

Weiss v Salgado

2025 NY Slip Op 31998(U)

May 27, 2025

Supreme Court, New York County

Docket Number: Index No. 805025/2021

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

-----X

SEBASTIAN WEISS, as Administrator of the Estate
of ALLEN WEISS, deceased,

Plaintiff,

- v -

JESSICA SALGADO, NATHANIEL BERMAN, SUPRIYA
SURESH GERARDINE, TAREK BARBAR, JUN LEE,
CATHERINE PUANGCO, ROBERT SEAN TANOUYE,
PHONG ANH HUNYH, and NEW YORK PRESBYTERIAN
HOSPITAL/WEILL CORNELL MEDICAL CENTER,

Defendants.

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INDEX NO. 805025/2021
MOTION DATE 08/24/2023
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral argument, Defendants Jessica Salgado, RN ("Nurse Salgado"), Nathaniel Berman, M.D. ("Dr. Berman"), Supriya Suresh Gerardine, M.D. ("Dr. Gerardine"), Tarek Barbar, M.D. ("Dr. Barbar"), Jun Lee, M.D. ("Dr. Lee"), Catherine Puangco, RN ("Nurse Puangco"), Robert Sean Tanouye, M.D. ("Dr. Tanouye"), and New York Presbyterian Hospital/Weill Cornell Medical Center ("NYPH") (collectively "Defendants") move for an order, pursuant to CPLR 3212, for summary judgment and dismissal of the complaint, with prejudice.¹

Plaintiff, Sebastian Weiss, on behalf of decedent Allen Weiss ("decedent"), opposes the motion.

¹ Named Defendant Phong Anh Hunyh was not served.

BACKGROUND

This action involves the care and treatment rendered to decedent during an Emergency Room (“ER”) visit and resulting admission to NYPH from April 16th to April 18th, 2020, during the COVID-19 pandemic, and during a subsequent follow up ER visit on April 21, 2020. The decedent, then 76 years old, was critically ill and presented to the ER with multiple comorbidities.

Plaintiff alleges that Defendants departed from good and accepted medical and nursing practice by administering medications through the peripheral IV line during Plaintiff’s initial admission to NYPH causing extravasation into the decedent’s arm which resulted resulting in extensive tissue damage. Plaintiff claims that these medications should have been administered through decedent’s existing Permacath central line in his chest to avoid the potential for extravasation. Plaintiff also claims that the decedent should have been admitted to the hospital on April 21, 2020, when he returned with a large necrotic ulcer on his right forearm, and that an Infectious Disease consult should have been called, as well as a referral to Plastic Surgery, and that doxycycline should not have been prescribed because it predisposed him to the subsequent MRSA infection.

On December 23, 2020, decedent died. Thereafter, Plaintiff commenced the underlying action as the Administrator of decedent’s estate alleging four causes of action: (1) medical malpractice, (2) lack of informed consent, (3) negligent hiring/retention, and (4) negligent credentialing. Plaintiff also asserts that the res ipsa loquitor doctrine is applicable.

Defendants now move for summary judgment under CPLR 3212 dismissing Plaintiff’s complaint. Defendants requested relief also asserts that Plaintiff’s claims are barred and dismissal is warranted under the qualified immunity afforded to health care providers through Article 30-D of the Public Health Law.

IMMUNITY CLAIMS AGAINST DEFENDANT UNDER EDTPA AND PHL

As a threshold matter, contrary to Defendants' contention, the Court finds that Plaintiff's claims are not barred under the Covid-19 immunity afforded by New York's Emergency or Disaster Treatment Protection Act ("EDTPA").

On April 3, 2020, Article 30-D of the Public Health Law [PHL] was enacted in response to the COVID 19 pandemic (Emergency or Disaster Treatment Protection Act [EDTPA], § 2, as added by L.2020) The purpose of this law was to "promote the public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency" (PHL § 3080).

In the case at bar, the issue is whether or not plaintiff's care was "impacted by . . . or as a result of the COVID-19 outbreak" (PHL § 3082[2]). The statute is satisfied upon a showing that "the care rendered to the person making the claim is affected, in some way, by the hospital or provider response to the pandemic" (*Townsend v Penus*, 2021 NY Slip Op. 32375[U], 1, at 3 [NY Sup Ct, Bronx County 2021]). A review of Defendants' submissions indicate that they only discuss in general terms the impact of the Covid-19 outbreak upon the healthcare provided by Defendants, and fail to demonstrate with specificity how "the treatment of the [decedent was] impacted by the health care facility or health care professional decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directive" (Public Health Law 3082[2]; see *Holder v Jacob*, 231 AD3d 78, 88 [1st Dept 2024]).

Thus, based on the foregoing, the EDTPA and PHL are inapplicable, and Defendants are not entitled to immunity from liability for the acts and omissions underlying Plaintiff's claims.

SUMMARY JUDGMENT DISMISSAL OF MEDICAL MALPRACTICE

A defendant physician 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 his or her alleged departure from accepted standards of medical practice, or by establishing that the plaintiff was not injured by such treatment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *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, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *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 his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

As a threshold matter, the Court finds that all claims as to Defendants Nurses Puangco and Salgado, former Resident Barbar, and Former Fellow Gerardine, individually,² are dismissed as a matter of law. It is well settled that “when supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene” (*Bellafore v Ricotta*, 83 AD3d 632 [2d

² Plaintiff submits no opposition regarding dismissal of the claims as to these Defendants individually.

Dept 2011]; see *Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 253 AD2d 616 [1st Dept. 1998]).

In this regard, Nurse Newman opined that Plaintiff's assessment and treatment by Nurse Salgado and Nurse Puangco's met the standard of nursing care, and that both nurses were acting under the direct supervision of attending physicians when providing care and treatment to Plaintiff. Additionally, the affirmation of ER Attending Physician Dr. Littauer indicates that Nurse Salgado treated decedent under his direct supervision on April 16, 2020, and that he and Nurse Salgado "were in frequent communication with each other about [decedent] and she administered medications [appropriately] in all respects and consistent with [his] expectation of the care to be provided to [decedent]."

Similarly, the record indicates that Dr. Barbar, a Resident at the time, treated decedent solely under the guidance and continuous supervision of Attending Physician, Dr. Lee. Dr. Barbar's April 17, 2020, treatment plan was co-signed by Dr. Lee on April 18, 2020. The record also shows that the April 16, 2020, treatment plan of Dr. Gerardine, a Medical Fellow at the time, was co-signed by Attending Physician Dr. Berman, and she affirms in her affidavit that Fellows treat patients under the direct supervision of Attending Physicians in their area of subspecialty and she treated decedent solely in her capacity as a Fellow.

In support of their motion for summary judgment, the remaining NYPH Defendants including Drs. Berman, Lee, and Tanoye submit the expert affidavit of Sara Newman, RN ("Nurse Newman"), and the affirmations of Lee C. Ruotsi, M.D, ("Dr. Ruotsi"), board-certified in Undersea and Hyperbaric Medicine and Wound Care, Robert A. Press, M.D. ("Dr. Press"), a board-certified in Internist and Infectious Disease physician, all of whom opine within a reasonable degree of medical certainty.

Specifically, Nurse Newman opines that the assessment and treatment provided by Nurses Salgado and Puangco to the decedent were appropriate and within the standards of nursing care and did not substantially contribute to decedent's injury. The treatment that was provided involved administering necessary, potentially vesicant, lifesaving medications through a peripheral IV in the emergent setting, a decision necessitated by the urgent need to treat the decedent's cardiac arrhythmia, as central line placement would have taken too long. Furthermore, Nurse Newman opines that the record lacks evidence of the decedent experiencing pain or discomfort prior to Nurse Puangco's documentation, negating any indication for earlier cessation of infusions. According to Nurse Newman, Nurse Puangco also acted appropriately in removing the IV and applying a compress, with her primary duty being to inform the physician for any further necessary action. Nurse Newman also finds no merit in allegations of insufficient nursing checks contributing to or delaying the identification of the extravasation and opines that any perceived lack of frequency was a direct consequence of the demands imposed by the COVID-19 pandemic. Nurse Newman concludes that the resulting right arm ulcer was an unavoidable sequela of decedent's critical underlying health issues and the necessary infusion treatment.

Defendants' second expert, Dr. Ruotsi, opines, to a reasonable degree of medical certainty, that the IV extravasation experienced by the decedent was a recognized complication, particularly in patients with poor vascular access, those on dialysis, and the elderly, and that the standard of care emphasizes timely identification rather than prevention, which occurred appropriately in this case. According to Dr. Ruotsi, the vesicant medication had a known risk of delayed-onset tissue damage, which likely occurred in the decedent despite the Defendants taking appropriate and immediate actions. Dr. Ruotsi further states that the decedent's discharge on April 18, 2020, was appropriate given his stabilized condition and the significant risk of Covid-19 exposure during the

pandemic's peak, and that the subsequent wound care of his right arm, including the management of suspected cellulitis, was also suitable, with neither plastic surgery referral nor further hospitalization being indicated at that time. Dr. Ruotsi opines that the prompt outpatient follow-up and the non-party plastic surgeon's management of the ulcer, including in-office debridement and wound vac use, were consistent with the standard of care, rendering any claims of delayed plastic surgery referral without merit, as the outcome would have been the same. Dr. Ruotsi also notes the appropriate treatment and eventual healing of the right arm ulcer by November 2020. With regard to the decedent's final NYPH admission, Dr. Ruotsi clarifies that the MRSA bacteremia and subsequent sepsis leading to his death were unrelated to the healed right arm ulcer, and instead stem from chronic infected lower extremity ulcers that predated the April 2020 treatment. Dr. Ruotsi concludes that the Defendants' care was not a proximate cause of decedent's alleged injuries or ultimate demise, and his deconditioning predated the treatment in question and worsened due to his prolonged dialysis.

Dr. Press, Defendants' third expert, opine that the assessment and treatment of decedent's April 21, 2020, ED visit, including the suspicion of cellulitis and the prescription of Doxycycline, were appropriate, and that given his presentation and the Covid-19 pandemic, an infectious disease consult and hospital admission were not necessary, since decedent could and did receive equivalent outpatient care during his admissions to NYPH. Dr. Press further states that all infectious disease-related care throughout decedent's illness until his death in December 2020 were appropriate. Notably, Dr. Press concurs with Dr. Ruotsi and finds no evidence linking decedent's subsequent MRSA infections to his right arm ulcer, highlighting that he showed no signs of bacteremia when the cellulitis was treated with Doxycycline (to which MRSA is often sensitive), and that no infection was noted during the debridement in June. Ultimately, Dr. Press concludes no correlation

existed between the April 2020 IV infiltration and resulting arm ulcer and the later MRSA bacteremia or the lower extremity issues causing the decedent's death, which were unrelated to the Defendants' actions or inactions regarding the right arm IV infiltration and healed right arm ulcer.

Based on the evidence in the record and the expert opinions of Drs. Ruotsi and Press, and Nurse Newman's affidavit, the Court finds that the NYPH Defendants have demonstrated their prima facie entitlement to summary judgment by showing that the care and treatment of NYPH Defendants during Plaintiff's April 16-21, 2020, hospital admission and ER visit met the appropriate standard of medical care and did not proximately cause Plaintiff's alleged injuries.

Once the proponent of a summary judgment motion makes a showing of entitlement to dismissal by tendering evidence sufficient to demonstrate the absence of material issues of fact, 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 v Prospect Hosp.*, 68 NY2d at 324; see also *Menzel v Plotnick*, 202 AD2d 558 [2d Dept 1994]; *Salamone v Rehman*, 178 AD2d 638 [2d Dept 1991]).

In opposition, the Plaintiff submits the expert affirmations of: (1) Expert A, a registered nurse ("Expert A"), with experience in hospital systems and emergency room settings, including educating nurses on patient assessments upon admission, carrying out physicians' orders, properly placing IV lines, performing medical infusion, and monitoring IV infusions; and (2) Expert B, a board-certified General, Vascular, and Critical Care Surgeon.³

As a preliminary matter, the Court finds no merit to Defendants' contention that Expert A, Plaintiff's Vascular Surgery expert, is not qualified to render an expert opinion in this matter.⁴ "A

³ The names of Plaintiff's experts are redacted pursuant to CPLR 3101(d). The Registered Nurse shall be referred to as Expert B.

⁴ The names of Plaintiff's experts are redacted pursuant to CPLR 3101(d). The physician shall be referred to as Expert A.

medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field; however, the expert must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*Kiernan v Arevalo-Valencia*, 184 AD3d 727, 729 [2d Dept 2020]). Thus, where a physician testifies outside of his or her area of expertise a proper foundation must be laid which supports the opinion rendered (*Id.*). A proper foundation has been laid here based on Expert A’s affirmation, which sets forth the expert’s education, training, and extensive experience as a Vascular and General Surgeon, particularly in the management and use of peripheral IV lines, central lines, and Permacaths. According to the affirmation, Expert A has performed thousands of central line placements, and is experienced in the prevention, response to and treatment of extravasation of vesicant medications in peripheral IV lines.

As such, the Court finds that Expert A’s affirmation provides a sufficient foundation to render the expert qualified to render an opinion based on the facts presented in the instant case.

Expert A opines, with reasonable medical certainty, that decedent’s injuries were preventable. Specifically, Expert A opines that nurses have a duty to question harmful physician orders, and Nurse Salgado departed from accepted practice by failing to address duplicate “Vesicant Alert” orders and by infusing calcium chloride via a peripheral IV instead of the existing Permacath as directed. Additionally, according to Expert A, using the decedent’s right upper arm for blood pressure likely worsened the infiltration and deviated from accepted practice. Expert A also opines that the Defendants’ extended failure to monitor the peripheral IV catheter and the delayed notification of the extravasation by Nurse Puangco also constituted departures from the standard of care, with their collective negligence being a substantial factor in causing the decedent’s extravasation injury.

Expert B concurs with Expert A and opines, to a reasonable degree of medical certainty, that infusing calcium-containing solutions through a new peripheral IV despite a functioning central line was a departure from accepted practice. Furthermore, Expert B also agrees with Expert A and opines that the significant delay in assessing the peripheral IV catheter, resulting in the failure to detect the extravasation, constituted gross negligence and a clear departure from the standard of care, preventing timely interventions that could have limited the worsening tissue damage. According to Expert B, the Defendants' departures, therefore, heightened the risk and directly led to the decedent's right arm extravasation.

Thus, the Court finds that Plaintiff's experts raise triable issues of fact regarding alleged deviations and whether such deviations proximately caused the decedent's extravasation injuries; thus, rebutting the Defendants' prima facie entitlement to summary judgment (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11 NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65 AD3d 610 [2d Dept 2009]). Accordingly, summary judgment is denied as to the branch of the NYPH Defendants' motion as it relates to medical malpractice. "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; *see Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

The Court notes that the Plaintiff's opposition is silent on, and, therefore, fails to raise triable issues of fact as to, whether the Defendants' alleged malpractice caused the decedent's death (*see Sukhraj v New York City Health and Hospitals Corp.*, 106 AD3d 809 [2d Dept 2013]).

[holding that summary judgment is warranted where plaintiffs' expert failed to address important elements set forth by the defendant's expert regarding causation]).

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]). A defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In the case at bar, the Defendants contend that the Plaintiff's lack of informed consent claim is inapplicable and without merit. Specifically, the Defendants' expert, Nurse Newman, opines that informed consent beyond the standard consent to treat obtained at admission is not necessary for the administration of vesicant or other non-research medications, particularly in emergent situations, treatment, procedure, or surgeries, such as the decedent's.

Based on Nurse Newman's expert opinion, the Court finds that the Defendants have met their burden on the claim of the lack of informed consent, which Plaintiff, in opposition, has failed to rebut.

SUMMARY JUDGMENT AS TO PLAINTIFF'S REMAINING CLAIMS NEGLIGENT HIRING, RETENTION, AND CREDENTIALING

Plaintiff's claims sounding in negligent hiring, retention, and credentialing by the NYPH Defendants and *res ipsa loquitur* are dismissed as a matter of law.

Plaintiff failed to properly plead a cause of action in negligent, hiring, retention and credentialing. Additionally, the doctrine of *res ipsa loquitur* is inapplicable in the circumstances presented here since Plaintiff has not demonstrated that the injury is of a kind that ordinarily does not occur in the absence of negligence, or that the instrumentality that caused the decedent’s injury was within the Defendants’ exclusive control (*see Pagano v Cohen*, 164 AD3d 516 [2d Dept 2018]).

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the Defendants’ motion is granted to the extent of dismissing the following: 1) Plaintiff’s complaint as to Defendants Jessica Salgado RN, Supriya Suresh Gerardine MD, Tarek Barbar MD, and Catherine Puangco RN, individually; 2) lack of informed consent cause of action, 3) negligent hiring/retention, and negligent credentialing causes of action, 4) any claims that the NYPH Defendants’ alleged departures caused the decedent’s death, and 5) any claims based on the doctrine of *res ipsa loquitur*; and it is further

ORDERED that in all other respects Defendants motion is denied in its entirety; and it is further

ORDERED that the Defendants are directed to serve a copy of this order upon all parties and the Clerk’s office within 10 days of entry of this order; and it is further

ORDERED, that the Clerk is directed to enter judgment in accordance with this Order and shall amend the caption to read as follows:

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

-----X

SEBASTIAN WEISS, as Administrator of the Estate
of ALLEN WEISS, deceased,

Plaintiff,

-against-

NATHANIEL BERMAN, M.D., JUN LEE, M.D.,

Index No.: 805025/2021

ROBERT SEAN TANOUYE, M.D.,
PHONG ANH HUNYH, M.D., and
NEW YORK PRESBYTERIAN HOSPITAL/WEILL
CORNELL MEDICAL CENTER,

Defendants.

-----X

and it is further

ORDERED, that the parties are directed to appear for a settlement conference on January 6th, 2026, at 10:00am in Room 351 located at 60 Centre Street, New York, NY.

This constitutes the decision and order of the Court.

5/27/2025

DATE


KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE