

Santos v Olsen
2022 NY Slip Op 35136(U)
April 5, 2022
Supreme Court, Bronx County
Docket Number: Index No. 23066/2012E
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Case Disposed ☐
 Settle Order ☐
 Schedule Appearance ☐

-----X
CRUZ SANTOS and ELIZABETH SANTOS,

Index #: 23066/12
DECISION/ORDER

Plaintiffs,

- against -

Present:

Hon. Joseph E. Capella
 J.S.C.

**DEAN G. OLSEN, NASSAU COUNTY PUBLIC
 ADMINSTRATOR AS ADMINISTRATOR OF THE
 ESTATE OF HOWARD L. MORGENLANDER,
 JEAN G. LAJEUNE, BARRY J. KANNER, ST.
 BARNABAS HOSPITAL, QUARRY ROAD
 EMERGENCY SERVICE, P.C., INTENSIVE CARE
 ASSOCIATES, P.C., WOODLANDS PULOMONARY
 ASSOCIATES, LLP, and WHITE PLAINS RADIOLOGY
 ASSOCIATES, P.C.,**

Defendants.

-----X
ST. BARNABAS HOSPITAL,

Third-Party Plaintiff,

- against -

NEW YORK UROLOGICAL SERVICES, P.C.,

Third-Party Defendant.

-----X
 The following papers numbered 1 to 3 read on this motion.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS	1
ANSWERING AFFIDAVITS AND EXHIBITS	2
REPLY AFFIRMATION	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DENIED AS FOLLOWS:

Defendants, Dean G. Olsen, M.D., and Quarry Road Emergency Service, P.C., seek summary judgment (CPLR 3212) and dismissal of the instant medical malpractice action. Plaintiff, Cruz Santos (Cruz), presented to St. Barnabas on July 12, 2010, with complaints of flank pain, inability to void, fever, nausea and dysuria. According to the complaint, plaintiffs allege a failure to timely catheterize and treat for urinary retention, resulting in sepsis and partial gangrene of the penis. As summary judgment relief is being sought, defendants must make a *prima facie* showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) In other words, defendants must provide evidentiary proof in the form of expert opinions and/or factual evidence that establishes that they did not deviate from accepted standards of care and practice, or that any departure was not a proximate cause of Cruz's injuries. (*Korszun v Winthrop*, 172 AD3d 1343 [2nd Dept 2019].) If they do, then the burden shifts to plaintiffs to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

In support of the motion, defendants provide an expert affirmation by Dr. James Thomas Bopp, who is board certified in internal and emergency medicine. Dr. Bopp notes that on July 12, Dr. Olsen was the attending ER physician who saw Cruz at around 7 p.m., and after unsuccessfully attempting to relieve the urinary retention with a Foley catheter, he requested a urology consult. A resident covering the urology department did

not see Cruz until approximately 11 p.m., during which time Dr. Olsen ordered additional pain medication out of concern for infection. According to Dr. Bopp, ordering medication and canceling and order for IV fluids was appropriate. Dr. Bopp notes that Dr. Olsen had several conversations with the urology resident, who was also unable to apply a Foley catheter, and it was ultimately decided to order a suprapubic catheter (SPC) to be done by interventional radiology (IR) the following morning. Dr. Olsen cleared Cruz at 3 a.m. Dr. Bopp opines that Dr. Olsen complied with the standard of ER care in his treatment of Cruz. He also opines that the alleged multiple conditions (e.g., dehydration, edema and sepsis) that Cruz subsequently developed could not have been prevented by Dr. Olsen, and the mere fact that Cruz developed them does not mean that Dr. Olsen was negligent. Based on the aforementioned, the Court is satisfied that defendants have met their burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiffs to demonstrate that issues of fact exist to warrant a trial.

In opposition, plaintiffs provide an expert affidavit from a Pennsylvania board certified urologist who opines that after seeking a consultation from urology, Dr. Olsen no longer seemed to act with the immediacy that Cruz's presentation required. Plaintiffs' expert notes that Dr. Olsen believed that giving IV fluids would not have been prudent because it would have added to the urine already collecting in the bladder. According to plaintiffs' expert, this was not in keeping with the standard of care because IV fluids

would prevent hypovolemic shock, septic shock and related complications. Plaintiffs' expert also opines that Dr. Olsen erroneously and in a departure from the standard of care accepted the urology recommendation for SPC by IR the following morning, even though he knew that this would result in Cruz remaining in acute urinary retention until such time. He opines that the standard of care required Dr. Olsen to perform SPC in the ER both prior to the arrival of the urology resident as well as that period of time in which Cruz remained in the ER until his transfer. Plaintiffs' expert opines that Dr. Olsen allowed Cruz to linger in acute urinary retention, and with a worsening infectious process.

Viewing the evidence in a light most favorable to plaintiffs, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the parties have come forward with experts who disagree on material issues of fact regarding whether there was a departure and proximate cause (*Alvarez v Prospect*, 68 NY2d 320 [1986]) – issues that must also be resolved by the trier of fact. (*Barnett v Fashakin*, 85 AD3d 832 [2nd Dept 2011]; *Frye v Montefiore*, 70 AD3d 15 [1st Dept 2009]). Based on the aforementioned, defendants' motion for summary judgment is denied, and plaintiffs are directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

4/5/22

Dated

Hon.

Joseph E. Capella, J.S.C.