

Hanrahan v Good Samaritan Hosp. Med. Ctr.

2013 NY Slip Op 33418(U)

December 20, 2013

Supreme Court, Suffolk County

Docket Number: 11-4787

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-13-13
ADJ. DATE 5-13-13
Mot. Seq. # 002 - MotD

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JANE MARIA HANRAHAN, as Administrator
of the Goods, Chattels and Credits of THOMAS
J. HANRAHAN, III, and JANE MARIA
HANRAHAN, Individually,

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Plaintiffs,

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and Weiner, M.D.
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- against -

GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, JEROME WEINER, M.D., JEAN H.
ANCION, M.D., SARAH ARTZ, D.O.,
FREDERICK DAVIS, D.O., ALEXANDER
MELMAN, M.D., JOHN FRANCFORT, M.D.,
MICHAEL AARON, M.D., KHALID NOORI,
M.D., CHETAN MALHOTRA, M.D.,
VENKATA MADDINENI, M.D., BISMAL
MASSAND, M.D., NEW YORK UNIVERSITY
HOSPITAL and FIRAS F. MUSSA, M.D.,
ROBERT TUROFF, M.D., JENNIFER
CASTRO, M.D., CHARLES LAROSA, M.D.,
and SCOTT WODICKA, M.D.,

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 23; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24-26; Replying Affidavits and supporting papers 27-29; 30-33; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) defendants, John Francfort, M.D. and Robert Turoff, M.D., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as asserted against them is granted as to John Francfort, M.D. and is denied as to Robert Turoff, M.D.

In this medical malpractice action, it is alleged that the defendants negligently departed from good and accepted standards of care and treatment of plaintiff's decedent, Thomas J. Hanrahan, III, from April 20, 2009 through April 21, 2009, when he was seen at the emergency room at Good Samaritan Hospital and admitted by Dr. Khalid Noori to the intensive care unit for bilateral leg pain and numbness. Dr. Noori requested, inter alia, a surgical consult with the on-call surgeon, Dr. Turoff, who did not come to the hospital to see the decedent and recommended that the decedent be transferred to another facility for treatment. It is alleged that Dr. Turoff abandoned the decedent. Dr. John Francfort was the chief of surgery. The decedent was to be transferred to New York University the following morning for vascular surgery. Thomas Hanrahan died on April 21, 2009. It is alleged that the defendants negligently failed to diagnose and treat the decedent for a blood clot which migrated, and for which he should have been provided timely surgical intervention. Causes of action for medical malpractice, and the wrongful death of Thomas J. Hanrahan, III, have been asserted. A derivative claim has been asserted by the decedent's spouse, Jane Maria Hanrahan.

Defendant Turoff seeks summary judgment dismissing the complaint as asserted against him on the basis that he did not go the hospital when called by Dr. Noori to see the decedent because he is not a vascular surgeon and believed that the decedent was suffering from vascular issues, and that he did not establish a physician/patient relationship with the decedent. Defendant Francfort seeks summary judgment dismissing the complaint as asserted against him on the basis that he was not on call on April 20, 2009, and thus bears no liability as he did not establish a physician/patient relationship with the decedent.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (002), defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaints, their respective answers with demands, and plaintiffs verified bills of particulars; uncertified and redacted copy of a SWAT Trauma Call which is not in admissible form to be considered; transcript of the stipulation of discontinuance dated June 1, 2011 (Asher, J.) relating to certain defendants in an action commenced in Suffolk County, index number 10-12099; stipulation dated June 28, 2011 consolidating the actions for the remaining parties in the aforementioned action with the action

pending in Suffolk County under index number 11-4787; uncertified copy of a Good Samaritan Hospital record which is not in admissible form; and unsigned copies of the transcripts of the examinations before trial of plaintiff Jane Maria Hanrahan dated November 14, 2011 and May 22, 2011, and former co-defendant Alexander Melman dated July 16, 2010, all with proof of service pursuant to CPLR 3116. It is noted that the moving defendants have submitted a certified copy of the Good Samaritan Hospital record in their reply papers.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

An expert opinion must represent a reasonable degree of certainty and must not be based on supposition or speculation (*see The People of the State of New York v Bethune*, 105 AD2d 262 [2d Dept 1984]; *People v the State of New York v Robar*, 29 Misc3d 625 [County Ct, Sullivan County 2010]). "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001] [citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

A physician-patient relationship is created when the professional services of a physician are rendered to and accepted by another for the purposes of medical or surgical treatment (*Zimmerly v Good Samaritan Hospital*, 261 AD2d 614, 690 NYS2d 718 [2d Dept 1999]); *Quirk v Zuckerman*, 196 Misc2d 496, 765 NYS2d 440 [Sup Ct, Nassau County 2003]). A cause of action to recover damages for medical malpractice must be founded upon the existence of a doctor-patient relationship (*Delacy v University Radiology Associates, P.C.*, 254 AD2d 450, 679 NYS2d 151 [2d Dept 1998]).

John W. Francfort, M.D. submitted his affidavit in support of this application for summary judgment. He set forth that he is a physician duly licensed to practice medicine in New York State and is board certified in surgery and vascular surgery. Dr. Francfort stated that he had absolutely no involvement in the care and treatment rendered to Thomas J. Hanrahan, III during his admission to Good Samaritan Hospital on April 20, 2009 through April 21, 2009. He continued that his handwriting does not appear on the chart, he did not supervise any of the medical providers who rendered care and treatment to the plaintiff's decedent, and he has no recollection of having any contact with the decedent, his family, the defendants in this action, or other health care providers who treated the decedent.

Dr. Francfort continued that in 2009, Good Samaritan Hospital did not have an on call vascular surgery schedule, and that the hospital maintained two surgical on call schedules: Trauma I & Service, and Trauma II. He stated that he was the on call general surgeon for Trauma I & Service for April 19, 2009, and was responsible for surgical calls starting at 7:00 a.m. on April 19, 2009, and ending at 7:00 a.m. on April 20, 2009. He did not have any further on call responsibilities at the hospital for the remainder of April 2009. Mr. Hanrahan did not present to Good Samaritan hospital Medical Center until 5:25 p.m. on April 20, 2009, at which time he was not on call. Dr. Francfort concluded that in the absence of any physician-patient relationship with the decedent, he is entitled to summary judgment dismissing the complaint as asserted against him.

Robert Turoff, M.D. submitted his affidavit wherein he averred that he is a physician licensed to practice medicine in New York State and is board certified in surgery. Dr. Turoff stated that he reviewed the Good Samaritan Hospital record of the decedent and determined that at no time did he render any medical treatment to the decedent; his handwriting does not appear in the medical record; and he did not supervise any of the medical providers at Good Samaritan Hospital who rendered care and treatment to the decedent. He continued that in April 2009, Good Samaritan Hospital did not have an on call vascular surgery schedule. On April 20, 2009, he continued, he was the on call general surgeon for Trauma I and Service, and received a telephone call from an emergency room physician from Good Samaritan Hospital whereby he was told of a patient who had decreased sensation to the lower extremities, weak pedal pulses, and feet which were cool to touch, and that the patient needed vascular surgery services. Dr. Turoff continued that because he is a general surgeon with a specialty in surgical oncology, he advised the emergency department physician that he was unable to provide vascular surgery services. Dr. Turoff stated that based upon the signs and symptoms reported to him during that conversation, he recommended transfer of the patient to the nearest facility which provided vascular surgery services. He was advised that the decedent requested transfer to New York University Medical Center. Dr. Turoff continued that he was not advised by the emergency department physician at Good Samaritan Hospital that he was unable to find a vascular surgeon, and that the decedent refused transfer to any other facility other than New York University Medical Center. Dr. Turoff stated that he did not have a physician/patient relationship with the decedent.

It is noted that co-defendant Firas F. Mussa, M.D. has submitted his affidavit and an attorney's affirmation in response to defendants' motion. Dr. Mussa avers that the decedent was not his patient and that he did not see or treat the decedent. Counsel for Dr. Mussa affirms that any inferences made by co-defendants Francfort and Turoff's expert identifying decedent as a patient of Dr. Mussa are false and should be disregarded.

In support of the moving defendants' motion, the affirmation of Henry S. Partridge has been submitted, wherein he affirms that he is licensed to practice medicine in New York State and is board certified in surgery. Although Dr. Partridge has not set forth his education and training as a basis for his expert opinions, he does indicate that during the course of his career, he has managed the care of thousands of patients with general surgical needs. Dr. Partridge opined within a reasonable degree of medical certainty that Dr. Francfort had no duty of care to the decedent and that no physician/patient relationship existed because Dr. Francfort was not on call, had no contact with the decedent, did not see any records relating to the case, did not author a single note, and the hospital record is devoid of any conversation with Dr. Francfort regarding caring for and/or treating the decedent. He continued that it is well known that a physician has no duty to a patient to whom he/she renders no care, offers no opinion, and provides no professional service.

Based upon the foregoing, Dr. Francfort has established prima facie entitlement to summary judgment dismissing the complaint. Plaintiff's expert has not raised a factual issue to preclude summary judgment from being granted to Dr. Francfort to demonstrate that indeed, a physician/patient relationship existed between Dr. Francfort and the decedent.

Accordingly, that part of motion (002) which seeks summary judgment dismissing the complaint as asserted against defendant John Francfort, M.D. is granted.

Dr. Partridge continued that no physician/patient relationship existed between Dr. Turoff and the decedent. He stated that Dr. Turoff did not make any entries into the hospital record, he did not examine the decedent, did not render any care and treatment to the decedent, and that Dr. Turoff advised the hospital to seek care for the patient at an institution that can provide local vascular surgery services as he is a general surgeon. Dr. Partridge opined that based upon his review of the hospital record, when the decedent arrived at Good Samaritan Hospital emergency department, he required the services of a physician with a specialty in vascular surgery, not general surgery. He continued that upon being contacted by the hospital, Dr. Turoff appropriately advised the hospital to transfer the patient to a local facility with vascular surgery services as the hospital did not maintain an on call vascular surgery schedule. Thus, continued Dr. Partridge, Dr. Turoff was not required to assume a physician/patient relationship for a different specialty to render the service sought. He stated that the hospital staff advised Dr. Turoff that the decedent's vascular surgeon was affiliated with New York University Hospital and that arrangements were being made for his transfer, therefore, Dr. Turoff was not required to see the decedent. Dr. Partridge opined that Dr. Turoff's direction advising the hospital to transfer the decedent did not create a physician/patient relationship or impose any duty to the patient. Thereafter, Dr. Turoff did not hear further from the hospital.

Based upon the foregoing, it is determined that Dr. Turoff has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against him as Dr. Partridge has not set forth the duty of care of a surgeon who is on call and is confronted with a vascular surgical emergency, whether Dr. Turoff should have seen and assessed the decedent to determine whether or not he could be safely transferred or if he needed immediate intervention by him, and whether, by ordering that the decedent be transferred, if Dr. Turoff formulated a diagnosis, and established a physician/patient relationship. As determined in *Quirk v Zuckerman*, 196 Misc 2d 496, 765 NYS2d 440 [Sup Ct, Nassau County 2003], although the doctor did not perform a physical exam upon the patient, he collaborated with the nurse practitioner who performed the full physical examination. The court continued that a doctor is charged with

the duty to exercise due care, as measured against the conduct of his or her own peers, the reasonably prudent doctor standard. A decision that is something less than a professional medical determination or not the product of a careful examination and evaluation does not suffice. In the instant action, Dr. Turoff asserts he did not examine plaintiff's decedent, however, he collaborated with the emergency room physician concerning the decedent's diagnoses and advised that the decedent be transferred. Whether or not the collaboration between Dr. Turoff and the emergency room physician constituted an implied physician/patient relationship between Dr. Turoff and the decedent is a question of fact for the jury to decide (*Quirk v Zuckerman, supra; Wink-Evans v North Shore Univ. Hosp. at Glen Cove*, 269 AD2d 443, 702 NYS2d 917 [2d Dept 2000]; *Bienz v Central Suffolk Hospital*, 163 AD2d 269, 557 NYS2d 139 [2d Dept 1990]). Even if it were determined that defendant Turoff established prima facie entitlement to summary judgment dismissing the complaint, the plaintiff has raised factual issues which preclude summary judgment from being granted.

Plaintiff has opposed this motion with the unredacted affidavit of Dr. Jack Rubenstein who averred that he is a physician licensed to practice medicine in New York State and is board certified in internal medicine, nephrology, and geriatric medicine. He set forth his work experience and the records and materials he reviewed. Dr. Rubenstein set forth his opinions within a reasonable degree of medical certainty. Based upon his review of the records and CT scan studies performed during the decedent's admission to Good Samaritan Hospital, it is Dr. Rubenstein's opinion that the decedent suffered from issues beyond the vascular circumstance that required surgical intervention. Specifically, he stated, the CT scan demonstrated findings compatible with an infract bowel and mesenteric ischemia, likely a consequence of the predicate condition of vascular insufficiency in the lower extremity. As a consequence, there exists a substantial issue as to whether surgical intervention, by even a surgeon lacking vascular expertise, could have been valuable in evaluating the clinical circumstances.

Dr. Rubenstein opined, that with respect to defendant Dr. Turoff, it is undisputed that he was called with reference to the decedent's emerging surgical conditions. He continued that the standard of care in the community is that when surgeons are called with respect to surgical emergencies, notwithstanding their specific expertise and subspecialty, they are required to make some form of an in-person surgical assessment unless the responsibility is specifically assumed by another competent practitioner. Dr. Rubenstein set forth and attached the three page note of Dr. Noori confirming that Dr. Turoff was called and advised of the emergent nature of Mr. Hanrahan's condition and that Dr. Turoff declined to appear. Dr. Rubenstein opined that at a minimum, given the fact that there was not an explicit direction by the hospital that they would handle the case, Dr. Turoff was obligated to surgically assess the decedent in person.

It is Dr. Rubenstein's further opinion that Dr. Turoff departed from good and accepted practice in making a transfer recommendation without specifically having seen the patient and making his own evaluation with respect to the patient's fitness to be transferred to another facility. Dr. Rubenstein opined that Dr. Turoff abandoned the decedent by deferring the requisite care to an undesignated physician or entity, which is not consistent with good and accepted practice in the community. These departures, opined Dr. Rubenstein, contributed to the decedent's demise. Dr. Rubenstein stated that there is no clear evidence in the record that suggests that Good Samaritan Hospital ever assumed the responsibility for the decedent, and that it was making every attempt to get a surgeon to the scene, and made multiple attempts which were ignored by Dr. Turoff, possibly Dr. Francfort and others, causing the plaintiff to die.

Hanrahan v Good Samaritan Hospital
Index No. 11-4787
Page No. 7

Dr. Rubenstein stated that Dr. Turoff acknowledged that he received the call for a surgery consult, and upon receipt of that call, had an obligation to see the patient unless it was unequivocally expressed that the hospital would take care of the decedent. The purpose of an on call surgeon is to respond to on call surgical emergencies. Notwithstanding Dr. Turoff's reluctance to what he perceived to be a vascular surgical emergency, the accepted standard of care in the medical community required at least his presence to make an appropriate assessment with respect to what surgery is to be performed, and the appropriateness for transfer, etc. Dr. Rubenstein further opined that had Dr. Turoff timely responded to this surgical emergency, there was a possibility that the vascular insufficiency could have been at least partially reversed, thereby allowing sufficient blood flow to possibly change the outcome: specifically, Thomas Hanrahan's life possibly could have been saved.

Based upon the forgoing, that part of motion (002) wherein defendant Robert Turoff, M.D. seeks summary judgment dismissing the complaint as asserted against him is denied.

Dated: Dec. 20, 2013

W. Gerard Ashe
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

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