

Zapolskaya v Brener

2023 NY Slip Op 34760(U)

September 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 504349/2018

Judge: Genine D. Edwards

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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of September 2023

P R E S E N T:

HON. GENINE EDWARDS

Justice.

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LINA ZAPOLSKAYA as the Administrator of the Estate of ALEKSEY RAK, deceased, and LINA ZAPOLSKAYA, individually,

Plaintiffs

-against-

Index No.: 504349/2018

ZACHARY BRENER, MD, BORIS KHORETS, MD, RAMON VERA, MD, MOHAMED RAHMAN, MD, MURRAY JONAS, MD, MIDWOOD DIALYSIS, LLC, NEOMY MEDICAL, PC d/b/a NEOMY DIALYSIS CENT and MOUNT SINAI BROOKLYN,

Decision & Order

Motion Seqs.: 1 & 2

Defendants.

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motions, Affirmations, Memorandum of Law, and Exhibits.....63-77, 78-94
Affirmation in Opposition, Memorandum of Law, and Exhibits.....110-117
Affirmations in Reply.....118, 122

In this medical malpractice and wrongful death action, plaintiffs alleged that defendants ZACHARY BRENER, MD, BORIS KHORETS, MD, and MOHAMED RAHMAN, MD were negligent when they discharged decedent (“Mr. Rak”) from Mount Sinai Brooklyn on February 15, 2016, despite objective evidence of pneumonia. In addition, plaintiffs contend that Dr. Brener negligently failed to appreciate signs of pneumonia when Mr. Raks appeared for his dialysis treatment post discharge, thereby delaying readmission to the hospital for further treatment. As a result of defendants’ negligent acts and omissions, Mr. Rak’s pneumonia progressed and

worsened resulting in respiratory distress that required intubation and ultimately caused his death by cardiac arrest on March 5, 2016, when Mr. Rak was noted to have pneumonia and sepsis.

Dr. Khorets (internist) and Dr. Rahman (pulmonary/critical care specialist) moved for summary judgment dismissing the complaint. They contend that Mr. Rak's pneumonia was properly and effectively treated during his initial admission, but that he, being immunocompromised due to underlying illnesses, developed heart failure, suspected multifocal pneumonia, multi-organ failure, and other conditions that led to his readmission and death. Dr. Khorets also moved for dismissal as to him on the ground that he was entitled to rely on the specialists who saw the decedent during each admission (referring to the consults in infectious diseases, pulmonary/critical care, hematology/oncology, and cardiology).

Dr. Brener also moved for summary judgment arguing that as Mr. Rak's nephrologist, he was entitled to rely on the recommendations of the pulmonary specialists and Mr. Rak's internist as to the propriety of his release from the hospital; he did not need to order new blood tests upon Mr. Rak's post-discharge dialysis appointment since he was asymptomatic and had just completed a course of antibiotics; blood test readings conducted by him were for hemodialysis patients who were hospitalized with blood born infections, not pulmonary infections such as pneumonia.

In opposition, plaintiffs' expert concluded that there were departures in the premature release of Mr. Rak in view of objective signs of pneumonia and in failing to timely readmit him to the hospital. The noted clinical findings by Drs. Brener and Vera evidenced the presence of pneumonia and warranted further evaluation and assessment in the form of a repeat imaging study. A repeat chest study was not performed prior to Mr. Rak's discharge on February 15, 2016, which constituted a departure from the accepted standard of care. Each of the four

attending physicians (Drs. Khorets, Vera, Rahman and Brener) had the ability, duty, and responsibility to order a repeat chest imaging study to ensure resolution of pneumonia prior to Mr. Rak's discharge. Their failure to order and perform such a study constituted a departure from the accepted standard of care. The fact that the most recent chest x-ray performed on February 12, 2016, demonstrated a possible newly formed pneumonia was further objective evidence that a repeat study was indicated and warranted.

Once discharged, Mr. Rak was seen at NEOMY Dialysis, on February 16, 18, 20 and 23, 2016. On February 16, 2016, Mr. Rak was noted to have a frequent productive cough. This clinical finding was yet another symptom suggestive of pneumonia. On February 17, 2016, Mr. Rak's laboratory results received by NEOMY revealed a white blood cell count of 22.7. Dr. Brener was notified of same by NEOMY staff, but he responded that this was Mr. Rak's normal white blood cell count. Dr. Brener, knowing that Mr. Rak was recently discharged from the hospital for treatment of pneumonia, did not evaluate him nor order a repeat chest imaging study.

On February 23, 2016, Mr. Rak was noted to have diminished sounds on the right side of his lung and the very next day, on February 24, 2016, Mr. Rak returned to the hospital with complaints of a cough and fever. Mr. Rak was readmitted under Dr. Khorets' service and again diagnosed with pneumonia. The defendants claim that Mr. Rak had been successfully treated for pneumonia when he was discharged on February 15th and developed a new pneumonia when he was readmitted nine days later, on February 24, 2016, but they did not explain the February 12th radiographic findings suggestive of pneumonia nor Mr. Rak's continued pulmonary complaints prior to his discharge. Plaintiffs' expert asserts that Mr. Rak demonstrated clinical signs of pneumonia as documented by multiple physicians that saw and examined him during the initial hospitalization just days before discharge. Similarly, objective radiographic findings from

February 12th suggested the presence of pneumonia. Plaintiffs' expert opines that defendants' negligent and premature discharge of Mr. Rak on February 15, 2016, before the pneumonia was fully treated permitted the pneumonia to progress and worsen, leading to readmission of Mr. Rak nine days later where he was diagnosed with respiratory distress and sepsis requiring intubation.

Likewise, according to plaintiffs' expert, Dr. Brener's failure to address Mr. Rak's symptoms in between the two hospitalizations and timely readmit Mr. Rak to the hospital caused the pneumonia to progress, worsening his prognosis by the time Mr. Rak was readmitted to the hospital on February 24, 2016. The expert suggested that as a direct result of the defendants' negligence, Mr. Rak suffered respiratory distress, required intubation, and the inadequately treated pneumonia was a substantial contributing factor to Mr. Rak's ultimate demise.

The elements of a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. A defendant's negligence is the proximate cause when it is a substantial factor in the events that produced the injury *See Mazella v. Beals*, 27 N.Y.3d 694, 706, 37 N.Y.S.3d 46 (2016); *Templeton v. Papathomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022). "When moving for summary judgment, a defendant... must establish the absence of any departure from good and accepted medical practice or that... plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). To sustain the burden, a defendant "must address and rebut any specific allegations of malpractice set forth in plaintiffs bill of particulars." *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017).

In opposition, plaintiff must "raise a triable issue of fact regarding the element or elements on which defendant has made its prima facie showing." *Aliosha v. Ostad*, 153 A.D.3d

591, 61 N.Y.S.3d 55 (2d Dept. 2017). To do so, plaintiff must submit the affidavit of “a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of plaintiff's injuries.”

Shectman v. Wilson, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009).

Dr. Khorets and Dr. Rahman established prima facie entitlement to judgment as a matter of law by submitting the affirmation of an expert who opined that they did not depart from good and accepted medical standards in their treatment of Mr. Rak; that the radiological studies done prior to Mr. Rak's release from the hospital indicated that his condition had improved; that there were no clinical signs of pneumonia upon his release. Additionally, the expert further averred that Dr. Khorets was entitled to rely on the opinions of the pulmonologists who agreed to Mr. Rak's discharge from the hospital.

But plaintiffs' expert raised triable issues of fact. Among other things, plaintiffs' expert opined that defendants failed to note that the findings from Mr. Rak's repeat chest x-ray on February 12, 2016, showed "resolving right lower lobe pneumonia and right basilar pleural effusion" as well as new findings of "possible superimposed left lower lobe pneumonia." Thus, there is a question of fact as to whether Mr. Rak's pneumonia was fully resolved when he was released, and whether his discharge from the hospital was in fact premature, thereby leading to complications that may have caused his death. In addition, although Dr. Khorets consulted with various specialists before releasing Mr. Rak from the hospital, there is a question as to whether, as the internist and primary care physician, Dr. Khorets was responsible for the decision to release Mr. Rak, although there were conflicting interpretations of Mr. Rak's test results by the other specialists and given the totality of the many health issues confronting Mr. Rak.

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147(2d Dept. 2021).

Dr. Brener also established entitlement to judgment as a matter of law. His function was to treat Mr. Rak’s end stage renal disease. Plaintiffs failed to shoulder their burden of establishing that Dr. Brener had a duty to diagnose or treat Mr. Rak’s cough or whether Dr. Brener was entitled to rely on the opinions of the doctors who were treating Mr. Rak for his pulmonary issues, and plaintiffs failed to demonstrate that Dr. Brener had a duty to substitute his opinion in place of those of the pulmonologist and internist who were treating Mr. Rak for pneumonia. Plaintiffs asserted that Dr. Brener should have sent plaintiff back to the hospital to be treated for pneumonia and their expert does not opine that Dr. Brener should have provided any emergency treatment himself. Where an expert fails to specify what additional treatment should have been provided and when such additional treatment was required, the opinion is conclusory, speculative, and insufficient to warrant denial of summary judgment. *Coffey v. Mansouri*, 209 A.D.3d 714, 176 N.Y.S.3d 641 (2d Dept. 2022).

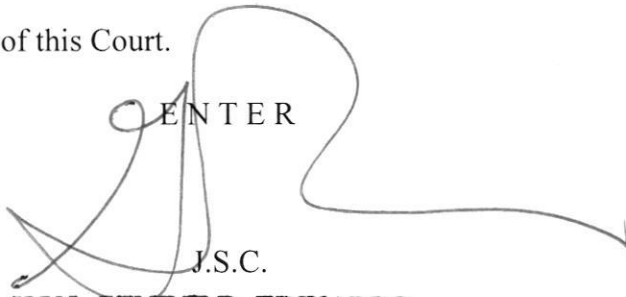
Moreover, plaintiffs did not demonstrate that Dr. Brener, in his capacity as a nephrologist, assumed a general duty to independently diagnose Mr. Rak’s medical condition when he interpreted tests done for the purpose of his dialysis. See, *Dockery v. Sprecher*, 68 A.D.3d 1043, 891 N.Y.S.2d 465 (2d Dept. 2009). Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the plaintiff. *Rivera v. New York Presbyterian Hospital*, 95 A.D.3d 861, 944 N.Y.S.2d 181 (2d Dept. 2012). Even when a physician undertakes a general duty of care and treatment, good and accepted standards of medical care and practice dictate that a

physician has a right to reasonably rely on consultants or specialists in other fields of medicine in determining an appropriate course of care and treatment. *Wasserman v. Staten Island Radiology Associates*, 2 A.D.3d 713, 770 N.Y.S.2d 108 (2d Dept. 2003).

It should be noted that this Court did not consider the supplemental affirmations annexed to the reply affirmation. *Pena v. Geisinger Community Medical Center*, 209 A.D.3d 663, 174 N.Y.S.3d 873 (2d Dept. 2022).

Dr. Khorets and Dr. Rahman's motion for summary judgment is denied. Dr. Brener's motion for summary judgment is granted, and the complaint is dismissed solely as to Dr. Brener.¹ The clerk shall amend the complaint accordingly. The parties shall appear for an Alternative Dispute Resolution on October 4, 2023, at 10:30AM.

The foregoing constitutes the decision and order of this Court.


CENTER
J.S.C.
HON. GENINE D. EDWARDS

¹ Defendants Midwood Dialysis, LLC, Neomy Medical, PC d/b/a Neomy Dialysis Center, Ramon Vera, M.D., Beth Israel Medical Center s/h/a Mount Sinai Brooklyn (MSB) and Murray Jonas, M.D. settled with the plaintiff and stipulations of discontinuance were filed.