

**Rice v West 37th Group, LLC**

2012 NY Slip Op 32917(U)

December 4, 2012

Sup Ct, New York County

Docket Number: 101207/05

Judge: Shlomo S. Hagler

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

**PRESENT:** SHLOMO HAGLER  
J.S.C.  
Justice

**PART** 17

Index Number : 101207/2005  
RICE, JAMES  
vs.  
WEST 37TH GROUP LLC.  
SEQUENCE NUMBER : 011  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 7, were read on this motion to/for \_\_\_\_\_  
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
 Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is cross motion as follows

- 1 Notice of Motion
- 2 Cross Motion
- 3 Opposition of Plaintiff to Motion & Cross Motion
- 4 Opposition of fourth third-party defendant to Motion
- 5 Opposition of fourth third-party defendant to cross motion
- 6 Reply in support of Motion
- 7 Reply in support of cross motion

**FILED**  
DEC 07 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

**THIS MOTION/ORDER TO SHOW CAUSE IS DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.**

Dated: 12/4/12

\_\_\_\_\_  
**SHLOMO HAGLER**  
J.S.C.

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
KATHLEEN RICE as Administrator of the  
Estate of JAMES RICE, decedent and  
KATHLEEN RICE, individually,

Plaintiffs,

Index No. 101207/05

-against-

WEST 37TH GROUP, LLC, GJF CONSTRUCTION  
CORP. d/b/a BUILDERS GROUP and CORD  
CONTRACTING CO.,

Defendants.

**FILED**

DEC 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
WEST 37TH GROUP, LLC, GJF CONSTRUCTION  
CORP. d/b/a BUILDERS GROUP,

Third-Party Plaintiffs,

Third-Party  
Index No. 590813/05

-against-

FIVE BORO ASSOCIATES,

Third-Party Defendant.

-----X  
WEST 37TH GROUP, LLC, GJF CONSTRUCTION  
CORP. d/b/a BUILDERS GROUP,

Second Third-Party Plaintiffs,

Second Third-Party  
Index No. 590592/08

-against-

JOSEPH CARFI, M.D., and BRUCE HERMAN,  
PHD.,

Second Third-Party Defendants.

-----X

-----X  
CORD CONTRACTING CO., INC.,

Third Third-Party Plaintiff,

Third Third-Party  
Index No. 590611/08

-against-

FIVE BORO ASSOCIATES, INC.,

Third Third-Party Defendant.

-----X

WEST 37TH GROUP, LLC, GJF CONSTRUCTION  
CORP. d/b/a BUILDERS GROUP,

Fourth Third-Party Plaintiffs,

Fourth Third-Party  
Index No. 590598/09

-against-

FIVE BORO ASSOCIATES,

Fourth Third-Party Defendant.

-----X

**Shlomo S. Hagler, J.:**

**Procedural History**

In this action which originated from a construction site accident, second third-party defendant Joseph Carfi, M.D. ("Dr. Carfi") moves, pursuant to CPLR § 3212, for summary judgment dismissing the second third-party action and all cross-claims. Second third-party defendant Bruce Herman, PhD. ("Dr. Herman") cross-moves for the same relief. Plaintiffs and fourth third-party defendant Five Boro Associates, Inc. ("Five Boro") oppose the motion and cross-motion. Both the motion and cross-motion are consolidated herein for disposition.

By stipulation dated November 16, 2011, second third-party plaintiffs West 37th Group, LLC, ("West 37th"), GJF Construction Corp. d/b/a Builders Group ("Builders Group") discontinued their claims against Dr. Carfi and Dr. Herman, leaving only fourth third-party defendant Five Boro's cross claim for contribution and/or indemnification pending against the doctors. (See, Exhibit "A" attached to the Affirmation of William T. O'Connell, Esq., dated January 13, 2012, wherein counsel for second third-party plaintiffs acknowledged that the action against the doctors were discontinued without prejudice). However, Five Boro's cross-claims against Dr. Carfi and Dr. Herman remain extant as asserted in its fourth third-party answer. (See, Exhibit "G" to the motion). The cross-claims are viable and stand alone even in face of the discontinuance of the third-party complaint because cross-claims may be asserted against non-parties. (See CPLR § 3019[d]).

As an initial matter, this Court finds that the contention that Dr. Herman's cross-motion is untimely is without merit. The cross-motion was timely made within the 60-day period set forth in this Part's Rules, and within the 120-day period provided by CPLR § 3212(a).

In a decision and order dated June 30, 2011 (motion sequence number 010), the Hon. Emily Jane Goodman, J.S.C. denied West 37th and Builders Groups' motion for summary judgment

dismissing plaintiffs' wrongful death cause of action against them, on the basis that it could not be said whether decedent's death

either was, or was not, a normal, foreseeable consequence of that accident. The court cannot determine, as a matter of law, that Rice's own actions, and/or those of his treating doctors, were an intervening, superseding cause of his death, such that [West 37th and Builders Group] would be relieved of liability for his death

(June 30, 2011 Decision and Order, at 12).

In that same motion, decedent's employer, Five Boro, cross-moved for summary judgment dismissing the fourth third-party complaint's causes of action for common-law indemnification and contribution. That cross motion was also denied, on the basis that "there has been no determination that either [West 37th and Builders Group] or Five Boro were, or were not, tortfeasors responsible for the causation of Rice's accident, including his death" (*id.* at 13).

The First Department affirmed this decision and order, concluding that "the issue of whether the accidental overdose of prescribed pain medication was a foreseeable consequence of the serious injuries suffered by plaintiff's decedent is a question for the trier of fact," and that "Five Boro is not entitled to dismissal of [West 37th and Builders Groups'] contribution and indemnity claims on the ground that the decedent did not suffer a 'grave injury' within the meaning of Workers' Compensation Law §

11" (*Rice v West 37th Group, LLC*, 96 AD3d 500, 502 [1st Dept 2012]).

The prior motion practice is not dispositive as to the instant motion and cross-motion by the doctors to dismiss the claims of medical malpractice. The prior issues related solely to the viability of plaintiff's wrongful death action and the determination whether or not decedent suffered a grave injury within the meaning of Workers' Compensation Law § 11. The issues of medical malpractice are new and have not been decided.

#### **Abbreviated Facts**

The facts of this matter are fully set forth in prior decisions of this Court, familiarity with which is assumed. Briefly, decedent James Rice fell from a ladder and was severely injured, resulting in debilitating pain from the time of his accident to his death two years later from an accidental overdose of prescription medications. (See, Report of Autopsy attached as Exhibit "P" to the motion). Dr. Carfi was James Rice's treating, prescribing physician at the time of his death, and Dr. Herman was the decedent's treating psychologist.

#### **Summary Judgment**

The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such proof has been offered, in order to defend the summary judgment motion, the

opposing party 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); Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 416 NYS2d 790 (1979); Freedman v Chemical Construction Corp., 43 NY2d 260, 401 NYS2d 176 (1977); Spearmon v Times Square Stores Corp., 96 AD2d 552, 465 NYS2d 230 (2d Dept 1983). "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." Spearmon, 96 AD2d at 553 (quoting Di Sabato v Soffes, 9 AD2d 297, 301, 193 NYS2d 184, 189 [1st Dept 1959]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. Kuehne & Nagel, Inc. v F.W. Baiden, 36 NY2d 539, 369 NYS2d 667 (1975).

#### **Medical Malpractice**

The requisite elements of proof in a medical or dental malpractice action are deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. Prigorac v Park, 20 AD3d 363 (1st Dept 2005).



### Analysis

#### Dr. Carfi

In support of the motion, Dr. Carfi submits an affidavit of Elizabeth Spratt, M.S. ("Ms. Spratt"), sworn to on October 13, 2011, a practicing toxicologist, who opined that "routine urine testing" would not have detected all of the medications that the decedent had been prescribed unless the "doctor" specifically ordered an extended panel which was not common to do so. While Ms. Spratt concluded that routine testing would not have detected certain medications that caused or contributed to decedent's overdose, she never opined if Dr. Carfi should have ordered an extended panel (which would have alerted Dr. Carfi as to all medications the decedent was taking) given the circumstances of decedent's past history and the concerns that were raised by decedent and his wife. In other words, Ms. Spratt failed to state that Dr. Carfi did not depart from accepted practice and such departure was not a proximate cause of decedent's death. As such, Dr. Carfi failed to meet his burden of proof for entitlement to summary judgment. Meth v Gorfine, 34 AD3d 267 (1st Dept 2006).

Assuming *arguendo* that Dr. Carfi had met his burden going forward, Five Boro submitted an affirmation of Jonathan R. Moldover, M.D. ("Dr. Moldover"), dated January 9, 2012, in opposition to Dr. Carfi's motion. In stark contrast, Dr.

Moldover, a medical doctor specializing in the field of pain management, specifically opined in great detail that Dr. Carfi failed to acknowledge and appreciate the decedent's history of drug abuse, and failed to order an extended panel of urine testing to monitor the decedent's use of narcotic prescription drugs. Dr. Moldover concluded that Dr. Carfi departed from accepted medical practice and such departure was a proximate cause of decedent's death. Thus, Dr. Moldover's affirmation is sufficient to raise a triable issue of fact precluding summary judgment. Bell v Ellis Hosp., 50 AD3d 1240 (3rd Dept 2008).

**Dr. Herman**

In support of the cross-motion, Dr. Herman submits an affidavit of Stephen Honor, Ph.D. ("Dr. Honor") sworn to on October 24, 2011, who is a forensic psychologist and neuropsychologist. Dr. Honor reviewed all of Dr. Herman's treatment notes. Initially, Dr. Honor states that a licensed psychologist in New York State, such as Dr. Herman, is not permitted to prescribe, or modify, medications. It is uncontroverted that Dr. Herman did not prescribe or modify any of decedent's medications; Dr. Carfi was decedent's primary medication provider and prescriber. Dr. Honor opined that Dr. Herman fully conformed to the standard of care for a psychologist, did not depart from accepted practice, and did not cause or contribute to decedent's injuries or death.

Dr. Herman met his burden of proof and Five Boro failed to oppose or rebut this showing by establishing a departure from accepted medical practice which was the cause of decedent's injury or death. Rossi v Arnot Ogden Med. Ctr., 268 AD2d 916 (3rd Dept 2000), *lv. denied* 95 NY2d 751 (2000). Unlike the opposition for Dr. Carfi, Five Boro did not submit expert medical evidence to establish a triable issue of fact. Giambona v Stein, 265 AD2d 775 (3rd Dept 1999).

**Conclusion**

Accordingly, it is

ORDERED, that the motion of Joseph Carfi, M.D. pursuant to CPLR § 3212, for summary judgment dismissing the cross-claims of Five Boro Associates, Inc. is denied; and it is

ORDERED, that the cross-motion of Bruce Herman, PhD. for summary judgment dismissing the cross-claims of Five Boro Associates, Inc. is granted.


The foregoing constitutes the decision and order of the Court.

**FILED**

DEC 07 2012

Dated: New York, New York  
December 4, 2012

**NEW YORK  
COUNTY CLERK'S OFFICE**

  
Hon. Shlomo S. Hagler, J. S. C.