

Fernandez v St. Luke's-Roosevelt Hosp. Ctr.

2008 NY Slip Op 31879(U)

June 30, 2008

Supreme Court, New York County

Docket Number: 0103622/2005

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

Justice

Index Number : 103622/2005
FERNANDEZ, ESTELA
VS.
ST. LUKE'S-ROOSEVELT HOSPITAL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION.

Dated: 6/20/08

STANLEY L. SKLAR

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----X
ESTELA FERNANDEZ, as Administratrix of the Estate of
HECTOR FERNANDEZ, deceased, and ESTELA FERNANDEZ,
individually,

Plaintiffs,

Index No.: 103622/05

-against-

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER and
ISABELLA GERIATRIC CENTER,

Defendants.

-----X
SKLAR, J.:

In this action in which it is claimed that plaintiff Estela Fernandez' spouse, Hector Fernandez ("Fernandez"), died on March 31, 2003 as a result of medical malpractice, the sole remaining defendant¹, Isabella Geriatric Center ("Isabella") moves for an order granting it summary judgment. The motion is denied.

Fernandez was admitted to Isabella on January 14, 2003 after having suffered an aortic aneurysm which resulted in anoxic brain encephalopathy, leaving him in a vegetative state warranting admission to the nursing home. He was admitted to Isabella on various medications, including some blood pressure medication. Fernandez was unable to eat and take medication orally and thus had a PEG tube through which food and medication could be administered. Isabella's records indicate that there were some periods when Fernandez's blood pressure was more elevated than during other periods. On March 27 Fernandez was transported to Westchester Medical Center to see his private cardiologist and was returned at 3:45 p.m. that

¹The action has been settled with respect to former defendant St. Luke's-Roosevelt Hospital.

day. The 4:10 p.m. nurse's note recites that Fernandez was returned with "some suggestion about blood pressure medication. Dr. Abed notified and will see him this afternoon." That evening Dr. Abed, an Isabella employee saw Fernandez and wrote an order for Altace, a new blood pressure medication, to be added to the three other blood pressure medications which Fernandez had already been taking. Dr. Abed wrote a note on March 27 which he testified read, "blood pressure is drifting upwards, 170 over 90 and then 150 over 80". Abed EBT p. 52 He testified that he then "added Altace [as a medication to be given] via the peg, the feeding tube." Abed EBT p. 52 Dr. Abed testified that he thought that the blood pressure would be drifting higher than it should be and that the addition of Altace would be helpful. Id 55

According to the March 2003 medication chart it appears that Altace was to be given at 9a.m., that Lasix and Lisinopril, two of the other blood pressure medications which Fernandez had been taking, were to be given at 10a.m. and that the final blood pressure medication, Labetalol, was to be given at 6a.m., 2p.m. and 10p.m. The following day, at about 8a.m. the patient's daughter, Kery Fernandez, came to Isabella to visit her father. Later that afternoon Fernandez' other daughter, Larissa Fernandez, who visited her father daily, went to the nursing home arriving some time after 2:30p.m. Shortly after her arrival a nurse attempted to "push" two medications into the PEG tube but everything spilled all over the patient's stomach because the PEG tube was not working. According to Kery Fernandez the incident occurred at around 4p.m. See K. Fernandez EBT p. 16; But see E. Fernandez EBT pp. 150-151, 153 (which suggests that at 3p.m. the nurse discovered that the tube was not working) The nurse left, and eventually Larissa Fernandez went to the front desk to find out when her father would get fed. L. Fernandez

EBT p. 22 About an hour later a physician, Dr. Abed, came to see the patient. Id 22; See also K. Fernandez EBT p. 16

Although the medical chart indicates that the blood pressure medications were due to be given well in advance of the discovery late in the afternoon of Friday, March 28 of the broken PEG tube by the nurse who tried to push the two medications, Dr. Abed testified that the patient received no blood pressure medication on March 28 (See Abed EBT pp. 89-92) because the PEG tube broke. According to Larissa Fernandez, Isabella was always late with the feedings and medications, and Fernandez' family always "had to be on top of it" to ensure that the patient received his feedings and medications. L. Fernandez EBT pp. 33-34, 42

When Dr. Abed saw the patient on March 28 he ordered that Fernandez be transferred to the hospital, St. Luke's-Roosevelt, so that he could be fed and so that his blood pressure would not rise further. Abed EBT p. 58 The nurse wrote a note that the patient's blood pressure was 161/107 and that he was transferred to St. Luke's at 6:30p.m. Ibid p. 60 According to Dr. Abed 161/107 was a "high" blood pressure. Ibid p. 60 While the nurse indicated that the patient was transferred at 6:30p.m., the ambulance call report (Motion, Exh. J) listed four times, 19:10 (7:10 p.m.), 19:34, 20:10 and 20:30 (8:30p.m.) which are presumably the call time, the time of arrival at Isabella, the time of departure from Isabella and the time of arrival at St. Luke's. The patient's blood pressure was listed as 180/110 on the ambulance call report. St. Luke's E.R. record indicates an arrival time of 8:32 p.m. on March 28 and indicates a blood pressure reading of 180/105. The March 29, 2003 Resident Admit Note indicates a blood pressure reading of 171/95. Several other blood pressure readings of March 29 listed in the hospital chart were 171/91 and 150/108. The hospital's Patient Order Session Summary recited that a house officer

should be called if there were a blood pressure higher than 150/90. The Attending Admit Note of March 29 stated that Labetalol should be given IV until the PEG was working, but that order was apparently rescinded perhaps because the patient's next several blood pressure readings were not as high. On the evening of Sunday March 30 the PEG tube was finally replaced. See E. Fernandez EBT p. 174 The medication administration record does not indicate that any Labetalol was given after the PEG tube was replaced. Early the next morning the patient was found unresponsive and a code was called. He was pronounced dead at 5:15 a.m. on March 31.

An autopsy was performed which gave the probable immediate cause of death as hypovolemic shock caused by the "rupture of dissecting aortic aneurysm". The dissection was "insinuating behind synthetic graft of prior repaired segment". *Id* The report further noted that "[a]t least 70% of patients with aortic dissection are hypertensive, with evidence of left ventricular hypertrophy as in this case". The report also stated that although there was atherosclerosis, that condition "is not considered a significant cause of aortic dissection".

Isabella now seeks summary judgment dismissing the action as to it. Its expert, Dr. Steven Goldberg, an internist and cardiologist, opines that Isabella did not depart from standards of accepted medical practice and that in any event causation is lacking. Dr. Goldberg asserts that Isabella immediately ordered a transfer to the hospital when the PEG tube broke and that Fernandez' blood pressure and cardiac medications were properly monitored while at Isabella.

In terms of causation Dr. Goldberg, who does not assert that the mere fact that one has an aortic aneurysm means that one has Marfan's Syndrome, in an *ipse dixit* manner maintains that

Fernandez had Marfan's Syndrome². He then concludes that Fernandez died as a result of a "diseased aorta which ruptured because of the prior repaired aneurysm and his pre-disposition to an aortic aneurysm due to Marfan's Syndrome". Dr. Goldberg maintains that Fernandez' blood pressure did not dramatically change from the time the PEG tube properly worked until it broke. He further opines, in a statement that is unclear as to which blood pressure readings he is referring to, that the "above" pressures were not elevated enough to cause a new aneurysm.

Plaintiff, relying inter alia on the affirmation of its expert internist and cardiologist, the unredacted version of which I reviewed in camera, asserts that Isabella failed to adequately monitor and control Fernandez' blood pressure throughout the time it cared for him, noting that normal blood pressure should be less than or equal to 110/80, and that Isabella improperly permitted Fernandez' blood pressure to be too high for a person recovering from a dissecting aortic aneurysm. The expert also maintains that Isabella was negligent in failing to give blood pressure medication by intravenous injection after the PEG tube broke, which caused Fernandez' blood pressure to be too high for an unreasonable length of time from the evening of March 27 until his time of transfer and admission to the hospital. In addition the expert maintains that Fernandez was not timely transferred to the hospital.

Plaintiff's expert alleges that these departures caused increased stress on Fernandez and caused the rupture "near or at the area of the prior repair", thereby resulting in Fernandez' death. The expert further rejects the claim that Fernandez had Marfan's Syndrome noting that the autopsy report made no mention of Fernandez having such a congenital condition.

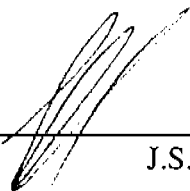
²According to Steadman's Medical Dictionary 4.0 Marfan's Syndrome involves congenital changes in the mesodermal and ectodermal tissues, skeletal changes such as long limbs and lax joints, ectopia lentis, vascular defects and marked iris transillumination.

Following a review of all of the papers submitted, including the medical records, the experts' affirmations and the deposition transcripts, Isabella's motion is denied. Isabella has failed to establish that Fernandez had Marfan's syndrome or that he was promptly transferred to the hospital. Indeed the evidence suggests that hours passed before the ambulance was called. In addition there is a lack of any explanation regarding why Fernandez received no blood pressure medication after March 27 despite medical orders for multiple blood pressure medications, including one newly added by Dr. Abed, to be given in the morning (and one to be given again at 2p.m.), when the malfunctioning PEG tube was ostensibly discovered by a nurse somewhere between 3 - 4 p.m. on March 28. Also, Dr. Abed's note of March 27 indicated that Fernandez' blood pressure was "drifting upwards". Further, he testified (EBT p. 60) that Fernandez was transferred to the hospital because the PEG tube was clogged and because his pressure was "high", namely 161/107. Finally, plaintiff's expert's affirmation raises issues as to whether Fernandez' blood pressure was properly controlled and whether the elevated pressures placed sufficient stress on the aorta to cause the second aneurysm and Fernandez' death.

Accordingly, the motion is denied.

Settle order.

Dated: June 30, 2008
60 Centre Street
New York, NY



J.S.C.