**Campbell v Kelly**

2012 NY Slip Op 32525(U)

September 28, 2012

Supreme Court, New York County

Docket Number: 100170/10

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/4/2012

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

PRESENT: LOBIS, Justice — PART 6

CAMPBELL, ROY A., ET AL.

- v -

KEVIN V. KELLEY, M.D., ET AL.

INDEX NO. 100170/10

MOTION DATE 6-26-12

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to 28 were read on this motion to/for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-16 |
| Answering Affidavits — Exhibits | 17-25 |
| Replying Affidavits | 26-28 |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 03 2012
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 9/28/12

JOAN B. LOBIS, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

---------------------------------------------------------------X

ROY A. CAMPBELL and MARY CAMPBELL,

Plaintiffs,

Index No. 100170/10

-against-

**Decision and Order**

KEVIN V. KELLY, M.D., and THE CITY OF NEW YORK,

Defendants.

---------------------------------------------------------------X

FILED

OCT 03 2012

NEW YORK COUNTY CLERK'S OFFICE

**JOAN B. LOBIS, J.S.C.:**

Defendants Kevin V. Kelly, M.D., and The City of New York move, by order to show cause, for an order granting them summary judgment, pursuant to C.P.L.R. Rule 3212. Plaintiffs Roy A. Campbell and Mary Campbell oppose the motion. This psychiatric malpractice case arises out of the alleged improper care that Dr. Kelly rendered to Mr. Campbell on January 10, 2009, and January 23, 2009. Plaintiffs allege that Dr. Kelly failed to identify that Mr. Campbell's mental condition had deteriorated. Mr. Campbell attempted to take his own life on February 18, 2009, by shooting himself in the torso.

Mr. Campbell was a New York City firefighter who was part of the search and rescue team at the World Trade Center in the days following September 11, 2001. On February 12, 2005, Mr. Campbell started treating with Dr. Kelly, a psychiatrist employed by the New York City Fire Department, upon referral from a counselor. At his first appointment, Dr. Kelly diagnosed Mr. Campbell with Post Traumatic Stress Disorder ("PTSD"),[1] based on his traumatic experience

[1] Defendants' expert states that PTSD is a psychiatric condition arising from observing or experiencing a traumatic event of such magnitude that the observer perceives a threat of injury or death.

surrounding the events of September 11. PTSD manifested itself in Mr. Campbell's experiencing of anger, insomnia, nightmares, and expressed worries about his daughter and his wife. Dr. Kelly prescribed medication for Mr. Campbell's depression, anxiety, and sleeping disorder. Dr. Kelly treated Mr. Campbell approximately seventeen (17) times between February 12, 2005, and January 23, 2009, and Dr. Kelly's notes indicate that Mr. Campbell expressed suicidal ideations on two separate occasions. Dr. Kelly testified that although he had no recollection of any office visits with Mr. Campbell and did not document each suicide assessment, it was his custom and practice to perform a suicide assessment at every visit. He explained that his suicide assessment consists of performing a mental status examination, during which he observes the patient's behavior and demeanor and asks questions based on the patient's presentation. He states that:

> the information is based on observation of the patient's physical appearance, manner, movements, interpersonal relatedness. Physical appearance would include things like grooming, dress, self-care. Physical movements would include typically the way the patient shakes hands, the speed and fluidity of his physical movements, whether he is calm or agitated. His relatedness would include things like his facial expression, his eye contact, whether he answers questions directly, whether he's terse or expansive, whether his thoughts follow logically one from another, whether they get to a goal in an organized fashion or veer off on tangents and how he answers questions about his emotional state, his physical state and the events in his life.

On February 25, 2006, Dr. Kelly documented that Mr. Campbell had thoughts of suicide and that he had access to a gun at his country house, but that he had no actual plan to carry it out. Dr. Kelly also documented that Mr. Campbell had stopped taking his prescribed medication and had experienced a "relapse of PTSD off meds." Dr. Kelly prescribed anti-depression

[* 4]

medication, scheduled another appointment for psychiatric treatment a week later, and provided Mr. Campbell with his cell phone number. On May 6, 2006, Dr. Kelly documented that Mr. Campbell had been experiencing recurrent suicidal ideas, sleep deprivation, unexplained crying, and a renewed suspicion of his wife's infidelity. Dr. Kelly noted that although Mr. Campbell had suicidal ideations, he had no plan to harm himself or others, and that Mr. Campbell would call his brother whenever these suicidal thoughts presented. Dr. Kelly's impression was that Mr. Campbell had "chronic marital conflict w/ depressive symptoms. . . insomnia, and possible paranoia," and decided against acute hospitalization because the risks outweighed the benefits. Dr. Kelly continued Mr. Campbell's medications, instructed him to return in less than one week, and told him to call Dr. Kelly should suicidal ideations return. Over the next several years, Dr. Kelly treated Mr. Campbell intermittently with no significant psychiatric or traumatic events.

On January 10, 2009, the first of the two dates now at issue, Mr. Campbell saw Dr. Kelly and reported that he had been sleeping poorly, that he stopped taking his medications, and that he had been acutely upset and angry due to his son being hospitalized for a cocaine overdose. Dr. Kelly prescribed anti-depression medication and instructed Mr. Campbell to return on January 23. On January 23, 2009, the second of the two dates at issue and the last visit before his suicide attempt, Mr. Campbell saw Dr. Kelly, complaining of significant emotional distress and poor sleep, but was less agitated because his son was out of the hospital. Dr. Kelly adjusted Mr. Campbell's medications and instructed him to return on February 20, 2009.

Ms. Campbell testified that on the evening of February 17, 2009, she called Dr.

Kelly's office twice out of concern that her husband had not arisen from bed that day, a behavior which she found to be unusual. Ms. Campbell left a voicemail on Dr. Kelly's office answering machine, expressing concern over her husband's behavior. On the morning of February 18, 2009, Ms. Campbell woke up to find her husband missing from the house, with his money and cell phone left on the table. Ms. Campbell found Dr. Kelly's cell phone number stored in her husband's cell phone, called it, and left Dr. Kelly another message.[2] In the meantime, the police became involved, and Ms. Campbell was told that her husband was barricaded in his mother's home. Ms. Campbell later learned that her husband had shot himself in the torso. Mr. Campbell testified that he recalled nothing of the incident, except for waking up that morning and saying to himself that "he couldn't do this anymore." His next memory is waking up in the hospital.

Plaintiffs' main allegations are that Dr. Kelly failed to perform a suicide assessment on January 10, 2009, and January 23, 2009;[3] failed to properly diagnose Mr. Campbell; failed to properly treat him; failed to properly prescribe medication; failed to monitor his conditions; and failed to respond to emergency calls. Plaintiffs further allege that the City of New York is vicariously liable for Dr. Kelly's actions. Plaintiffs allege that as a result of Dr. Kelly's negligence, Mr. Campbell suffered, inter alia, a gun shot wound to the torso; damage to the brain, spleen, and

---

[2] Dr. Kelly eventually returned Ms. Campbell's call in the afternoon of February 18, 2009, after Mr. Campbell had shot himself.

[3] In their bill of particulars, plaintiffs allege that the dates of negligence ranged from February 12, 2005, to February 18, 2009; however, their opposition papers limit those dates to January 10 and 23, 2009.

[* 6]

liver; depression; anxiety; loss of enjoyment of life; and pain and suffering.[4] Plaintiff Ms. Campbell has derivative claims of loss of consortium, services, and support.

Defendants move for summary judgment on the grounds that no issues of fact exist that Dr. Kelly did not deviate from the standard of care; that Dr. Kelly's professional judgment is entitled to deference under the law; that Dr. Kelly lacked the necessary control over Mr. Campbell to prevent the attempted suicide because Mr. Campbell was a voluntary outpatient; and that the statute of limitations bars plaintiffs' claims of negligence that predate October 2008. In support of their motion, defendants submit the expert affirmation of Paul Nassar, M.D., a physician licensed to practice medicine in New York and board certified in general psychiatry and forensic psychiatry. Dr. Nassar opines with a reasonable degree of medical certainty that the services rendered by Dr. Kelly were proper and did not deviate from accepted standards of care in the field of psychiatry and mental health, as Mr. Campbell's self-injurious conduct was neither foreseeable nor related to any alleged acts or omissions on the part of Dr. Kelly. Dr. Nassar opines that, based on Dr. Kelly's testimony about his custom and practice, Dr. Kelly thoroughly and appropriately assessed Mr. Campbell and treated him for PTSD. He opines that the appropriate course of treatment in treating a patient with PTSD would be to prescribe medication as needed and provide psychotherapy, as well as to administer other treatment modalities. He opines that Dr. Kelly appropriately treated Mr. Campbell by prescribing medication for his depression, anxiety, and insomnia, and by adjusting the medications depending on Mr. Campbell's complaints of side effects and responsiveness to the

[4] By letter to defendants dated June 5, 2012, plaintiffs withdrew their claims for psychiatric and psychological injuries.

[* 7]

medications. Dr. Nassar further states that the mere fact that Dr. Kelly did not note negative findings in his suicide assessment (i.e. lack of suicidal ideation on January 23, 2009) does not mean that a suicide assessment was not done, as it is customary in the field of medicine and psychiatry to document only "positive" findings. Dr. Nassar further opines that there could have been no connection between Mr. Campbell's last visit and his attempted suicide, because any number of events could have occurred in those twenty-six (26) days which could have triggered Mr. Campbell's suicide attempt. Dr. Nassar explains that there is no specific behavior that serves as a predictor of whether someone will attempt suicide, and that suicidal behavior is not frequently premeditated, but rather impulsive.

In opposition, plaintiffs argue that summary judgment should be denied because issues of fact exist as to whether Dr. Kelly departed from good and accepted psychiatric practice by failing to perform a suicide assessment on January 10 and 23, 2009, and by failing to return Ms. Campbell's phone calls on February 17 and 18, 2009. Plaintiffs argue that Dr. Kelly's statement regarding his custom and practice is inadmissible as habit evidence. Plaintiffs further state that the lack of documentation of a suicide assessment on those two days, coupled with the fact that Dr. Kelly does not have any recollection of treating Mr. Campbell independent of his medical records, prevents defendants from eliminating all issues of fact. They aver that had Dr. Kelly performed a suicide assessment, he would have documented it like he did on February 25, 2006, and May 6, 2006. Plaintiffs further state that defendants' expert's opinion is therefore speculative, conclusory, and lacking in any factual basis, as it erroneously relies on inadmissible evidence.

Plaintiffs submit an affidavit[5] from a physician (name redacted) licensed to practice medicine in Connecticut and board certified in the fields of psychiatry and neurology. The expert states that he or she is familiar with the standard of care of psychiatry in New York pertaining to the signs, symptoms, diagnosis, treatment, and prevention of suicide in patients. Plaintiffs' expert opines that Dr. Kelly did not adhere to the accepted standards of medical practice because he failed to perform a complete suicide assessment of Mr. Campbell on January 10 and 23, 2009. The expert states that Dr. Kelly could not have used his professional judgment in Mr. Campbell's care and treatment because he did not carefully examine Mr. Campbell. Specifically, plaintiffs' expert states that Dr. Kelly failed to appreciate the significance of a number of issues: prior suicidal ideations; access to firearms; use of alcohol; non-compliance with medication; diagnosis of PTSD; impulsive tendencies; insomnia; paranoia; a recent traumatic event involving his son's drug overdose; and emotional distress. The expert concludes that, taken together, these are all risk factors for suicide. Plaintiffs' expert opines that the psychiatric standard of care mandates that a psychiatrist perform a suicide assessment on a patient whenever there is a new traumatic event in that patient's life. Thus, in plaintiffs' expert's opinion, on January 10, 2009, when Mr. Campbell reported anger due to his son's hospitalization, and on January 23, 2009, when Mr. Campbell complained of emotional distress and insomnia, Dr. Kelly should have performed a suicide assessment of Mr. Campbell. Plaintiffs' expert avers that had a suicide assessment been performed, Dr. Kelly would have "more

[5] Defendants argue in their reply papers that plaintiffs' expert's opinion is inadmissible because he is only licensed to practice medicine in Connecticut. Pursuant to C.P.L.R. Rule 2106, only a physician who is licensed to practice in New York is authorized to sign an affirmation; an out-of-state physician must make his or her statement by affidavit. While the expert statement annexed to plaintiffs' opposition papers is in the form of an affirmation, the court notes that the unredacted version submitted for in camera review is in the form of an affidavit. As defendants allege no prejudice, the court will consider plaintiffs' expert's affidavit.

likely than not" concluded that Mr. Campbell was at a severe or high risk of suicide, which would have indicated acute hospitalization or, at the very least, daily treatment. Plaintiffs' expert opines that Dr. Kelly departed from the standard of care by failing to promptly return Ms. Campbell's telephone calls, and by failing to make himself, or a covering physician, accessible to plaintiffs. He or she states that, given the fact that psychiatric emergencies can occur at any time, a psychiatrist must make himself or herself available 24 hours a day. Plaintiffs' expert concludes that these departures were substantial factors in causing Mr. Campbell to attempt suicide by shooting himself in the torso with a firearm.

"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 eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied. Winegrad, 64 N.Y.2d at 853.

Defendants' expert relies largely on Dr. Kelly's testimony that his customary practice is to conduct a suicide assessment at every session and to make a notation only in the event of a "positive" finding. Evidence of habit, or custom and practice, is generally admissible to establish

[* 10]

that a person performed a certain act, because "'one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again.'" Rivera v. Anilesh, 8 N.Y.3d 627, 633-34 (2007), quoting Halloran v. Virginia Chems., 41 N.Y.2d 386, 392 (1977). This doctrine applies to instances where a person has a "deliberate and repetitive practice" and is in "complete control of the circumstances." Rivera, 8 N.Y.3d at 634. Rivera is one of the few cases where habit evidence has been discussed in the context of a summary judgment motion in a medical malpractice case. The conduct evaluated in Rivera was the defendant dentist's pre-extraction procedure, which the Court of Appeals found was not likely to "vary from patient to patient depending on the particular medical circumstances or physical condition of the patient." Id. at 635-36. The Court of Appeals ruled that the dentist's testimony about her customary practice for administering anesthesia was admissible for the purposes of establishing her treatment of the plaintiff, given that the frequency and nature of the routine practice made it suitable for consideration as habit evidence. The Court of Appeals distinguished pre-extraction procedures from surgical procedures, the latter having previously been deemed inadmissible due to the varying nature of each patient's medical condition and the actions of the doctor. Id. at 635, mentioning Glusaskas v. Hutchinson, 148 A.D.2d 203 (1st Dep't 1989).

Based on the distinctions drawn in Rivera, habit evidence pertaining to suicide assessments is not admissible on defendants' motion for summary judgment as proof that Dr. Kelly complied with the standard of care in treating Mr. Campbell. Dr. Kelly testified that he takes into consideration a litany of factors when performing a suicide assessment, such as the patient's mental status, behavior, and demeanor, and generates questions and conclusions based on such observations.

[* 11]

The care and treatment of each psychiatric patient during a suicide assessment is different and depends on the particular circumstances and presentation of that patient. Thus, a psychiatrist's suicide assessment is similar to a surgeon's variable surgical procedures and unlike a dentist's routine pre-extraction procedures, which are identical regardless of the patient's presentation. Moreover, in Rivera, the Court of Appeals noted that the defendant performed the pre-extraction procedure "thousands of times," based on the defendant's testimony. Here, it is unclear how many times Dr. Kelly performed suicide assessments. While Dr. Kelly testified that he conducted an assessment on every visit, the line of questioning that prompted his answer related to his visits with Mr. Campbell, which totaled to approximately seventeen (17) visits. There is no mention of Dr. Kelly performing assessments on each and every visit for every patient that presented to his office. As defendants' expert's opinion that Dr. Kelly conformed with the standard of care in performing suicide assessments of Mr. Campbell is predicated on habit evidence that is insufficient to support summary judgment, defendants did not meet their burden of eliminating all issues of fact.

Further, defendants' expert's opinion that it is customary in the field of medicine and psychiatry to document positive findings, but not negative findings, is insufficient, by itself, to support of their claim for summary judgment. Defendants' expert's statement of the standard of care with regard to documentation does not address whether a suicide assessment was conducted in the first place. In essence, defendants reach their conclusion that Dr. Kelly did not depart from the standard of care because he conducted the suicide assessment, which yielded negative responses and found Mr. Campbell to be a threat to neither himself nor others, all due to the absence of a notation in the records. While this could be possible, it does not extinguish all issues of fact and precludes

[* 12]

judgment as a matter of law at this juncture.

Similarly, as to defendants' argument that Dr. Kelly lacked the necessary control over Mr. Campbell to prevent the attempted suicide, it does nothing to entitle them to summary judgment. Citing Engelhart v. County of Orange, 16 A.D.3d 369 (2d Dep't 2005), defendants argue that mental health care professionals generally do not have sufficient control over a voluntary outpatient to impose liability. However, the facts of Engelhart are distinguishable, because here, the issue is not whether Dr. Kelly owed a duty to a pedestrian who is not the patient or to the general public, but rather whether Dr. Kelly properly treated Mr. Campbell during his visits on January 10 and 23, 2009. In addition, there is insufficient evidence on the record to remove all questions of fact regarding whether any action may have been possibly undertaken by Dr. Kelly between January 23, 2009, and February 18, 2009 (i.e., acute hospitalization or daily treatment).

Furthermore, defendants fail to address the allegation contained in plaintiffs' bill of particulars that Dr. Kelly was negligent by failing to be available for and respond to emergency calls for assistance from Ms. Campbell. They fail to proffer any expert evidence to state which standard of care exists with regard to telephone calls of this nature. Defendants' argument that Dr. Kelly satisfied the standard of care by giving Mr. Campbell his cell phone number does not address Dr. Kelly's alleged failure to promptly return Ms. Campbell's phone calls. Medical expert affirmations which fail to address the essential factual allegations in the bill of particulars fail to establish prima facie entitlement to summary judgment as a matter of law. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010).

To the extent that defendants seek to dismiss plaintiffs' allegations of negligence during treatments rendered to Mr. Campbell on dates prior to October 2008 on the grounds that they are time barred, that portion of their motion is granted, as unopposed. Accordingly, it is hereby

ORDERED that the portion of defendants' motion seeking to dismiss claims of negligence that predate October 2008 is granted; and it is further

ORDERED that the remainder of defendants' motion seeking summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on October 23, 2012, at 9:30 a.m.

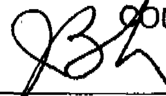
**FILED**

OCT 03 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: September 24, 2012

ENTER:



JOAN B. LOBIS, J.S.C.