

James v New York-Presbyt. Hosp.

2024 NY Slip Op 30262(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 805088/2019

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

-----X

RUBY JAMES, as Administrator of the Estate of EDENA
JAMES, Deceased,

Plaintiff,

- v -

NEW YORK-PRESBYTERIAN HOSPITAL, PRITISH
IYER, M.D., JOSHUA DAVID GELERIS, M.D., "JOHN
DOE 1, M.D.," "JANE DOE 1, M.D.," the first and last
names being fictitious and presently unknown, NEW YORK
CITY HEALTH & HOSPITALS CORPORATION,
METROPOLITAN HOSPITAL CENTER, JONNA
MERCADO, M.D., JUMANA CHALABI, M.D., LAURA
DUTU, M.D., "JOHN DOE 2, M.D.," and "JANE DOE 2,
M.D.," the first and last names being fictitious and presently
unknown,

Defendants.

-----X

INDEX NO. 805088/2019
MOTION DATE 06/28/2023,
06/27/2023
MOTION SEQ. NO. 006, 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 228, 230, 233, 236, 237, 238, 239, 240, 241, 248

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 008) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 227, 232, 235, 242, 243, 244, 245, 246, 247, 249, 250

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants in part Defendants New York City Health & Hospitals Corporation’s (“NYCHHC”), Metropolitan Hospital Center’s (“Metropolitan Hospital”), Jonna Mercado, M.D.’s (“Dr. Mercado”) and Jumana Chalabi, M.D.’s (Dr. Chalabi”) (collectively “NYCHHC Defendants”) motion for summary judgment filed under motion sequence 006, to the extent that the court grants dismissal of Plaintiff Ruby James, as Administrator of the Estate of Edena James, deceased’s (“Plaintiff”) Amended Verified Complaint against Dr. Mercado, the court dismisses Plaintiff’s claims for negligence and medical

malpractice as to alleged departures related to the Decedent's cardiac care, failure to perform a cardiac risk stratification on the Decedent, failure to recognize and diagnose the Decedent's malnutrition, electrolyte imbalance and fluid imbalance and proximate causation for her death. The court also dismisses Plaintiff's claims for lack of informed consent (Fourth Cause of Action), Public Health Law violations/punitive damages (Fifth Cause of Action), wrongful death (Sixth Cause of Action) and pecuniary loss (Seventh Cause of Action).

As to motion sequence 008, the court grants in part Defendants New York-Presbyterian Hospital's ("NY Presbyterian") and Joshua David Geleris, M.D.'s ("Dr. Geleris") (collectively, "NY Presbyterian Defendants") motion for summary judgment filed under motion sequence 008, to the extent that the court grants dismissal of Plaintiff's claims for negligence and medical malpractice regarding the movant's alleged failure to recognize and diagnose the Decedent's malnutrition, electrolyte imbalance and fluid imbalance and proximate causation for her death. The court also dismisses Plaintiff's claims for lack of informed consent (Fourth Cause of Action), Public Health Law violations/punitive damages (Fifth Cause of Action), wrongful death (Sixth Cause of Action) and pecuniary loss (Seventh Cause of Action).

The court denies the remainder of the motions.

Plaintiff brought this action against the NY Presbyterian Defendants, NYCHHC Defendants, Prithish Iyer, M.D., and others (collectively, "Defendants") alleging medical malpractice, negligence, lack of informed consent, violations of Public Health Law/punitive damages, wrongful death and pecuniary loss.

In a previous decision and order, dated June 30, 2023 (NYSCEF Doc. No. 223), the court granted a motion for Plaintiff to discontinue the action against Defendant Sergei Kochlatyi. In a decision and order, dated November 16, 2023 (NYSCEF Doc. No. 251), the court granted

Defendant Fort Tryon's summary judgment motion and dismissed Plaintiff's complaint against Defendant Fort Tryon.

Essentially, Plaintiff alleges in substance that Defendants failed to timely recognize, treat and prevent further deterioration of the Decedent's severe malnutrition and progressive decubitus ulcers which resulted in her injuries and death. The Decedent had multiple hospitalizations for treatment of various conditions and illnesses. She was admitted to Harlem Hospital from May 10, 2017 to May 19, 2017, NY Presbyterian from July 24, 2017 to August 2, 2017 and from August 10, 2017 to August 23, 2017, Metropolitan Hospital from August 23, 2017 to December 27, 2017, Fort Tryon from December 27, 2017 to June 8, 2019, and New York Presbyterian-Allen Hospital intermittently from Fort Tryon and from June 8, 2019 until her death on June 11, 2019. Plaintiff alleges in substance that Defendants departed from accepted practice during the Decedent's admissions and that such departures resulted in injuries and death to the Decedent.

A. THE NYCHHC DEFENDANTS' MOTION (006)

The NYCHHC Defendants now move for summary judgment dismissal of Plaintiff's complaint under motion sequence 006. The NYCHHC Defendants rely on the expert affirmations of Dr. Susan C. Hirsh, an internal medicine physician, and Dr. Burton J. Glass, a surgeon. The NYCHHC Defendants argue in substance that they consistently provided appropriate care to the Decedent during her hospitalization at Metropolitan from August 23, 2017 to December 27, 2017, and that such treatment did not proximately result in injury or death to the deceased Plaintiff. They further argue in substance that when the Decedent presented to Metropolitan, she was suffering from multiple life-threatening co-morbidities, which included severe malnourishment, a sacral ulcer, thirty to forty pounds of unintentional weight loss over a two-month period, temporal wasting, opiate drug use, anemia, and other severe ailments which

made her outcome inevitable despite the consistent high-quality of care rendered by the NYCHHC Defendants. The movants further argue in substance that the medical records, testimony and expert opinions support that at the time the Decedent was discharged to Fort Tryon for subacute rehabilitation, her malnutrition was largely resolved through the nutritional plan and placement of a PEG, the sacral ulcer showed pink granulation with no necrosis, her sepsis, urinary tract infection and respiratory issues were resolved and she did not suffer any hypoxic brain injury or intracranial hemorrhage following her cardiac arrest. Therefore, they argue that there were no departures and that they did not cause or contribute to the deceased Plaintiff's alleged injuries.

The movants also argue in substance that Dr. Mercado and Dr. Chalabi are entitled to summary judgment because their involvement with the Decedent's care and treatment was limited. Dr. Mercado was only involved in the Decedent's treatment while she was admitted to the medical floor and near her discharge. She established an appropriate plan to determine the source of the deceased Plaintiff's tachycardia and ruled out possible causes. Dr. Chalabi was only involved in the September 10, 2017 medical floor care and from November 30, 2017 through her discharge.

In their reply, the movants further support their arguments in favor of dismissal and argue in substance that the Plaintiff failed to raise any disputed factual issues based on the record and that Plaintiff's expert opinions were insufficient to defeat the motion.

B. THE NY PRESBYTERIAN DEFENDANTS' MOTION (008)

Defendants NY Presbyterian and Dr. Geleris now move under motion sequence 008 for summary judgment in their favor. The movants rely on the expert affirmations of Dr. Michael Hundert, an internal medicine physician, and Dr. David Feldman, a gastroenterologist/liver

specialist, and argue that at all times their care and treatment of the Decedent was within good and accepted medical practice during both admissions from July 24, 2017 and August 3, 2017 and from August 10, 2017 and August 23, 2017. Additionally, they argue that their care and treatment was not a proximate cause of the Decedent's claimed injuries or death.

The movants further argue in substance that the Decedent had a significant history of alcohol and drug abuse, she had a gastric bypass procedure approximately 10-11 years prior to her admission to NY Presbyterian, and she was noncompliant with the gastric bypass regimen and follow-up after the first five years. The movants further argue that the Decedent suffered from poor health. She was treated at NY Presbyterian for severe malnutrition, anemia, lower leg swelling and pain, difficulty and painful swallowing, abnormal liver studies and significant weight loss. They argue that she was appropriately discharged to Metropolitan Hospital on August 23, 2027. The movants argue in substance that they ordered the appropriate consultations, diagnostic studies, radiographic imaging and blood tests and that they appropriately treated the Decedent's malnourishment and nutritional deficiencies, her abnormal liver findings and her skin and sacral ulcer, which was present upon her second admission on August 10, 2017. The movants argue that the sacral ulcer did not worsen and there was no evidence of infection during her admission.

The movants further argue in substance that Plaintiff's lack of informed consent claim should be dismissed as there were no procedures performed on the Decedent that caused or contributed to her claimed injuries or death. They argue that Plaintiff's Public Health Law violation claims should be dismissed because they are not applicable to hospitals and that punitive damages are not warranted. They further argue that Plaintiff's wrongful death and pecuniary loss causes of action should be dismissed as there is no causal connection between the

movant's care and treatment of the Decedent and her death two years later, on June 11, 2019. The movants argue in substance that the autopsy report revealed that the cause of death was a combination of sepsis from an infested sacral ulcer, lactic acidosis and coagulopathy, further aggravated by valproic acid hepatotoxicity from nutritional deficiency.

In reply, the movants further argue that Plaintiff abandoned several claims set forth in the Bill of Particulars by failing to address them specifically in their experts' reports or opposition. The movants further argue that Plaintiff did not allege any departures from certain specialists. They also argue in substance that Plaintiff's surgeon expert is not qualified to opine on Defendants' care and the affirmation contains conclusory and speculative statements that lack any probative value. They further argue that the court should disregard Plaintiff's expert registered nurse's affidavit because it was incorrectly titled as an affirmation and the registered nurse is not a certified wound care expert and not qualified to comment on a medical doctor's care.

C. PLAINTIFF'S OPPOSITION TO BOTH MOTIONS

Plaintiff opposes both motions and relies on the expert affirmation of a surgeon and the expert affidavit of a registered nurse. Plaintiff argues in substance that the movants failed to meet their prima facie burden of eliminating issues of fact regarding their care rendered to the Decedent for her malnutrition and decubitus ulcers during her admissions to the movants' facilities and that issues of fact regarding liability and causation on Plaintiff's claims for negligence and medical malpractice remain to be tried. Plaintiff argues in substance that the Defendants departed from good and accepted medical and nursing practices by failing to recognize signs and symptoms of severe malnutrition, failing to urgently administer enteral and parenteral nutrition, failing to properly prevent and treat multiple pressure ulcers and other

departures. Plaintiff further alleges in substance that the NYCHHC Defendants also departed by failing to call for the appropriate consults and multidisciplinary evaluations, failing to promulgate a pressure ulcer reduction protocol on admission, and failing to perform a cardiac risk stratification. Plaintiff alleges that the NY Presbyterian Defendants also departed by failing to order or implement a turning schedule to avoid the development of pressure ulcers. Plaintiff further alleges that these departures caused the Decedent to lose her best chance for rehabilitation and recovery, malnutrition which was near starvation, pressure ulcers and other sequelae until her untimely death on June 11, 2019, when she was just 36 years old.

Plaintiff also argues in substance that the court should deny the motions on procedural grounds since the movant's expert affirmations exceeded the maximum word count required by the CPLR.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish 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 Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d

106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]. It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate

cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here 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" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, as to both motions, the court finds that the movants met their initial burdens of establishing a prima facie case of entitlement to summary judgment in their favor as a matter of law. However, as to both motions, the court finds that Plaintiff demonstrated that material issues

of fact remain to be tried as to whether Defendants NYCHHC, Metropolitan Hospital, Dr. Chalabi, NY Presbyterian and Dr. Geleris departed from the standard of care in their treatment, prevention and care of the Decedent's progressive decubitus ulcers, in their treatment, care and further deterioration of the Decedent's severe malnutrition and whether such alleged departures were a proximate cause of the Decedent's alleged injuries, but not her subsequent death. The court finds that Plaintiff's experts were competent to opine on these issues and that their opinions regarding the alleged departures and proximate causation as to Plaintiff's alleged injuries, but not her subsequent death, were sufficient to defeat the motions as to these claims.

The court finds that Plaintiff failed to raise issues of material facts based on admissible evidence as to Plaintiff's claims regarding any specific departures related to Dr. Mercado's treatment of the Decedent, Defendants' alleged departures related to the Decedents' cardiac care and their failure to perform a cardiac risk stratification on the Decedent and whether they failed to recognize and diagnose the Decedent's malnutrition, electrolyte imbalance and fluid imbalance. The record is clear that the Defendants recognized and diagnosed the Decedent's severe malnutrition, but the experts disagree on whether they departed in their treatment and care of such malnutrition.

The court finds that Plaintiff's experts' opinions on the departures related to Dr. Mercado were conclusory and failed to adequately identify specific departures attributable Dr. Mercado which were supported by competent evidence in light of the limited treatment provided. The court also finds that the Plaintiff's experts' opinions regarding the Decedent's cardiac care failed to adequately rebut Defendants' expert opinions, they were conclusory and not adequately supported by the record.

Furthermore, although the NYCHHC Defendants focused their motion on Plaintiff's negligence and medical malpractice claims, they did not expressly limit their motion to such claims. The court finds that Plaintiff failed to identify any procedure or basis to support her lack of informed consent claim and any proximate causation. Additionally, Plaintiff's alleged Public Health Law violations do not apply to Defendants' facilities and Plaintiff failed to demonstrate that punitive damages are warranted in this case. The court also finds that Plaintiff failed to oppose these claims as they were not addressed in Plaintiff's experts' opinions or in Plaintiff's opposition. Therefore, the court dismisses these claims.

Finally, the court finds that Plaintiff failed to sufficiently demonstrate that any of the Defendants' alleged departures were a proximate cause of her death two years after her discharge from their facilities and after she was hospitalized on multiple occasions for various conditions.

Thus, as set forth above, the court grants in part both motions and dismisses Plaintiff's Amended Complaint against Dr. Mercado, the court limits Plaintiff's negligence and medical malpractice claims as set forth herein and the court dismisses Plaintiff's claims for lack of informed consent, violation of the Public Health Laws/punitive damages, wrongful death and pecuniary loss in the Fourth, Fifth Sixth and Seventh Causes of Action, respectively, set forth in Plaintiff's Amended Verified Complaint. The court denies the remainder of the motions.

As such, it is hereby

ORDERED, that as to motion sequence 006, the court grants in part Defendants New York City Health & Hospitals Corporation's, Metropolitan Hospital Center's, Jonna Mercado, M.D.'s and Jumana Chalabi, M.D.'s motion for summary judgment filed under motion sequence 006, to the extent that:

- 1) the court grants the portion of the motion seeking dismissal of Plaintiff Ruby James, as Administrator of the Estate of Edena James, deceased's Amended Verified Complaint as against Defendant Jonna Mercado, M.D., only, the court dismisses Plaintiff's Amended Verified Complaint as against Defendant Jonna Mercado, M.D., only, the court severs the remaining claims, and directs the Clerk of the Court to enter judgment in favor of Defendant Jonna Mercado, M.D. as against Plaintiff, with prejudice and without costs;
- 2) the court dismisses Plaintiff's claims for negligence and medical malpractice as to the movant's alleged departures related to the Decedent's cardiac care, their failure to perform a cardiac risk stratification on the Decedent, their failure to recognize and diagnose the Decedent's malnutrition, electrolyte imbalance and fluid imbalance and any proximate causation for her death;
- 3) the court dismisses Plaintiff's claims for lack of informed consent, set forth in the Fourth Cause of Action; violations of the Public Health Law/punitive damages, set forth in the Fifth Cause of Action; wrongful death, set forth in the Sixth Cause of Action; and pecuniary loss, set forth in the Seventh Cause of Action; and
- 4) the court denies the remainder of the motion; and it is further

ORDERED, that as to motion sequence 008, the court grants in part Defendants New York-Presbyterian Hospital's and Joshua David Geleris, M.D.'s motion for summary judgment, to the extent that:

- 1) the court grants the portion of the motion seeking dismissal of Plaintiff Ruby James, as Administrator of the Estate of Edena James, deceased's claims for negligence and medical malpractice as to the movant's alleged departures related to the Decedent's

cardiac care, their failure to perform a cardiac risk stratification on the Decedent, their failure to recognize and diagnose the Decedent’s malnutrition, electrolyte imbalance and fluid imbalance and any proximate causation for her death;

- 2) the court dismisses Plaintiff’s claims for lack of informed consent, set forth in the Fourth Cause of Action; violations of the Public Health Law/punitive damages, set forth in the Fifth Cause of Action; wrongful death, set forth in the Sixth Cause of Action; and pecuniary loss, set forth in the Seventh Cause of Action; and
- 3) the court denies the remainder of the motion; and it is further

ORDERED that the court amends the caption to remove the name of Defendant Jonna Mercado, M.D. as a party to this action and directs the Clerk of the Court to amend the caption to the following:

-----X
 RUBY JAMES, as Administrator of the Estate of EDENA
 JAMES, Deceased,

Plaintiff,

-against-

NEW YORK-PRESBYTERIAN HOSPITAL, PRITISH
 IYER, M.D., JOSHUA DAVID GELERIS, M.D., “JOHN
 DOE 1, M.D.,” “JANE DOE 1, M.D.,” the first and last
 names being fictitious and presently unknown, NEW YORK
 CITY HEALTH & HOSPITALS CORPORATION,
 METROPOLITAN HOSPITAL CENTER, JUMANA
 CHALABI, M.D., LAURA DUTU, M.D., “JOHN DOE 2,
 M.D.,” and “JANE DOE 2, M.D.,” the first and last names
 being fictitious and presently unknown,

Defendants.

-----X
 and it is further;


ORDERED that counsel for Defendant Jonna Mercado, M.D. shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk

of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the amended caption pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the court.

1/18/2024
DATE


ERIKA M. EDWARDS, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE