

Puglisi v Musso

2023 NY Slip Op 35101(U)

November 14, 2023

Supreme Court, Queens County

Docket Number: Index No. 717052/2020

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ANDREW PUGLISI as Executor of the Estate of
LORI C. PUGLISI,

Index No. 717052/2020

Part MDP

Plaintiff,

Motion Date: October 18, 2023

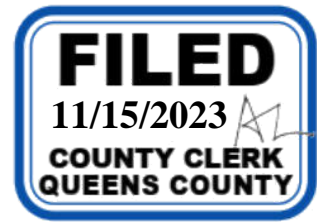
-against-

Calendar No. 2

Sequence No. 3

MARIA N. MUSSO, D.O., HEATHER M. RIBAUDO,
PA-C, ANNA K. NAQVI, PA-C, SHIRLEY BOW,
M.D., NORTHWELL HEALTH, INC., NORTHWELL
HEALTHCARE, INC, and NORTH SHORE
UNIVERSITY HOSPITAL,

Defendants.
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The following papers numbered EF-144 to EF-172 read on this motion by defendant HEATHER M. RIBAUDO, PA-C for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF144-EF164
- Affirmation in Opposition, Exhibits.....EF166-EF169
- Reply Affirmation.....EF170-EF172

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Heather M. Ribaldo, PA-C's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, as defendant Ribaldo eliminated all triable issues of fact with respect to whether she departed from good and accepted medical standards and proximately caused decedent plaintiff's injury and death.

Plaintiff commenced this action for medical malpractice and wrongful death based upon defendants' medical treatment of plaintiff from October 13, 2017 through December 22, 2018, and defendant Heather M. Ribaldo, PA-C's alleged failure to notify plaintiff decedent Lori C. Puglisi

of her abdomen and pelvis CT scan results and failure to refer her for subsequent testing and treatment, thereby resulting in plaintiff decedent's injuries and death. Plaintiff filed the Summons and Complaint on September 29, 2020, and issue was joined. PA Ribaudó filed her Answer on November 18, 2020.

PA Ribaudó argues that summary judgment should be granted and presents the pleadings, parties' deposition testimony, plaintiff's medical records, and expert affirmation of Charles L. Bardes, M.D. in support of her motion. PA Ribaudó argues that the evidence demonstrates that she did not depart from acceptable standards of care that caused or contributed to plaintiff decedent's injuries and death. The medical records show that plaintiff decedent underwent a CT scan of her abdomen and pelvis on September 22, 2017, which noted a lower lobe lung nodule. The records further show Dr. Musso was made aware of the CT scan results and Dr. Musso's office manager Giovanna Cifone spoke with plaintiff regarding the results, as confirmed by Dr. Musso's deposition testimony. The records show that PA Ribaudó evaluated plaintiff decedent on October 13, 2017 for pre-surgical medical clearance for kidney stone removal on October 16, 2017, and this was PA Ribaudó's sole encounter with plaintiff decedent. PA Ribaudó testified that she was not aware that plaintiff decedent had a CT scan or its results when she evaluated plaintiff decedent on October 13th.

PA Ribaudó presents the affirmation of Dr. Charles L. Bardes in support of her motion. Dr. Bardes attested he is a physician who is board certified in Internal Medicine. He reviewed the pleadings including plaintiff's Bills of Particulars, the parties' deposition testimony, and plaintiff's medical records in rendering his opinions. Dr. Bardes opined within a reasonable degree of medical certainty that PA Ribaudó did not deviate from accepted standards of medical practice in the care rendered to plaintiff decedent, and any alleged acts or omissions on PA Ribaudó's part did not worsen her condition and were not the proximate cause of plaintiff's injuries or death. Dr. Bardes attested that a Physician's Assistant (PA) receives general medical training, and the role of a PA is to examine, diagnose, and treat patients under the supervision of a physician. Dr. Bardes attested that PA Ribaudó's only encounter with plaintiff decedent was on October 13, 2017 for the sole purpose of obtaining pre-operative clearance to undergo right urethroscopy and lithotripsy. Dr. Bardes opined within a reasonable degree of medical certainty that PA Ribaudó provided appropriate pre-operative clearance to plaintiff decedent on October 13, 2017. Dr. Bardes attested that in clearing a patient for surgery, a physician or PA must ensure that the patient is medically optimized for surgery and make recommendations for peri-operative management, which he opined PA Ribaudó performed properly and appropriately.

Dr. Bardes attested that based upon PA Ribaudó's testimony, she did not see the radiology report of the abdomen and pelvis CT scan that was performed on September 22, 2017. PA Ribaudó testified she reviewed plaintiff decedent's current medication list, past medical history, Dr. Reigel's stress test results, and Dr. Steinberg's pulmonary clearance results when she examined

plaintiff decedent and took her vital signs. Dr. Bardes opined within a reasonable degree of medical certainty that PA Ribaldo properly clearly plaintiff decedent for surgery, after examining plaintiff decedent, reviewing her vital signs, and obtaining cardiac and pulmonary clearance from Dr. Reigel and Dr. Steinberg. Dr. Bardes further opined within a reasonable degree of medical certainty that PA Ribaldo had no responsibility to review the radiology report or convey the results to plaintiff decedent, as the sole purpose of a pre-operative clearance visit is to ensure that the patient can undergo surgery, and the visit is not akin to providing a complete medical evaluation. Dr. Bardes further opined to a reasonable degree of medical certainty that the finding of a pulmonary nodule on the radiology report would not impact whether plaintiff decedent was able to safely undergo surgery, and opined that even if the nodule had been recognized, the urological procedure would have proceeded as planned. Dr. Barnes argued that it was therefore irrelevant to the limited purpose of PA Ribaldo's pre-operative examination of plaintiff decedent to review the CT scan, and therefore defendant PA Ribaldo did not depart from good and accepted standards, and any acts or omissions were not the proximate cause of plaintiff decedent's injuries or death.

Plaintiff opposes defendant PA Ribaldo's motion and argues that she failed to present a prima facie entitlement to summary judgment. He argues that defendant's expert opinions are conclusory and fail to address the conflicting evidence in the record. Plaintiff further argues there are issues of fact with regard to whether PA Ribaldo deviated from accepted medical standards in failing to review the radiology report and convey the results to plaintiff decedent. He argues that timely detection of plaintiff decedent's lung cancer by PA Ribaldo would have led to earlier treatment, and would have been associated with a much better chance of survival. Plaintiff noted that the CT report from September 22, 2017 recommended a four-month follow-up scan, which if performed, would have resulted in earlier treatment and surgery and a potentially better outcome.

Plaintiff presents the expert affidavit of Daniel Podd, a Registered Physician Assistant Certified in New York in support of his opposition. PA Podd attested that he reviewed plaintiff's medical records, the parties' deposition testimony, and Dr. Bardes' affirmation in rendering his opinions. PA Podd opined within a reasonable degree of medical certainty that PA Ribaldo departed from applicable standards of care by failing to review and consider the radiology report in connection with the pre-operative evaluation, and by failing to convey the results to plaintiff decedent. PA Podd attested that the pre-operative evaluation process is a clinical assessment that precedes the delivery of anesthesia for a procedure and to assess the presence and stability of acute and chronic medical illnesses and the impact of surgery. PA Podd further attested that the evaluation should consist of references to diagnostic studies, and opined that PA Ribaldo failed to properly undertake the pre-operative medical clearance process for plaintiff decedent by failing to review the radiology report. PA Podd further attested that irrespective of Dr. Bardes' presumption that the identification of a pulmonary nodule would not have impacted pre-operative clearance for the surgery, PA Ribaldo was still under an obligation to be aware of the lung nodule, consider it in the context of plaintiff decedent's pre-operative evaluation, and convey the findings to

supervising doctor co-defendant Dr. Musso. Based upon the foregoing, PA Podd opined that PA Ribaldo departed from applicable standards of care by failing to review the radiology report and convey the results to plaintiff decedent.

Plaintiff also presented the expert affidavit of Dr. Richard I. Whyte, a physician licensed in Massachusetts and board certified by the American Board of Surgery and the American Board of Thoracic Surgery. Dr. Whyte attested that he reviewed plaintiff's medical records in rendering his opinions. Dr. Whyte opined within a reasonable degree of medical certainty that PA Ribaldo's failure to ensure that plaintiff decedent and Dr. Musso were made aware of the lung nodule finding deprived plaintiff decedent of a substantial opportunity for successful treatment and survival. He argued that if plaintiff decedent had a follow up CT scan in January 2018, as noted in the September 2017 CT report, she would likely have undertaken treatment and surgery one year earlier than when plaintiff decedent ultimately began treatment for the malignant node. Dr. Whyte further opined that had PA Ribaldo made them aware of the findings, plaintiff decedent would have undergone a follow up CT scan and treatment for the nodule sooner. Based upon the foregoing, plaintiff argues there are material issues of fact with respect to whether PA Ribaldo departed from accepted standards of care, and therefore summary judgment is not warranted.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 317 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *see also Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires

dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

Defendant PA Ribauda established a prima facie entitlement to summary judgment through the pleadings, medical records, deposition testimony, and expert affirmation of Dr. Bardes. (*See Soto v. Andaz*, 8 A.D.3d 470 [2d Dept. 2004].) PA Ribauda demonstrated that she did not depart from good and accepted medical standards because she was not required to review the radiology report and convey the findings to plaintiff decedent and Dr. Musso, as the sole purpose of the visit was for plaintiff decedent to obtain pre-operative clearance for her right urethroscopy and lithotripsy. Defendant demonstrated through her deposition testimony that she was not aware a CT scan had been performed on plaintiff decedent, nor did she read the findings. The medical records presented show Dr. Musso may have been aware of the nodule after receiving the CT report, and her office procedure, confirmed by the records, was for her office assistant to notify plaintiff decedent. PA Ribauda further demonstrated that she was within the standard of care by reviewing plaintiff decedent's medication list and medical history, conducting an examination, and taking her vital signs in performing her pre-operative clearance assessment. PA Ribauda further demonstrated that the finding of a long nodule would not have had an impact on plaintiff decedent's pre-operative clearance, which was the sole purpose of that visit. Based upon the foregoing, PA Ribauda established a prima facie entitlement to summary judgment.

Plaintiff failed to raise a triable issue of fact in dispute. He failed to demonstrate that PA Ribauda was aware of the CT findings, and failed to demonstrate she departed from accepted standards of medical care in not reviewing the imaging prior to the pre-surgical clearance evaluation. Plaintiff's expert affidavit of PA Podd is insufficient to rebut defendant Ribauda's prima facie case, as he did not explain how defendant Ribauda's failure to review the radiology report and convey the findings to plaintiff decedent and Dr. Musso proximately caused plaintiff decedent's injuries and death. (*See Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019][holding that when a defendant makes a prima facie showing with respect to a departure from accepted medical practice and proximate cause, the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and causation element of medical malpractice].) While PA Podd extensively attested that PA Ribauda departed from accepted medical standards by failing to review the report and convey the findings to plaintiff decedent and Dr. Musso, PA Podd failed to demonstrate how PA Ribauda's alleged departure proximately caused plaintiff decedent's injuries and death. Therefore, PA Podd's affidavit is insufficient to rebut defendant Ribauda's prima facie case. (*See id, supra.*)

Plaintiff's expert affidavit of Dr. Whyte also is insufficient to rebut defendant Ribauda's prima facie case, as it is conclusory and speculative. (*See Lowe v. Japal*, 170 A.D.3d 701, 703 [2d Dept. 2019][holding that in order to not be considered speculative or conclusory, expert opinions

in opposition “should address specific assertions made by the movant’s expert’s, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record”]. Dr. Whyte’s affidavit did not opine that PA Ribaudo’s failure to review the report and convey its findings was a departure from accepted medical standards. Dr. Whyte also did not address the standard for a pre-operative visit and opine with respect to what PA Ribaudo should have done, or failed to do, during the pre-operative clearance visit. Therefore, Dr. Whyte’s affidavit failed to address specific assertions made in Dr. Bardes’ affirmation. Further, Dr. Whyte’s opinion that PA Ribaudo’s failure to review the report and convey the findings to plaintiff decedent and Dr. Musso deprived her of a substantial opportunity for successful treatment and survival is speculative. Dr. Whyte’s opinion that plaintiff decedent would have gone for a follow up scan and undertaken treatment soon thereafter if she had been informed is speculative and not supported by the evidence. (*See Bowe v. Brooklyn United Methodist Church Home*, 150 A.D.3d 1067, 1068 [2d Dept. 2017].) As Dr. Whyte’s opinions do not address specific assertions in Dr. Bardes’ affirmation or rely on specifically cited evidence in the record, Dr. Whyte’s affidavit is speculative and insufficient to rebut defendant Ribaudo’s prima facie case. Based upon the foregoing, plaintiff failed to raise a triable issue of fact.

Accordingly, defendant Heather M. Ribaudo, PA-C’s motion for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212 is granted. Plaintiff’s Complaint is hereby dismissed solely as to defendant Heather M. Ribaudo, PA-C.

This constitutes the decision and Order of the Court.

Dated: November 14, 2023



Hon. Tracy Catapano-Fox, J.S.C.

