

**Parmanand v Centeno**

2022 NY Slip Op 34612(U)

August 9, 2022

Supreme Court, Queens County

Docket Number: Index No. 719603/2018

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Peter J. O'Donoghue IA Part MD  
Justice

RAYWATIE PARMANAND, as Administrator  
of the Estate of NFN PARMANAND,  
deceased,

Plaintiff, x

Index  
Number 719603/2018

- against -

Motion

LESLEY ANN CENTENO, ROBERT CENTENO, JR.,  
TENZING S. LAMA, UMBRELLA CORP.,  
JAMAICA HOSPITAL MEDICAL CENTER and  
DR. M. MALLIN, M.D.,

Defendants.

Date January 26, 2022

Motion Seq. Nos. 6 & 7

x



The following numbered papers read on these motions: (1) by the defendants Lesley Ann Centeno and Robert Centeno, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them; (2) the cross motion by the plaintiff, pursuant to CPLR 3212, for summary judgment against the defendants Lesley Ann Centeno and Robert Centeno; and (3) the separate motion by the defendants Jamaica Hospital Medical Center and David M. Mallin, M.D., pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them.

Papers  
Numbered

Seq. #6

Notice of Motion - Affidavits - Exhibits..... EF 102-107  
Notice of Cross Motion - Affidavits - Exhibits.... EF 132-134  
Answering Affidavits - Exhibits..... EF 136  
Reply Affidavits..... EF 137, 145

Seq. #7

Notice of Motion - Affidavits - Exhibits..... EF 108-130  
Answering Affidavits - Exhibits..... EF 138-144

Reply Affidavits..... EF 146

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated for the purpose of a single order and are determined as follows:

Factual and procedural background

This action stems from an accident between a motor vehicle and a pedestrian which occurred shortly after the pedestrian was discharged from the defendant Jamaica Hospital Medical Center (JHMC). The relevant facts are as follows. At approximately 8:00pm on May 26, 2017, the decedent was brought to JHMC by ambulance. The decedent was intoxicated, and stated that he drank two bottles of wine and "a couple of shots." Notably, the decedent had been admitted to the emergency room at JHMC for intoxication on several prior occasions. During the May 26, 2017 admission, a laceration on the decedent's forehead was observed, and the decedent reported that this may have been the result of an assault by, or a fight with, someone else.

During his treatment at JHMC that evening, the decedent was under the care of David M. Mallin, M.D., the attending physician in the emergency room, and Mallin's plan of care was to perform CT scans of the decedent's head and cervical spine. The findings from the CT scans were ultimately unremarkable, and at this point the plan of care was to monitor the decedent and observe him for sobriety. After it was determined that the decedent was alert and oriented, had stable vitals, and was able to walk with a normal gait, he was discharged at approximately 2:00am on May 27, 2017.

At approximately 2:30am, the defendant Lesley Ann Centeno (the driver) was driving south on the Van Wyck Expressway near the Jamaica Avenue exit when she struck the decedent, who was attempting to cross the expressway from west to east. According to the driver, the vehicle she was driving was owned by the defendant Robert Centeno, her father, and she was using the vehicle with her father's permission. The driver also testified that the expressway was straight and flat, but that there were no streetlights in the area. According to the driver, she was traveling in the left-hand lane of the expressway at approximately 50 miles per hour when the decedent crossed in front of the passenger side of the vehicle. In addition, the driver testified that while the weather was clear at the time of the accident and nothing had hindered her visibility, she did not see the decedent until approximately one second prior to the accident, at which point she "pressed my brake as hard as I could." However, the driver was unable to avoid the accident. Her vehicle struck the decedent, which set off a chain reaction of

automobile accidents involving three other vehicles. The autopsy report notes that the decedent's cause of death was "blunt impact to head, torso, and extremities."

The plaintiff Raywatie Parmanand, in both her individual capacity and as administratrix of the decedent's estate, subsequently commenced this action against, among others, the driver, Robert Centeno, JHMC, and Mallin, asserting causes of action for, among other things, negligence and wrongful death against all defendants. Insofar as asserted against the driver and Robert Centeno (the Centeno defendants), the plaintiff alleges that they were negligent in, among other things, operating their vehicle at an excessive and/or imprudent speed, failing to see what was there to be seen, and failing to operate their vehicle in a safe and prudent manner as to avoid the collision. The plaintiff also asserted a cause of action for medical malpractice against JHMC and Mallin (the JHMC defendants). In particular, the plaintiff alleges that the JHMC defendants and their employees and agents were negligent in, among other things, failing to use and/or timely use accepted medical practices in the evaluation, care, and/or discharge of decedent, improperly discharging the decedent, and failing to properly train, hire, and/or supervise their agents, servants, and employees.

The Centeno defendants submitted an answer which denied the plaintiff's allegations and asserted affirmative defenses of the decedent's comparative negligence and assumption of risk. The Centeno defendants also asserted cross claims for common-law indemnification and contribution against all defendants. JHMC and Mallin separately answered the complaint. In their respective answers, JHMC and Mallin each denied the plaintiff's allegations, asserted affirmative defenses of the decedent's contributory negligence, and asserted cross claims for common-law indemnification and contribution against the Centeno defendants.

Discovery now having been completed, the Centeno defendants move for summary judgment dismissing the complaint and all cross claims asserted against them (Seq. #6). The plaintiff opposes the motion and cross moves for summary judgment against the Centeno defendants. In addition, the JHMC defendants separately move for summary judgment dismissing the complaint and all cross claims asserted against them (Seq. #7).

#### Motion Sequence #6

In support of their motion, the Centeno defendants submit, among other things, the transcripts from the depositions of the driver, Mallin, and nonparty witness Nicole Tuccillo. The Centeno

defendants contend that these submissions establish that the driver was not operating her vehicle in a negligent manner at the time of the accident. The Centeno defendants further assert that the decedent violated Sections 1152(a) and 1229-a(a) of the Vehicle and Traffic Law by attempting to walk across the Van Wyck Expressway, and that these violations are the sole proximate cause of the accident, since the driver could not have expected a pedestrian to cross the expressway.

The only evidence offered by the Centeno defendants as to how the accident occurred is the deposition testimony of the driver, who testified to the following. She had not consumed drugs or alcohol in 24 hours prior to accident. When the accident occurred, she was driving south on the Van Wyck Expressway, traveling in the left lane at 50 miles per hour. The speed limit on the Van Wyck Expressway was 50 miles per hour. In addition, there was a concrete divider to her left, and there was a gap of several inches between the left lane and the concrete divider. The accident occurred near the Jamaica Avenue exit, in an area where there are no street lights. Just prior to the accident, she was looking straight ahead, and nothing hindered her visibility. She saw the decedent about one second prior to the accident, coming from her right side. She then steered her vehicle to the left and applied heavy pressure to her brakes, but the decedent struck the passenger side windshield of her vehicle.

The aforementioned testimony establishes, prima facie, that the driver was not operating her vehicle in a negligent manner at the time of the accident (see *Tyberg v City of New York*, 173 AD3d 1239 [2d Dept 2019]; cf. *Cruz v Jeffrey*, 138 AD3d 1057, 1058 [2d Dept 2016]). In addition, this testimony establishes, prima facie, that the decedent's actions in crossing the Van Wyck Expressway when it was impossible to yield was the sole proximate cause of the accident (see *Pixtun-Suret v Gevinski*, 165 AD3d 715, 715 [2d Dept 2018]; *Balliet v North Amityville Fire Dept.*, 133 AD3d 559, 560 [2d Dept 2015]). Pursuant to Vehicle and Traffic Law § 1229-a, no pedestrian shall "occupy any space within the limits of a state expressway highway or state interstate route highway, including the entrances thereto and exits therefrom" (Vehicle and Traffic Law § 1229-a[a]). It is uncontested that the decedent was crossing the Van Wyck Expressway on foot at the time of the accident. While the plaintiff alleges that the driver failed to avoid a collision with the decedent, the driver's testimony establishes that she did not see the decedent until a moment before the accident, and there was nothing to indicate that a pedestrian was likely to be on the Van Wyck Expressway at that time, since she testified that traffic was light and she had no reason to slow down or stop prior to the

accident (see *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]).

In opposition to the Centeno defendants' motion, the plaintiff asserts that there is an issue of fact as to whether the driver was operating her vehicle in a negligent manner because she told one NYPD investigator that she was traveling "about 50-55 mph" at the time of the accident. The plaintiff also argues that the driver failed "to see that which he [or she] should have seen through the proper use of his [or her] senses" (*Lieb v Jacobson*, 202 AD3d 1072, 7073 [2d Dept 2022]) because an investigation by the NYPD found that, contrary to the driver's testimony, the portion of the expressway where the accident occurred was well lit. Notably, however, the plaintiff failed to submit any evidence in support of these factual assertions. The plaintiff's remaining arguments are speculative and insufficient to defeat the Centeno defendants' motion (see *Zuckerman v City of New York*, 49 NY2d 557, 563-564 [1980]). Thus, the plaintiff failed to raise an issue of fact (see *Pixtun-Suret*, 165 AD3d at 715; *Balliet*, 133 AD3d at 560). Similarly, insofar as the plaintiff's arguments and submissions in support of her cross motion are identical to those in opposition to the Centeno defendants' motion, the plaintiff's cross motion is denied.

For similar reasons, the Centeno defendants motion for summary judgment dismissing the cross claims for contribution and indemnification asserted against them is granted. "The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks omitted]). "Similarly, the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor. The duty that forms the basis for the liability arises from the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him" (*Raquet*, 90 NY2d at 183 [internal quotation marks and citations omitted]). Here, as previously established, the Centeno defendants demonstrated that they were free from fault in the happening of the accident. Thus, the Centeno defendants established prima facie entitlement to summary judgment dismissing the cross claims asserted against them (see *Charles v William Hird & Co., Inc.*, 102 AD3d 907, 909 [2d Dept 2013]). In opposition, neither the plaintiff nor the JHMC defendants addressed this branch of the Centeno defendants motion.

Motion Sequence #7

In support of their motion, the JHMC defendants submit, among other things, an expert affirmation from Mark Silberman, M.D. Silberman is board-certified in emergency medicine, pulmonary medicine, and internal medicine, and is currently the Chief of Emergency Medicine at St. John's Riverside Hospital located in Dobbs Ferry, New York. Based on his training and experience, Silberman asserts that he is familiar with the applicable standards of care related to a hospital's emergency department. Silberman further asserts that he reviewed the pleadings, medical records, and deposition transcripts of the parties and concluded that the JHMC defendants did not depart from the standard of care in treating the decedent, and their actions did not contribute to the decedent's injuries or death. In particular, Silberman asserts that the decedent was properly evaluated and monitored prior to discharge, that the decedent was properly discharged, that no supervision or escort was required at discharge, and that the JHMC defendants followed proper procedures and protocols for treating and discharging the decedent.

*The primary allegations of medical malpractice*

"[T]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Rauci v Shinbrot*, 127 AD3d 839, 841 [2d Dept 2015]; see *Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). "[A] defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; see *Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Mackauer v Parikh*, 148 AD3d 873, 876 [2d Dept 2017]; see *Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). However, where a defendant's expert merely recounts the treatment rendered and provides a conclusory opinion that this treatment did not represent a departure from good and accepted medical practice, a defendant has failed to meet its prima facie burden (see *Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 794, 784 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194, 198 [2d Dept 2002]). A defendant's failure to meet their prima facie burden requires denial of their motion for summary

judgment, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In opposing the motion, a plaintiff "must 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To succeed in opposing a motion for summary judgment, where a defendant makes a prima facie showing that there was no deviation from the standard of care and an independent showing that any deviation therefrom was not a proximate cause of the plaintiff's injuries, the plaintiff must rebut this showing by raising a triable issue of fact as to both the departure element and the causation element (see *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995 [2d Dept 2017]). "However, a plaintiff's expert's affidavit that is conclusory or speculative is insufficient to raise a triable issue of fact in opposition to a defendant's prima facie showing of entitlement to judgment as a matter of law in a medical malpractice action" (*Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 649-650 [2d Dept 2014]; see *Kadanoff v Whitlow*, 189 AD3d 1569, 1570 [2d Dept 2020]). When analyzing the parties' submissions, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]; see *Hutchinson v New York City Health & Hosps. Corp.*, 172 AD3d 1037, 1040 [2d Dept 2019]).

Here, the JHMC defendants established, prima facie, that they did not depart from the standard of care in treating and discharging the decedent (see *Agostini v Varughese*, 190 AD3d 799, 800 [2d Dept 2021]). Silberman opined that "the standard of care requires an ED physician to observe an alcoholic, intoxicated patient in the hospital long enough to assure clinical sobriety prior to discharge," and explained that "[c]linical sobriety means the patient has clear, coherent speech, is alert and oriented, and is walking with a steady gait." Based on the deposition testimony and medical records, Silberman opined, within a reasonable degree of medical certainty, that the JHMC defendants properly evaluated the decedent's condition in order to ensure that he was clinically sober prior to discharge. Silberman further opined, within a reasonable degree of medical certainty, that the decedent was properly discharged from JHMC. Silberman opined that, when discharging a patient, there is "no set standard of care as to the timing of discharge or the need for accompaniment, escort, or supervision." According to Silberman, because the decedent would not be driving home, the JHMC defendants did not depart from the standard of care by discharging the decedent when there were still residual alcohol levels in his blood.

However, the JHMC defendants failed to establish, prima facie, that any alleged departure did not proximately cause the decedent's injuries and death. With respect to causation, Silberman merely asserted that "there are no facts in this case which suggest that intoxication had anything to do with [the decedent's] actions or his death after discharge" from JHMC. This conclusory statement is insufficient to meet the JHMC defendants' prima facie burden (see *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 926-927 [2d Dept 2019]).

Because the JHMC defendants failed to meet their prima facie burden with respect to proximate cause, the plaintiff is only required to raise an issue of fact with respect to the JHMC defendants' alleged departure from the standard of care (see *Stukas*, 83 AD3d at 24-25). To meet this burden, the plaintiff relies on an affirmation from her expert, Mark Winther, M.D. Winther is board-certified in emergency medicine, and is the Chief of Emergency and Trauma Services for Bassett Medical Center in Cooperstown, New York. Based on his training and experience, Winther asserts that he is familiar with the applicable standards of care related to a the assessment and treatment of patients in a hospital's emergency department. Winther further asserts that he reviewed the pleadings, medical records, and deposition transcripts of the parties, and concluded that the JHMC defendants failed to properly evaluate and monitor the decedent prior to discharging him because they failed to appropriately evaluate the decedent for clinical sobriety, they administered medications, including lorazepam, improperly, and they failed to have the decedent evaluated by a social worker or community navigator.

With respect to clinical sobriety, Winther addressed Silberman's specific assertions and, in effect, opined that Silberman's opinion were incomplete. According to Winther, "[c]linical sobriety is not simply assessed by observing a patient's gait as and/or if they are alert and oriented." Rather, Winther asserts that assessments of clinical sobriety include evaluations of a patient's decision-making capacity. However, in making this assertion, Winther relied on fleeting references to unidentifiable medical literature, which was not included in the plaintiff's opposition papers (see *Wagman v Bradshaw*, 292 AD2d 84, 87 [2d Dept 2002]). Thus, Winther's assertions here are of no probative value, and his affirmation failed to raise an issue of fact on this point.

Next, to the extent that the plaintiff's bill of particulars alleges that the JHMC defendants failed "to inform and/or fully, properly, adequately, and completely disclose to and advise plaintiff as to the true nature of the risks of the care,

treatment, and/or medical services rendered for and on behalf of plaintiff and the reasonably foreseeable risks, dangers, and/or consequences" and failed "to consider the risks, hazards, and/or dangers of the care, treatment, and/or medical services rendered," these allegations are overly broad and factually vague (see *Castellano v Norwegian Christian Home & Health Ctr., Inc.*, 24 AD3d 490, 491 [2d Dept 2005]). Thus, Winther's assertions that the JHMC defendants departed from the standard of care by improperly administering lorazepam to the decedent and doing so without first obtaining the decedent's informed consent were improperly raised for the first time in the plaintiff's opposition papers (see *Larcy v Kamler*, 185 AD3d 564, 566 [2d Dept 2020]). Similarly, Winther's assertion that the JHMC defendants departed from the standard of care by failing to have the decedent evaluated by a social worker or community navigator was not raised in the plaintiff's bill of particulars (see *Larcy*, 185 AD3d at 566). Finally, Winther's remaining assertions, including the contention that the decedent "was unable to sign the patient belongings document, likely due to his degree of intoxication" are speculative, and are therefore insufficient to raise a triable issue of fact (see *Gilmore v Mihail*, 174 AD3d 686, 687-688 [2d Dept 2019]).

*The remaining allegations against the JHMC defendants*

In addition to the primary allegations of medical malpractice, the plaintiff alleged that the JHMC defendants were negligent in failing to properly train, hire, and/or supervise their agents, servants, and/or employees. The JHMC defendants assert that these claims should be dismissed because they are effectively duplicative of the medical malpractice allegations. The JHMC defendants' argument here is correct.

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]), Nevertheless, there is an exception where the plaintiff seeks punitive damages on the basis that the employer exhibited gross negligence in hiring or retaining the employee (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 741-742 [2d Dept 2017]). Here, however, the plaintiff did not allege that Mallin or any of JHMC's other employees were acting outside of the scope of their employment during the course of the decedent's treatment. In addition, the plaintiff did not assert a claim for punitive damages based upon a theory that JHMC was grossly negligent in hiring its employees (see *Decker v State of New York*, 164 AD3d 650, 653-654 [2d Dept 2018]). Therefore, by

submitting the pleadings, the JHMC defendants established prima facie entitlement to summary judgment dismissing these claims. In opposition, the plaintiff failed to address this argument regarding the negligent hiring and supervision claims. On this basis, the branch of the JHMC defendants' motion seeking summary judgment dismissing these claims is granted.

The plaintiff further alleged that the JHMC defendants were negligent in failing to promulgate and follow proper practices, procedures, protocols, and/or standards in the care and discharge of the decedent. The JHMC defendants assert that these claims should be dismissed because JHMC had procedures in place for treating intoxicated patients, and these procedures were followed during the course of the decedent's treatment. Summary judgment dismissing these claims is inappropriate. In support of this branch of their motion for summary judgment, the JHMC defendants submitted excerpts from the JHMC policy manuals which were related to treating intoxicated patients. In addition, Silberman expressly referred to these policies and noted that they were followed by Mallin and other staff at JHMC. However, with respect to their sufficiency and propriety, Silberman merely restated the language of these policies and offered a conclusory opinion that they were proper. This evidence is insufficient to establish prima facie entitlement to summary judgment dismissing this claim (see *Ross-Germain v Millennium Med. Servs., P.C.*, 144 AD3d 658, 660 [2d Dept 2016]). This branch of the JHMC defendants' motion is therefore denied, regardless of the sufficiency of the plaintiff's papers in opposition (see *Winegrad*, 64 NY2d at 853).

*The Centeno defendants' cross claims*

In light of the foregoing, the Centeno defendants are effectively relieved from liability to the plaintiff. Under these circumstances, the Centeno defendants' cross claims for contribution and indemnification are rendered academic and must be dismissed (see *Naqvi v Chi*, 24 AD3d 639, 640 [2d Dept 2005]).

Accordingly, it is

ORDERED that the Centeno defendants' motion for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further,

ORDERED that the JHMC defendants' motion for summary judgment dismissing the medical malpractice allegations against them is granted; and it is further,

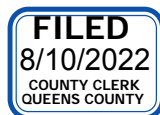
ORDERED that the JHMC defendants' motion for summary judgment dismissing the negligent hiring, retention, and supervision claims against them is granted; and it is further,

ORDERED that the JHMC defendants' motion for summary judgment dismissing allegations that they failed to promulgate and follow proper practices, procedures, protocols, and/or standards in the care and discharge of the decedent is denied; and it is further,

ORDERED that the Centeno defendants' cross claims for indemnification and contribution are dismissed as academic; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated: August 9, 2022



  
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PETER J. O'DONOGHUE, J.S.C.