley*, 117 AD3d 193, 200-201 [1st Dept 2014], *aff'd* 27 NY3d 982 [2016]; *Krackmalnik v Maimonides Med. Ctr.*, 142 AD3d 1143, 1144 [2d Dept 2016]; *People v Oddone*, 89 AD3d 868, 869-870 [2nd Dept 2011], *reversed on other grounds* 22 NY3d 369 [2013]; *Ellis v Eng*, 70 AD3d 887, 891-892 [2nd Dept 2010]; cf. *Zito v Zabarsky*, 28 AD3d 42, 44 [2d Dept 2006]), particularly given the conclusory nature of the article and CDC guidelines relied upon by Dr. Moreno. This denial, however, is made without prejudice to the Silverstein Defendants making a motion in limine for a *Frye* hearing based upon proper proof.

Therefore, Presbyterian's motion (motion sequence number 3) is granted, the complaint is dismissed as against it, the action is severed accordingly, and the clerk is directed to enter judgment accordingly.

The Silverstein Defendants' motion (motion sequence number 4) is denied.

In addition, the caption is amended to read as follows:

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ELYA MOSKOVICS, as Administrator of the Estate
of HENYA MOSKOVICS, Deceased, and ELYA
MOSKOVICS, Individually,
Plaintiffs,

- against -

NYU MEDICAL CENTER, NICHOLAS GAVIN, M.D.,
MARK FORAN, M.D., TINA WU, M.D.,
MATERNAL FETAL MEDICINE ASSOCIATES,
P.L.L.C., and MICHAEL SILVERSTEIN, M.D.,
Defendants.

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This constitutes the decision and order of the court.

E N T E R,

J. S. C.