St. Surin v Mercy Med. Ctr.
2025 NY Slip Op 34515(U)
January 2, 2025
Supreme Court, Queens County
Docket Number: Index No. 717599/2020
Judge: Tracy Catapano-Fox
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

--X

MARIE J. SAINT SURIN as Administrator of the Estate of JOSEPH SAINT SURIN,

Plaintiff,

-against-

MERCY MEDICAL CENTER, ALEXANDER TELIS, M.D., KINGA RAMOS, P.A.-C, PAUL J. KUBIAK, M.D., and ANDREW FINKELSTEIN, M.D.,

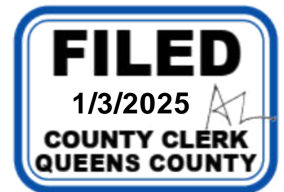
Defendants.

--X

Index No. 717599/2020

Part MDP
Motion Date: December 4, 2024

Calendar No. 29
Sequence No. 6



The following papers numbered EF-124 to EF-161 read on this motion by defendants MERCY MEDICAL CENTER, ALEXANDER TELIS, M.D., and KINGA RAMOS, P.A.-C for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……………	EF124-EF144
Affirmation in Opposition, Exhibits………………....	EF155-EF159
Reply Affirmation…………………………………...	EF160-EF161

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Mercy Medical Center, Alexander Telis, M.D. and Kinga Ramos, P.A.-C's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied, as there are issues of fact with respect to whether they departed from good and accepted standards of care and proximately caused or contributed to decedent's injuries and death. (*See Barry v. Lee*, 180 A.D.3d 103 [1st Dept. 2019], *aff'd* 35 N.Y.3d 1050 [2020].)

Plaintiff commenced this medical malpractice and wrongful death action arising out of decedent Joseph Saint Surin's total left knee replacement surgery performed on May 9, 2019 by co-defendant Dr. Kubiak at defendant Mercy Medical Center's facility. Plaintiff filed the Summons and Complaint on October 5, 2020 and issue was joined by moving defendants via the

filing of their Answer on October 26, 2020. It is noted that the medical records show Mr. Saint Surin passed away on May 10, 2019.

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 Steve H. Salzman, M.D. in support of their motion. Defendants argue they were not involved in decedent's knee replacement surgery, but on May 10, 2019, responded to decedent when a Rapid Response Team code was called. Defendants argue decedent became dizzy and was never stable enough to be tested before the cardiac episodes and therefore defendants did not depart from the standard of care in not administering tPA. They argue P.A. Kinga Ramos and Dr. Alexander Telis acted appropriately and within the standard of care in treating decedent and none of their actions or inactions were the proximate cause of decedent's injuries and death.

Defendants present the affirmation of Dr. Steve H. Salzman in support of their motion. Dr. Salzman affirmed he is a physician licensed to practice medicine in New York, and is board certified in Internal Medicine, Pulmonary Diseases, Critical Care Medicine and Sleep Medicine. He affirmed he is familiar with the use and administration of the systemic thrombolytic agent tPA and with the standard of care in 2019 when treating patients who develop a massive pulmonary embolism (PE). Dr. Salzman reviewed the medical records, parties' deposition transcripts and pleadings in rendering opinions, and opined within a reasonable degree of medical certainty that the staff of Mercy Medical Center, Dr. Telis and P.A.-C Ramos, did not depart from the standard of care and were not the proximate cause of decedent's injuries. He noted plaintiff's claims involve care given on May 10, 2019, from approximately 1:35pm, when decedent became dizzy and collapsed, to approximately 3:08pm, when decedent expired. Dr. Salzman noted during this short window of time, decedent coded on two separate occasions, requiring CPR and ACLS measures, and opined decedent was never stable enough for any testing to determine the cause of decedent's condition and confirm PE.

Dr. Salzman opined following decedent's elective surgery, he was properly and timely monitored by defendant Mercy Medical Hospital's nursing staff. He further opined there was no evidence in the record indicating what happened on May 10th, as decedent had no signs or symptoms of a massive PE at any time prior to his collapse. Dr. Salzman opined defendants properly provided deep vein thrombosis prophylaxis, including compression devices on decedent's lower extremities, and aspirin post-surgery, and decedent was alert and active prior to become dizzy and collapsing to the floor.

Dr. Salzman opined defendants' treatment when decedent collapsed was appropriate and in keeping with good and accepted medical practice. He noted decedent was appropriately moved from the floor to a stretcher and a room where appropriate efforts were made by PA Ramos and

Mercy Medical Center staff to stabilize him. Dr. Salzman opined that before any testing could be performed decedent needed to be stabilized, and it was appropriate for decedent to be manually ventilated by mask. Dr. Salzman also opined Dr. Telis and PA Ramos' treatment did not cause either cardiac arrest, and their treatment before each arrest was appropriate. He further opined performance of a bedside Transthoracic Echocardiogram (TTE) while decedent was in ICU was not the standard of care, and there was no departure by not conducting one prior to or during the second cardiac arrest. Dr. Salzman further opined the failure to obtain d-Dimer results was not a departure, as it is not used for the diagnosis of a pulmonary embolism.

Dr. Salzman opined the only possible treatment for decedent's medical situation would have been the administration of tPA or another thrombolytic medication. He opined surgical intervention was not a possibility due to decedent's condition, and administration of Heparin was not the standard of care. Dr. Salzman further opined defendants did not depart by failing to give tPA because it was appropriate for Dr. Telis and PA Ramos to wait for a confirmed diagnosis before considering the use of tPA, as it is not the standard of care to give tPA based upon a presumptive diagnosis of a massive PE. He reasoned tPA has dangerous side effects that can result in a patient's death, and therefore is only given after testing is performed to confirm a patient's condition, and there was not enough time to make a diagnosis for decedent.

Dr. Salzman opined it was an appropriate exercise of clinical judgment for PA Ramos to consider the possibility that decedent's condition was caused by a stroke based upon decedent's presenting signs and symptoms. He also opined it was appropriate for PA Ramos to begin a stroke work up for decedent, and not a departure from the standard of care for PA Ramos to consider a hemorrhagic stroke given decedent's signs and symptoms. Dr. Salzman opined the administration of tPA is contraindicated in a patient with a hemorrhagic stroke, and opined the failure to administer tPA prior to or immediately after the first cardiac arrest was not a departure. He further opined it was appropriate to wait for further testing to rule out a hemorrhagic stroke before administering tPA to decedent. Dr. Salzman also opined it was appropriate and in keeping with the standard of care for PA Ramos to intubate decedent to protect his airway. He also opined the administration of Propofol was indicated and appropriate upon transfer to the ICU given the information available to PA Ramos about decedent's condition.

Dr. Salzman opined Dr. Telis appropriately ran the second code, by administering epinephrine and other medications that were appropriate and indicated. He further opined defendants' staff acted appropriately and within the standard of care, and did not require administration of tPA during the code or any time prior to decedent being pronounced. Dr. Salzman opined there was no way of affirmatively ruling in or out a pulmonary embolism or hemorrhagic stroke that would make it appropriate to administer tPA. Based upon the above, defendants argue they are entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiff opposes the motion, arguing there are issues of fact that warrant denial of the motion. Plaintiff presents the pleadings, parties' deposition testimony, medical records and expert affirmations of Dr. Jeffrey S. Stein and Dr. Wilfredo Talavera in support of the opposition. Plaintiff argues defendants Dr. Telis and PA Ramos failed to recognize the signs of and timely diagnose and treat decedent for a pulmonary embolism, which proximately caused his injuries and death. She further argues defendants failed to conduct an appropriate differential diagnosis and administer intravenous heparin and thrombolytic therapy that more than likely would have saved his life. Plaintiff argues defendants failed to present a prima facie entitlement to summary judgment, as the expert opinions are conclusory and failed to address the evidence in the record. Plaintiff further argues her expert opinions present conflicting arguments that warrant denial of the motion.

Plaintiff presents the affirmation of Dr. Jeffrey S. Stein in support of her opposition. Dr. Stein affirmed he is a licensed physician in New York who is board certified by the American Board of Vascular Surgery. He affirmed he is fully familiar with the diagnosis, evaluation, assessment and treatment of deep vein thrombosis (DVT) and pulmonary embolism (PE), and with the standard of care for patients in decedent's condition. Dr. Stein affirmed to reviewing the medical records, parties' deposition testimony and affirmations of Dr. Salzman and Dr. Fred D. Cushner in rendering opinions.

Dr. Stein opined it was an egregious departure from the standard of care for defendants not to immediately consider the diagnosis of PE in a high-risk, postoperative patient such as decedent who had experienced dizziness, hemodynamic instability and loss of consciousness. He further opined it was essential to have a high level of suspicion for venous thrombo-embolism (VTE) under decedent's circumstances, and defendants should have immediately initiated lifesaving measures, including systemic anticoagulation, systemic thrombolytic therapy, and consultation with vascular surgery and interventional radiology specialists. Dr. Stein opined clinical suspicion for pulmonary embolism for decedent was high, and the standard of care required immediate initiation of anticoagulation, and is recommended even before confirmation of the diagnosis. He further reasoned a stroke was a very unlikely diagnosis, as decedent had a normal blood glucose that ruled out hypoglycemia and was neurologically intact.

Dr. Stein opined that five minutes after decedent collapsed, a PE diagnosis should have been the obvious, most likely diagnosis and primary concern. He further opined if proper treatment had been instituted at that time, it is more likely than not decedent would have survived, as he was able to be resuscitated after his initial cardiac arrest. Dr. Stein noted Dr. Telis authored a note describing decedent complaining of chest pain and dizziness before being lowered to the floor, which is strongly suggestive of PE. Dr. Stein opined it was a clear departure from the standard of care to fail to consider and make a proper diagnosis, and initiate proper therapy and intervention. He further opined PA Ramos negligently failed to consider the correct diagnosis of PE and delayed

treatment when decedent should have immediately been given anticoagulation with Heparin and other systemic thrombolytic therapy.

Dr. Stein disagreed with Dr. Salzman's opinions, opining it is well established and supported by medical literature to initiate anticoagulation if there is a high suspicion of PE before clinical confirmation of a diagnosis, particularly with a patient in decedent's condition of hemodynamic instability. He also disagreed with Dr. Salzman's opinion that there was insufficient time to perform testing to confirm a PE diagnosis, as Dr. Stein noted more than thirty-five minutes elapsed between when the Rapid Response Team was called and decedent's arrival in the ICU. Dr. Stein opined this was more than enough time to perform an EKG and TTE, either of which more than likely would have provided confirmatory evidence of a PE. He also disagreed with Dr. Salzman's opinion that tPA was the only treatment available, as he opined Heparin was available and could and should have been immediately administered intravenously. Dr. Stein also disagreed with Dr. Salzman's opinion that tPA is a dangerous medication for decedent, as he opined the risk to benefit considerations weigh in favor of administering tPA, and Dr. Telis and PA Ramos' failure to administer tPA was not because of potential risks but because they failed to consider the obvious diagnosis of PE.

Dr. Stein opined there was no clinical evidence to suggest decedent had a stroke, hemorrhagic or otherwise, as he had no focal neurologic deficits, no history of stroke or cerebrovascular disease. He reasoned it was not incorrect for defendants to consider the possibility of a stroke in a differential diagnosis, but it should have been very low on the list and should not have prevented defendants from starting appropriate treatment. Dr. Stein further reasoned there is no evidence defendants seriously considered PE as a likely diagnosis, as there is no evidence in the medical record or deposition testimony that defendants considered tPA as a treatment for PE but withheld it due to concerns decedent was having a hemorrhagic stroke.

Dr. Stein opined the improper administration of Propofol precipitated decedent's cardiac arrest in the ICU, as giving decedent Propofol during a sudden hemodynamic compromise and likely PE was a deviation from the standard of care and substantially contributed to decedent's cardiac arrest and death. He further opined TTE is a valuable tool in diagnosing PE and evaluating the cause of a sudden hemodynamic compromise. Dr. Stein reasoned a CT angiogram of the chest may be more sensitive and specific for diagnosing a PE, but both a CT and TTE would have more than likely confirmed the diagnosis of PE given the severity of decedent's hemodynamic compromise. He further opined defendant Mercy Medical Center's lack of capability to provide TTE in an emergency is a critical deviation from the standard of care. Dr. Stein also opined the Doppler ultrasound and TTE may confirm or rule out a PE, and while not 100% accurate, both have the benefit of not requiring movement or transport of an unstable patient. Dr. Stein opined there were numerous departures from the standard of care by defendants that substantially contributed to decedent's death, and with proper care, his death was avoidable.

Plaintiff also presented the affirmation of Dr. Wilfredo Talavera in support of the opposition. Dr. Talavera affirmed he is a licensed physician in New York who is board certified in Internal Medicine with a specialty in pulmonary disease. He affirmed to be fully familiar with the standard of care for patients suffering from DVT, PE and VTE, as well as the critical care treatment required. Dr. Talavera affirmed he reviewed the medical records, deposition testimony, and expert affirmations in rendering opinions with a reasonable degree of medical certainty. Dr. Talavera opined to a reasonable degree of medical certainty there were several departures from the standard of care by defendants that deprived decedent of a substantial chance of survival.

Dr. Talavera opined to a reasonable degree of medical certainty there were clear departures from the standard of care by defendants, including their failure to recognize decedent's obvious signs of massive PE and provide appropriate and timely treatment. He opined defendants should have immediately acted upon the diagnosis and treatment for PE when decedent experienced cardiovascular collapse and respiratory distress. Dr. Talavera also opined to a reasonable degree of medical certainty that defendants' failures deprived decedent of a substantial chance of survival, as there were several effective treatments for PE, including tPA and anticoagulation therapy, that substantially reduce the incidents of mortality.

Dr. Talavera opined PA Ramos departed from the standard of care in failing to recognize decedent suffered a PE, or even considering it, as she performed a medical and neurological exam on decedent and determined a stroke code be called. He opined PA Ramos made the stroke diagnosis and failed to consider other etiologies, especially PE, required of an appropriate differential diagnosis. He reasoned PA Ramos admitted she did not consider PE or other possible etiologies until after decedent had his first cardiac arrest. Dr. Talavera disagreed with Dr. Salzman's opinion that PA Ramos exhibited appropriate clinical judgment in considering the possibility of a stroke, as Dr. Talavera opined a stroke was highly unlikely in this situation. He opined the failure to consider PE or recognize it as the most obvious diagnosis, represented a clear departure from good and accepted standards.

Dr. Talavera opined Dr. Telis' claim that decedent had an aortic dissection was highly unlikely and Dr. Telis ignored PE as the most obvious major illness to be considered in a differential diagnosis. He opined decedent had numerous risk factors to show a high risk for developing DVT or PE, including history of cardiovascular disease, hypertensive heart disease, lung disease, obesity, age and post-operative condition. Dr. Talavera opined decedent's DVT prophylaxis plan was designed and written for a low-risk patient, which decedent was not, and had he received appropriate DVT prophylaxis, would more than likely not suffer a PE.

Dr. Talavera opined it was a departure from the standard of care for defendants not to render tPA to decedent, as the contraindication of tPA did not outweigh the probability of imminent death with untreated massive PE. He opined there was ample time to administer Heparin and begin

tPA, which should have been administered at the time of decedent's collapse or while in the ICU, and the failure to do so deprived decedent of a substantial chance of survival. He also opined a bedside test should have been utilized to aid in diagnosis PE, such as TTE, since decedent was too unstable to have the standard of care CT angiogram of the chest. Dr. Talavera opined defendants' failure to perform a TTE, Doppler, or d-dimer test was a clear departure from the standard of care, and a total failure to conduct an appropriate differential diagnosis. He opined it was a departure for defendant Mercy Medical Hospital not to have the emergent capability of performing a TTE in the ICU after decedent's cardiovascular collapse. Dr. Talavera further opined defendants' departures substantially deprived decedent of a chance of survival, as mortality from acute PE is reduced from approximately 30% to 8% with proper diagnosis and treatment. Dr. Talavera opined decedent was resuscitated after his first cardiac arrest, and if tPA had been administered subsequent to his initial collapse, his chances of survival were excellent. He noted decedent's initial embolism was not immediately fatal, as decedent regained consciousness and was able to move and speak with agitation. Dr. Talavera opined prompt administration of Heparin following decedent's collapse would have stopped the extension of a clot and tPA any time prior to death would have substantially increased the chance of survival. Based upon the above, plaintiff argues 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. Nicolia & 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 with 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. Salzman, 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. Defendants demonstrated appropriate DVT prophylaxis was implemented after the surgery, and the VTE and PE could neither have been anticipated nor prevented based upon decedent's lack of clinical signs and symptoms. They further established that the window of time between decedent's dizziness and collapse and first cardiac arrest was insufficient to perform testing to confirm PE and administer tPA. Defendants further demonstrated they appropriately worked up decedent for a hemorrhagic stroke, which was a reasonable conclusion in a differential diagnosis. They further demonstrated they appropriately intubated decedent and sent him to the ICU and performed lifesaving measures. Defendants further demonstrated through Dr. Salzman's affirmation that tPA is not administered without confirmation of a PE due to negative side effects, and they did not depart from the standard of care in failing to administer tPA or Heparin based upon decedent's condition. They further established their actions or inactions were not the proximate cause of decedent's injuries and death. Based upon the foregoing, defendants demonstrated a prima facie entitlement to summary judgment.

However, plaintiff raised triable issues of fact with respect to whether defendants departed from accepted standards of care and proximately caused decedent's injuries and death. Specifically, there are triable issues of fact with respect to whether defendants failed to perform a proper and appropriate differential diagnosis, whether PA Ramos and Dr. Telis failed to recognize the signs and timely diagnose and treat decedent for PE, and whether these departures were the proximate cause of decedent's injuries and death. Plaintiff raised triable issues of fact by

presenting the expert affirmations of Dr. Stein and Dr. Talavera that specifically rebutted Dr. Salzman's opinions with regard to defendants' failure to diagnose PE and timely and properly administer tPA. (*See Loccisano v. Ascher*, 195 A.D.3d 610, 613 [2d Dept. 2021].) Plaintiff also established through expert testimony that decedent demonstrated signs of impending PE and raised issues of fact whether if he had been administered heparin he would have had a good chance of surviving, especially in light of the fact he was resuscitated after his cardiac arrest. Plaintiff also raised issues of fact with regard to whether PA Ramos properly determined decedent was having a hemorrhagic stroke, rather than assessing decedent to have a massive PE. Plaintiff also raised issues of fact whether defendants could have timely and properly administered tPA prior to or without confirming a PE through testing, and whether there was sufficient time to perform testing that would have ruled in or ruled out a PE. Plaintiff also demonstrated there are issues of fact whether the alleged departures prevented decedent from a substantial chance of survival. As there are conflicting expert opinions whether defendants departed from accepted standards of care and proximately caused decedent's injuries and death, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].)

Accordingly, defendants Mercy Medical Center, Alexander Telis, M.D. and Kinga Ramos, P.A.-C'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 court conference on Wednesday, February 5, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: January 2, 2025

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