

Edan v Johnson
2016 NY Slip Op 32587(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 805223/2012
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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BONNIE EDAN, as Executrix of the
Estate of LAWRENCE SAUL, deceased,

Plaintiff,

Index No. 805223/2012

Decision and Order

-against-

RUTH C. JOHNSON, M.D., MONIQUE GIRARD, M.D.,
HERCULES MEDICAL, P.C., KIRK GARRATT, M.D.,
DENNIS K. MILLER, M.D., AUDREY ROSINERG, M.D.,
and LENOX HILL HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

In this medical malpractice lawsuit defendants Monique Girard, M.D. (sequence four) and defendants Ruth Johnson, M.D. and Hercules Medical, P.C. (sequence five) move for summary judgment. Separate motions by defendants Drs. Garratt, Miller, and Lenox Hill Hospital (LHH) resulted in voluntary dismissals. For the reasons stated below, the pending motions are granted in part and denied in part.

Plaintiff Bonnie Edan is Executrix for her uncle Lawrence Saul. At the time of Laurence Saul's death, he had a history of diabetes, hypertension, hypercholesterolemia, and benign prostatic hypertrophy. In addition, he had a stent placed in his left anterior descending coronary artery in 2006. On April 3, 2010, the decedent presented to the emergency room at LHH and was diagnosed with an anterolateral ST elevation myocardial infarction. He was taken to the cardiac catheterization lab where he was found to have a 100% occlusion of the left anterior descending artery near the ostium of the stent. Efforts to restore sufficient blood flow through the occluded artery were not totally satisfactory. Mr. Saul was maintained in the hospital until his

transfer to a rehabilitation facility on July 31, 2010, but in less than a day he was hospitalized at New York Presbyterian Hospital. On August 17, 2010, he was transferred to LHH. He succumbed to an infection on October 22, 2010 without ever being released from the hospital.

The moving defendants were both employees of Hercules Medical, P.C. (Hercules). The decedent had been periodically treated by doctors at Hercules since 2005. Dr. Johnson, a board-certified internist, first saw Mr. Saul on November 15, 2007. At the time Mr. Saul was on a regimen of medications that included Plavix and aspirin. These medications were prescribed to prevent blood clots and were commonly used by post-stent patients. Dr. Monique Girard is a doctor of osteopathic medicine and board-certified in family medicine. She has been employed by Hercules since December 2008. She first treated Mr. Saul on January 30, 2009. Both doctors saw him at various times for various complaints including chest pains, which they concluded were secondary to costochondritis. He was last seen at Hercules on March 31, 2010.

In 2010, Mr. Saul was also under the care of a urologist, Dr. Salant, at Urological Medical Associates (UMA). Dr. Salant was planning to perform a transurethral resection of the prostate (TURP), a surgical procedure used to treat enlarged prostates. A note in the UMA records dated February 10, 2010, noted, "Will speak with cardiologist if safe to hold ASA and Plavix for one week." A second note, dated February 17, 2010, indicated Mr. Saul called to report "he was evaluated by cardiologist – ok to d/c [discontinue] ASA, Plavix for TUNA [transurethral needle ablation of the prostate]." Dr. Garratt, a cardiologist at LHH noted in LHH records of April 3, 2010, "patient had stopped ASA and Plavix for one week pending prostate surgery." Dr. Garratt

was the attending cardiologist at LHH who treated Mr. Saul in 2006 and 2010 while he was a patient at LHH.

Both defendants move for summary judgment arguing that defendants have not deviated from the standard of care. Plaintiff makes two allegations of medical malpractice in her bill of particulars. Plaintiff alleges that both doctors deviated from the standard of care by inappropriately stopping Plavix and aspirin prior to the prostate surgery and by the manner they treated the decedent's complaints of chest pain prior to April 3, 2010. The defendants deny they ever advised Mr. Saul to stop taking the medications. They allege that all treatment prior to April 3, 2010 was proper.

Both defendants present affirmations from experts supporting their motions. Dr. Girard's expert, Dr. Preston L. Winters, a board-certified internist and medical examiner, opines that there is no evidence that Dr. Girard told Mr. Saul to stop taking either Plavix or aspirin. Even if she did, that would not be a deviation from the standard of care. The expert opines that because Mr. Saul's stent was inserted three years prior to the anticipated date of surgery there is no deviation in stopping these anticoagulation medications before surgery. Dr. Winters goes on to say that the symptoms exhibited by Mr. Saul were properly treated by the defendants and no additional testing was required. Dr. Johnson and Hercules supported their motion with an affirmation by Dr. Howard D. Kolodny, a board-certified internist who, expressing similar opinions to Dr. Winters, concludes that if Mr. Saul stopped Plavix and aspirin it was not at the direction of Drs. Girard or Johnson but would have been at the direction of Dr. Salant at UMA or an unidentified cardiologist.

Moreover, he opines that there is no evidence that Mr. Saul ever told anyone at Hercules that he was scheduled to undergo a TURP. At best, the record reflects that the defendants were made aware of the possibility of such a procedure in the future. Dr. Kolodny also concurs in the opinion that all treatment given at Hercules was proper.

In opposition plaintiff offers the opinions of Dr. Bruce Decter, board-certified in cardiovascular disease and nuclear cardiology. It is his opinion that Dr. Johnson and Dr. Girard departed from the standard of care by failing to continue aspirin prior to Mr. Saul's prostate surgery. Without specifying which doctor was the one to advise Mr. Saul to discontinue, his opinion is based on the facts that the doctors at Hercules were managing his cardiac condition and that no one else was functioning as his cardiologist at the time or managing his anticoagulation. The expert's opinion is limited to the direction to stop taking aspirin. He agrees that stopping Plavix for Mr. Saul would not have been a departure. The expert offers no opinion on the cardiac care leading up to April 3, 2010.

In reply defendants rightfully assert that plaintiff has offered no opposition to dismissing the allegation of malpractice based on the general treatment of Mr. Saul prior to April 3, 2010. They restate their arguments as to the lack of any proof that either doctor directed Mr. Saul to discontinue aspirin or Plavix and state that the opinions that plaintiff offers on this issue are conclusory and mere speculation. Therefore, they argue, the opposition arguments of plaintiff are not sufficient to defeat defendants' prima facie entitlement to summary judgment.

To prevail on summary judgment in a medical malpractice case, a defendant must demonstrate that he or she did not depart from accepted standards of practice or that, even if he or she did, this did not proximately cause the patient's injury. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). The movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care. Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). Further, it must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). If the movant fails to make a prima facie showing, then the burden does not shift to the plaintiff. Makinen v. Torelli, 106 A.D.3d 782, 784 (2nd Dep't 2013). If the defendant does make a prima facie showing, on the other hand, the plaintiff must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit attesting the defendant departed from the accepted standard of care and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Summary judgment is improper where conflicting expert opinions exist. Elmes v. Yelon, 140 A.D.3d 1009, 1011 (2nd Dep't 2016). Instead, the conflicts must be resolved by the factfinder. See id.

Defendants have made a prima facie showing of entitlement to summary judgment dismissing the claims of malpractice for advising plaintiff-decedent to stop taking Plavix and aspirin and for failing to properly monitor and treat Mr. Saul's cardiac condition prior to April 3, 2010. In her opposition papers, plaintiff puts forward expert opinions only on the issue of Plavix and aspirin. By not offering any support for the claim that the defendants deviated from the

standard of care in the monitoring and treatment of Mr. Saul prior to April 3, plaintiff has abandoned the claim and it will be dismissed. Plaintiff's expert does offer an opinion as to the discontinuing of the Plavix and aspirin. While considering that discontinuing Plavix was not a departure, he concludes that one of the doctors at Hercules must have been the cardiologist that gave the instruction since they were the only physicians treating Mr. Saul during the relevant time. Therefore, the jury could conclude that the notations made by Drs. Salan and Garratt about Mr. Saul's cardiologist were references to the defendants. The jury would then have to determine if the defendants discontinued the aspirin and if they did whether this was a deviation and proximate cause of the decedent's injury. The evidence is at best circumstantial, but the references in the records of both Dr. Salant and Dr. Garratt are enough to defeat summary judgment since plaintiff's version of the facts must be accepted at this stage. Because this is a wrongful death case, the doctrine that plaintiff has a lesser standard of proof may apply. See Noseworthy v. City of New York, 298 N.Y. 76 (1948). But the Court need not reach that issue at this time. Therefore, it is

ORDERED that the motion is granted in part and denied in part; and it is further

ORDERED that the caption is amended to reflect the discontinuances in the prior motions, and the caption shall read:

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M.D.,

Defendants.

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Plaintiff is directed to file a copy of this order with the Motion and Trial Support Clerks, who are directed to amend the caption accordingly. The parties shall use the new caption in all future proceedings. Finally, the parties are directed to appear on February 7, 2017 in Part 6, at 9:30 a.m. to set a trial date.

Dated: Dec. 21, 2016

ENTER:



JOAN B. LOBIS, J.S.C.