

Printz v Rosenberg

2005 NY Slip Op 30280(U)

September 20, 2005

Supreme Court, New York County

Docket Number: 0115949/2001

Judge: Stanley L. Sklar

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

PRESENT: Stanley L. Sklar

PART 29

0115949/2001

PRINTZ, ROCHELLE
VS
ROSENBERG, STEVEN D.D.S.

SEQ 07

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motlon/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 9/20/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
ROCHELLE PRINTZ, as the Executrix of the Estate
of HARVEY PRINTZ, deceased, and ROCHELLE
PRINTZ, Individually,

Plaintiffs,

Index No.: 115949/01

-against-

STEVEN N. ROSENBERG, D.D.S., MARK S. MOSES,
D.D.S., JAY S. KASARSKY, D.D.S., HOWARD D.
GOLDIN, M.D., PHILIP S. BARIE, M.D., and NEW
YORK PRESBYTERIAN HOSPITAL,

Defendants.

-----X
Sklar, J.:

In this medical/ dental malpractice action, in which it is claimed that plaintiff's decedent, Harvey Printz ("Printz"), died as a result of a toxic mega colon caused by the ingestion of two antibiotics prescribed by his dentists, Howard Goldin, M.D., who treated Printz after he had finished those antibiotics and had developed abdominal complaints, moves for an order granting him summary judgment dismissing the complaint and all cross claims.

Initially it should be noted that at oral argument (See, oral argument transcript) plaintiff's counsel did not dispute the assertion raised in the reply papers that this motion was timely since an extension to move for summary judgment was granted in a February 16, 2005 conference call among the court, defense counsel and plaintiff's former counsel. Accordingly, I shall entertain this motion.

In the reply papers and at oral argument defense counsel asserted that Dr. Goldin should be granted summary judgment as to anything which occurred on or before August 9 since plaintiff's expert failed to raise any issue of fact as to that period of time. At oral argument, plaintiff's counsel agreed. See OA transcript, p 3 According all claims arising on or before

August 9 are dismissed as to Dr. Goldin. This leaves the issue of the propriety of Dr. Goldin's care of Printz on August 10 and 11, the day of his demise.

As the movant Dr. Goldin in the first instance has the burden of prima facie establishing his entitlement to summary judgment by eliminating all material issues raised by the pleadings. If he fails to do so the motion must be denied irrespective of the adequacy of the opposing papers.

The bill of particulars (§§ 10-11) as to Dr. Goldin alleges that he was negligent on August 9, 2000, the first date of treatment, "up to and including August 11, 2000". The complaint (§ 6) alleges that Dr. Goldin continuously treated Printz from August 1- 11th, 2000. The bill of particulars alleges, inter alia, (at pp 2, 3) that Dr. Goldin was negligent "in failing to immediately hospitalize [Printz] when he presented with these symptoms [evidently referring to nausea, abdominal distention, abdominal pain, bloating and diarrhea, following the ingestion of antibiotics] so that he could be stabilized", and "in negligently and carelessly failing to appropriately follow-up the condition of the [decedent]".

The movant wholly fails to address Dr. Goldin's care of the decedent on August 10, 2000 the date on which there was a series of telephone calls beginning at 10:45 A.M. between decedent and/or his family and Dr. Goldin and/or his office, as reflected in the decedent's telephone records which show calls to Dr. Goldin's office that day at 10:45 A.M., 3:28 P.M., and 10:03 P.M., and the testimony which indicates that Dr. Goldin either called and spoke to Printz' son, Wayne, who lived with Printz and his wife, and/or spoke to Printz' wife, or was called by the son or wife on the evening of August 10 at a time variously described as between 7-8:00 P.M. (See Goldin EBT, pp 50-53), 7:00, 7:30 or 8:00 P.M. (See R. Printz EBT, pp 78-81), and between 7 and 9:30 P.M. (See W. Printz EBT, pp 51-53, 61-62). While Dr.

Goldin claimed that during that conversation he informed the son to get his father immediately to the hospital (See Goldin EBT, p), Mrs. Printz asserted that Dr. Goldin told her to hydrate her husband by giving him broth, juice “and this water preparation” (K. Printz EBT, p 81) and her son testified (W. Printz EBT, p 53) that Dr. Goldin gave them two choices ... to either give Printz Coke, Pedialyte or broth or they could take him to the hospital. According to the hospital chart (aff. in opp., exh G, p 3), which contains a “Prehospital Care Report”, the “NYP EMS” was called at 10:08 P.M. on August 10 and Printz arrived at New York Hospital at 10:45 P.M. Dr. Goldin’s expert offers no opinion as to the advice rendered by Dr. Goldin on August 10, nor does that expert offer any opinion about the lack of causation with respect to any delay in getting Printz to the hospital resulting from any advice rendered by Dr. Goldin on August 10, assuming arguendo that Dr. Goldin told Printz’ son and/or wife that a viable alternative was for Printz to stay home and take fluids. Thus Dr. Goldin has failed to meet his prima facie burden of establishing that he was not negligent on August 10, or that even if he were, it caused no injury to Printz. In any event, the papers raise issues as to what advice Dr. Goldin gave during the August 10 phone call, whether Dr. Goldin’s advice resulted in a delay in getting Printz to the hospital and as to the length of any such delay. While Dr. Goldin’s counsel at oral argument stated that, assuming arguendo Dr. Goldin was responsible for a delay in Printz arriving at the hospital, the surgery was in any event delayed until the afternoon of August 11 by the alleged subsequent tortfeasor, codefendant Dr. Barie, that does not mean that other medical steps could not have been taken to treat Printz prior to that surgery.

With respect to the care rendered by Dr. Goldin on August 11, 2001, movant’s expert simply opines that Dr. Goldin’s role as a consultant to the hospital staff, surgeons and intensivists was carried out in an appropriate fashion and in conformity with the accepted

standards of medical practice. No opinion on causation is offered as to the care rendered by Dr. Goldin on August 11. Moreover, the expert's opinion is wholly conclusory and devoid of any facts regarding the treatment rendered by Dr. Goldin on August 11, and thus fails to meet Dr. Goldin's burden of establishing that the care rendered by him on August 11 was in accordance with standards of good and accepted medical practice.

I further note that the hospital record (aff. in opp., exh G, p 2), which lists Dr. Goldin as one of Printz' admitting physicians, and the papers, including but not limited to Dr. Goldin's deposition testimony (pp 59-84) and the hospital chart both of which detail his involvement in Printz' care on August 11 (See e.g. chart, pp 13, 16, 19), and the affidavit of plaintiff's expert (the original unredacted version of which I reviewed in camera) (see expert's aff. ¶ 13), raise issues as to whether Dr. Goldin exercised reasonable care "to ensure that his orders with respect to [the] patient [were] carried out" [See *Kless v. Lee*, 19 AD3d 1083 (4th Dept, 2005); *Pigno v. Bunim*, 43 AD2d 718 (2nd Dept, 1973), aff'd 35 NY2d 841; *Lium v. Ploski*, 87 AD2d 860 (2nd Dept, 1982)], especially under the circumstances where it was evident to Dr. Goldin during his early morning visit to Printz on August 11 that the patient was "seriously" ill with toxic mega colon (Id 61, 80), was a "[v]ery high risk" (Id p 80), "constituted a major risk for surgery" (Id p 64, 68), was not in condition for surgery (Id 64, 65, 66), and required "close observation ... [and] resuscitat[ion] ... for the next few hours".

In light of the foregoing the motion is denied except to the extent that all claims and any cross claims asserted against Dr. Goldin arising on or before August 9, 2001 are dismissed.

Settle order.

Dated: September 20, 2005
60 Centre Street
New York, NY 10007



J.S.C.