

Dreitlein v Grossman
2011 NY Slip Op 33739(U)
October 20, 2011
Supreme Court, Suffolk County
Docket Number: 03-21674
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 4-6-11

ADJ. DATE 6-8-11

Mot. Seq. # 015 - MG

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ROBERT DREITLEIN, Individually and as :
Administrator of the Estate of LINDA KRIZAN- :
DREITLEIN, and on behalf of LINDA KRIZAN- :
DREITLEIN and the Distributees of her Estate, :
 :
Plaintiff, :
 :
- against - :
 :
ELLIOT GROSSMAN, M.D., BRUNSWICK :
HOSPITAL, NEW-ISLAND HOSPITAL, :
 :
Defendants. :
-----X

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 15; Replying Affidavits and supporting papers 16 - 19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant New Island Hospital for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

This action seeks to recover damages for medical malpractice and wrongful death arising from the care and treatment rendered by the defendants to the decedent, Linda Krizan-Dreitlein, during the period of time from March 1, 2001 through November 14, 2002. On March 1, 2001, the decedent underwent lumbar spinal fusion surgery, which was performed by Sebastian Lattuga, M.D., at Mercy Hospital. Following the surgery, the decedent developed complications which required additional treatment, care, examination and diagnosis, as well as, multiple surgeries and hospitalizations. During this period of time, the decedent was under the care of the defendant physician, was required to undergo additional surgeries, and was hospitalized, at least once, at each of the defendant hospitals. On November 14, 2002, the decedent died due to a bilateral pulmonary thromboemboli, which the plaintiff contends related directly to complications arising from the initial and subsequent surgeries. In the complaint, the plaintiff alleges, *inter alia*, that the decedent sustained personal injuries, and ultimately death, as a result of the defendants' medical malpractice. Specifically, in the complaint and bill of particulars, the plaintiff alleges that the defendants departed from accepted standards of medical care by failing to use reasonable care in diagnosing and

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treating the decedent's condition; negligently and carelessly performing the services rendered; failing to properly prescribe medication; failing to properly ascertain decedent's allergies; failing to take a full and accurate medical history; failing to use their best judgment in the care of the decedent; and failing to possess that reasonable degree of learning, skill and competence which was necessary for the treatment of the decedent and that is ordinarily possessed in the rendition of surgical and medical services by those practicing in the community.

Defendant New Island Hospital now moves for summary judgment dismissing the action against it on the grounds that the care and treatment rendered by its staff during the decedent's admission was within the accepted standards of medical care, and that there was no causal connection between any treatment rendered by any member of its staff and the decedent's purported injuries.

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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage (*see Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 842, 871 NYS2d 617 [2d Dept 2008]). Therefore, on a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Flanagan v Catskill Regional Med. Ctr.*, *supra*; *Langan v St. Vincent's Hosp. of N.Y.*, 64 AD3d 632, 882 NYS2d 500 [2d Dept 2009]; *Bjorke v Rubenstein*, 53 AD3d 519, 861 NYS2d 757 [2d Dept 2008]). If the defendant makes its prima facie showing, then the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury (*see Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009]; *Bjorke v Rubenstein*, *supra*; *Vera v Soohoo*, 41 AD3d 586, 838 NYS2d 154 [2d Dept 2007]; *see also Langan v St. Vincent's Hosp. of N.Y.*, *supra*).

The evidence submitted here established, as a matter of law, that New Island Hospital staff did not depart from good and accepted medical practice in treating the decedent. The evidence submitted also established that the care and treatment rendered to the decedent by New Island Hospital staff was not a proximate cause of the decedent's injuries and death. In support of the motion for summary judgment, New Island Hospital submits, *inter alia*, the deposition testimony of Elliot Grossman, M.D., the expert affirmation of Dan Reiner, M.D., and the decedent's hospital records at New Island Hospital. As is relevant to this motion, Dr. Grossman testified that he first treated the decedent on August 2, 2001 when he was

covering another surgeon at his practice at defendant Brunswick Hospital. The decedent was suffering from a chronic wound infection as a result of a prior lumbar spine surgery. On August 3, 2001, Dr. Grossman performed a surgical procedure, an excision of a large abdominal wall subcutaneous mass, in order to treat the decedent. The plaintiff tolerated the procedure well and, initially, she was in satisfactory post-operative condition with no complications. The decedent had three post-operative visits with Dr. Grossman in his office, the last visit, occurring on August 30, 2001. In December of 2001, the decedent presented to the emergency room at defendant North Shore University Hospital at Plainview, and was examined and treated by Dr. Grossman. At this time, the plaintiff had a wound abscess, caused by a wound infection, at the site of the previous excision. According to Dr. Grossman, a major contributing factor to wound breakdowns and healing difficulty is obesity, and the decedent was morbidly obese. On December 6, 2001, Dr. Grossman drained the abscess. He next saw the decedent on December 13, 2001, on which date she had no indication of a residual infection. Her wound was treated by open packing and was expected to heal without the need for medication. The decedent did not show up for her next three appointments with Dr. Grossman. Dr. Grossman had no knowledge of the decedent's admission to Brunswick Hospital for abdominal pain in March of 2002.

Dr. Grossman next saw the decedent on June 24, 2002, on which date she complained of breakdown in the area of the lower panniculus. Following examination, Dr. Grossman believed the decedent may require another operation, and ordered a CT scan of the abdomen and pelvis to evaluate the area. The CT scan showed post-operative changes reflective of the original lumbar spine surgery, and was, otherwise, unremarkable. Dr. Grossman determined that the decedent required surgery to have more of her panniculus removed. On September 23, 2002 he performed a wide excision of the chronic subcutaneous infection in the decedent's abdomen. The decedent was discharged on September 25, 2002. Dr. Grossman next saw the decedent on September 30, 2002, on which date her abdominal wall wound was intact and healing. On October 3, 2002, Dr. Grossman saw the decedent in the emergency room at New Island Hospital. At that time, her wound had disrupted and was open, but there was no evidence of an infection. Dr. Grossman testified that there was nothing that could have been done to prevent her wound from opening because the weight of her abdominal fat hanging down was opening the wound. He treated the decedent with open packing and she was discharged on October 5, 2002. On October 7, 2002 and October 14, 2002, the decedent had follow up visits with Dr. Grossman at his office and had no new complaints. Her wounds were being managed at home with the visiting nurses service. On October 21, 2002, the decedent had a follow up visit with Dr. Grossman, at which time she was no longer improving. Her weight was pulling her abdominal wound open and the wound was extending. It was obvious to Dr. Grossman at this time that the decedent required an extensive removal of the pannicular apron if her wound was ever going to heal. At an October 30, 2002 visit, he informed the decedent to prepare for admission to New Island Hospital where the aforementioned surgery would be performed. On November 4, 2011, the decedent was electively admitted to New Island Hospital for the scheduled surgery. During the surgery, all skin and subcutaneous tissue of her lower panniculus was excised and the wound was closed. The decedent remained in the hospital through November 11, 2002, and Dr. Grossman remained her treating physician during this time. On November 11, 2002, Dr. Grossman discharged the decedent. At this time, the decedent had no signs of deep vein thrombosis including no signs of swelling or redness of the lower right leg. According to Dr. Grossman, there was no indication at the time of discharge for Heparin to be prescribed. Dr. Grossman did not see the decedent again following her discharge on November 11, 2002. The plaintiff died of a pulmonary thromboli as a result of deep vein thrombosis on November 14, 2002. Dr. Grossman testified that deep vein thrombosis is a complication of any major surgery.

In his affidavit, Dr. Reiner avers that he reviewed the decedent's medical records from New Island Hospital, the bill of particulars, and the deposition testimonies taken in the instant matter. Based on his review of these documents, Dr. Reiner concludes that the care and treatment rendered to the decedent by New Island Hospital staff was, at all times, within good and accepted standards of medical practice. In addition, he opines, to a reasonable degree of medical certainty, that the care and treatment rendered to the plaintiff by New Island Hospital staff was not, in any way, a proximate cause of the decedent's alleged injuries. Dr. Reiner notes that the majority of the allegations of the bill of particulars allege negligence pertaining to the decedent's private attending physician, for which the hospital cannot be held liable. Dr. Reiner outlines the care and treatment rendered to the decedent on her last admission to New Island Hospital commencing on November 4, 2002. He avers that during the decedent's presentation to New Island Hospital on November 4, 2002 she received appropriate care and treatment from the staff. He states that the nursing staff properly and appropriately documented her medical condition in the hospital chart, properly and appropriately documented her vital signs, properly documented the medications that her physicians ordered, and administered the medications ordered in an appropriate manner. Dr. Reiner states that it is clear from the decedent's medical records, as well as from Dr. Grossman's deposition testimony, that the decedent was a private patient of Dr. Grossman throughout the course of her admission to New Island Hospital, and that the staff followed all physician orders in a timely and efficient manner. Dr. Reiner states that there was no evidence of medical malpractice on the part of New Island Hospital staff. In this regard, the record indicates that the patient was admitted for an elective surgery, and that she was treated by all staff members involved in her care in a proper, professional and compassionate manner. Any order that was made by the attending physician was carried out in a timely and professional manner and there is no evidence that the doctor's orders were not completed or were completed in a substandard manner. According to the chart, the decedent received proper care by the nursing staff post-operatively and her course was uneventful. The nursing staff properly advised the attending physician as to the status of the decedent, and post-operative care was proper at all times. According to Dr. Reiner, the record does not reflect any early signs of pulmonary embolism during the decedent's stay at New Island Hospital from November 4, 2002 to November 11, 2002. At that time, the decedent was able to ambulate well and surgical wounds were sufficiently healed to allow her to be discharged. Dr. Reiner notes that the discharge order was made by the decedent's private attending physician after performing his own examination of the patient on November 11, 2002. In conclusion, based on the decedent's medical chart and all other documents reviewed, Dr. Reiner opines, within a reasonable degree of medical certainty, that at all times the New Island Hospital staff appropriately cared for decedent. Lastly, he states that the hospital staff's involvement with the decedent did not cause or contribute in any way to the alleged injuries.

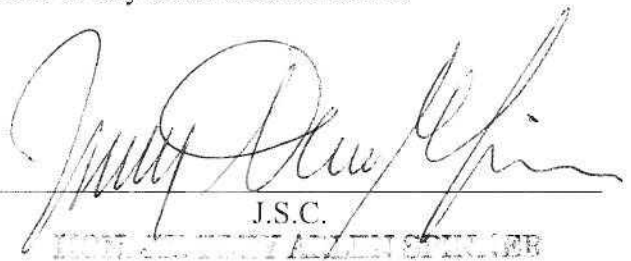
As New Island Hospital correctly contends, the evidence submitted establishes that it cannot be held liable for any purported malpractice on the part of Dr. Grossman. As a general proposition, "a hospital may not be held liable for the malpractice of a physician who is not [its] employee" (*Brink v Muller*, 86 AD3d 894, 927 NYS2d 719 [3d Dept 2011]; *Citron v Northern Dutchess Hosp.*, 198 AD2d 618, 603 NYS2d 639 [3d Dept 1993], lv denied 83 NY2d 753, 612 NYS2d 107 [1994]; see *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]). Further, hospitals are "shielded from liability when its employees follow the orders of [a private] attending physician unless the latter's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness" (*Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 253 AD2d 616, 618, 677 NYS2d 340 [1st 1998] [citation omitted]; see *Costello v Kirmani*, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]). Here, it is undisputed that Dr. Grossman was the decedent's private attending physician and not an employee of New Island Hospital (see *Sela v Katz*,

supra; **Sledziewski v Cioffi**, 137 AD2d 186, 528 NYS2d 913 [3d Dept 1988]). The evidence submitted also establishes that New Island Hospital staff was not negligent in following Dr. Grossman's orders (*see Sela v Katz, supra*; **Sledziewski v Cioffi, supra**).

In opposition to New Island Hospital's *prima facie* showing of entitlement to summary judgment, the plaintiff failed to raise a triable issue of fact. The expert affidavit submitted by the plaintiff was insufficient for this purpose as it contained only conclusory and unsubstantiated allegations that defendants' departures from accepted standards of medical care were a proximate cause of the decedent's injuries and death (*see McLoughlin v Suffolk Obstetrics & Gynecology, LLP*, 85 AD3d 984, 925 NYS2d 869 [2d Dept 2011]; **Garbowski v Hudson Val. Hosp. Ctr.**, 85 AD3d 724, 924 NYS2d 567 [2d Dept 2011]; **Ahmed v New York City Health & Hosps. Corp.**, 84 AD3d 709, 922 NYS2d 202 [2d Dept 2011]). Accordingly, the motion by defendant New Island Hospital for summary judgment dismissing the action as against it is granted.

Contrary to the plaintiff's contention, New Island Hospital's motion should not be denied based on its purported negligence in affording Dr. Grossman privileges. At the outset, the Court notes that the plaintiff makes such allegation of negligence, for the first time, in opposition to the instant motion for summary judgment. In any event, the evidence fails to establish a triable issue of fact with regard to such contention. A hospital may be liable for failing to properly review an independent physician's qualifications before according him use of the hospital's facilities (*see Boone v N. Shore Univ. Hosp. at Forest Hills*, 12 AD3d 338, 784 NYS2d 151 [2d Dept 2004]; **Sledziewski v Cioffi, supra**). However, the record before this Court fails to present any indication that New Island Hospital failed to comply with the requisite statutory and administrative guidelines with respect to its review of Dr. Grossman's qualifications or ever had any reason to limit or revoke Dr. Grossman's hospital privileges (*see Boone v N. Shore Univ. Hosp. at Forest Hills, supra*; **Sledziewski v Cioffi, supra**; *see also Ortiz v Jaber*, 44 AD3d 632, 843 NYS2d 384 [2d Dept 2007]). Indeed, the only evidence before this Court indicates that Dr. Grossman had privileges at numerous hospitals, in addition to New Island Hospital, following his graduation from medical school in 1978, that he never had his privileges revoked at any hospital, and that he had never been the subject of any disciplinary action by the State of New York or any other medical board.

Dated: 20 October 2011


J.S.C.
HON. JUDITH A. SIKES

 FINAL DISPOSITION X NON-FINAL DISPOSITION