

Liburd v St. Joseph's Med. Ctr.
2013 NY Slip Op 34206(U)
April 16, 2013
Supreme Court, Bronx County
Docket Number: 301296/07
Judge: Stanley B. Green
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NEW YORK SUPREME COURT - COUNTY OF BRONX

IAS PART 6

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

-----X
JOHN A. LIBURD, SR. And TESSA LIBURD,
Individually and as co-administrators of the
Estate of JOHN A. LIBURD, JR.,

INDEX NO. 301296/07

Plaintiff(s),

-against-

ST. JOSEPH'S MEDICAL CENTER, EMPRESS
AMBULANCE SERVICE, INC., NARDO SAN
DIEGO, M.D., MICHAEL GUTTENBERG, M.D.
and EDWARD STEINKRAUS,

Defendant(s)

Present:
HON. STANLEY GREEN
J.S.C.

-----X
The following papers numbered 1 to read on this motion
No. on the Calendar of November 16, 2012

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1,2,
Answering Affidavit and Exhibits.....	3
Replying Affidavit and Exhibits.....	4
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: April 16, 2013



STANLEY GREEN, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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JOHN A. LIBURD, SR. And TESSA LIBURD,
Individually and as co-administrators of the
Estate of JOHN A. LIBURD, JR.,

INDEX NO. 301296/07

Plaintiff(s),
-against-

ST. JOSEPH'S MEDICAL CENTER, EMPRESS
AMBULANCE SERVICE, INC., NARDO SANDIEGO, M.D.,
MICHAEL GUTTENBERG, M.D. and EDWARD STEINKRAUS,
Defendants.

DECISION

-----X

HON. STANLEY GREEN:

The motion by St. Joseph's Medical Center for summary judgment dismissing the complaint, the motion for summary judgment dismissing the complaint by Nardo San Diego, M.D. and Michael Guttenberg, M.D. and the cross-motion by plaintiffs for an order pursuant to CPLR§3126 striking the answers of St. Joseph's Medical Center, Dr. San Diego and Dr. Guttenberg are hereby consolidated for decision with the motion for summary judgment by Empress Ambulance Service, Inc., and Edward Steinkraus. Upon consolidation: (1) the motion by St. Joseph's Medical Center is granted to the extent that plaintiffs' claim that St. Joseph's departed from accepted medical practice by failing to direct the ambulance to transport decedent to Montefiore Medical Center or another medical center is dismissed; (2) the motion by Empress Ambulance Service, Inc. and Edward Steinkraus is granted to the extent that plaintiffs' claim that Empress and Steinkraus departed from accepted medical care by transporting decedent to St. Joseph's Medical Center rather than to Montefiore Medical Center or another facility is dismissed; (3) the motion by Nardo San Diego, M.D. and Michael Guttenberg, M.D. is granted to

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the extent that the complaint is dismissed as against Dr. San Diego and plaintiffs' claim that Dr. Guttenberg departed from accepted standards of medical practice by failing to direct the ambulance to take decedent to Montefiore Medical Center is dismissed; and (4) plaintiff's cross-motion for an order striking the answers of St. Joseph's Medical Center, Dr. San Diego and Dr. Guttenberg is denied.

On August 22, 2007, plaintiffs' 17 year old son collapsed while playing basketball at Tibbetts Brook Park in Yonkers, NY. At 2:13 p.m., Empress Ambulance Service, Inc. received a call for emergency services at the park. At 2:20 p.m., ambulances arrived at decedent's location in the park. The first EMT's on the scene placed decedent on a stretcher, then turned him over to paramedic Steinkraus. Decedent regained consciousness briefly and complained of severe chest pain. Steinkraus took decedent's vital signs, connected him to a cardiac monitor and provided oxygen. He also placed two IV lines and started IV fluids. Then, at 2:39 p.m. decedent was transported to St. Joseph's Medical Center, the nearest hospital. According to Steinkraus, en route to the hospital, either he or his supervisor called St. Joseph's on the paramedic control line and informed an unknown person of decedent's condition and his imminent arrival at the hospital. The ambulance arrived at St. Joseph's at 2:50 p.m. Decedent was immediately seen by Dr. Guttenberg, the Director of the Emergency Department and hospital staff began a preliminary assessment, obtaining vital signs and connecting decedent to a cardiac monitor. Dr. Guttenberg's assessment was that decedent was in hypotensive decompensated shock and that his heart was not pumping blood sufficiently to meet the body's needs and keep him alive. An EKG obtained within five minutes of decedent's arrival was consistent with "global" cardiac ischemia. At 3:05 p.m., Dr. Guttenberg contacted Montefiore Medical Center's Cath Lab to make arrangements for

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decedent's transfer there, if he could be sufficiently stabilized. By 3:10 p.m., decedent had been given sodium bicarbonate and a repeat bolus of intravenous fluids. However, decedent began coughing up frothy sputum, indicative of pulmonary edema and Dr. Guttenberg decided to intubate him and place him on a ventilator. At 3:12 p.m. and 3:14 p.m., medications were given in preparation for intubation. At 3:15 p.m., Dr. Guttenberg intubated decedent. A third intravenous line was established and by 3:20 p.m. another dose of sodium bicarbonate was given. At 3:22 p.m., decedent went into complete cardiac arrest. Code medications were given and at 3:30 p.m., Dr. Guttenberg consulted with Dr. Bleiberg (a cardiologist) at decedent's bedside. Dr. Bleiberg agreed with the treatment that was being administered. Despite continued efforts to resuscitate him, decedent remained pulseless and was pronounced dead at 4:00 p.m. An autopsy determined that the cause of death was a bridging left anterior descending coronary artery with an acute myocardial infarction, cardiac hypertrophy and congestive heart failure.

Plaintiffs claim that Empress Ambulance Service and Steinkraus departed from accepted standards of medical care by failing to properly treat decedent at the scene, by failing to timely transport him and by transporting him to St. Joseph's Medical Center, rather than Montefiore Medical Center, which Steinkraus knew had a cardiac catheterization lab.

Plaintiffs claim that St. Joseph's and defendant doctors departed from good and accepted medical practice, inter alia, by: (1) failing to direct Empress to transport decedent to Montefiore Medical Center; (2) failing to perform radiological studies and tests; (3) failing to obtain appropriate consultations; (4) failing to administer Valium and/or other appropriate medications; and (5) failing to transport decedent to Montefiore Medical Center or another medical center.

St. Joseph's seeks dismissal of the complaint on the grounds that they had no authority to

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direct Empress to take decedent to Montefiore Medical Center or another facility and the care and treatment provided by its staff and physicians was at all times within the accepted standards of medical practice and did not cause decedent's death. In support of the motions, St. Joseph's submits medical records, deposition testimony and the affirmation of Dr. Sharon Frankel, who is board certified in Emergency Medicine. Dr. Frankel opines, inter alia, that: (1) decedent was properly transported to St. Joseph's in accordance with EMS protocols; (2) according to the protocols, Emergency Department physicians could not instruct the ambulance crew to take the patient elsewhere; (3) the hospital staff properly evaluated and treated decedent in accordance with the generally accepted standards of care in the community; and (4) none of the care and treatment rendered caused injury to decedent.

Dr. San Diego and Dr. Guttenberg seek dismissal of the complaint on the grounds that Dr. San Diego did not participate in decedent's treatment, Dr. Guttenberg had no authority to redirect the ambulance and the care and treatment he provided was at all times within accepted standards of emergency medicine and did not cause decedent's death. In support of the motion, Drs. San Diego and Guttenberg submit the affirmation of Dr. Gregory Mazarin, who is a diplomat of the American Board of Emergency Medicine. Dr. Mazarin opines that Dr. Guttenberg's testimony and the medical records show that Dr. San Diego did not participate in decedent's treatment, other than as part of the Code team. Dr. Mazarin opines that Dr. Guttenberg's care and treatment of decedent was excellent and it would have been a departure from good and accepted standards of Emergency Medicine for Dr. Guttenberg to turn away the ambulance and direct it to Montefiore Medical Center. Dr. Mazarin notes that an EKG was performed right away and Dr. Guttenberg made the correct diagnosis of a massive heart attack was made within minutes. Dr. Mazarin also

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notes that when Dr. Guttenberg realized that decedent's best chance for survival was to be taken as soon as possible to the Montefiore Medical Center cardiac catheterization lab, he properly contacted Montefiore to make arrangements to transfer decedent there and, opines that his brief absence from decedent's bedside was not a departure. With respect to plaintiffs' remaining claims, Dr. Mazarin opines that Dr. Guttenberg properly intubated decedent at 3:15 p.m., a cardiac consultation was timely obtained, administration of Valium was contraindicated, that a chest x-ray or echocardiogram not have added any useful diagnostic information because the correct diagnosis had already been made and decedent was not a candidate for an emergent surgical procedure given his critical condition.

Empress and Steinkraus seek dismissal of the complaint on the grounds that they properly transported decedent to St. Joseph's Medical Center, the "nearest appropriate hospital" and that plaintiffs have presented no evidence that they breached any duty to decedent. In support of the motion, Empress and Steinkraus submit a copy of the Westchester Regional Paramedic Protocols, which provide, at INTRO-4, that "Patients shall be transported to the nearest appropriate hospital," Steinkraus' testimony that he chose St. Joseph's in accordance with the protocols and the affirmation of Dr. Frankel, who opines that decedent was properly transported to St. Joseph's pursuant to EMS protocols and that St. Joseph's and hospital staff had no authority to redirect the ambulance to another hospital.

In opposition to the motions, plaintiffs submit affirmations of a cardiologist and an expert in Pediatrics and Pediatric Emergency Medicine who is familiar with standards of care and appropriate protocol of emergency room physicians, paramedics and EMT's. These experts opine that Empress and Steinkraus departed from accepted standards of care by transporting decedent to

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St. Joseph's Hospital, rather than to Montefiore Medical Center, which has a cardiac catheterization lab, or another tertiary care facility. Plaintiff's expert in emergency medicine also opines that the failure of paramedics to intubate and commence pressors in the field and the delay of 19 minutes before transporting decedent were "likely" substantial contributing factors in causing decedent's death. Plaintiffs' expert cardiologist opines that St. Joseph's Hospital departed from accepted medical care by failing to immediately intubate decedent and start him on pressors and medications to emergently increase his blood pressure, increase his cardiac output and correct his worsening acidosis. He opines that if these measures had been performed, decedent would have been adequately stabilized for emergency transfer to Montefiore where he would have the emergent placement of an Intra Aortic Balloon Pump as well as an emergency cardiac catheterization to locate and repair the underlying coronary mechanism responsible for his hemodynamic crisis. This expert opines, within a reasonable degree of medical certainty, that the failure of St. Joseph's Hospital to immediately intubate, start pressors and inotropes and transfer Mr. Liburd to Montefiore Medical Center were departures that were a substantial factor in causing "his otherwise preventable death."

Initially, it is noted that the evidence shows that Dr. San Diego did not participate in decedent's treatment, that he was not a "supervisor" of Dr. Guttenberg and plaintiffs' expert's affirmations to not indicate findings of any malpractice on his part. Accordingly, Dr. San Diego is entitled to summary judgment dismissing the complaint.

It is also noted that plaintiffs allege that defendants are liable for decedent's death under the doctrine of *res ipsa loquitur*. However, the doctrine of *res ipsa loquitur* is inapplicable to this case since a heart attack can occur in the absence of negligence and the injury was not caused by

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an “instrumentality” within the exclusive control of defendants (cf. States v. Lourdes Hospital, 100 NY2d 208).

With respect to Empress and Steinkraus’s decision to transport decedent to St. Joseph’s, rather than to Montefiore, the evidence presented by defendants establishes that decedent was transported decedent to St. Joseph’s in accordance with the Westchester Regional Paramedic Protocols in effect in August 2007 and plaintiffs do not dispute that those protocols were in effect or that St. Joseph’s is the nearest hospital to the place where decedent suffered his heart attack. Therefore, plaintiffs have failed to raise a triable issue of fact as to whether Empress and Steinkraus departed from accepted practice by transporting decedent to St. Joseph’s Medical Center. However, Empress and Steinkraus have failed to present evidence sufficient to demonstrate that they properly treated decedent at the scene and timely transported him to a hospital. While they have submitted the affirmation of St. Joseph’s expert, Dr. Frankel, in support of the motion, Dr. Frankel offers no opinion regarding Steinkraus’ treatment of decedent at the scene nor does she offer an opinion regarding the 19 minute delay in transporting decedent from the scene. Accordingly, Empress and Steinkraus’ motion for summary judgment on these issues is denied. Even assuming, arguendo, that the evidence had been sufficient to meet Empress’ and Steinkraus’ prima facie burden, the affirmations of plaintiffs’ experts are sufficient to raise triable issues of fact as to whether the failure these claimed departures were substantial factors in causing decedent’s death. Accordingly, the motion by Empress and Steinkraus is granted only to the extent that plaintiffs’ claim that Empress and Steinkraus departed from good and accepted medical practice by transporting decedent to St. Joseph’s Medical Center is dismissed.

With respect to the motions by St. Joseph’s Medical Center and Dr. Guttenberg, the

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affirmations of Dr. Frankel and Dr. Mazarin establish that St. Joseph's and Dr. Guttenberg did not depart from accepted standards of medical care by failing to redirect the ambulance to Montefiore Medical Center or in their treatment of decedent. However, the opinion of plaintiffs' experts raise triable issues of fact as to whether the failure of St. Joseph's and, thus, Dr. Guttenberg, to immediately intubate, start pressors and inotropes and transfer Mr. Liburd to Montefiore Medical Center were departures from accepted standards of medical care and if so, as to whether these departures were substantial factors in causing his death. The question of whether decedent would have died regardless of the malpractice, is a factual issue that can only be resolved by a jury (King v. St. Barnabas Hospital, 87 AD3d 238, citing Mortenson v Memorial Hospital, 105 AD2d 151).

At to plaintiffs' emergency medical expert's claim that St. Joseph's departed from good and accepted standards of care by failing to have an Online Medical Control doctor ("who should have redirected the ambulance to Montefiore Medical Center which was less than one mile away"), by failing to have a protocol for ambulances calling in with moribund patients and by failing to have a clear chain of command for Online Medical Control, he fails to cite what "Westchester County policies and procedures" he refers to and fails to address the Westchester Regional Paramedic Protocols which provide not only that a patient such as decedent must be taken to the closest appropriate hospital, but also that "ambulance diversion is a hospital-based decision that is not binding on the ALS service." This renders his opinion conclusory and insufficient to raise a triable issue of fact on this issue. Accordingly, the motion by St. Joseph's Medical Center and the motion by Dr. Guttenberg are granted only to the extent that plaintiff's claim that St. Joseph's and Dr. Guttenberg departed from accepted standards of practice by failing to direct the ambulance to Montefiore Medical Center are dismissed.

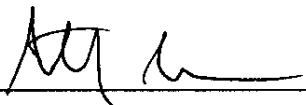
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Plaintiffs' cross-motion to strike the answers of St. Joseph's Medical Center, Dr. San Diego and Dr. Guttenberg on the ground that they lost or destroyed an x-ray is denied. Dr. Guttenberg's testimony shows that no x-ray was ever taken due to decedent's deteriorating condition and there is no evidence of willful or contumacious behavior by defendants and no proof of lack of willfulness to disclose that would warrant the sanction of striking their answers (Rodrigues v. Sklar, 56 AD3d 537). While Dr. San Diego testified that an x-ray was taken and reviewed by himself and Dr. Guttenberg, this merely raises triable issues of fact as to whether an x-ray was ever performed. In any event, plaintiffs have fail to show that they are prejudiced by the loss of the x-ray (if it existed), since their expert fails to explain what "key" evidence the x-ray would be expected to show.

Movants shall serve a copy of this order on the Clerk of the Court who shall enter judgment dismissing the complaint as against Nardo San Diego, M.D.

This constitutes the decision and order of the court.

Dated: April 16, 2013



STANLEY GREEN, J.S.C.