

**Pollack v St. Francis Hosp.**

2022 NY Slip Op 32399(U)

July 18, 2022

Supreme Court, New York County

Docket Number: Index No. 805286/2018

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 10M

*Justice*

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ELISA POLLACK and LAWRENCE POLLACK, as Executors  
of the Estate of ALBERT POLLACK, Deceased,

Plaintiffs,

INDEX NO. 805286/2018MOTION DATE 11/03/2021MOTION SEQ. NO. 005

- v -

ST. FRANCIS HOSPITAL, NEIL R. BERCOW, M.D.,  
LAWRENCE H. DURBAN, M.D. and ALLA RUS, P.A.,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 170

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants in part Defendants St. Francis Hospital's ("St. Francis"), Neil R. Bercow, M.D.'s ("Dr. Bercow"), Lawrence H. Durban, M.D.'s ("Dr. Durban") and Alla Rus, P.A.'s ("P.A. Rus") (collectively "Defendants") summary judgment motion, filed under motion sequence 005, to the extent that the court grants the portions of the motion seeking dismissal of Plaintiffs Elisa Pollack and Lawrence Pollack, as Executors of the Estate of Albert Pollack, Deceased's ("Plaintiffs") complaint as against Defendants Dr. Bercow and P.A. Rus, dismissal of Plaintiffs' direct claims against St. Francis, and dismissal of Plaintiffs' lack of informed consent claims, but the court denies the remainder of the motion. Therefore, Plaintiffs' remaining claims against Dr. Durban and St. Francis' vicarious liability for Dr. Durban's actions or inactions remain as set forth herein.

Plaintiffs filed this medical malpractice, negligence and lack of informed consent action against the Defendants and discontinued their claims against Ankur Anand, M.D. ("Dr. Anand")

and Jason Wells, M.D. (“Dr. Wells”). The court previously severed their names from the caption. Plaintiffs allege in substance that Defendants deviated from accepted standard of medical practice in their care and treatment of the Deceased Plaintiff Albert Pollack from August 23, 2016 to August 26, 2016 at St. Francis, in that Dr. Durban perforated the Decedent’s superior vena cava during a lead extraction procedure on August 23, 2016, to remove and replace an automated implantable cardioverter defibrillator (“ICD”). Plaintiffs further alleged in substance that Defendants failed to advise the Decedent of the alternatives to the surgical procedure and failed to diagnose his condition, causing his injuries and death on August 26, 2016.

The Defendants now move under motion sequence 005 for an order granting summary judgment dismissal of Plaintiffs’ complaint as against them and for an order striking all “reckless” language from Plaintiffs’ complaint. Defendants rely on the expert affirmations of Dr. Alfred Calliford and Dr. Steven Evans who opine in substance that Defendants did not deviate from good and accepted practice, that the lead extraction procedure was indicated and necessary, that the Deceased Plaintiff’s informed consent was properly obtained prior to performance of the procedure and that no negligent act or omission by Defendants was a substantial factor in causing the Deceased Plaintiff’s injuries or death. Defendants also argue that the court should strike the “reckless” language in the complaint because the court previously denied Plaintiffs’ request to add punitive damages and no such damages are appropriate in this case.

Defendants also argue in substance that the court should reject Plaintiffs’ expert affirmations because one lacks a certificate of conformity, both fail to rebut Defendants’ experts’ opinions and they are speculative and conclusory. Defendants argue in substance that the court should also reject Plaintiffs’ improper attempts to raise new theories of liability for the first time

in their opposition papers which include allegations that Dr. Durban should have performed an ICD lead abandonment instead of an ICD lead extraction.

Additionally, Defendants argue that Dr. Durban obtained the Deceased's informed consent and that perforation of the superior vena cava is a rare, but known complication of ICD lead extraction. They further argue that the St. Jude Riata lead is associated with a higher failure rate than other leads and the one previously placed in the Deceased Plaintiff was subject to FDA recall. Defendants further argue that the decision to perform the ICD lead extraction was necessary, within Dr. Durban's best medical judgment and lead abandonment was too risky.

Plaintiffs do not oppose the portions of the motion seeking dismissal of their claims against Defendants Dr. Bercow and P.A. Rus and direct claims against St. Francis. Plaintiffs' argue in substance that factual issues remain including whether Dr. Durban should have performed an ICD lead abandonment because an extraction is a more complex and risky procedure and whether Dr. Durban failed to obtain Plaintiff's informed consent by advising the Deceased Plaintiff of the increased risks that he would have with the lead extraction procedure and the less risky alternatives, including lead abandonment.

Plaintiffs rely upon the expert opinions of Dr. Steven L. Zweibel and Dr. Arlen G. Fleisher who opine in substance that Dr. Durban deviated from good and accepted practice and that such departures were the proximate cause of the Deceased Plaintiff's injuries and death. Plaintiffs argue in substance that Dr. Durban's departures include that he performed the lead extraction without first advising the Deceased Plaintiff of the high risks of extraction, without discussing and recommending the less risky alternative of ICD lead abandonment, that Dr. Durban performed the lead extraction procedure instead of lead abandonment and that he failed

to promptly and properly recognize and respond to the perforated superior vena cava, which resulted in the Deceased Plaintiff's pain, suffering and death three days later.

Plaintiffs also argue in substance that Dr. Durban was required to advise the Deceased Plaintiff that he had a higher risk of suffering a superior vena cava tear and other major complications during the ICD extraction procedure. Plaintiffs also argue in substance that Dr. Durban failed to promptly perform a sternotomy and failed to place the Deceased Plaintiff on cardiopulmonary bypass promptly following his acute drop in his blood pressure two minutes after the completion of the lead extraction procedure.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and

that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1<sup>st</sup> Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1<sup>st</sup> Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to

comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1<sup>st</sup> Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, "a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff's) injuries" (*see* Public Health

Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1<sup>st</sup> Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

As an initial matter, the court considers the merits of Plaintiffs' expert affidavits, but declines to consider any arguments raised by the parties in correspondence filed subsequent to oral arguments, as such correspondence from Plaintiff's counsel is an authorized sur-reply. However, the court determines that Plaintiffs' arguments regarding the alternative procedure of lead abandonment is not a new theory of liability improperly raised for the first time in their opposition papers, but a theory that was discussed throughout the case and in Defendants' initial papers. Additionally, it is common sense that an alternative to extracting a lead or any medical device is to leave it in place or abandon it and make necessary repairs. Therefore, there is no surprise or prejudice to Defendants and the court will not preclude Plaintiffs from making arguments related to abandonment.

Here, the court finds that Defendants established their prima facie entitlement to judgment in their favor as a matter of law. However, Plaintiffs raised material triable issues of fact regarding their negligence and malpractice claims against Dr. Durban, but they failed to rebut Defendants' arguments for summary judgment dismissal of the complaint as against Defendants Dr. Bercow, P.A. Rus, direct claims against St. Francis and their lack of informed consent claims against all Defendants.

Such factual issues regarding Dr. Durban include, but are not necessarily limited to, whether Dr. Durban departed from good and accepted medical practice by performing the ICD lead extraction procedure on the Deceased Plaintiff and the manner in which he performed the procedure; whether he should have recommended and performed an ICD lead abandonment procedure instead of the ICD lead extraction procedure; whether he should have performed a

sternotomy promptly after the drop in blood pressure; whether he failed to promptly recognize and respond to the perforated superior vena cava; and whether any of Dr. Durban's actions or inactions were a proximate cause of the Deceased Plaintiff's injuries and/or death.

The court grants dismissal of Plaintiffs' lack of informed consent claim against Defendants and finds that Defendants demonstrated that Dr. Durban adequately advised the Deceased Plaintiff of the risks, benefits, alternatives and potential complications of the procedure orally and in writing. Such risks and complications included a tear of the superior vena cava and the possible need for open chest repair and open heart surgery with a risk of catastrophic consequences and death. Defendants also established that Dr. Durban advised the Deceased Plaintiff of the option of abandoning the lead and implanting a new one, but he did not recommend it because of the risks caused by abandonment. The court finds that Plaintiffs' attempts at creating an issue of fact regarding Dr. Durban's purported departure for failing to advise the Deceased Plaintiff of his increased risks related to the extraction procedure and Plaintiffs' other arguments related to lack of informed consent do not adequately rebut Defendants' experts' claims. Therefore, the court dismisses this claim.

The court denies the portion of Defendants' motion seeking an order striking the "reckless" language from Plaintiffs' complaint as Defendants failed to demonstrate their entitlement to such relief. However, the court previously denied Plaintiffs' request to amend their complaint to add a demand for punitive damages against Dr. Durban, so Plaintiffs are precluded from seeking such damages at trial.

Therefore, the court dismisses Plaintiffs' complaint against Dr. Bercow and P.A. Rus, dismisses all direct claims against St. Francis and dismisses their lack of informed consent claim against all Defendants, but denies the remainder of the motion. Thus, Plaintiffs' claims against

Dr. Durban and their vicarious liability claims against St. Francis based on Dr. Durban's alleged actions or inactions are severed and continue in this action.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendants St. Francis Hospital's, Neil R. Bercow, M.D.'s, Lawrence H. Durban, M.D.'s and Alla Rus, P.A.'s summary judgment motion, filed under motion sequence 005, to the extent that the court:

- a) grants dismissal of Plaintiffs Elisa Pollack and Lawrence Pollack, as Executors of the Estate of Albert Pollack, Deceased's complaint as against Defendants Neil R. Bercow, M.D. and Alla Rus, P.A.;
- b) grants dismissal of Plaintiffs' direct claims against Defendant St. Francis Hospital;
- c) grants dismissal of Plaintiffs' lack of informed consent claims against all Defendants;
- d) denies the remainder of the motion;
- e) severs the remaining claims against Defendant Lawrence H. Durban and St. Francis Hospital's vicarious liability for Dr. Durban's actions or inactions, as set forth herein, and continues such claims; and it is further

ORDERED that the court directs the Clerk of the Court to dismiss Plaintiffs' complaint as against Defendants Neil R. Bercow, M.D. and Alla Rus, P.A., only, and to enter judgment in favor of Defendants Neil R. Bercow, M.D. and Alla Rus, P.A. as against Plaintiffs Elisa Pollack and Lawrence Pollack, as Executors of the Estate of Albert Pollack, Deceased, without costs to any party; and it is further

ORDERED that the court amends the caption to the following:

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 ELISA POLLACK and LAWRENCE POLLACK, as Executors of  
 the Estate of ALBERT POLLACK, Deceased,

Plaintiffs,

-against-

ST. FRANCIS HOSPITAL AND LAWRENCE H.  
 DURBAN, M.D.,

Defendants.

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 and it is further;

ORDERED that counsel for the Defendants shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten (10) days of the date of this order, who is directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that the remaining parties are directed to appear for a status conference to set a trial date/settlement conference before this court on September 6, 2022, at 12:00 p.m., in Part 10, located in Room #412 at 60 Centre Street, New York, New York.

