

Gilbride v Fieldston Lodge Care Ctr.

2018 NY Slip Op 31526(U)

June 8, 2018

Supreme Court, Bronx County

Docket Number: 20950/11

Judge: Robert T. Johnson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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THOMAS GILBRIDE, Individually and as Administrator
of the Estate of UNSUK GILBRIDE,

Plaintiffs,

-against-

MEMORANDUM DECISION
Index No. 20950/11

FIELDSTON LODGE CARE CENTER, DR. DIMYAN
BALIKCIOGLU, DR. MELUMET K. ALBULAK,
“JOHN DOE” and “JANE DOE Nos. 1-41”,

Defendants.

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HON. ROBERT JOHNSON:

The following papers were considered on the motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion and annexed Exhibits and Affidavits.....	1
Answering Affidavits and Exhibits.....	2
Replying Affidavits.....	3

Defendant Dimyan Balikcioglu, M.D.’s (“the moving defendant” or “Dr. Balik”) motion seeking summary judgment is decided as follows.

Plaintiffs commenced this medical malpractice and wrongful death action on behalf of the estate of UnsuK Gilbride (“decedent”), alleging that defendants’ negligent care of the decedent failed to prevent her from disconnecting her tracheostomy tube while she was at the Fieldston Lodge Care Center (“Fieldston”) on May 13, 2010, causing her to suffer deprivation of oxygen and brain death.

Plaintiffs’ allegations specific to Dr. Balik are that (1) Dr. Balik failed to take precautions to prevent the decedent from pulling out her tracheostomy tube, such as writing orders for sedation, monitoring, and physical restraints; (2) Dr. Balik failed to timely re-insert the tracheostomy tube after it became disconnected; and (3) Dr. Balik improperly administered and treated the decedent with Haldol.

Dr. Balik argues that liability cannot be imputed to him for his failure to timely re-insert the decedent's breathing tube after it became disconnected on May 13, 2010 as it is undisputed that he was not present at Fieldston at the time of the incident and was not called until after the decedent was transferred to Montefiore Medical Center. Dr. Balik sets forth that, according to Fieldston policy, it was not his responsibility to reinsert the tracheostomy tube, as he was only responsible for the internal medicine care of the decedent. Moreover, Dr. Balik argues that the decedent was placed on a floor designated for ventilator patients; the ventilators had alarms to alert nurses and respiratory therapists if a tracheostomy tube was disconnected; and, significantly, it was the responsibility of the nurses and respiratory therapists on the floor to monitor the decedent to ensure that her tracheostomy tube was properly placed; to ensure that the decedent was breathing properly and not in distress; and to evaluate whether the decedent required additional monitoring based on their daily interaction with the decedent.

Dr. Balik further argues, with support from his expert, Dr. Cameron Hernandez, Board Certified in internal medicine and specialized in geriatric medicine, that the care rendered by Dr. Balik constituted proper and appropriate preventative measures relevant to the decedent's episodes of agitation and pulling on her tracheostomy tube. She concludes that Dr. Balik properly ordered medications previously prescribed, properly requested a psychiatric consult (with Dr. Chenthitta, a consultant psychiatrist) to evaluate the decedent's psychotropic medications, and timely followed the recommendations of Dr. Chenthitta with respect to administering Haldol for the decedent's agitation. Dr. Hernandez additionally concludes that the administration of Haldol was clearly monitored, and it was an appropriate medication to treat the decedent's agitation. Significantly, Dr. Hernandez finds that the use of physical restraints is discouraged in hospitals and nursing homes,

and used only as a last resort when alternative treatment fails. Dr. Hernandez believes that Dr. Balik properly refrained from ordering physical restraints.

Thus, Dr. Balik argues that the evidence and Dr. Hernandez's medical opinion demonstrate that Dr. Balik's care of the decedent was within the accepted standard of care and did not proximately cause the events on May 13, 2010 resulting in her death, and therefore, dismissal of this action as to Dr. Balik is warranted.

In opposition, plaintiffs argue that Dr. Balik departed from accepted standards of care in failing to order additional measures to insure that the decedent would be unable to pull out her tracheostomy tube. Plaintiffs' expert, Dr. Carol Anne Rupe, Board Certified in family practice, concludes that once Dr. Balik was aware that the decedent was at risk for pulling on the tracheostomy tube, Dr. Balik should have considered and implemented additional measures to stop the decedent from pulling the tracheostomy tube, including the prescription for restraints, increased supervision and monitoring. Dr. Balik's failure to consider and/or prescribe these additional measures was a departure from good and accepted medical practice.

Notably, Dr. Rupe also concluded that Fieldston was negligent and departed from good and accepted medical practice because Fieldston did not have and should have had an individual who was qualified to cannulate¹ a vent-dependant patient, who becomes de-cannulated, on all shifts and around the clock. Since the decedent was de-cannulated and the tracheostomy tube could not be reinserted by the respiratory therapist, the decedent suffered a cardiac arrest, lapsed into a coma and never recovered.

Dr. Balik replies by arguing that plaintiffs' opposition is insufficient to rebut his entitlement

¹Insert the tube.

to summary judgment. The one sentence where plaintiffs' expert opines that Dr. Balik was negligent for allegedly failing to order additional measures to insure that the decedent would be unable to pull out her tracheostomy tube, without any supporting data, is insufficient. He further sets forth that plaintiffs' expert does not address that federal and State Law restrict the use of restraints to those circumstances where less restrictive interventions have been tried and failed, and that there was no indication for restraints on the day in question.

The proponent of a motion for summary judgment 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, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action (*See Zuckerman v City of New York*, 49 NY2d at 562). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion (*See Lau v Margaret E. Pescatore Parking, Inc.*, 30 NY3d 1025 [2017]).

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the injuries alleged (*See Roques v Nobel*, 73 AD3d 204, 206 [1st Dept 2010]). To satisfy the burden, a defendant must present expert opinion that is supported by the facts

in the record, and that opinion must address the essential allegations in the bill of particulars (*Id.*). If the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Id.*).

The moving defendant made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint. The decedent's medical records and the moving defendant's expert's affirmation established both that there were no departures from the standard of care, and that the care and treatment rendered by Dr. Balik was not a proximate cause of the decedent's removal of her tracheotomy tube. The moving defendant's expert affirmation is detailed and predicated upon evidence within the record.

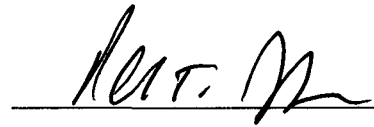
In opposition, plaintiffs have provided the expert affirmation of Dr. Rupe. However, plaintiffs' expert's opinion is conclusory and, therefore, does not raise a triable issue of fact (*See Zuckerman v. City of New York, et al.*, 49 NY2d 557 [1980]; *Oestreich v. Present*, 50 AD3d 522 [1st Dept 2008]). Plaintiffs' expert, without more, concluded that Dr. Balik was negligent in failing to order closer monitoring or restraints; that it was Dr. Balik's responsibility to make such orders; and that such orders were warranted or that they would have changed the events. Plaintiffs' expert did not attempt to refute defendant's expert's contention that the medical record does not indicate behavior warranting the ordering of any restraints that day. Moreover, plaintiffs' expert did not address that applying restraints in the absence of agitation is against federal and State law. Moreover, plaintiff's expert does not discuss the claim that Dr. Balik failed to re-insert the tracheostomy tube and that he improperly administered Haldol to the decedent.

Accordingly, it is hereby ORDERED that defendant Dimyan Balikcioglu, M.D.'s motion for summary judgment is GRANTED in its entirety, and all claims in this action are dismissed as against him; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of Dimyan Balikcioglu, M.D.

This constitutes the decision and order of the court.

Date: June 8, 2018

A handwritten signature in black ink, appearing to read "R. T. Johnson", is written over a horizontal line.

ROBERT T. JOHNSON, J.S.C.