Gamble v Montefiore Med. Ctr.
2023 NY Slip Op 35223(U)
October 26, 2023
Supreme Court, Bronx County
Docket Number: Index No. 30276/2017E
Judge: Michael A. Frishman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

----------X

LANELL GAMBLE, As Administrator of the Estate of BAHEA FANT, and LANELL GAMBLE, Individually,

Index №. 30276/2017E

PlaintiffS,

- against -

Hon. MICHAEL A. FRISHMAN
Acting Justice of the Supreme Court

MONTEFIORE MEDICAL CENTER, THE UNIVERSITY HOSPITAL FOR ALBERT EINSTEIN COLLEGE OF MEDICINE, CHAYA B. ABELOW, M.D., and JANICE BARNHART, M.D.,

Defendants.

----------X

The following papers numbered 33-54, 57-68 and 70 were read on this Motion for Summary Judgment **(Seq. No. 001)**.

Sequence No. 001	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support, Statement of Material Facts – Exhibits and Affidavit Annexed	33-54
Affirmation in Opposition, Counterstatement and Response to Statement of Material Facts - Exhibits and Affidavits Annexed	57-68
Reply Affirmation	70

The motion of defendants MONTEFIORE MEDICAL CENTER, THE UNIVERSITY HOSPITAL FOR ALBERT EINSTEIN COLLEGE OF MEDICINE, CHAYA B. ABELOW, M.D., and JANICE BARNHART, M.D.,[1] seeking summary judgment dismissing the Complaint against them is granted in part and denied in part.

Plaintiffs commenced this action to recover damages for medical malpractice and wrongful death, alleging that defendants were negligent in failing to properly diagnose plaintiffs' decedent's (hereinafter "decedent") dilated cardiomyopathy consequently resulting in her death. Plaintiffs also assert causes of action for lack of informed consent, loss of services, and negligent hiring.

Defendants seek summary judgment dismissing the Complaint against them arguing, *inter alia*, that the care rendered by the staff at MMC, Dr. Abelow, and Dr. Barnhart comported at all times with the standard of care and no action or failure to act on the part of the staff at MMC, Dr. Abelow, and Dr.

[1] Unless otherwise stated, hereinafter collectively "defendants" or "movants," and individually as "MMC," "Einstein," "Dr. Abelow," and "Dr. Barnhart."

Barnhart proximately caused decedent's injuries. They also argue that they are entitled to dismissal of claims against defendant Einstein as well as plaintiffs' lack of informed consent and negligent hiring claims as unopposed and abandoned. Their motion is supported, among other things, by the affirmation of Dr. Katz, who is Board Certified in Internal Medicine, Cardiovascular Diseases, and Adult Comprehensive Echocardiography.

In opposition to defendants' motion for summary judgment, plaintiffs first argue that defendants have failed to meet their *prima facie* burden. Irrespective, plaintiffs further assert that the motion should be denied, as plaintiffs' expert demonstrates that there are many issues requiring denial of defendants' motion. Plaintiffs rely on the affidavit of an undisclosed physician who is Board Certified in Internal Medicine and Cardiovascular Diseases.

A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept 2015]). If a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Pullman v Silverman*, 125 AD3d 562, 562 [1st Dept 2015], *aff'd* 28 N.3d 1060 [2016]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007][internal citation omitted]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

At the outset, plaintiffs do not oppose dismissal of all claims against defendant Einstein and therefore, Einstein is dismissed from this action.

It appears undisputed that on September 17, 2015, decedent presented to the emergency room with complaints of chest pain and tongue swelling and was admitted to MMC through September 20, 2015, during which she was attended to by Dr. Abelow and Dr. Barnhart in addition to other MMC medical personnel. It also appears undisputed that upon discharge decedent was instructed see her primary care physician that week who could refer her to dermatologist or dentist as needed and follow up on mouth cultures. It is further undisputed that decedent appeared for a follow-up appointment at MMC's Family Care Center on September 25, 2015 and the records show that her chief complaint at this visit was palpitations with associated symptoms of shortness of breath and chest pains[2] and that decedent died on November 6, 2015 with her cause of death noted as "dilated cardiomyopathy, etiology undetermined."

[2] There appears to be a dispute over whether decedent also returned for a follow-up on October 10, 2015. However, the Court finds this of no consequence to this decision.

With respect to plaintiffs' medical malpractice and wrongful death claims, defendants' have met their *prima facie* burden that the care and treatment they provided to decedent comported with accepted medical practice, and that nothing they did or failed to do proximately caused injury to her.

However, in opposition plaintiff raised triable issues of fact as to her medical malpractice and wrongful death claims. Plaintiffs' expert identified his or her qualifications to offer expert opinion on the care and treatment on the subject matter of this action, listed the factual materials reviewed and relied on in forming those opinions, identified the standards of care and defendants' deviations therefrom, and causally related the moving defendants' departures to decedent's purported injuries.

Specifically, plaintiffs' expert opines that defendants deviated from accepted medical practice by failing to properly determine the etiology of decedent's chest pain and failing to refer her to a cardiovascular consultation at any time during her admission or September 25, 2015 follow-up visit which caused decedent's condition to worsen resulting in her premature death.[3] In addition, plaintiffs' expert's review of decedent's September 18, 2015 echocardiogram calls into question the accuracy of MMC's findings, to wit, whether it was properly interpreted and calculated by non-party Dr. Neches as decedent's ejection fraction being 65%. Rather, plaintiffs' expert's interpretation and opinion of decedent's echocardiogram images is that her ejection fraction was in an abnormal range of 50%-55%, which would have alerted MMC's treating personnel that a cardiology consult was required, and which would have led to diagnosis and treatment of her condition thereby avoiding her death.[4] Although the Court recognizes that Dr. Barnhart is not a cardiologist, plaintiffs' expert points to Dr. Barnhart's own sworn testimony that a patient with continued complaints of chest pain and a borderline normal ejection fraction would have resulted in different discharge instructions, to wit, that she would have suggested cardiology follow-up for the PCP to arrange and a repeat echocardiogram within a month of her discharge. Furthermore, while not directly disputing Dr. Katz's explanation that elevated CPK is an enzyme that is found in all muscles of the body and that CPK leaks into the bloodstream when muscle tissue is damaged, plaintiffs' expert disagrees with Dr. Katz that decedent's elevated CPK levels were not a reason for cardiac concern and that they were more likely caused by decedent's tongue edema. To this point, plaintiffs' expert opines that when there are no signs and symptoms of damages to any other muscles, but there are symptoms of issues with the heart and elevated CPK, the standard of care requires ruling out a cardiac cause to the elevated CPK. Furthermore, plaintiffs' expert opines that based on decedent's symptoms and history,[5] it was a deviation from the standard of care to fail to include DCM on the differential diagnosis. Consequently, questions of fact exist barring dismissal of plaintiffs' medical malpractice, wrongful death and loss of services claims as a matter of law.

---

[3] The Court recognizes that a handwritten note by non-party Nurse Cruz at 5 p.m. contained in decedent's September 20, 2015 discharge papers states that she denied any chest pain. However, that does not resolve the question of fact as a matter of law and the possibility that Nurse Cruz will be called as a witness at trial and her credibility properly weighed by a jury.

[4] There also appears to be a question of fact at to what constitutes a borderline normal ejection fraction. Defendants' expert states that normal is anything above 52% whereas plaintiffs' expert states normal is 55% or more. Additionally, Dr. Barnhart testified that borderline normal is between 50% to 60%.

[5] The Court notes that plaintiffs' expert references decedent's prior MMC medical records from August 2013, July 2014, and July 2015, attached as exhibits to their Opposition which note therein, inter alia, previous complaints of chest pressure. However, there are no allegations in the instant matter of alleged malpractice during those previous examinations.

In contrast, with respect to plaintiffs' claim for lack of informed consent, plaintiffs submitted no evidence that defendants failed to obtain decedent's informed consent. As such, plaintiffs' claim for lack of informed consent is heretofore dismissed.

Similarly, with respect to plaintiffs' claim for negligent hiring, plaintiffs have set forth no evidence that defendant MMC was negligent in their credentialing of Dr. Abelow, Dr. Barnhart and other personnel or knowledge of propensity to cause injury. Therefore, plaintiffs' claims that MMC failed to hire competent personnel are unsupported by the record and must be dismissed.

We have considered the parties' remaining arguments and find them unavailing.

Accordingly, it is hereby,

ORDERED that the portion of defendants' motion seeking summary judgment as plaintiffs' claims against THE UNIVERSITY HOSPITAL FOR ALBERT EINSTEIN COLLEGE OF MEDICINE is granted; And it is further

ORDERED that the portion of defendants' motion seeking summary judgment as to plaintiffs' lack of informed consent and negligent hiring claims are granted; And it is further

[This portion of the decision has been intentionally left blank]

ORDERED that the motion is otherwise denied; And it is further

ORDERED that the Clerk of the Court, Bronx County, is directed to amend the caption in this action to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
LANELL GAMBLE, As Administrator of the Estate of BAHEA FANT, and LANELL GAMBLE, Individually,

Index №. 30276/2017E

Plaintiffs,

- against -

MONTEFIORE MEDICAL CENTER, CHAYA B. ABELOW, M.D., and JANICE BARNHART, M.D.,

Defendants.
----------X

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: 10/26/23

Hon. Michael A. Frishman, A.J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER