

Avtzon v Cohen

2022 NY Slip Op 34402(U)

December 16, 2022

Supreme Court, Kings County

Docket Number: Index No. 521013/2019

Judge: Ellen M. Spodek

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At MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 16th day of December, 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RIVKA AVTZON as Administrator of the Estate of YONAH
AVTZON, Deceased, and RIVKA AVTZON, Individually,

Index No. 521013/2019

DECISION AND ORDER

MS # 2

Plaintiffs,

-against-

YOSEF COHEN, P.A., HILLEL ISSEROFF, M.D., ELI
ROSEN, M.D., FARAJ SAMARA, M.D., CROWN
MEDICAL, P.C., and JOSEPH GELBFISH, M.D.,

Defendants.

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Motion and Affirmation
Affirmation in Opposition
Reply Affirmation

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Defendants HILLEL ISSEROFF, M.D., ELI ROSEN, M.D. and CROWN MEDICAL, P.C (“Crown Medical”) move pursuant to CPLR 3212 for an Order granting Summary Judgment on the causes of action for negligence, negligent hiring retention and supervision, and wrongful death, and dismissing the remaining cause of action for loss of consortium. Plaintiff opposes the motion.

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Background

This cause of action arises out of the death of Yonah Avtzon, who passed away on January 9, 2019 following a series of medical treatments at Crown Medical, P.C., for influenza and a subsequent kidney injury. The relevant treatments took place between 2017 and 2019.

Decedent, Yonah Avtzon was a patient of Crown Medical, having treated there with several of the defendants since 1985, including defendants, Hillel Isseroff, M.D., Eli Rosen, M.D., and Faraj Samara, M.D. Defendant Rosen was Yonah Avtzon's primary care physician, prior and subsequent to March of 2017. Yonah Avtzon was taking 40 mg of Omeprazole twice daily, off and on since at least November 2012 for treatment of gastritis and GERD, prescribed by Dr. Jeffrey Gamss. (Exhibit "O" Apple Drugs Pharmacy records, p. 3).

During a visit on May 1, 2013, where Decedent, was treated by Dr. Isseroff for complaints of cellulitis, a urinalysis was performed which showed 1+ for protein. Blood work was taken which indicated a serum creatinine level of 0.87 and an EGFR of 96 ml/min. The normal reference range for creatinine is 0.7 - 1.3 mg/dL. The normal reference range for EGFR is >60 mL/min. (see Exhibit "H" Medical Records from NYU Langone.) At the time, Mr. Avtzon was taking Omeprazole 40 mg, prescribed by Dr. Gamss, which was then refilled by Dr. Isseroff (see Exhibit F, pgs. 310, 312-0314, 894-913).

On August 12, 2013, Yonah Avtzon was noted with proteinuria, after a urinalysis revealed 1+ protein in his urine. (Exhibit "F" Crown Medical records, p. 254.) On August 12, 2013, Yonah Avtzon's creatinine was 1.29 mg/dL. Mr. Avtzon was seen again in the office the following day on August 13, 2013 an again on August 15, 2013 as a follow up regarding his left sided abdominal pain. He was referred for a kidney ultrasound due to renal stones, which

ultimately showed no abnormality. On March 12, 2015, Mr. Avtzon's creatinine was normal at 0.91, and on August 3, 2016, it remained normal at 0.90. (Exhibit "F" p. 255.)

Mr. Avtzon presented to Crown Medical on August 8, 2016, treating with defendant Dr. Isseroff. During the visit, Dr. Isseroff reviewed prior urinalysis results from August 12, 2013 and August 3, 2016, both of which were positive for 1+ protein. At the time of the visit Mr. Avtzon complained of GERD, chronic dysphagia and regurgitation. Dr. Isseroff referred the patient to defendant Dr. Gelbfish for a cardiovascular evaluation and to Dr. Zoltan for a urology consult. (Exhibit "F" pp. 254-255).

Yonah Avtzon presented to Crown Medical on March 26, 2017, and was seen by PA Yosef Cohen. At the time of the visit, Mr. Avtzon was 5'8 and weighed 197 lbs. His BMI was 29.95. (Exhibit "F" p. 248.) He complained of fever of 104° the previous night, chills, fatigue, cough with productive yellow sputum over two days, and myalgia. He was obese and advised that he had not received a flu shot. (Exhibit "F" p. 248). On March 26, 2017, PA Cohen performed a rapid flu test which returned positive for Influenza B. (Exhibit "F" p. 249.) On March 26, 2017, PA Cohen prescribed 75 mg Tamiflu (twice per day for 5 days) for treatment of Influenza B, and Naproxen (500 mg as needed every 12 hours for 5 days) for treatment of fever. (Exhibit "F", p. 249.)

Yonah Avtzon returned to Crown Medical on April 5, 2017 when he advised Defendant Samra that he was not feeling better, post flu and Tamiflu. He reported weakness, calf pain, sore throat, coughing, and lack of appetite. He complained of fatigue, nausea, vomiting and productive cough of yellow / green sputum. His medications included Omeprazole 40 mg twice daily, and Vitamin D. He weighed 200 lbs. and appeared fatigued. (Exhibit "F" p. 244.) During the April 5, 2017 visit, defendant Samra ordered a basic metabolic panel with EGFR which

indicated a creatinine level greater than 20.0. He was referred to NYU for a chest x-ray. (Exhibit "F" p. 244.) On April 6, 2017, defendant Samra spoke to the plaintiff advising that the chest x-ray was negative; however, Mr. Avtzon was in renal failure and instructed him to stop antibiotics and go to the ER at NYU for further evaluation. (Exhibit "F" p. 243.)

Yonah Avtzon presented to the emergency department at NYU Langone Medical Center on April 6, 2017 at 1:19 p.m. for evaluation by a nephrologist upon the recommendation of Defendant Rosen after learning that his creatinine was at a critical level of 24. (Exhibit "G", NYU Langone Medical records, p. 42.) Yonah Avtzon was admitted to the medicine / nephrology service at NYU from April 6, 2017, through April 16, 2017. (Exhibit "G" pp. 42-43.)

On April 6, 2017, NYU nephrologist, Dr. Danial Matalon performed an initial evaluation diagnosing Mr. Avtzon with acute kidney injury status post treatment of influenza with Tamiflu and Ibuprofen noting that "history, symptoms, and labs most consistent with AIN (acute interstitial nephrosis), possibly from Ibuprofen, less likely from Omeprazole as he has been taking it for years and his renal failure is acute. Other etiologies are possible as well." (Exhibit "G" pp. 70-71.) Dr. Jacob Spinner drafted an admission note on April 7th that Mr. Avtzon reported "finishing the oseltamivir, also took rare Ibuprofen for discomfort..." (Exhibit "G" p. 73.)

On April 10, 2017, Yonah Avtzon underwent a renal biopsy suggestive of acute interstitial nephritis secondary to drug hypersensitivity reaction and acute diffuse and mild tubular injury. (Exhibit "G" pp. 116-117.) 23. On April 13, 2017, Dr. Jina Park discussed the results of Mr. Avtzon's biopsy with Dr. Matalon noting that "given patient now producing more urine, improving Cr [creatinine 10.8] on dialysis, may signify recovery of renal function / reversibility." (Exhibit "G" p. 122.) Dr. Matalon determined that Mr. Avtzon was stable for

discharge home on April 16, 2017 with instructions to take Prednisone 80 mg daily, and to continue dialysis as an outpatient. His creatinine level was 7.1 (Exhibit "G" pp. 146-147, 167.)

On May 9, 2017, Mr. Avtzon obtained a second opinion from senior nephrologist, Dr. Gerald Appel at Columbia University. Dr. Appel noted that the patient had received dialysis twice per week as an outpatient following discharge from NYU, and had stopped completely the week prior to his visit. Dr. Matalon noted that the patient's acute kidney injury was consistent with AIN. The most likely cause was medication "suspect Omeprazole with perhaps NSAIDs; however, Tamiflu could have caused this as well. Would avoid all of them." (Exhibit "N" Dr. Matalon's records, pp 121 - 122.) Mr. Avtzon's creatinine level on June 16, 2017 was 2.2 (Exhibit "N" p.18.)

Mr. Avtzon returned to Dr. Matalon's office on May 23, 2017. He was again noted to have stopped dialysis "when recovery was noted." His permacatheter had been removed, AKI due to AIN was recovering, and his creatinine had decreased to 3.3. Dr. Matalon noted that he "may not need further follow up in my office unless creatinine does not return to normal" and that he was continuing to follow with Dr. Rosen. (Exhibit "N" p. 22.)

Mr. Avtzon's creatinine level was 2.0 on July 7, 2017, and 2.4 on July 17, 2017 leading Dr. Matalon to suggest that it may have plateaued around the 2.0's. (Exhibit "N", p. 19.) Mr. Avtzon's creatinine was determined stable by Dr. Matalon on September 27, 2017 at 2.1. Prior edema was relatively resolved, he was recommended to continue diet, exercise and weight loss, to continue medications, and return in two months (Exhibit "N", pp. 15 - 16.) On November 22, 2017, Mr. Avtzon's creatinine measured 2.2. (Exhibit "N" p. 12.) On February 20, 2018, Mr. Avtzon's creatinine measured 2.1. (Exhibit "N" p. 9.) On May 18, 2018, Mr. Avtzon's creatinine

measured 2.0. (Exhibit "N", p. 6.) On August 21, 2018, Mr. Avtzon's creatinine measured 2.0. (Exhibit "N", p. 3).

Yonah Avtzon returned to NYU on December 15, 2018 after transfer from Cobble Hill Medical Center with complaints of moderate fatigue over four weeks. His troponin level was elevated at .599 and he had a drop in hemoglobin. He was diagnosed with acute on chronic diastolic congestive heart failure with minimal troponin elevation, down trending, likely demand related. His creatinine was 1.94. Etiology was unclear, though NICM (nonischemic cardiomyopathy) was suspected. (Exhibit "G" pp. 1116-1123.) Dr. Matalon performed a renal consult on December 16, 2018, noting that he had been in his office 6 weeks prior. At the time, Mr. Avtzon reported a poor appetite, and poor intake over one month with increased lower extremity edema. His BP results and urinary output from the day were reviewed.

Dr. Matalon noted that Mr. Avtzon had chronic kidney disease with new volume overload and congestive heart failure. He noted that his worsening volume overload did not seem to be due to chronic kidney disease or diet alone, and expressed concern for cardiac ischemia. (Exhibit "G", pp. 1146 - 1147.) Dr. Matalon confirmed that Mr. Avtzon's renal function was stable on December 18, 2018. Mr. Avtzon reported feeling well on December 19, 2018 and he was cleared for discharge with follow up appointments with his primary care physician and cardiologist. (Exhibit "G", pp. 1168-1170).

Yonah Avtzon presented to cardiologist and defendant, Dr. Joseph Gelbfish's office on January 2, 2019 due to complaints of recent shortness of breath. He reported feeling well and was at his baseline level of activity. (Exhibit "O", Dr. Gelbfish's records, pp. 13-16.) Mr. Avtzon returned to Dr. Gelbfish's office on January 8, 2019 to undergo treadmill exercise testing (stress test.) After obtaining a maximal heart rate of 151 bpm, the test was terminated due to dyspnea

and fatigue. The test was determined to be normal and ECG was negative for ischemia. (Exhibit "O", pp. 18-19.) Yonah Avtzon expired at 8:19 a.m. while at home on January 9, 2019. (Exhibit "P", Death Certificate.)

Discussion

On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp.*, 120 A.D.3d 1287 (2d Dept. 2014); *Stukas v Streiter*, 83 AD3d 18, 24-26 (2d Dept. 2011).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Brinkley v. Nassau Health Care Corp.*, supra; *Fritz v. Burman*, 107 A.D.3d 936, 940 (2d Dept. 2013); *Lingfei Sun v. City of New York*, 99 AD3d 673, 675 (2d Dept. 2012); *Bezerman v. Bailine*, 95 AD3d 1153, 1154 (2d Dept. 2012); *Stukas v. Streiter*, at 24. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff's injury. *Contreras v Adeyemi*, 102 AD3d 720, 721 (2d Dept. 2013); *Gillespie v New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012); *Semel v Guzman*, 84 AD3d 1054, 1055-56 (2d Dept. 2011). The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas*, at 24.

In support of this motion, defendants submit the affirmation of Dr. Karim El Hachem, a board-certified nephrologist licensed to practice in the State of New York. Dr. El Hachem opines

that no aspect of the treatment administered by Dr. Rosen or Dr. Isseroff constitutes a departure from good and accepted standards of medical practice (see Aff. In Supp. Para 7.) Dr. El Hachem further states that even if Drs. Rosen and Isseroff had departed from good and accepted standards, there is no way to determine whether those departures proximately caused Mr. Avton's death because there was no post-mortem examination (Id. At para. 3). Dr. El Hachem argues that Mr. Avtzon was not suffering from underlying kidney disease, as plaintiffs claim, but rather that he had "minimal, isolated proteinuria," of indeterminate cause (Id. at para. 21). He points out that the slightly elevated levels of protein in Mr. Avtzon's urine in 2017 when he was prescribed NSAIDS and Oseltamivir could have been caused by a number of underlying issues including stress and dehydration. He argues that given the relatively slight level of protein elevation during this time period, NSAIDS and Oseltamivir were not contraindicated (Id.) He argues that there was no failure to timely diagnose or treat kidney disease on the part of either Dr. Rosen or Dr. Isseroff, and that their approach with respect to conducting work ups of Mr. Avtzon and referring him to other doctors was appropriate. (Id.)

Dr. El Hachem states that as to the renal failure in 2017, the medical records establish that Mr. Avtzon suffered a "sudden, unexpected and unpredictable hypersensitivity reaction to one or more medications," and not a complication from a chronic kidney injury. (Id. para. 23)

Dr. El Hachem points out that in December of 2019 when Mr. Avtzon was hospitalized for acute diastolic heart failure, his creatinine levels were stable and he was not suffering from acute renal failure (Id. at para. 38). Because there was no post-mortem examination, he states, there is no way to state with any degree of medical certainty that Mr. Avtzon's death was caused by his renal condition or any such related issues. (Id. at para. 40.)

In support of their opposition, plaintiffs have also submitted an expert affirmation from a board-certified doctor of internal medicine licensed to practice in the state of New York. Plaintiff's expert argues that the defendants at Crown Medical departed from good and excepted standards of medical practice by failing to conduct additional testing to determine the cause of Mr. Avtzon's proteinuria in 2015 (Aff. In. Opp. Para. 24). Plaintiff's expert also claims that it was a departure not to document chronic kidney disease in Mr. Avtzon's chart at that time.

Plaintiff's expert further opines that Mr. Avtzon's renal failure in 2017 was not sudden or unpredictable, but rather a direct result of his taking NSAIDs, Tamiflu, and Omeprazole, which are "known to further compromise kidney function," and "would typically be discontinued in patients where there is a concern for abnormal kidney function." (Id. at para. 25.) Plaintiff's expert further states that defendants at Crown Medical departed from good and accepted standards of medical practice by failing to examine both Mr. Avtzon's kidneys and his cardiovascular function in 2017.

Plaintiff's expert goes on to state that Mr. Avtzon's creatinine levels were elevated, not stable in December of 2018, and that Mr. Avtzon's chart indicated that kidney disease was a possible cause of his heart failure. (Id at para. 37.)

After oral argument and a review of the papers, the Court finds that the Crown Medical defendants have sustained their burden of showing that they did not depart from good and accepted medical standards. The burden then shifted to plaintiff to provide evidence to the court that the defendants did in fact deviate from the accepted standards of medical care, raising a triable issue of fact. The Court finds that plaintiff has not sustained his burden as to either of the Crown Medical defendants. Mere "conclusions, expressions of hope or unsubstantiated

allegations or assertions” are insufficient to defeat summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Here, plaintiff’s expert fails to establish triable issues of fact or to create any causal link between the alleged departures by Dr. Rosen and Dr. Isseroff, and Mr. Avton’s death. Plaintiff’s expert opines that it was a departure not to conduct further testing to determine the cause of Mr. Avtzon’s proteinuria. However, he does not refute Defendant’s experts’ claim that proteinuria can have several causes, some of which are benign. It is not disputed that Mr. Avtzon’s protein levels were 1+, but Plaintiff’s expert does not provide any specific facts to refute Defendant’s expert’s claim that it was appropriate to assume a benign cause.

Plaintiff’s expert opines that it was a departure for defendants not to perform cardiovascular evaluations at various points or to refer Mr. Avtzon to a cardiologist. However, Dr. Isseroff did refer Mr. Avtzon to a cardiologist, defendant Dr. Gelbfish, who remained his cardiologist until the end of his life. In fact, Plaintiff’s expert claims that it was a departure for Dr. Rosen not to send Mr. Avtzon to the Emergency Room on January 8, 2019 because he failed to complete a cardiac stress test performed by Dr. Gelbfish, who also did not refer Mr. Avtzon to the emergency room and felt it was safe for him to go home.

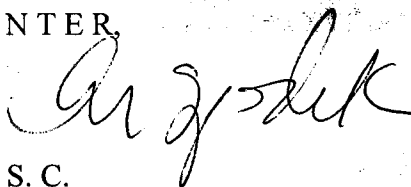
Finally, Plaintiff’s expert concludes by stating that “defendants were responsible for allowing Mr. Avtzon’s proteinuria to go untreated, leading to chronic kidney disease. Therefore, the etiology of Mr. Avtzon’s heart failure is clear.” (Aff. In Opp. Para, 37). However, the core issue of this case is that the etiology of Mr. Avtzon’s heart failure is not clear. Simply stating that his heart failure and death were a result of untreated chronic kidney disease does not create a triable issue of fact. The medical records in this case in fact indicate the contrary, that there were many potential causes of his heart failure including possible kidney disease.

Although Plaintiff's expert addresses each of Defendant's expert's points and states that he reviewed the records, he does not offer more than conclusory statements regarding Mr. Avtzon's health. Ultimately, Plaintiff's expert fails to draw a connection between Mr. Avtzon's kidney issues and his death, and fails to point out any triable issues of fact.

Conclusion

Defendants' motion is granted in its entirety. The complaint is dismissed as to Crown Medical, Dr. Rosen, and Dr. Isseroff. This constitutes the decision and order of the court.

ENTER,



J. S. C.

Honorable Ellen M. Spadek

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