

Raskin v New York Methodist Hosp.
2022 NY Slip Op 33107(U)
September 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 500831/16
Judge: Bernard J. Graham
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of September, 2022.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

-----X
DAVID RASKIN, as Successor Executor of the Estate of
LUIDA RASKIN,

Plaintiffs,

-against-

Index No.: 500831/16

NEW YORK METHODIST HOSPITAL, MARGARITA
KHOTSYNA, MUKUL ARYA, HIMANSHU VERMA,
CAROLA FERNANDEZ, JOSEPH DURZIEH, and
VADIM NAKHAMIYAYEV,
Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc. Nos.:

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

76-79, 95-97
109-112, 122-125
140, 142

Upon the foregoing papers, defendants New York Methodist Hospital (Methodist), Margarita Khotsyna, Mukul Arya, Himanshu Verma, Carola Fernandez and Vadim Nakhamiyayev (motion sequence number 8) and defendant Joseph Durzieh (motion sequence number 9), move, in their separate motions, for an order, pursuant to

CPLR 3212, granting them summary judgment dismissing the complaint as against them.

For the reasons discussed below, both motions are denied.

Plaintiff David Raskin¹ alleges that medical malpractice by defendants in the care and treatment of the decedent, Luida Raskin, caused her death on September 4, 2014, from ascending cholangitis.² On August 21, 2014, Ms. Raskin, who had multiple comorbidities, including diabetes, end stage renal disease, high blood pressure and morbid obesity, visited the office of Dr. Durzieh, a gastroenterologist, with primary complaints of sharp abdominal pain of 5 out of 10 in intensity, right upper quadrant epigastric pain without radiation and diarrhea. Upon examination, Dr. Durzieh found that Ms. Raskin's abdomen was soft, non-tender and non-distended, with positive bowel sounds. Based upon the examination, Dr. Durzieh's differential diagnosis, relevant to the pain, was epigastric pain secondary to peptic ulcer disease versus biliary etiology.³ Dr. Durzieh ordered a sonogram, which Ms. Raskin scheduled for September 2, 2014, and an endoscopy, which Ms. Raskin scheduled for September 10, 2014, and instructed Ms. Raskin to go to the Emergency Room or call his office if she experienced worsening pain, fever, nausea, chills, vomiting or jaundice.

¹ The Court notes that former plaintiff Barry Raskin, Luida Raskin's husband, and executor of her estate, died on September 15, 2021. As a result of Barry Raskin's death, this matter was stayed. On April 4, 2022, the Surrogate's Court of Kings County issued a decree appointing David Raskin as the Successor Executor of the Estate of Luida Raskin. Plaintiff David Raskin, Luida Raskin's son, has since been substituted as plaintiff in this action and this caption was amended in accordance therewith by Order dated September 8, 2022.

² Cholangitis is inflammation of the common bile duct, typically caused by a partial blockage of the duct by gallstones, that can rapidly progress to sepsis.

³ Dr. Durzieh made other findings relevant to the diarrhea complaint and gave her a kit that she could use to submit a stool sample to a lab company.

With respect to the blood tests, they are mentioned in the plan section of Dr. Durzieh's notes relating to the visit, and Dr. Durzieh testified at his deposition that Ms. Raskin requested that the blood tests be performed at her dialysis facility and that he gave her paperwork relating to the blood tests to be performed. However, there is no prescription or order for such a test in Dr. Durzieh's records and, in an affidavit submitted in opposition to the motion, Barry Raskin, Ms. Raskin's husband, states that he was present at the office visit and denies that Dr. Durzieh recommended, ordered, or prescribed a blood test on that day. The records from the dialysis facility do not show that any blood tests were conducted during any of Ms. Raskin's visits to the facility following her visit with Dr. Durzieh.

Ms. Raskin presented to Methodist's Emergency Room on August 30, 2014 with primary complaints of diarrhea for four weeks, abdominal pain and weakness. Ms. Raskin informed the Emergency Room staff that she had seen a gastroenterologist recently, that an ultrasound was scheduled for next Tuesday, and that an endoscopy was scheduled for next Wednesday.⁴ At that time, Ms. Raskin's vital signs were normal (for her) and she had no fever. Upon examination, defendant Carola Fernandez, M.D., found that Ms. Raskin's abdomen was non-distended, non-tender, and that there was no guarding or rebound pain noted. Blood work was performed, which, as is relevant here, showed a slightly elevated white blood cell count of 13.6 and that Ms. Raskin was icteric. After receiving intravenous fluids and anti-diarrheal medication at the Emergency Room,

⁴ The calendar for 2014 shows that the next Tuesday and Wednesday were September 2nd and September 3rd, respectively.

Ms. Raskin reported feeling better and requested to go home. Dr. Fernandez discharged Ms. Raskin with a diagnosis of chronic diarrhea, gave her a prescription for Ciprofloxacin 500 mg, and told her to follow-up with her private physician in three to four days.

On August 31, 2014, Ms. Raskin underwent dialysis and had no complaints. Ms. Raskin also had no complaints during the day on September 1, 2014, but that night she developed severe abdominal pain in the right upper quadrants, and after she vomited, her husband decided that she needed to go to the hospital. Ms. Raskin arrived at the Emergency Room at Methodist at around 2:30 a.m. on September 2, 2014. Upon examination later that morning, she had a low-grade fever, altered mental status, scleral icterus,⁵ right upper quadrant pain with a palpable tender mass and positive Murphy's sign.⁶ Blood work showed, among other things, significantly elevated white blood cell counts, elevated bilirubin levels, alkaline phosphatase levels and serum transaminases levels and coagulopathy.⁷ An ultrasound interpreted by 10:49 a.m. was consistent with gallbladder wall thickening, cholecystitis and biliary obstruction, as was the CAT scan completed two to three hours later.

At 3:52 p.m., Dr. Arya conducted a gastroenterological consultation. Dr. Arya's impression was "Acute cholecystitis with concurrent cholangitis[,] [c]oagulopathy likely secondary to nutritional deficiency, biliary obstruction and possible underlying liver disease as well." Among other things, Dr. Arya recommended an intensive care unit

⁵ Scleral icterus is the yellowing of the whites of the eyes that is associated with Jaundice.

⁶ Murphy's sign is a test for gall bladder disease that is part of an abdominal exam.

⁷ Coagulopathy is a condition in which the blood's ability to clot is impaired.

(ICU) consultation, the administration of vitamin K to correct coagulopathy, and fresh frozen plasma prior to any endoscopic retrograde cholangiopancreatography (ERCP). Finally, Dr. Arya noted that he planned to conduct an ERCP the next day.

Dr. Khotsyna, who was Ms. Raskin's admitting doctor, saw Ms. Raskin later that day and was her attending until she was transferred to the ICU at 10:36 p.m. that day.⁸ According to her deposition testimony, by the time she saw Ms. Raskin, a provisional diagnosis had largely been reached by the other doctors involved in Ms. Raskin's care. After conducting her own examination and reviewing the findings of these doctors and/or discussing Ms. Raskin's condition with same, Dr. Khotsyna's impression was that plaintiff had sepsis secondary to cholangitis versus pancreatitis or appendicitis and biliary obstruction secondary to stones or cancer. Dr. Khotsyna repeated many of Dr. Arya's recommendations, and made suggestions for the antibiotics to be given based on the diagnosis.

Several doctors consulted in the care of Ms. Raskin in the morning of September 3, 2014, including Dr. Nakhamiyayev, who performed a surgical consultation, and an ERCP was planned for that afternoon. In the early afternoon of that day, before the ERCP was performed, Ms. Raskin coded. The Methodist ICU team, however, was able to stabilize her. Dr. Verma performed the emergency ERCP at around 6:00 p.m. that evening and placed a stent in the common bile duct to address the stricture in the bile duct, which placement released a gush of black bile. Another code was called at 8:38

⁸ Although Dr. Khotsyna did not sign off on her notes until 8:38 p.m., she saw Ms. Raskin earlier in the day, although the exact time of her initial examination is not clear from her testimony.

p.m. that evening, which was successfully treated. The Methodist staff, however, was not able to revive Ms. Raskin when she coded in the morning of September 4, 2014, and she was declared dead at 9:37 a.m.

“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]). In order to meet this burden, a defendant need only address and rebut the specific allegations of malpractice set forth in plaintiff’s complaint and bill of particulars (see *Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 726 [2d Dept 2016]; *Bhim v Dournmashkin*, 123 AD3d 862, 865 [2d Dept 2014]). “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]).

In support of his motion, Dr. Durzieh has submitted an affirmation from Robert Fath, M.D., a gastroenterologist, who asserts that Dr. Durzieh's differential diagnosis that included epigastric pain secondary to peptic ulcer disease verses biliary etiology was appropriate given Ms. Raskin's history, complaints and his examination, and the sonogram and blood tests ordered by Dr. Durzieh were the correct tests to address biliary issues.⁹ Further, in the absence of right upper quadrant tenderness, jaundice, nausea, vomiting, or fever, Dr. Fath asserts that there was no ground to consider a more serious biliary condition (such as what she ended up dying from), there was no reason to order the tests on an emergent basis and there was no reason to refer Ms. Raskin to a hospital. Based on this affirmation from Dr. Fath, the deposition testimony in the record, and Ms. Raskin's medical records, Dr. Durzieh has demonstrated his prima facie entitlement to summary judgment dismissing the action based on a showing that there were no departures from accepted medical practice in his care of Ms. Raskin (*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]).

In opposing the motion, plaintiff has submitted an affirmation by Lester Paul Salwen, M.D., a gastroenterologist, who contends that Dr. Durzieh did not take Ms.

⁹ Plaintiff asserts that there is no evidentiary basis to find that Dr. Durzieh ordered blood tests. Plaintiff may be correct that the Dead Man's Statute (*see* CPLR 4519) bars Dr. Durzieh from relying on his testimony regarding his conversation with Ms. Raskin about the blood tests in support of his summary judgment motion (*see Grechko v Maimonides Med. Ctr.*, 188 AD3d 832, 835-836 [2d Dept 2020]; *Beyer v Melgar*, 16 AD3d 532, 533 [2d Dept 2005]; *cf. Nigro v Benjamin*, 155 AD2d 872, 872 [4th Dept 1989]). However, the statement in the plan section of Dr. Durzieh's notes regarding the visit is not barred by the Dead Man's Statute (*see Butler v Cayuga Med. Ctr.*, 158 AD3d 868, 873 [3d Dept 2018]; *Beyer*, 16 AD3d at 533), and contrary to plaintiff's contentions, this Court finds it is sufficient to demonstrate that blood tests were ordered. This issue is academic, however, because this Court finds that plaintiff has demonstrated an issue of fact requiring denial of the motion in any event.

Raskin's complaints of pain seriously enough, and thus should have insured that plaintiff underwent the sonogram in a timelier manner. Dr. Salwen also asserts that he did not actually order the blood tests, given that there is no prescription for the tests in his records, and given that Barry Raskin, who was present at the office visit, asserts that Dr. Durzieh made no mention of having blood work done. Even if Dr. Durzieh had in fact requested that the blood work be performed at the dialysis facility, Dr. Salwen states that blood work at such a facility would not have included the correct blood chemistries required.

This Court finds that plaintiff, through Barry Raskin's affidavit, has demonstrated factual issues as to whether Dr. Durzieh properly ordered the blood tests to be performed. In addition, even if Dr. Durzieh ordered blood work to be performed at the dialysis center, Dr. Salwen's affirmation demonstrates the existence of a factual issue regarding whether such blood work could properly be performed at the dialysis center. These factual issues regarding the blood work, along with Dr. Salwen's assertion that the ultrasound should have been performed in a timelier fashion, are sufficient to demonstrate the existence of a factual issue with respect to the adequacy of Dr. Durzieh's care that requires denial of his motion (*see Wiater v Lewis*, 197 AD3d 782, 784 [2d Dept 2021]; *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 544-546 [2d Dept 2017]; *Omane v Sambaziotis*, 150 AD3d 1126, 1129 [2d Dept 2017]; *Leto v Feld*, 131 AD3d 590, 592 [2d Dept 2015]; *Polanco v Reed*, 105 AD3d 438, 441-442 [1st Dept 2013]; *Bell v Ellis Hosp.*, 50 AD3d 1240, 1241-1242 [3d Dept 2008]).

With respect to Ms. Raskin's Emergency Room visit on August 30, 2014, Methodist and Dr. Fernandez rely on an affirmation from Saul Melman, M.D., who is board certified in emergency medicine. Dr. Melman asserts that given the absence of concerning vital signs and absence of right upper quadrant tenderness, the blood test ordered was appropriate and there was no sign of more involved gastrointestinal conditions such as gallbladder disease, bile duct infection, cholecystitis and cholangitis or any other condition requiring further testing, gastrointestinal consults, or emergency treatment. Based on these same factors, Dr. Melman asserts that the vitals and physical exam did not suggest sepsis, and thus the slightly elevated white blood cell count of 13.6 did not require further testing or treatment and that there was nothing else in the blood test results that suggested the need for additional tests or treatment. Based on this affirmation from Dr. Melman, the deposition testimony in the record, and Ms. Raskin's medical records, Methodist and Dr. Fernandez have demonstrated their prima facie entitlement to summary judgment dismissing the action relating to the August 30, 2014 emergency room visit (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693).

In opposition, plaintiff submits an affirmation from Alan Schechter, M.D., who is board certified in emergency medicine. Dr. Schechter opines that Dr. Fernandez improperly discounted Ms. Raskin's complaints of weakness and of abdominal pain in assessing her condition. Dr. Schechter also opines that Dr. Fernandez overlooked the importance of the blood test findings of an elevated white blood cell count, a sign of a possible infection, and the positive icteric index, which reflects the existence of

discoloration of blood caused by excessive bilirubin, a sign of biliary obstruction. Based on the complaints and blood test results, Dr. Schechter contends that Dr. Fernandez should have considered a diagnosis of a biliary obstruction, ordered an abdominal ultrasound, abdominal CT Scan, and additional blood tests to assess liver function. Dr. Schechter asserts that these tests would likely have revealed the conditions discovered two days later, namely gallstones/sludge, a dilated common bile duct, elevated liver function tests showing biliary obstruction, and infection, all at a time before Ms. Raskin became overwhelmingly septic.

This Court concludes that Dr. Schechter's affirmation is sufficient to demonstrate the existence of a factual issue with respect to the adequacy of the treatment of Ms. Raskin by Dr. Fernandez and Methodist with respect to the emergency room visit on August 30, 2014, and that their motion must be denied in this respect (*see Wiater*, 197 AD3d at 784; *Neyman*, 153 AD3d at 544-546; *Omane*, 150 AD3d at 1129; *Leto*, 131 AD3d at 592; *Polanco*, 105 AD3d at 441-442; *Bell*, 50 AD3d at 1241-1242).

With respect to the care of Ms. Raskin from September 2, 2014 until her death on September 4, 2014, Methodist, Dr. Khotsyna, Dr. Arya, Dr. Verma and Dr. Nakhamiyayev rely on an affirmation from Peter Shamamian, M.D., a board certified general surgeon.¹⁰ Dr. Shamamian opines that the doctors involved in Ms. Raskin's care

¹⁰ Under the circumstances here, this Court finds that, in view of the departures alleged by plaintiff, Dr. Shamamian, a board general surgeon, is qualified to opine on the adequacy of the care by Methodist and the defendant doctors (*see Goldschmidt v Cortland Regional Med. Ctr., Inc.*, 190 AD3d 1212, 1215 [3d Dept 2021]; *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 405 [1st Dept 2010]; *Humphrey v Jewish Hosp. & Med. Ctr. of Brooklyn*, 172 AD2d 494, 494 [2d Dept 1991]; *see also Mezzone v Goetz*, 145 AD3d 573, 574 [1st Dept 2016], *lv dismissed* 29 NY3d 1074 [2017]; *Walsh v Brown*, 72 AD3d 806, 807

upon her return to Methodist ordered the appropriate tests relating to her presenting condition, obtained the proper consultations, properly diagnosed her condition as probable ascending cholangitis, and properly treated her condition. Notably, Dr. Shamaian asserts that Ms. Raskin was in septic shock on September 2, 2014, and that she needed to be stabilized and resuscitated before any surgical procedures, including the ERCP, could be performed. Further, emergent ERCP surgery could not have been performed on September 2, 2014 because her blood was not clotting at that time. Finally, Dr. Shamamian asserts that Ms. Raskin's injuries and resulting death were inevitable at the time of her presentation on that day because she was very septic, and therefore no different or earlier treatment would have made a difference in her medical course. Based on this affirmation from Dr. Shamamian, the deposition testimony in the record, and Ms. Raskin's medical records, Methodist, Dr. Khotsyna, Dr. Arya, Dr. Verma and Dr. Nakhamiyayev have demonstrated their prima facie entitlement to summary judgment dismissing the action as it relates to the care rendered on September 2, 2014 to September 4, 2014 (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693).

In opposition, plaintiff relies on the affirmation of Dr. Salwen, who asserts that an emergency ERCP, with stent placement and flushing of infected bile, should have been conducted within 12 to 24 hours of Ms. Raskin's presentation because, by that time, all

[2d Dept 2010]). Notably, as evidenced by plaintiff's opposition, plaintiff's contentions with respect to the adequacy of the care relevant to the September 9, 2014 visit solely relates to the timeliness of the ERCP procedure, which would appear to fall within the expertise of a general surgeon. This issue, however, is academic, given that this Court also finds that plaintiff has demonstrated the existence of factual issues requiring denial of the motion.

the tests necessary to diagnose her condition had been conducted, and antibiotics alone could not address the obstructed bile ducts or clear the infected bile. Dr. Salwen asserts that administration of fresh frozen plasma, blood transfusions, broad spectrum antibiotics and fluid and electrolyte resuscitation could have stabilized Ms. Raskin enough for such an intervention, and that her coagulopathy (i.e., her clotting ability) was improving once vitamin K was administered. Contrary to Dr. Shamamiam's assertion that Ms. Raskin's death was inevitable upon her presentation on September 2, 2014, Dr. Salwen asserts that the earlier performance of an ERCP could have given Ms. Raskin a significantly better chance of survival.

This Court concludes that Dr. Salwen's affirmation is sufficient to demonstrate the existence of a factual issue with respect to the adequacy of the treatment of Ms. Raskin by Methodist, Dr. Khotsyna, Dr. Arya, Dr. Verma and Dr. Nakhamiyayev relating to the September 2, 2014 admission (*see Wiater*, 197 AD3d at 784; *Neyman*, 153 AD3d at 544-546; *Omane*, 150 AD3d at 1129; *Leto*, 131 AD3d at 592; *Polanco*, 105 AD3d at 441-442; *Bell*, 50 AD3d at 1241-1242).

In sum, the affidavits of plaintiff's experts demonstrate the existence of factual issues relating to the adequacy of the care rendered by defendants. The conflicting opinions of the experts with respect to this care rendered present issues of credibility that must be determined by a jury (*see Lesniak v Huang*, 186 AD3d 1512, 1513 [2d Dept

2020]; *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]).

Accordingly, both motions are hereby denied.

This constitutes the decision and order of the Court.

ENTER

A handwritten signature in black ink, appearing to read "Bernard J. Graham", written over a horizontal line.

J.S.C.

HON. BERNARD J. GRAHAM