

Petrello-Rosen v Hossain

2024 NY Slip Op 34862(U)

September 19, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 617459/2021

Judge: Maureen T. Liccione

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SHORT FORM ORDER

INDEX No. 617459/2021
CAL. No. 202300866MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 78 - SUFFOLK COUNTY

PRESENT:

Hon. MAUREEN T. LICCIONE
Justice of the Supreme Court

MOTION DATE 10/5/23
ADJ. DATE 2/28/24
Mot. Seq. # 001 MG; CASEDISP

-----X
GINA ANNE PETRELLO-ROSEN and LISA
MARIE PETRELLO, as Co-Executors of the
Estate of KATHLEEN BIRMINGHAM,
deceased,

Plaintiffs,

- against -

SYEDA HOSSAIN, M.D. and MOUNT SINAI
DOCTORS LONG ISLAND-NESCONSET,

Defendants.
-----X

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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants, dated September 28, 2023; Answering Affidavits and supporting papers by plaintiffs, dated January 31, 2024; Replying Affidavits and supporting papers by defendants, dated February 5, 2024; Other Memorandum of Law; it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is granted.

Plaintiffs Gina Petrello-Rosen and Marie Petrello Rosen, as co-executors of the estate of Kathleen Birmingham, commenced this action to recover damages for alleged medical malpractice and the wrongful death of their mother, Kathleen Birmingham. The decedent, who was referred by her primary care physician to defendant Syeda Hossain, M.D., a gastroenterologist, for evaluation and management of ulcerative colitis, died from complications related to colon cancer on March 6, 2020. By their bill of particulars, plaintiffs allege, among other things, that Dr. Hossain failed to timely render proper medical care and detect the decedent's colon cancer, which deprived her of an opportunity for early diagnosis and treatment. They further allege that defendant Icahn School of Medicine at Mount

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Sinai s/h/a Mount Sinai Doctors Long Island-Nesconset (hereinafter referred to as Mount Sinai Doctors Long Island-Nesconset), is vicariously liable for the negligence of Dr. Hossain.

The following facts are not in dispute. On January 16, 2020, the decedent, then 72-years-old, presented to Dr. Hossain's office for evaluation of her existing ulcerative colitis, which was diagnosed when she was sixteen years old. During the presentation, the decedent complained that since receiving a flu shot in October 2019, she had developed increased diarrhea with mucus, bloating, abdominal cramping, rapid weight loss, and lightheadedness. Dr. Hossain examined the decedent, who she noted was not in acute distress or toxic in appearance, and reviewed the report of a CT scan ordered by decedent's primary care physician, which revealed, among other things, abnormal colon thickening, focal narrowing, inflammatory stricture, and an enlarged 10.0 mm mesenteric lymph node adjacent to the transverse colon. Dr. Hossain recommended follow up imaging. Dr. Hossain further reviewed laboratory studies conducted by the decedent's primary care physician. She diagnosed the decedent with, among other conditions, colitis-pancolitis in active flare, formulated a treatment plan involving a liquid diet and the use of prednisone, and directed that she undergo a colonoscopy within three to six weeks. On January 21, 2020, the decedent called Dr. Hossain's office with complaints that she had not had a bowel movement for 5 days. Nonparty Dr. David Oustucky, who was covering for Dr. Hossain that day, directed the decedent to use a Fleet enema and undergo an abdominal x-ray. The report for an x-ray performed on the decedent later that day indicated "bloating, constipation, ulcerative colitis, and bowel obstruction." Although the decedent reported bowel movements after the use of the Fleets enema on January 23, 2020, she called emergency medical services (EMS) on January 26, 2020, complaining of severe abdominal pain. Upon assessment EMS noted that the decedent had a distended, rigid and tender abdomen in all four quadrants, and transported her to the emergency department of Long Island Community Hospital.

As the decedent's condition did not improve, the examining physician ordered tests, a general surgery consult, and a CT scan, which revealed findings compatible with large bowel obstruction secondary to a stricture in the large colon just distal to the hepatic flexure, ascites, and bowel perforation with intra-abdominal air. A laparotomy to address the bowel obstruction and perforation was ordered for the decedent. When the laparotomy was conducted, a "completely obstructing mass" was discovered in the transverse colon, and a pathology report of a specimen taken during the procedure noted, among other things, an invading and moderately differentiated adenocarcinoma tumor of the distal ascending colon. The decedent, who remained on a ventilator following the procedure, began experiencing multiorgan failure two days later. Following an evaluation by oncology conducted on January 31, 2020, the decedent was diagnosed as having "reasonably low risk stage II colon cancer." After her transfer from the surgical intensive care unit, the decedent began experiencing neurological decline, noted as possibly being related to septic shock or prolonged hospital stay, and her family signed a DNR/DNI consent after consultation with palliative care. On March 5, 2020, the decedent's treating physician documented that despite aggressive supportive measures, her clinical condition showed no progress or improvement. After lengthy discussions, her daughters decided to initiate comfort measures without aggressive treatment; only pain relief intervention was to be administered. On March 6, 2020, the decedent was found without spontaneous respirations or pulse, and her pupils were fixed and dilated, and she was pronounced dead soon thereafter.

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Defendants now move for summary judgment on the grounds the care rendered by Dr. Hossain and Mount Sinai Doctors Long Island-Nesconset was appropriate and did not deviate from any accepted standards of medical practice. More specifically, defendants assert that Dr. Hossain and Dr. Oustucky acted within the standard of care during their involvement with the decedent's care on January 16, 2020 and January 21, 2020, respectively, and that such care was not the proximate cause of the decedent's injuries. In addition, defendants argue that since neither Dr. Hossain nor Dr. Oustucky deviated from accepted medical care, or caused or contributed to the decedent's injuries, vicarious liability cannot be imputed against defendant Mount Sinai Doctors Long Island-Nesconset. In support of their motion defendants submit, inter alia, copies of the pleadings, the transcripts of the parties' deposition testimony, the decedent's medical records, the decedent's autopsy report, and expert affidavits by Dr. Maxwell Chait, M.D., and Dr. Marc Shapiro, M.D. Plaintiffs oppose the motion on the ground defendants failed to eliminate triable issues from the case as to whether Dr. Hossain violated the standard of care when she failed to recognize that the decedent's clinical presentation was not consistent with a flare of ulcerative colitis; whether Dr. Hossain ordered inappropriate treatment of steroids and unnecessarily delayed a colonoscopy; whether defendants violated the standard of care when they treated the decedent for constipation rather than a partial obstruction; and whether defendants delay in appropriately treating the decedent affected the course and outcome of her treatment. Plaintiffs opposition includes, among other things, a copy of the decedent's autopsy report and a unredacted copy of an affirmation by their medical expert, Dr. Mark Flasar, M.D.

It is well established that the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 165 NYS3d 573 [2d Dept 2022]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 ; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient and that defendant was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is

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a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). Specifically, in a medical malpractice action, a plaintiff opposing a motion for summary judgment must submit a physician's affidavit of merit that raises triable issues of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Johnson v Queens-Long Is. Group*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; *Dellacone v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]; *Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see Arkin v Resnick*, *supra*; *Dolan v Halpern*, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Here, defendants met their prima facie burden by demonstrating, through the submission of expert affidavits by a board certified gastroenterologist and a surgeon, that neither Dr. Hossain nor Dr. Oustucky deviated from accepted medical care in their treatment of the decedent, and that vicarious liability, therefore, cannot be imputed against Mount Sinai Doctors Long Island-Nesconset, as neither doctor caused or contributed to the decedent's death or injuries (*see Wicks v Virk*, 198 AD3d 1315, 152 NYS3d 379 [4th Dept 2021]; *Salovin v Orange Regional Med. Ctr.*, 174 AD3d 1191, 105 NYS3d 184 [3d Dept 2019]; *Capobianco v Marchese*, 125 AD3d 914, 4 NYS3d 127 [2d Dept 2015]; *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]). Dr. Maxwell Chait, M.D., a board certified gastroenterologist, opined to a reasonable degree of medical certainty that the care and treatment Dr. Hossain rendered to the decedent surrounding the single office visit on January 16, 2020 was in accordance with appropriate standards of care and did not cause or contribute to the decedent's alleged injuries (*see Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 917 [2d Dept 2013]; *LeMaire v Kuncham*, 102 AD3d 659, 659, 957 NYS2d 732 [2d Dept 2013]; *Forrest v Tierney*, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]). Dr. Chait states that Dr. Hossain appropriately reviewed the decedent's medical history and determined that she was experiencing an exacerbation of Crohn's disease or ulcerative colitis, and that the treatment plan she recommended, including, prescription of a steroid, a liquid diet, and scheduling a colonoscopy within three to six weeks, was within the standard of medical care given that the CT scan performed on the decedent eight days earlier did not reveal the existence of any bowel obstructions. Dr. Chait further opines that it was his opinion within a reasonable degree of medical certainty, given the decedent's non-toxic appearance, her ongoing use of antibiotics prescribed by her primary care doctor, and the absence of evidence of sepsis, intractable pain, significant blood loss, or obstruction, that it was

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acceptable for Dr. Hossain, who had no further involvement in the decedent's care, to determine that it was not necessary to transfer her to the hospital for further evaluation and treatment.

Additionally, Dr. Chait avers that the sole involvement in the decedent's care by nonparty doctor Dr. David Oustecky, during a telephone call on January 21, 2020, was in accordance with good and accepted medical practice, as his recommendation that she administer a Fleet enema and undergo an x-ray if she developed nausea was appropriate to treat an active Crohn's disease or ulcerative colitis exacerbation without risking a colon perforation. Dr. Chait also notes that Dr. David Oustecky's treatment and care of the decedent was in accordance with good and accepted medical practice, as the decedent called Dr. Hossain's office two days later and reported that she did have a bowel movement after use of the Fleet enema, and that she had undergone an x-ray which was interpreted as normal without any evidence of obstruction. Dr. Chait then opines, within a reasonable degree of medical certainty, that the decedent's active Crohn's disease and colon cancer, rather than her use of a Fleet enema, likely caused the obstructing mass that eroded through her bowel wall; that this mass would have required surgical intervention regardless of any act or omission by the doctors; and that Dr. Hossain's and Dr. Oustecky's sole involvement in evaluating the decedent on January 16, 2020, and on January 21, 2020, did not cause, exacerbate, or contribute to her alleged injuries.

Defendants also submitted an expert affidavit by Dr. Marc Shapiro, M.D., a board certified surgeon, who opines within a reasonable degree of medical certainty that defendants' respective single involvement with the decedent in no way affected her outcome or caused her subsequent obstruction, perforation, and death. Dr. Shapiro avers, within a reasonable degree of medical certainty, that given the decedent's underlying stricture and malignancy, the five days between January 21, 2020 and her presentation at the emergency room on January 26, 2020, was enough time for an obstruction and perforation to develop in her colon. Dr. Shapiro contends the fact the decedent presented with an obstruction and perforation five days after a negative abdominal x-ray in no way indicates that something was "missed" on the x-ray, or that the obstruction was present at the time it was conducted. According to Dr. Shapiro, even assuming, arguendo, that something was missed during the x-ray examination, it is his opinion within a reasonable degree of medical certainty that the decedent's outcome would have been the same, and that Dr. Hossain and Dr. Oustecky were entitled to rely on the radiologist's interpretation of the x-ray imaging. Finally, Dr. Shapiro opines within a reasonable degree of medical certainty that nothing the defendants did or did not do could have prevented the decedent's outcome, and that in retrospect, had she gone for regular colonoscopies, the tumor may have been identified earlier and her demise likely prevented.

In opposition to defendant's prima facie showing, plaintiffs failed to raise a triable warranting denial of the motion (*see Cooper v City of New York*, 200 AD3d 849, 157 NYS3d 542 [2d Dept 2021]). Notably, a review of the affirmation by plaintiff's expert reveals that it is conclusory, without basis in the record, and fails to address the specific assertions of defendant's experts (*see Valentine v Weber*, 203 AD3d 992, 161 NYS3d 850 [2d Dept 2022]; *Scopelliti v Westmed Med. Group*, 193 AD3d 1009, 146 NYS3d 656 [2d Dept 2021]). In particular, plaintiff's expert does not dispute the contention by defendants' experts that Dr. Hossain and Dr. Oustecky were entitled to rely on the radiologist's interpretation of the decedent's January 9, 2020 x-ray, which did not include suspicion of a partial

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obstruction. Indeed, plaintiff’s expert failed to address the assertion by Dr. Shapiro that given the decedent’s underlying stricture and malignancy, the five days between her January 21, 2020 evaluation and her presentation at the emergency room on January 26, 2020, was enough time for an obstruction and perforation to develop in her colon, and that the fact the decedent presented with an obstruction and perforation five days after a negative abdominal x-ray in no way indicates that something was “missed” on the x-ray, or that the obstruction was present at the time it was conducted. Likewise, notwithstanding his assertion that an expedited diagnostic colonoscopy was required, plaintiff’s expert failed to address the opinion of defendant’s expert, Dr. Chait, that the standard of care dictated that a colonoscopy should not be performed during an exacerbation of either Crohn’s disease or ulcerative colitis, because doing so posed a risk of perforation or acute exacerbation of either condition. Therefore, as the allegations of medical malpractice by plaintiff’s expert are conclusory, speculative, and failed to address the specific assertions of defendant’s experts, they are insufficient to defeat defendants’ prima facie showing of entitlement to summary judgment (see *Coffey v Mansouri*, 209 AD3d 714, 716, 176 NYS3d 641 [2d Dept 2022]; *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1067-1068, 56 NYS3d 108). Accordingly, the motion by defendants seeking summary judgment dismissing the complaint against them is granted.

Dated: 9/19/24


HON. MAUREEN T. L'ESCAIGNE, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION