

Jorif v Patel

2022 NY Slip Op 34568(U)

March 16, 2022

Supreme Court, Richmond County

Docket Number: Index No. 150049-2018

Judge: Judith N. McMahon

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

IAS PART 6

ORDER

ROLANDO JORIF, as the Proposed
Administrator of the Estate of PAULINA
JORIF, Deceased,

Plaintiffs,

- against -

Index Number: 150049-2018

Hon. Justice
Judith N. McMahon

SUNHIL H. PATEL, M.D., VLADIMIR
RUBINSHTEYN, M.D., ANA PAULA
OPPENHEIMER, M.D., PETER GOTTLIEB,
M.D., NEVEN NASSIF, M.D. and RICHMOND
UNIVERSITY MEDICAL CENTER,

Defendants.

Defendant Peter Gottlieb, M.D.'s motion (sequence 003), Pursuant to CPLR § 3212,
granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendant
Peter Gottlieb, M.D., is granted as detailed herein.

Defendant Neven Nassif, M.D.'s motion (sequence 004), Pursuant to CPLR § 3212,
granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendant
Neven Nassif, M.D., is granted as detailed herein.

Defendants Vladimir Rubinshteyn, M.D., and Richmond University Medical Center's
motion (sequence 005), Pursuant to CPLR § 3212, granting summary judgment and dismissing
Plaintiff's Verified Complaint, against Defendants Vladimir Rubinshteyn, M.D., and Richmond
University Medical Center is granted in part and denied in part as detailed herein.

This is a medical malpractice case in which Plaintiff alleges that Defendants, during an
admission to Defendant Richmond University Medical Center allegedly failed to properly place a

percutaneous endoscopic gastrostomy (“PEG”) tube, failed to diagnose that there was a perforation from the PEG tube, failed to request appropriate consults, failed to manage the patient properly in light of her diagnosis of Guillain-Barre Syndrome, failed to order various imaging, and failed to timely and properly diagnose and treat infection/sepsis, leading to pain and suffering and the death of Plaintiff Decedent Paulina Jorif.

Defendants now move for summary judgment to dismiss Plaintiff’s case as against them.

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements.” *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendant Peter Gottlieb, M.D. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Peter Dicipinigaitis. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendant Peter Gottlieb, M.D.’s motion, Dr. Dicipinigaitis opined that “there is no suggestion or evidence that would support the plaintiff’s claim that Dr. Gottlieb deviated from accepted standards of care in the treatment rendered, nor did the Dr. Gottlieb cause any untoward damage or injury. It is also my opinion, within a reasonable degree of medical certainty, that any acts or omissions allegedly committed by Dr. Gottlieb were not the proximate cause of any damages or injuries, nor did said treatment cause any exacerbations or worsening of the patient’s condition or outcome.”

Dr. Dicipinigaitis elaborated that “Intubation of the patient was indicated due to the patient's decreased oxygen saturation level. The patient's endotracheal tube was appropriately monitored, and the patient's ventilator settings were timely and properly reviewed and considered and the appropriate recommendations for the settings made. The patient's laboratory values, saturation levels and arterial blood gases were also timely and appropriately monitored and considered...a bronchoscopy was properly indicated and properly and timely performed by Dr. Gottlieb based on hemoptysis and the patient's abnormal chest x-ray. The appropriate specimen was removed and sent for testing. Dr. Gottlieb did not deviate from good and accepted medical standards in not pursuing brushing or biopsies on February 23, 2016, as the patient was hemodynamically unstable. At all times, Dr. Gottlieb timely and properly appreciated the patient's pre-operative condition, intraoperative changes, post-operative condition and appropriately monitored the patient during the subject admission. Dr. Gottlieb timely and properly referred the patient for surgical evaluation.”

Defendant Neven Nassif, M.D. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Brian Feingold.

In support of Defendant Neven Nassif, M.D.'s motion, Dr. Feingold opined that, “DR. NASSIF properly treated the patient throughout the admission. DR. NASSIF repeatedly contacted and ensured that the correct consults were called, and that they continued to see and treat the patient throughout those times that the patient was admitted to the Medical floor of RUMC. DR. NASSIF properly evaluated the patient on those occasions that she did see the patient on the medical floor, noted the pertinent findings, and properly documented them so that the other physicians at RUMC, including the multiple consults, were aware of the ongoing events

related to the patient. DR. NASSIF also spoke directly with the numerous consults to further assist in treatment of the pat[i]ent.”

Dr. Feingold concluded that, “Even if plaintiff claims that perforation should have been suspected and/or diagnosed earlier, DR. PATEL and the gastroenterologists at RUMC were managing the patient's PEG site stoma, continued to recommend and treat the patient conservatively, and subsequently with an attempted stoma repair and clipping once suspected and diagnosed. Once this was unsuccessful, DR. NASSIF properly called for a surgical consult to provide possible alternatives. Contacting surgery any earlier would not have changed the outcome. It is entirely speculative to say that surgery, if contacted earlier, would have immediately opted to perform surgery, and that, if surgery was performed earlier, the outcome would have been any different.”

Defendants Vladimir Rubinshteyn, M.D., and Richmond University Medical Center established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Andrew Boyarsky.

In support of Defendants Vladimir Rubinshteyn, M.D., and Richmond University Medical Center's motion, Dr. Boyarsky opined that, “the hospital staff and Dr. Rubinshteyn did not deviate from the accepted standards of medical practice in the medical care and treatment they rendered to decedent. Dr. Rubinshteyn, in his capacity as a general surgeon was called for a consult on March 24, 2016. He promptly performed a consultation, performed a thorough examination and ordered appropriate testing. Based on the CT results, Dr. Rubinshteyn appropriately determined emergent laparotomy was necessary to stop the leakage. As such, it is my opinion that Dr. Rubinshteyn met the standard of care [and] appropriately performed the exploratory laparotomy and stopped the leakage, as noted at the post-operative follow-up.”

Dr. Boyarsky concluded, “that Dr. Rubinshteyn did not create any of the conditions that arose requiring emergent surgery and intervened immediately upon the request for a surgical consult. Additionally, he successfully performed an exploratory laparotomy to stop the contents that were already leaking in decedent’s abdominal cavity. It is also my opinion that Dr. Rubinshteyn’s treatment was in no way a substantial factor in decedent’s death. For arguments sake, even if one were to argue that there was a delay of a few hours in performing the surgery, such a minor delay would in no way have contributed to or impacted decedent’s outcome.”

“Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff did not oppose the summary judgment motions of Dr Peter Gottlieb or Dr. Vladimir Rubinshteyn, so those portions of Defendants’ motions are granted.

Plaintiff submitted an Affirmation from a doctor specializing in Internal Medicine and Cardiovascular Disease in Opposition to the summary judgment motions of Dr. Neven Nassif and Richmond University Medical Center.

In opposition to Defendant Dr. Nassif’s motion, Plaintiff’s Expert opined “that NEVEN NASSIF, M.D., failed to properly treat PAULINA JORIF's infection, sepsis, and septic shock... When it was noted that PAULINA JORIF likely had peritonitis and abdominal cellulitis on March 18, 2016, the standard of care required NEVEN NASSIF, M.D., to immediately order and refer PAULINA JORIF for CT imaging with contrast to rule out a gastric leak as the cause of infection and sepsis, and to determine whether emergency surgery was necessary. However, the CT was not performed until March 24, 2016, allowing the leak, infections, and sepsis to intensify...[also] on March 22, 2016, the standard of care required NEVEN NASSIF, M.D., to, again, immediately order and refer PAULINA JORIF for CT imaging with contrast to rule out a gastric leak as the cause of infection and sepsis...had NEVEN NASSIF, M.D., ordered and referred PAULINA JORIF for imaging when she was first found to have peritonitis and abdominal cellulitis, the exploratory laparotomy washout and closure would have been performed days earlier. At that time, the procedure would have cleared the infections and sepsis

and stopped their source. Instead, the emergency surgery was delayed by days, causing the infections and sepsis to progress to the point that PAULINA JORIF passed away.”

In opposition to the motion of Defendant RUMC, Plaintiff’s Expert opined that, “RICHMOND UNIVERSITY MEDICAL CENTER deviated from the standards of good and accepted medical practice by and through SUNHIL H. PATEL, M.D.,...[in] that one of the many PEG placements and attempted PEG placements by SUNHIL H. PATEL, M.D., caused the gastric perforation that allowed the infections and sepsis to advance to the point that PAULINA JORIF passed away. The CT imaging performed revealed a suspected leak that was confirmed to be a gastric perforation leak during the exploratory laparotomy washout and closure. The infected material was washed out and the gastric perforation leak was closed too late to allow PAULINA JORIF to overcome the infections and sepsis.”

The Court notes that Defendant Dr. Sunil Patel did not move for summary judgment.

Regarding breaches of the standard of care alleged against Dr. Nassif, “In opposition, the Plaintiff failed to raise a triable issue of fact by the submission of [their] Expert’s affidavit since expert opinions which are speculative, conclusory, and unsubstantiated are insufficient to defeat a motion for summary judgment.” *Martirosyan v. Antreasyan*, 153 A.D.3d 616, 57 N.Y.S.3d 404 (N.Y.A.D. 2nd Dept. 2017).

Plaintiff’s Expert incorrectly states that a CT scan was not performed until March 24, 2016, when the record reflects that a CT scan was performed on March 23, 2016. Additionally, Plaintiff’s Expert incorrectly states that a CT scan was necessary to rule out a gastric leak and determine if emergency surgery was necessary. Plaintiff’s Expert’s opinion fails to address the fact that Dr. Nassif noted that the PEG was leaking as early as March 9, 2016, and called for

consults from Gastroenterology and Infectious Disease, whose expertise Dr. Nassif relied upon in determining Plaintiff's treatment.

"General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion...the plaintiff's expert must specifically address the defense expert's allegations." *DiLorenzo v. Zaso*, 148 A.D.3d 1111, 50 N.Y.S.3d 503 (N.Y.A.D. 2nd Dept. 2017); *See also Kim v. N. Shore Long Island Jewish Health Sys., Inc.*, No. 2018-05600, 2022 WL 302685 (N.Y.A.D. 2nd Dept. 2022).

Plaintiff's Expert's Affirmation is speculative and conclusory in regards to breaches of the standard of care attributable to Dr. Nassif as it fails to set forth an explanation of the reasoning and does not rely on specifically cited evidence in the record. *See Tsitrin v. New York Community Hospital*, 154 A.D.3d 994, 62 N.Y.S.3d 506 (N.Y.A.D. 2nd Dept. 2017).

However, the summary judgment motion of RUMC must be denied as to the vicarious liability of RUMC for the actions of Dr. Patel, who did not move for summary judgment and for whom Plaintiff's Expert specifies breaches of the standard of care. Plaintiff's Expert does not opine as to breaches of the standard of care attributable to the staff of RUMC, so only the portion of RUMC's motion related to vicarious liability for Dr. Patel is denied, the remainder is granted.

"In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant[s] departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

There are questions of fact including, but not limited to, the liability of Dr. Patel (who did not move for summary judgment) and RUMC's vicarious liability for same.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020).

ORDERED Defendant Peter Gottlieb, M.D.'s motion (sequence 003), Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendant Peter Gottlieb, M.D., is granted unopposed; and it is further

ORDERED that Plaintiff's claims against Defendant Peter Gottlieb, M.D. are severed and dismissed; and it is further

ORDERED Defendant Neven Nassif, M.D.'s motion (sequence 004), Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendant Neven Nassif, M.D., is granted; and it is further

ORDERED that Plaintiff's claims against Defendant Neven Nassif, M.D. are severed and dismissed; and it is further

ORDERED Defendant Vladimir Rubinshteyn, M.D.'s motion (sequence 005), Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendants Vladimir Rubinshteyn, M.D. is granted unopposed; and it is further

ORDERED that Plaintiff's claims against Defendant Vladimir Rubinshteyn, M.D. are severed and dismissed; and it is further

ORDERED that Defendant Richmond University Medical Center's motion (sequence 005), Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Verified Complaint, against Defendant Richmond University Medical Center is granted only as to Plaintiff's direct claims against Richmond University Medical Center; and it is further

ORDERED that Plaintiff's direct claims against Defendant Richmond University Medical Center are severed and dismissed; and it is further

ORDERED that Defendant Richmond University Medical Center's motion (sequence 005), Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff's Verified

Complaint, against Defendant Richmond University Medical Center is denied as to Plaintiff's vicarious liability claims against Richmond University Medical Center for the actions of Dr. Patel; and it is further

ORDERED that any and all other requested relief is denied; and it is further

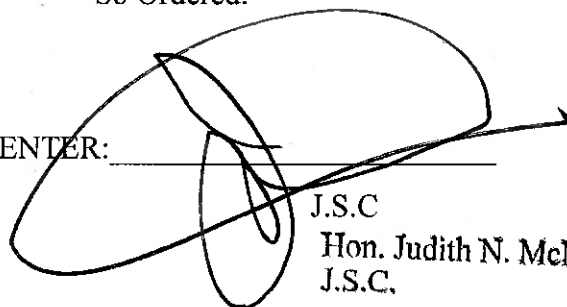
ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on May 10, 2022, at 11:00 AM; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: March 16, 2022

So Ordered.

ENTER: _____

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

J.S.C
Hon. Judith N. McMahon
J.S.C.