

O'Rourke v Epstein

2025 NY Slip Op 34470(U)

April 18, 2025

Supreme Court, Queens County

Docket Number: Index No. 707846/2020

Judge: Tracy Catapano-Fox

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Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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RICHARD L. O'ROURKE, as Executor of the Estate of
JOHN J. GUTLEBER, deceased, and FRAN
GUTLEBER, individually,

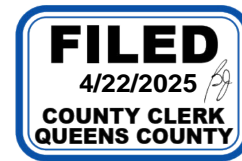
Plaintiffs,

Index No. 707846/2020
Part MDP
Motion Date: March 19, 2025

-against-

Calendar No. 15
Sequence No. 1

LAURENCE EPSTEIN, STEVEN GOLDBERG,
LEONARD LANDESBERG, MINH TRINH,
NORTHWELL HEALTH, INC., NORTH SHORE
UNIVERSITY HOSPITAL, NORTHWELL HEALTH
PHYSICIAN PARTNERS, PROHEALTH CARE
ASSOCIATES, L.L.P., NORTH SHORE
CARDIOLOGY & INTERNAL MEDICINE, NYU
LANGONE HEALTH SYSTEM and NYU LANGONE
PULMONARY ASSOCIATES- NORTH SHORE,



Defendants.

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The following papers numbered EF-86 to EF-175 read on this motion by defendants STEVEN GOLDBERG, PROHEALTH CARE ASSOCIATES, L.L.P., and NORTH SHORE CARDIOLOGY & INTERNAL MEDICINE for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF86-EF108
- Affirmation in Opposition, Exhibits.....EF167-EF170
- Reply Affirmation.....EF175

Upon the foregoing papers, and after oral argument, it is ordered that this motion is determined as follows:

Defendants Steven Goldberg, ProHealth care Associates, L.L.P. and North Shore

Cardiology & Internal Medicine's motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is denied. (*See Erkomaishvili v. Volovoy*, 186 A.D.3d 799 [2d Dept. 2020].) Plaintiffs commenced this medical malpractice and wrongful death action alleging failure to timely diagnose and treat decedent John J. Gutleber's atrio-esophageal fistula. Plaintiffs filed the Summons and Complaint on June 17, 2020 and issue was joined on August 21, 2020. It is noted decedent passed away on September 7, 2018, and the death certificate listed the cause of death as cardiopulmonary arrest as a consequence of septic shock and atrial-esophageal fistula.

Defendants move for summary judgment, arguing they did not depart from applicable standards of care nor did they cause decedent's injuries and death. They present the pleadings, decedent's medical records, parties' deposition testimony and the expert affirmation of Harvey Goldberg, M.D. in support of their motion. Dr. Goldberg affirmed to be a physician licensed in New York who is board certified in internal medicine and cardiology. He affirmed to be familiar with the standard of care in Internal Medicine and Cardiology in 2018 based upon his education, experience and training. Dr. Goldberg reviewed the pleadings, deposition testimony and decedent's medical records in rendering opinions. Dr. Goldberg opined within a reasonable degree of medical certainty that the care defendants rendered was in accordance with good and accepted standards of care and none of their actions or omissions proximately caused decedent's injuries and death.

Dr. Goldberg opined within a reasonable degree of medical certainty that Dr. Steven Goldberg properly managed and treated decedent's atrial fibrillation with medication before appropriately referring decedent to an electrophysiologist for a possible cardiac ablation. He further opined in the office visits after the ablation procedure, decedent had no signs or symptoms to raise suspicion of an atrial esophageal fistula or other issue warranting hospitalization. Dr. Goldberg opined Dr. Steven Goldberg appropriately ordered chest x-rays that revealed pneumonia and properly treated decedent. He further opined the atrial esophageal fistula was not diagnosable and did not occur until after decedent's last visit with Dr. Steven Goldberg.

Dr. Goldberg opined within a reasonable degree of medical care that defendants followed the standard of care that require formulation of a treatment plan for a patient with atrial fibrillation. He opined Dr. Steven Goldberg appropriately documented his communications with decedent and decedent's wife regarding conservation management of atrial fibrillation with medication and a cardioversion for four months prior to referring decedent to an electrophysiologist for cardiac ablation. Dr. Goldberg opined Dr. Steven Goldberg appropriately advised decedent regarding both courses of treatment, either to continue with periodic conversions or try definitive treatment with cardiac ablation, and both courses of treatment were appropriate to address decedent's condition. He further opined Dr. Steven Goldberg did not have an obligation to obtain informed consent from decedent before the cardiac ablation procedure, as Dr. Steven Goldberg is not an electrophysiologist and did not perform the procedure.

Dr. Goldberg opined Dr. Steven Goldberg appropriately treated decedent post-operatively on August 15, 2018. He further opined there was no reason for Dr. Steven Goldberg to suspect decedent's nosebleed and dyspnea were indicative of atrio-esophageal fistula, as these conditions had resolved and were explained by decedent's history of aspiration following the August 9, 2018 ablation procedure. He further opined Dr. Steven Goldberg appropriately started decedent again on betablockers and Flecainide during that visit. Dr. Goldberg opined Dr. Steven Goldberg appropriately treated decedent on August 23, 2018, and properly suspected an aspiration pneumonia secondary to decedent's significant nosebleed post-ablation. He opined Dr. Steven Goldberg appropriately ordered a chest x-ray that showed a left lower lobe infiltrate with small effusion and appropriately prescribed Augmentin. Dr. Goldberg further opined Dr. Steven Goldberg properly treated decedent's pneumonia, and if decedent had atrio-esophageal fistula at that time, decedent would not have responded well to the antibiotics.

Dr. Goldberg opined Dr. Steven Goldberg appropriately treated decedent during the August 25, 2018 visit, including appropriately continuing Augmentin, as the standard of care required a daily dose for 10-14 days and follow up with a chest x-ray. He further opined decedent's complaints of black bowel movement twice at the September 1, 2018 visit with Dr. Steven Goldberg was not indicative of a fistula and did not require further workup or referral. Dr. Goldberg opined Dr. Steven Goldberg properly used his medical judgment to determine decedent's bowel movement was not an issue and a referral to a gastroenterologist, upper endoscopy or radiographic imaging with contrast was not indicated at that time. Dr. Goldberg opined Dr. Steven Goldberg properly performed a rectal examination at that last visit, which did not show active bleeding. He further opined if decedent had an atrial-esophageal fistular or an active ulcer while on blood thinners, there would have been ongoing bleeding, and not bleeding that stopped and then started again.

Dr. Goldberg noted Dr. Steven Goldberg properly took a blood count on September 1, 2018 which showed a completely normal hematocrit and hemoglobin which was unchanged from the last blood count a few weeks earlier. He opined Dr. Steven Goldberg appropriately ruled out any active bleeding and appropriately considered the most likely cause of decedent's transient microscopic GI bleed was due to longstanding use of anti-coagulation medicine. Dr. Goldberg opined Dr. Steven Goldberg appropriately recommended decedent stop taking Celebrex to potentially address the black bowel movement, and re-prescribed ulcer medication, and advised decedent to contact him if the condition continued, but decedent did not present to Dr. Steven Goldberg again.

Dr. Goldberg opined Dr. Steven Goldberg properly created a differential diagnosis, for which atrio-esophageal fistula is an extremely rare complication and would be very low on the differential diagnosis, in light of a normal white blood count and CBC, no active bleed, no chest

pain or heartburn and decedent stating he felt stronger. He further opined decedent's pneumonia was not a sign or symptom of the atrio-esophageal fistula and was a separate condition explained by the epistaxis and aspiration after the ablation procedure. Dr. Goldberg further opined Dr. Steven Goldberg appropriately referred decedent to pulmonologist Dr. Landesberg to be evaluated for persistent findings on the x-ray films with pleural effusion.

Dr. Goldberg opined decedent did not have an atrio-esophageal fistula while treating with Dr. Steven Goldberg, and opined decedent would not have been able to work from September 1, 2018 through September 5, 2018 if he had. He further opined Dr. Steven Goldberg appropriately followed the standard of care in referring decedent to the hospital on September 5, 2018 to get a further workup. Dr. Goldberg opined the gold standard of care for diagnosing an atrio-esophageal fistula is a CT scan or MRI, and noted decedent's CT scan on September 5, 2018 was negative for fistula. He opined decedent's symptoms were consistent with a pleural effusion and not an atrial-esophageal fistula, and Dr. Steven Goldberg appropriately worked decedent up and treated him for the effusion. Dr. Goldberg opined defendants' care and treatment of decedent was appropriate and within the standard of care and none of their actions or omissions proximately caused decedent's injuries and death. Based upon the above, defendants argue summary judgment is warranted.

Plaintiffs oppose defendants' motion, arguing defendants failed to present a prima facie case, and there are issues of fact that warrant denial of the motion. Plaintiffs present the pleadings, parties' deposition testimony, medical records and two expert affirmations in support of the opposition. Plaintiffs argue defendants failed to present a prima facie entitlement to summary judgment, as they failed to acknowledge Dr. Steven Goldberg withheld information that would have led to an evaluation for a fistula. They further argue their cardiology and electrophysiology experts present conflicting opinions that warrant denial of defendants' summary judgment motion.

Plaintiffs present an affirmation from a physician licensed in Georgia and board certified in internal medicine, cardiovascular disease and clinical cardiac electrophysiology. Plaintiffs' expert reviewed the pleadings, parties' deposition testimony, decedent's medical records and rendered opinions based upon the expert's experience and training. The expert affirmed to be familiar with the applicable standard of care in 2018 and opined Dr. Steven Goldberg departed from the standard of care in failing to consider the possibility decedent developed a post-ablation atrio-esophageal fistula. Plaintiffs' expert opined Dr. Goldberg failed to order appropriate diagnostic studies following decedent's catheter ablation on August 9, 2018, and the failure to consider that critical diagnosis directly contributed to the fistula being undiagnosed until decedent had a massive stroke and cardiac arrest that ultimately caused his death.

Plaintiffs' expert opined Dr. Goldberg departed from the standard of care by failing to consider the diagnosis of an atrio-esophageal fistula during the post-operative period and instead assumed decedent's recurrent symptoms were solely due to aspiration pneumonia. The expert

further opined this departure led to a failure to diagnose the fistula in a timely fashion until after decedent had a stroke and cardiac arrest and resulted in his death.

Plaintiffs' expert opined most atrio-esophageal fistulas develop during the first six weeks after atrial fibrillation catheter ablation, with average onset of symptoms at three weeks post-procedure. The expert opined decedent had numerous red flags that should have alerted Dr. Goldberg to consider atrio-esophageal fistula. Plaintiffs' expert further opined during decedent's September 1, 2018 visit with Dr. Goldberg, there was evidence of a mild to moderate upper gastrointestinal bleed for which the standard of care required further investigation. The expert further opined bleeding three weeks post-ablation should not have been dismissed as resolved without further workup, but the standard of care required Dr. Goldberg to immediately order radiographic imaging with contrast to rule out atrio-esophageal fistula and/or refer decedent to a gastroenterologist for further investigation. Plaintiffs' expert further opined Dr. Goldberg's failure to take the above steps or additional investigation was a departure from the standard of care.

Plaintiffs' expert opined Dr. Goldberg's failure to notify Dr. Epstein about decedent's gastrointestinal bleed deprived Dr. Epstein of the opportunity to evaluate the situation and escalate care appropriately. The expert noted Dr. Epstein testified that had he known about the pneumonia and GI bleed, he would have wanted an appointment referral to someone who could rule in or out esophageal injury. Plaintiffs' expert disagreed with defendants' expert Dr. Harvey Goldberg and opined decedent's treatment for pneumonia did not warrant delaying the melena workup, as melena is a sign of a potentially life threatening condition and demands urgent evaluation. The expert further opined Dr. Steven Goldberg could have pursued melena and pneumonia at the same time, as they may both be related to and caused by esophageal injury due to the catheter ablation. Plaintiffs' expert further disagreed with defendants' expert and opined an assumption the melena was caused by anticoagulants and stress without performing a further diagnostic workup does not meet the standard of care.

Plaintiffs' expert disagreed with defendants' expert Dr. Harvey Goldberg, and opined normal hemoglobin and hematocrit levels on September 1, 2018 did not rule out a serious underlying condition or active bleeding. The expert notes decedent's levels were essentially unchanged during the hospital admission when decedent was diagnosed with an atrio-esophageal fistula, and normal levels do not obviate the need for appropriate investigation.

Plaintiffs' expert opined Dr. Steven Goldberg failed to consider or rule out an atrio-esophageal fistula on September 5, 2018 despite clear indications that warranted its inclusion in a differential diagnosis. The expert opined decedent's sudden recurrence of high fever on September 5th, accompanied by gastrointestinal bleeding and persistent symptoms despite antibiotics was a red flag for an atrio-esophageal fistula in a patient four weeks post-procedure. Plaintiffs' expert opined the standard of care required Dr. Steven Goldberg to expand his differential diagnosis and

order imaging with explicit instructions to evaluate for a fistula, yet he continued to focus on empyema secondary to pneumonia and failed to recognize the possibility of an atrio-esophageal fistula. The expert further opined Dr. Goldberg's failure to communicate the finding of an upper GI bleed to Dr. Epstein and other medical personnel on September 5th contributed to decedent's diagnosis remaining focused on pneumonia and delayed consideration of an atrio-esophageal fistula.

Plaintiffs' expert disagreed with defendants' expert Dr. Harvey Goldberg's opinion that the fistula was not present during Dr. Steven Goldberg's treatment of decedent or when decedent presented to the emergency room on September 5, 2018. The expert opined fistulas develop over time, and decedent's clinical course demonstrates the progression of an undiagnosed and untreated atrio-esophageal fistula. Plaintiffs' expert noted decedent's blood culture on September 5th was positive for gram-negative rods, which is consistent with the present of a fistula at the time of presentment to the emergency room and not consistent with developing between September 5th and September 6th. The expert opined there was no justification for failing to consider or rule out an atrio-esophageal fistula in decedent based upon his symptoms within a month of undergoing a catheter-based atrial fibrillation ablation. Plaintiffs' expert further opined Dr. Goldberg's failure to consider this life-threatening condition and order appropriate imaging was a departure from the standard of care, and prevented timely intervention and proximately caused decedent's injuries and death.

Plaintiffs also presented the affirmation of a physician licensed in New York and board certified in Diagnostic Radiology. Plaintiffs' expert affirmed to being familiar with the standard of radiological care in 2018 and rendered opinions based upon the expert's experience and education and a review of the pleadings, deposition testimony and medical records. Plaintiffs' expert reviewed decedent's CT angiogram performed on September 5, 2018, and confirmed the presence of mediastinal air. The expert opined mediastinal air represents an emergent medical concern and the standard of care requires it must be identified and immediately conveyed to the referring doctor. Plaintiffs' expert further opined radiologist Dr. Nikal Goyal departed from the standard of care in failing to identify and convey to the referring doctor the presence of free mediastinal air, resulting in a delay in the eventual diagnosis of an atrio-esophageal fistula. The expert further opined Dr. Goyal was not provided with an appropriate clinical history which contributed to decedent's misdiagnosis. Based upon the above, plaintiffs argue there are conflicting expert opinions that warrant denial of the motion.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolio & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrongful act, neglect or default caused the decedent's death. (*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].)

Defendants established a prima facie entitlement to summary judgment through production of the documentary evidence and affirmation of Dr. Harvey Goldberg, that they rendered care and treatment in accordance with good and accepted standards of care and did not proximately cause or contribute to decedent's injuries and death. They established Dr. Steven Goldberg appropriately treated decedent for his post-ablation symptoms, ordered appropriate labs and created a proper differential diagnosis to address decedent's symptoms. Defendants further established based upon

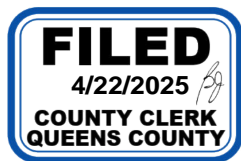
Dr. Harvey Goldberg's affirmation that Dr. Steven Goldberg did not depart from the standard of care in not ordering further diagnosis testing to evaluate a potential atrio-esophageal fistula, as decedent did not have signs and symptoms of a fistula during defendants' care and treatment. Defendants further established none of their actions or inactions proximately caused decedent's injuries and death based upon the medical records and Dr. Harvey Goldberg's affirmation. Based upon the foregoing, defendants demonstrated a prima facie entitlement to summary judgment.

However, plaintiffs raised triable issues of fact with regard to whether Dr. Steven Goldberg departed from the standard of care in failing to consider an atrio-esophageal fistula, failing to immediately order radiographic imaging with contrast on September 1, 2018 and failing to refer decedent to a gastroenterologist on September 1, 2018 to rule out an atrio-esophageal fistula, and whether these departures were a proximate cause of decedent's injuries and death. Defendants' argument that plaintiffs' expert is not qualified to render opinions is without merit. Plaintiffs' expert sufficiently addressed defendants' expert Dr. Harvey Goldberg's opinions and raised issues of fact as to whether defendants departed from the standard of care in treating decedent on and after September 1, 2018. Plaintiffs' expert sufficiently raised issues of fact whether decedent's symptoms on September 1, 2018 warranted further investigation as to whether decedent had a post-ablation atrio-esophageal fistula, and whether Dr. Steven Goldberg departed from the applicable standard of care in treating decedent that proximately caused decedent's injuries and death. It is noted plaintiffs' experts did not express opinions regarding Dr. Steven Goldberg's care and treatment from March 28, 2018 to September 1, 2018, and therefore those claims are dismissed. As the parties presented conflicting medical expert opinions that can only be resolved by a jury, summary judgment is not warranted. (*See Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902 [2d Dept. 2017].)

Accordingly, defendants Steven Goldberg, ProHealth care Associates, L.L.P. and North Shore Cardiology & Internal Medicine's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied. The parties are directed to appear for a pretrial conference on Wednesday, July 16, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: April 18, 2025





Hon. Tracy Catapano-Fox, J.S.C.