

Velez v Patel

2023 NY Slip Op 30138(U)

January 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 500606/2017

Judge: Ellen M. Spodek

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PRESENT: HON. ELLEN M. SPODEK; PART 63

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JOSE VELEZ, SR., as Administrator of the Estate of
FRANCES VELEZ, Deceased,

Index No.500606/2017
Motion Date November 29, 2022
Motion Seq. No 3 and No 4

Plaintiff (s),

-against-

**DECISION + ORDER ON
MOTION**

LALIT PATEL, M.D., ALBERT WRIGHT, M.D., and
NEWYORK-PRESBYTERIAN BROOKLYN
METHODIST HOSPITAL,

Defendant (s).

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 110 and (Motion 004) 103, 104, 112 and in opposition 107, 108, 109 were read on this motion for SUMMARY JUDGMENT.

1. Upon the foregoing documents, the motion of defendant New York-Presbyterian Brooklyn Hospital (Motion 003) and the cross motion of defendant Albert Wright, M.D., for summary judgment pursuant to CPLR 3212 (b) dismissing plaintiff's complaint are denied.

2. This matter arises out of surgery and medical clearance for surgery upon plaintiff's decedent, Frances Velez when she had stage 4 colon cancer, which plaintiff claims was contraindicated.

3. In support of the motion Defendant, NEWYORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL submitted the affirmation of Arthur I. Goldberg, MD., a physician and a medical oncologist who opined that the treatment by Dr. Wright, Plaintiff's Decedent's private

physician, and the staff at NEWYORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL conformed with the standard of care. He opined that appropriate consent was obtained and that the surgery performed by Dr. Wright was warranted.

4. In his cross-motion, DR. ALBERT WRIGHT also relies upon the affirmation of Dr. Goldberg reiterating his opinion that Dr. Wright's surgery was warranted and appropriate.

5. In opposition, Plaintiff submits the affirmation of Alan H. Jaffe M.D., a physician licensed to practice medicine in the State of New York. Dr. Jaffe is a board-certified gastroenterologist.

6. It was Dr. Jaffe's opinion that Drs. Wright and Shah (who gave clearance at Methodist for surgery) both departed from the accepted standards of medical practice as neither reviewed and/or appreciated the significance of the masses on Ms. Velez's liver; the prominent lymph node and smaller ones in her retroperitoneum; and the infiltrative changes of the fat as well as surrounding adenopathy. Dr. Jaffe noted these findings were evident on the scans, done prior to the hospital admission. With the aforementioned findings, surgery was contraindicated in Ms. Velez. He described the relevant laboratory values, confirming these opinions.

7. Dr. Jaffe further opined that Ms. Velez was a high risk patient by definition because she had stage 4 colon cancer as a result of the metastases to the liver which are not documented during the surgical clearance process or hospital notes.

8. Dr. Jaffe further opined that the departures, set forth in detail in his affirmation were the cause of Ms. Velez' death.

9. Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party" (CPLR §3212[b]). A party seeking summary judgment must show that there are no material

issues of fact that are in dispute and that it is entitled to judgment as a matter of law (*see Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [Pt Dept. 2007]). Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*id.*).

10. A Defendant moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing that "in treating the plaintiff, there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" (*Roques v. Nobel*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Assunta v. Rubin*, 189 AD3d 1321, 1323 [2d Dept. 2020]). To satisfy the burden, defendant must present expert testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature (*see Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Perre v. Vassar Bros. Hosp.*, 52 AD3d 670, 670 [2d Dept. 2008], *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985)).

11. Once Defendant has met his or her burden on the motion, the plaintiff must "submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant [and/or hospital] that it 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 the summary judgment motion (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324-325 [1986]). Thus, in opposing the motion, Plaintiff's expert "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm

suffered" (*Dallas-Stephenson v. Waisman*, 39 AD3d 303 [1st Dept. 2007], quoting *Ferrara v. South Shore Orthopedic Associates, P.C.*, 178 AD2d 364,366 [15¹ Dept. 1991]).

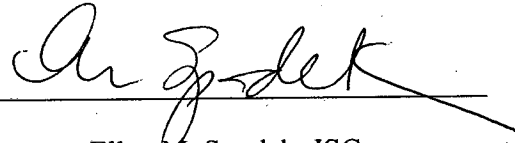
12. In opposition, Plaintiff's gastroenterologist, Dr. Jaffe, has sufficiently rebutted Defendants' prima facie showing and has demonstrated that an issues of fact exist as to whether Dr. Wright and Dr. Shah departed from the standard of care and proximately caused Plaintiffs alleged injuries.

13. Dr. Jaffe's affirmation was sufficient to raise a triable issue of fact as to whether the surgery and clearance were medically necessary (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

This is the decision and Order of the Court

ENTER,

Dated 1/10/23



Ellen M. Spodek, JSC