

**Burroughs v Rodriguez**

2013 NY Slip Op 31380(U)

June 24, 2013

Supreme Court, New York County

Docket Number: 150177/08

Judge: Alice Schlesinger

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

**PRESENT:** ALICE SCHLESINGER  
Justice

**LA PART 16**  
PART \_\_\_\_\_

— Index Number : 150177/2008  
BURROUGHS, BARBARA  
vs.  
RODRIGUEZ, JOSE A.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to \_\_\_\_\_, 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 *granted*, and the Clerk is directed to *sever and dismiss* all claims against defendant *Jose A. Rodriguez, M.D.*, in accordance with the accompanying *memorandum decision*.

**FILED**

JUN 27 2013

NEW YORK  
COUNTY CLERK'S OFFICE

JUN 24 2013

Dated: June 24, 2013

*Alice Schlesinger*, J.S.C.  
**ALICE SCHLESINGER**  
 NON-FINAL DISPOSITION

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

1. CHECK ONE: .....  CASE DISPOSED
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

-----X  
BARBARA BURROUGHS,

Plaintiff,

-against-

Index No. 150177/08  
Mot. Seq. Nos.002 & 003

JOSE A. RODRIGUEZ, M.D., LISA MARIE PATRICK,  
M.D., JAMES P. HALPER, M.D., RONIT LAVIE, M.D.,  
AND LENOX HILL HOSPITAL,

Defendants.

**FILED**

-----X  
SCHLESINGER, J.:

JUN 27 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Barbara Burroughs, while recovering from hip surgery that occurred on December 27, 2006, fell from her bed two days later and sustained injury. This fall, which counsel for Ms. Burroughs maintains resulted in "five separate remedial surgeries, . . . numerous extended hospital stays, costly remedial aids and medications, further ambulatory limitations, and extensive pain and suffering," is the basis of this lawsuit. (See ¶ 36 of Heitz' Affirmation in Opposition to Summary Judgment and in Support of Cross-motion). The defendants against whom the suit was brought are the following: Dr. Jose A. Rodriguez, the surgeon who performed the December 27, 2006 hip operation; Dr. Lisa Marie Patrick, a resident in Psychiatry at the Hospital who, with an attending psychiatrist Dr. James P. Halper, evaluated the plaintiff at about twelve noon on the twenty-ninth, about two hours and forty-five minutes before her fall, which occurred at approximately 2:45 p.m.; Dr. Halper, who diagnosed plaintiff as suffering from delirium at the noon evaluation; Dr. Ronit Lavie, an attending internist (apparently incorrectly identified as a "psychiatrist" in ¶31 of the Heitz affirmation) who saw the plaintiff at about 10:00 a.m. on the twenty-ninth and wrote in the Progress Notes to hold Klonopin, but who did not write a follow-up order; and Lenox Hill Hospital ("LHH"), particularly the nursing staff there.

Before this Court are motions for summary judgment by Drs. Rodriguez and Patrick and LHH. Appropriately, these motions were served on all parties through their counsel. These motions are all supported by affirmations from well-credentialed physicians. The motion on behalf of Dr. Rodriguez is supported by Dr. Roger Levy, a board certified Orthopedic Surgeon. In a thorough affirmation, he discusses all the claims made against Dr. Rodriguez, pre and post surgery (Exh F). He opines that all the claims are without merit and explains convincingly why that is so. Clearly, via his statement, a prima facie case for summary judgment has been made out. No one opposes his motion. Apropos of plaintiff's cross-motion discussed later, "No one" includes defendants Dr. Halper and Dr. Lavie.

Dr. Patrick's motion is supported by Dr. Philip R. Muskin, who is board certified in Psychiatry, Geriatric Psychiatry and Psychosomatic Medicine and is Chief of Consultation Liaison Psychiatry at Columbia University Medical Center (Exh A). He opines as to the lack of validity of any of the claims against Dr. Patrick, but also against Lenox Hill Hospital. In the latter regard, he says that he is abundantly familiar with the nursing standards of care as they relate to the claims, including nursing assessment and patient safety.

With regard to opinions expressed on behalf of Dr. Patrick, he informs that he has thirty years of knowledge and experience in the field of Psychiatry. He states that Dr. Patrick was a Psychiatric Resident whose assessment of the plaintiff was consistent with standards of care in every respect. Specifically, he opines that her note in the chart demonstrates that together with Dr. Halper, she performed a thorough examination, reached appropriate conclusions, and recommended the appropriate interventions. Further, she had no obligation to obtain the patient's records from prior admissions.

Clearly, via Dr. Muskin's opinions vis-a-vis Dr. Patrick, a prima facie case has been made out. Again, no one opposes her motion.

Therefore, with regard to both Dr. Rodriguez and Dr. Patrick, their motions are granted and the actions against each are dismissed. Also, in this regard, the cross-motion by plaintiff is granted. That cross-motion asks the Court to preclude any remaining defendants from asserting any claims of negligence against these defendants (now removed from the action) pursuant to CPLR Article §16.

First of all, no party takes issue or opposes the cross-motion. Secondly, such preclusion is proper because, as counsel for plaintiff argues, the Court's decisions here in favor of Drs. Rodriguez and Patrick are the procedural equivalent of a trial. As pointed out earlier, all parties were served with these motions. Therefore, it follows that all parties had an opportunity to be heard and/or contest any opinion of behalf of these doctors and their freedom from negligence. But no one did. Therefore, these decisions do constitute the law of this case and do preclude any remaining defendants from contesting any of these opinions at a later time and/or at trial.

As to the Hospital's motion, we have a very different situation. Plaintiff strenuously opposes the motion and in support of this opposition, submits two affirmations: the first from a highly qualified and experienced Registered Nurse, Doreen Johnson; and the second from Dr. Stephen Marcus, a board certified Orthopedic Surgeon.

Dr. Muskin for LHH first recounts the relevant events at the hospital relating to Ms. Burroughs. All the experts proceed in this way. He begins his opinions with the comment that plaintiff's allegations as to what the Hospital should have done to prevent this accident (and plaintiff does make many such allegations as to this accident, an

accident characterized by plaintiff as preventable) "represent a profound misunderstanding of the applicable standards of care" (§29). He then refers to Ms. Burrough's chart to show that between 6:00 a.m. on December 29 and Ms. Burrough's fall at 2:45 p.m., she was seen by no fewer than three RN's, a Nurse Practitioner, six Doctors and at least one Nurse's Aide. Further, he points out that she was seen no fewer than three times in the forty-five minutes before her fall.

Dr. Muskin believes that the standard of care does not require a patient such as Ms. Burroughs to be monitored more frequently. In fact, in his opinion, there is no evidence to show that there was a lack of monitoring. Further, this doctor believes that there was no indication here for "one-to-one" observation, a status of monitoring that plaintiff claims should have been used. Beside that, Dr. Muskin states, the staff cannot be blamed for anything less because a physician must order that high standard of observation before it is implemented. Referring to both Dr. Patrick's and Dr. Halper's psychiatric evaluation of Ms. Burroughs, Dr. Muskin opines that they "properly concluded that one-to-one observation was not indicated." (§33).

The above is followed by a discussion of the Morse Fall scale, which is a way of determining a patient's risk level for a fall. Plaintiff complains that in Ms. Burrough's circumstance, her risk level should have been updated and upgraded. But Dr. Muskin feels otherwise and remarks that even without a formal upgrading to "high risk", in every practical sense the staff treated her as if she was in that category. As to the circumstances of the fall, the doctor urges that there was no reason for the nurses to suspect that this patient would get out of bed on her own to use the bathroom, as she had only very recently urinated and defecated in her bed.

[\*6]

Finally, Dr. Muskin opines that there was absolutely no reason here to use restraints of any kind. He explains that Ms. Burroughs was neither aggressive nor agitated nor sedated, and though she may have been disoriented, her "consciousness" was not impaired. (¶41). Further, she met none of the criteria for restraints.

With regard to the medication Klonopin, which can be used as an aid for alcohol withdrawal, the chart indicates it was begun then withheld. Dr. Muskin opines that this approach was proper and played no part in the accident, contrary to the claims made by plaintiff.

I find that Lenox Hill Hospital, by its use of Dr. Muskin's affirmation, has established a prima facie case for summary judgment in its favor. But as stated earlier, plaintiff in this instance very actively opposes the motion. And though in Reply counsel for LHH describes that opposition as "conclusory", "inadequate" and based on "rank speculation" (terms regularly used by advocates for both sides in characterizing their adversary's presentations), I find otherwise. In fact, I find that the opposition not only refutes Dr. Muskin's opinions, but it clearly establishes that there are legitimate issues here as to whether Ms. Burrough's fall from her bed was or was not preventable, and if the fall was preventable, what things should have been done that were not.

Plaintiff asserts her opposition to the Hospital's motion mainly via the comprehensive statement made by Nurse Doreen Johnson, someone with impeccable educational and professional experience in Nursing who the Court finds is eminently qualified to discuss the issues in this case. As noted earlier, plaintiff also submits an affirmation from an orthopedic surgeon, Dr. Stephen Marcus.

[\* 7]

Nurse Johnson begins her statement with a review of Ms. Burroughs' therapeutic history, going back to the year 2000 when she was in a rehabilitation center for substance abuse known as Father Morton Ashley, Inc. in Maryland. It should be noted here that a key to the claims made by the plaintiff is that it was important for Lenox Hill Hospital to familiarize itself with an accurate history of plaintiff's psychiatric and physical issues in the years and months before this Hospital admission so as to understand the patient and provide her with the care she needed.

In this regard, Nurse Johnson relates important events. In 2003, Ms. Burroughs fell down a flight of stairs wherein she knocked herself unconscious and broke a bone in her left ankle. The next day she was found and taken by ambulance to Jersey Shore University Medical Center, where on July 20, 2003, she underwent a psychiatric consultation that included her history of alcohol dependency and attempts at fighting this condition.

Ms. Burroughs finally had surgery for her ankle at LHH on February 7, 2006. In June of that year, six months before the admission here, she again was admitted for surgery on her left hip, which she had fractured in a fall the month before. This was her second fall in two weeks and, like the present incident, was from her bed. Dr. Katchis at Lenox Hill had performed the earlier surgeries, and Dr. Weiner performed the hip procedure on June 28, 2006. The day after that surgery on June 29, the plaintiff had been placed on one-to-one observation because of agitation and hallucinations regarding her dead son.

Also during that admission and before the surgery, the Hospital staff had determined that the patient was at a "high risk of fall". Her Morse scale score was 80/100.



[\* 8]

At the December 27 admission, the one at issue here, no attempt was made to evaluate the admission that had occurred six months earlier. (Dr. Muskin opined that no one had an obligation to do that). This time her risk assessment for falling was less than "high risk" and her Morse scale score was 35/100.

Nurse Johnson, as all experts do, relates the events of December 29 when Ms. Burroughs was first observed to be disoriented at about 6:00 a.m. At around noon, when she saw Drs. Halper and Patrick she was suffering from delirium and told the doctors she believed she was in a Radisson Hotel and that the date was nine months earlier, March 30, 2006. Clearly, these events established that the patient was disoriented as to time and place.

Nurse Johnson describes Ms. Burroughs' state as one of "transient confusion," which she explains is known to cause a failure to comprehend one's own limitations. Based on this state, together with the patient's exhibited inability to control her bodily functions that afternoon, Nurse Johnson details multiple departures from nursing and hospital standards of care. These include the failure to designate the plaintiff as a patient at "high risk" for fall, the failure to properly toilet her, the failure to recommend to her physicians that they should order one-to-one observation or to ask Gail, her daughter, who was with her mother but who had to leave to pick up her children, to provide for this supervision as it was necessary. She also notes the failure to recommend four upright bed rails. This expert elaborates on all of the above alleged departures.

Finally, there is an issue here involving the medication Klonopin, which as stated earlier can be used to help a patient withdraw from alcohol. Ms. Burroughs was prescribed this medication on December 28 and she took it. On the 29<sup>th</sup>, one of the doctors seeing

her, Dr. Lavie, wrote in her chart that the medication should be "held". But she did not write an order to that effect. There is some controversy between counsel whether the medication in fact was stopped. The chart does seem to indicate that Ms. Burroughs received a dose at 12:05 on the 29<sup>th</sup>.

In any event, Nurse Johnson says that it is the obligation of nurses to confirm what the precise instructions are regarding medication. Here, she opines with a reasonable degree of nursing care, the nurses departed from the standard of care by withholding Klonopin solely on the basis of a doctor's note in the chart absent an order.

Additionally on the subject of Klonopin, as noted, plaintiff submits an affirmation from Dr. Stephen Marcus, an Orthopedic Surgeon. His entire statement deals with the plaintiff's past history and the function and benefits of Klonopin to Ms. Burroughs. His opinion is that the plaintiff's fall was preventable and further that her failure to receive the benefit of Klonopin was a substantial factor in the persistence of her delirium, which in turn increased her likelihood of falling. In this regard, Dr. Marcus speaks to the effectiveness of this drug in treating symptoms of alcohol withdrawal, which this doctor believes the plaintiff was experiencing. But if it is stopped, it loses its effectiveness.

As stated earlier, moving counsel submits a long Reply commenting adversely on virtually everything plaintiff's expert says. She argues that they are speculative opinions that make no sense. However, despite these accusations, I find that the plaintiff has sufficiently put into issue whether, if the Lenox Hill staff had done things differently to and for a patient in their care, Ms. Burroughs' fall could have been prevented. The defense says "No" but the plaintiff says "Yes". That is why we have trials. And that is why the motion by the Hospital for summary judgment is denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Jose A. Rodriguez, M.D., is granted and the Clerk is directed to sever all claims against that defendant and enter judgment dismissing them; and it is further

ORDERED that the motion for summary judgment by defendant Lisa Marie Patrick, M.D., is granted and the Clerk is directed to sever all claims against that defendant and enter judgment dismissing them; and it is further

ORDERED that the motion for summary judgment by defendant Lenox Hill Hospital is denied; and it is further

ORDERED that the plaintiff's cross-motion is granted and all remaining defendants in this action are precluded from asserting a CPLR Article 16 defense in connection with any acts or omissions by defendants Dr. Rodriguez and Dr. Patrick; and it is further

ORDERED that counsel for all remaining parties shall appear for a pre-trial conference on Wednesday, July 10, 2013 at 11:00 a.m. prepared to discuss settlement and select a trial date.

Dated: June 24, 2013

JUN 24 2013

**FILED**

*Alice Schlesinger*  
\_\_\_\_\_  
J.S.C.

JUN 27 2013

NEW YORK **ALICE SCHLESINGER**  
COUNTY CLERK'S OFFICE