

Rivas v 181st St. Med. P.C.

2024 NY Slip Op 33831(U)

October 9, 2024

Supreme Court, New York County

Docket Number: Index No. 805183/2016

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHY J. KING PART 06

Justice

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ANTONIA RIVAS AS ADMINISTRATOR OF THE ESTATE
OF WILLIAM LARA, DECEASED AND ANTONIA RIVAS,
INDIVIDUALLY,

Plaintiff,

- v -

181ST STREET MEDICAL P.C.D/B/A 181ST STREET
URGENT CARE CENTER, CELIA CALDERON

Defendant.

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INDEX NO. 805183/2016

MOTION DATE 08/31/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Defendants, 181st STREET MEDICAL, P.C. s/h/a 181st STREET MEDICAL P.C. d/b/a 181st STREET URGENT CARE CENTER (“181st Street Medical”), and CECILIA G. CALDERON, M.D. s/h/a CELIA CALDERON, M.D., (“Dr. Calderon” and collectively “Defendants”), move for an order pursuant to CPLR § 3211 and § 3212: (1) dismissing the complaint and any and all claims arising therefrom or related thereto, entirely with prejudice, as against the Defendants, on the ground that Plaintiffs have failed to state a cause of action upon which relief may be granted; (2) granting the Defendants summary judgment dismissing this action and any and all claims arising therefrom and relating thereto entirely with prejudice against the Defendants; and (3) granting summary judgment and dismissing any and all claims which moving Defendants have made a prima facie showing and which Plaintiffs fail to sufficiently rebut.

Plaintiffs, Estate of William Lara and Antonia Rivas individually, oppose the motion.

Plaintiff is the wife and Executrix of the Estate of William Lara, the Plaintiff's decedent ("decedent"), and brings this action on behalf of the estate alleging causes of action sounding in medical malpractice, vicarious liability, and wrongful death. Plaintiffs allege that the Defendants departed from accepted standards of care by, inter alia, failing to properly treat and diagnose the decedent; failing to take a proper history; failing to obtain and/or refer the decedent for proper diagnostic studies; failing to properly perform a physical examination, failing to properly refer the decedent to appropriate specialists; failing to recognize the signs/symptoms of a heart condition; and failing to obtain diagnostic imaging studies. Based on the aforementioned alleged departures by the Defendants, the Plaintiffs claim the decedent suffered conscious pain and suffering, fear of impending death, mental disturbances, confusion, cardiopulmonary arrest, and death.

According to the record, on May 4, 2014, decedent, who was then 71 years old, presented to 181st Street Medical P.C., and Cecilia Calderon, M.D., a primary care physician, for an urgent care visit for the first and only time, with complaints of flu-like symptoms for a week, nasal congestion, and cough. It was noted that he had a medical history of diabetes, hypertension and high cholesterol. A physical examination revealed that the decedent had bilateral coarse lung sounds and no wheezes/rhonchi/rales. His heart rate and rhythm were noted to be regular, with no murmurs, clicks, rubs or palpitations. Dr. Calderon documented that the decedent had no chest pain or discomfort, syncope or dyspnea on exertion, PND, orthopnea, edema, or cyanosis, and no shortness of breath. During this visit, his vital signs were HR (heart rate) – 116; BP (blood pressure) - 121/76; RR (respiratory rate) – 12; Temperature - 98.7, and O2 Sat. - 98%. Dr. Calderon indicated that the decedent was in no acute distress.

Dr. Calderon diagnosed the decedent with bronchitis and allergic rhinitis, and prescribed

an antibiotic, Azithromycin, along with Robitussin and Flonase. At the time of the visit, the decedent's glucose level was 335; insulin was offered to the decedent, which he refused.

On May 5, 2024, the decedent went into cardiac arrest, and was transported to New York Presbyterian Hospital via ambulance. He expired on that date. According to the record, the cause of death was cardiac arrest secondary to complications of atherosclerotic heart disease.

It is well-settled that “[t]o sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521 [1st Dept 2004]). A Defendant moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to an alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye*, 70 AD3d 15), and by establishing that the Plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy this burden, a Defendant must present expert opinion testimony that is supported by the facts in the record, which addresses and rebuts specific allegations of malpractice set forth in the Plaintiff's complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). Furthermore, to satisfy the burden on a motion

for summary judgment, admissible forms of proof include affidavits, pleadings, written admissions, deposition testimony and medical records (*Id.*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the proponent makes a prima facie showing, the burden shifts to the opposing party “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324; *see also Menzel v Plotnick*, 202 AD2d 558 [2d Dept 1994]; *Salamone v Rehman*, 178 AD2d 638 [2d Dept 1991]; *see Zuckerman*, 49 NY2d 557).

In support of the motion, the Defendants submit the affirmation of Dr. Sanford Goldberg (“Dr. Goldberg”), who is board-certified in Internal Medicine and Gastroenterology, and opines with a reasonable degree of medical certainty based upon a review of the pleadings, bills of particulars, the decedent’s medical records, and the deposition transcripts in this matter. Specifically, Dr. Goldberg opines that the care and treatment rendered to the decedent by the Defendants was appropriate and within the applicable standards of medical care, and did not cause or contribute to the decedent’s alleged injuries.

Specifically, Dr. Goldberg opines to a reasonable degree of medical certainty that: 1) the care provided by the Defendants on May 4, 2014, was appropriate and decedent did not evidence any signs or symptoms of cardiac disease, as he made no complaints of chest pain or discomfort, shortness of breath, or dyspnea on exertion, and that the examination of decedent’s heart by Dr. Calderon revealed no abnormalities in the heart rate or rhythm, and no murmurs, palpitations, clicks or rubs; 2) a proper history was taken, which included decedent’s medical and social history, as well as his active medications. Based on the history taken by Dr. Calderon, blood sugar testing was done, and Dr. Calderon offered decedent insulin due to a glucose level

of 335, which he refused; 3) Dr. Calderon performed an appropriate physical based on the decedent's complaints which included examination of the decedent's eyes, head, ears, nose and throat; a cardiovascular, neurological and respiratory examination; and a skin, extremities and musculoskeletal examination; 4) there was no need to refer the decedent to appropriate specialists because his complaints did not warrant evaluation from a specialist; and 5) there was no indication to perform an EKG or ultrasound of the heart when decedent presented to Dr. Calderon because his complaints were flu-like symptoms for a week, nasal congestion and cough, and Dr. Calderon appropriately inquired as to his medical history and symptoms, and performed a cardiovascular examination which was normal.

Dr. Goldberg notes that the deposition testimony of the decedent's son indicates that the decedent had chest and back pain the day prior, and had not sought medical attention, which is consistent with Dr. Calderon's assessment when she evaluated the decedent that he did not have chest or back pain.

The Court finds that based on Dr. Goldberg's affirmation, the Defendants have met their prima facie burden establishing entitlement to judgment as a matter of law that Defendants did not deviate from the standard of care in treating the decedent on May 4, 2014, and that such deviation was not the proximate cause of the decedent's injuries (*see Zuckerman*, 49 NY2d 557; *see also Alvarez*, 68 NY2d 320; *Frye*, 70 AD3d 15; *Bahnyuk v Reed*, 174 AD3d 481 [1st Dept 2019]).

In opposition, Plaintiffs submit the expert affirmation of Harlan L. South, M.D. ("Dr. South"), who is board certified in Internal Medicine. Dr. South opines, to a reasonable degree of medical certainty, based on a review of the decedent's medical records, pleadings, bills of particulars, deposition transcripts, and the exhibits annexed to the Defendants' moving

papers, that the Defendants departed from good and accepted medical care, and that those departures were substantial factors in the pain, suffering and death of the decedent.

Specifically, Dr. South opines that Dr. Calderon and her staff departed from good and accepted medical practice in failing to take a proper history, which caused and/or contributed to Defendants' failure to identify the risk of an ongoing or imminent heart attack. He states that the decedent's medical record relating to the May 4th visit is "at the best, unreliable, and at the worst, likely altered," since it does not indicate that decedent was accompanied by his wife, the family history is incomplete, and there is no documentation that decedent had been complaining of chest pain with radiation to the back for the previous week, as reported by his family to EMS on May 5, 2014, when decedent was emergently transported to the hospital.

Dr. South further opines that Defendants departed from the standard of care by failing to perform a proper cardiac workup given the decedent's presentation on May 4, 2014, and factors such as his advanced age, presenting symptoms and complaints, medical history, and elevated blood sugar and A1C level, and heart rate. He opines that these abnormalities were red flags of a cardiac event, which Dr. Calderon did not include in her differential diagnosis. Dr. South opines that either an EKG should have been performed, to confirm or rule out a cardiac event, or the decedent should have been referred to a cardiac specialist for further evaluation. Dr. South opines that these departures by the Defendants prevented the decedent from obtaining proper and immediate care which could have saved his life.

Lastly, Plaintiffs' expert opines that the expert opinion of Dr. Goldberg, the Defendants' expert, is inaccurate and incomplete as to the present medical history, with inattention to the primary complaint of chest tightness/pressure radiating to the back and its subsequent implications of an impending heart attack.

In opposition to Defendants' motion, the Plaintiffs also submit the affidavit of Plaintiff, Antonia Rivas, which in sum and substance, asserts that she heard the decedent complain to the staff and doctor of tightness/pressure in his chest and difficulty breathing, and that the Defendants never took a full family history from the decedent.

The Court finds that the conflicting expert affidavits of the Plaintiffs and the Defendants raise triable issues of fact (*see Roques*, 73 AD3d 204). The Plaintiffs have established the requisite nexus between the malpractice allegedly committed by the Defendants and the resulting injury, based on the expert affirmation of Dr. South and the record evidence, thereby rebutting the Defendants' prima facie showing (*Alvarez*, 68 NY2d at 324; *Mignoli v Oyugi*, 82 AD3d 443, [1st Dept 2011]).

In particular, Plaintiffs have raised issues of fact pertaining to whether the Defendants departed from the standard of care in failing to conduct further diagnostic cardiac testing and/or failing to refer the decedent to a cardiac specialist to determine whether a cardiac event was imminent, based on the decedent's presenting symptoms and complaints, medical and family history, and elevated blood sugar and A1C levels. The Plaintiffs' have also raised issues of fact as to whether these departures resulted in decedent's alleged injuries and death.

"Summary judgment is not appropriate in a malpractice action where, as here, the parties adduce conflicting expert opinions" because "[s]uch credibility issues can only be resolved by a jury" (*Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]; *Amendola v Brookhaven Health Care Facility, LLC*, 150 AD3d 1061 [2d Dept 2017]); *Griffin v Cerabona*, 103 AD3d 420 [1st Dept 2013]; *Feinberg v Feit*, 23 AD3d 517 [2d Dept 2005].

Since Plaintiffs have raised issues of fact as to the medical care and treatment provided by Dr. Calderon and staff, Plaintiffs' vicarious liability claims cannot be dismissed. Specifically, Plaintiffs' expert opines that Dr. Calderon and staff were involved in pertinent decisions, treatment rendered and intake during the decedent's May 4, 2014, visit. It is well-settled that a hospital or other medical facility is liable for the negligence or malpractice of its employees (*see Hill v St. Clare's Hosp.*, 67 NY2d 72 [1986]).

The Court notes that neither the moving Defendants nor the Plaintiffs specifically address the Plaintiffs' wrongful death claim.

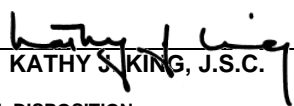
Accordingly, it is hereby,

ORDERED that the moving Defendants' motion for summary judgment and dismissal of the complaint is denied; and it is further,

ORDERED that within twenty (10) days of entry of this order, counsel for the Plaintiffs shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court, and it is further

ORDERED that all parties appear for a settlement conference on December 3, 2024, at 11:30 a.m. at 60 Centre St., New York, NY, Room 351.

This constitutes the decision and order of the Court.

<u>10/9/2024</u> DATE					 KATHY S. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE