Lewis v Lantis
2023 NY Slip Op 35191(U)
March 7, 2023
Supreme Court, Bronx County
Docket Number: Index No. 25720/2016E
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

----------X Index #: **25720/16**

WILLEN LEWIS, As Administrator of the Estate of TROY LEWIS, deceased, and WILLEN LEWIS, Individually, **DECISION/ORDER**

Plaintiff,

- against -

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

JOHN C. LANTIS II, M.D., MOUNT SINAI ST. LUKES HOSPITAL and MOUNT SINAI ROOSEVELT HOSPITAL a/k/a MOUNT SINAI WEST,

Defendants.

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The following papers numbered 1 to 4 read on this motion dated October 11, 2021.

PAPERS	NUMBERED
NOTICE OF MOTION & MEMO OF LAW	**1 - 2**
ANSWERING AFFIRMATION	**3**
REPLY AFFIRMATION	**4**

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Motion by defendants for summary judgment (CPLR 3212) and dismissal of plaintiffs' complaint, which alleges medical malpractice, wrongful death and lack of informed consent is denied. Overall, the crux of plaintiffs' claim is that defendants failed to timely and properly diagnose and treat decedent's deep vein thrombosis (DVT), pulmonary embolism (PE), and patent foramen ovale (PFO), causing a thrombotic stoke and death. The initial burden is on defendants to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) 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 are detailed and thorough expert affirmations by Dr. Mark S. Silberman, who is board certified in internal, pulmonary, critical care and emergency medicine, and Dr. Larry A. Scher, a board certified vascular surgeon, and they opine that the treatment decedent received in the emergency department (ED), intensive care unit (ICU) and vascular surgery unit were within the accepted standards of care. According to defendants' experts, when decedent presented to the ED on June 16, 2015, with right upper extremity (RUE) pain and numbness, defendants arrived at the appropriate differential diagnosis of DVT/PE and the presence of paradoxical embolism in the right brachial artery in the setting of a PFO. They opine that anticoagulation therapy was timely commenced, decedent appropriately received a vascular surgery consult by Dr. Lantis, an embolectomy was appropriately performed on June 17, and informed consent was appropriately obtained. Decedent did fall on June 17; however, these experts opine that decedent's second stroke at the hospital was not a result of the fall, but it was this second stroke that caused the fall. These experts opine that the second stroke was not caused by anything the defendants did or failed to do. 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 on this issue.

In opposition, plaintiffs provide a detailed expert affirmation by a physician who is board certified in neurology, vascular neurology and neurosonology. According to plaintiffs' expert, defendants failed, *inter alia*, to conduct a complete neurological exam in the ED with the use of a non-contrast MRI, which would have revealed and diagnosed an ischemic stroke. This expert opines that the lack of a multidisciplinary discussion particularly with the involvement of a vascular neurologist limited the management options, which only included anticoagulation with heparin and embolectomy of the axilllary artery without effectively addressing the source of the embolus. In addition, closing the PFO would have decreased the chances of another stroke. As for informed consent, decedent was not informed of his high risk for a devastating stroke and of the treatment option of PFO closure. Viewing the evidence in a light most favorable to plaintiffs, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the Court is satisfied that the aforementioned departures raised by plaintiffs' expert creates issues of fact sufficient to warrant a trial. The trier of fact will hear from these experts, including the evidence that each one relies upon in forming the basis for their expert opinion, and in turn they will evaluate the weight and credibility of the testimony of these experts. (*Cassano v Hagstrom*, 5 NY2d 643 [1959]; *State v Marks*, 87 AD3d 73 [3rd Dept 2011].) Defendants' summary judgment motion 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.

_____3/7/23_____ Hon._____
Dated Joseph E. Capella, J.S.C.