Henry v Bezalel Rehabilitation & Nursing Ctr.
2020 NY Slip Op 30369(U)
February 3, 2020
Supreme Court, New York County
Docket Number: 805298/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

---------- X Index No.: 805298/14

MARLENE HENRY, as Administratrix of the Estate of LYNETTE ALLAN, Deceased,

Plaintiff,

-against-

,

BEZALEL REHABILITATION & NURSING CENTER, RAJBIR S. CHOPRA, M.D., ST JOHN'S EPISCOPAL HOSPITAL, JAMAICA HOSPITAL MEDICAL CENTER, NAGARAJ D. RAO, M.D., and JEFFREY C. CHAN, M.D.,

Defendants,

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JOAN A. MADDEN, J.:

In this action alleging medical malpractice and lack of informed consent, defendants Jamaica Hospital Medical Center ("Jamaica Hospital"), Nagaraj D. Rao, M.D. ("Dr. Rao") and Jeffrey Chan, M.D. ("Dr Chan'), move for summary judgment dismissing the complaint against them.[1] Plaintiff opposes the motion with respect to Jamaica Hospital and Dr. Rao but not as to Dr. Chan.

Background

This action involves allegations of negligence and malpractice in connection with the care and treatment of plaintiff's decedent Lynette Allan ("Mrs. Allan"), at Jamaica Hospital where she died on October 10, 2012 at the age of 74, due to complications from clostridium difficile colitis ("C. difficile"). Mrs. Allan underwent left knee replacement surgery at the Hospital for Joint

[1] Defendant St. John's Episcopal Hospital separately moved for summary judgment it (motion sequence no. 003), as did defendant Bezalel Rehabilitation & Nursing Center (motion sequence no. 004). There was no opposition to these motions, which were granted by separate order. Defendant Dr. Rajbir S. Chopra, M.D. did not move for summary judgment nor did he oppose the motions by the co-defendants.

Diseases on September 18, 2012, and was given Clindamycin, an antibiotic prior to surgery. On September 22, 2012, she was discharged to Woodmere Rehabilitation & Nursing Home for post-operative rehabilitation, and on September 25, 2012, she was transferred to Bezalel Rehabilitation & Nursing Center ("Bezalel") for further post-operative rehabilitation, where she was treated by Dr. Rajbir S. Chopra, M.D. ("Dr. Chopra"). On October 2, 2012, Mrs. Allan was transferred to St. John Episcopal Hospital ("St John's), at the order of Dr. Chopra. Dr. Chopra remained Mrs. Allan's treating physician at St. John's where she underwent treatment until October 5, 2012. On October 6, 2012, she was transferred back to Bezalel for continued rehabilitation care.

On October 7, 2012, Allan was transferred to Jamaica Hospital for a work up due to abdominal distension, abdominal pain, nausea, and vomiting. On October 10, 2012, she underwent an exploratory laparotomy which was performed at Jamaica Hospital by Dr. Sebastian Schubl and Dr. Chan, and was diagnosed with necrotic small bowel and colon. Later that day she died of complications of C. difficile, including small bowel ischemia.

In this action, plaintiff alleges, *inter alia*, that Jamaica Hospital and its employees, including Dr. Rio, departed from the applicable standard of care by failing to timely and properly diagnose Mrs. Allan with, and in failing to test for, C. difficile and by improperly delaying surgical treatment and that these departures caused and/or contributed to Mrs. Allan's complications, including the development of a small bowel obstruction, the need for a colectomy and exploratory laparotomy, sepsis, renal failure, coagulopathy and death.[2] Additionally, plaintiff

[2]Plaintiff also alleged in their Bill of Particulars various other departures, including the failure to properly treat Mrs. Allan's complaint of knee pain and surgical wounds, to pursue appropriate non-surgical treatments, the failure to administer necessary and proper antibiotics and

alleges that defendants failed to obtain informed consent to the procedures at Jamaica Hospital.

In support of its motion for summary judgment, Jamaica Hospital and Dr. Rao submit the expert affirmation of Henry Partridge, M.D., a physician licensed to practice medicine in the State of New York, who was board certified as a surgeon prior to his retirement in 2018. Dr. Partridge opines, upon review of the pleadings, Bills of Particulars, medical records deposition transcripts, within a reasonable degree of medical certainty, that the care Mrs. Allan received at Jamaica Hospital between October 7, 2012, and October 10, 2012, "was good and appropriate, and that there was nothing that was done or not done at Jamaica Hospital which caused or contributed to her alleged injuries [and that]... no delay in delay in treatment caused or contributed to her injuries." Specifically, he opines that 'by the time Ms. Allan's true condition could be diagnosed or treated, her death was unavoidable [and that]... the procedure done by Dr. Schubl and Dr. Chan at [Jamaica Hospital] were necessary to attempt to save the patient's life, therefore there would be no rational reason for consent to surgery to be withheld."

With regard to the care and treatment of Mrs. Allan as rendered by Dr. Rao, the Emergency Department attending physician at Jamaica Hospital who admitted her, Dr. Partridge opines that Dr. Rao's "assessment and care of Mrs. Allan was compliant with the standard of care" and that "[h]is differential diagnosis was consistent with her presentation and his work up to rule out an intestinal obstruction and possible diverticulitis was indicated." He also opines that "there was no reason to include C, difficile as part of the differential diagnosis at this point

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medications to treat her condition; undertaking counter-indicated procedures; and the failure to call in specialists. As plaintiff's expert does not opine as to these departures with respect to Jamaica Hospital or Dr. Rao, the court will consider these departures abandoned as against these defendants.

since the patient was constipated as opposed to having diarrhea which is a primary indicator of C. difficile colitis."

In addition, Dr. Partridge opines that after the initial work up was completed,

> Dr. Rao still had no reason to include Clostridium difficile colitis in the patient's differential diagnosis during the period of time he provided care to the patient in the ED [Emergency Department]. Clostridium difficile, often called C. difficile or C, diff., is a bacterium that can cause symptoms ranging from diarrhea to life-threatening inflammation of the colon. C. difficile most commonly affects older adults in hospitals or in long-term care facilities and typically occurs after use of antibiotic medications. The hallmark sign of C. difficile is multiple episodes of watery diarrhea. C. Difficile and diverticulitis have three common signs and symptoms: fever, leukocytosis and abdominal pain, all of which this patient had at the time of admission. The factor that distinguishes the two conditions is that a patient with diverticulitis usually presents with constipation while a patient with C. difficile colitis will present with diarrhea. This patient's history in the [Jamaica Hospital] record, which is consistent with the prior nursing home records, confirms the patient did not have diarrhea at all up until the point that Dr. Rao completed his treatment of the patient. To the contrary, the patient was constipated for several days (since October 3, 2012) prior to coming to [Jamaica Hospital]. Therefore, at the time of Dr. Rao's assessment of the patient, there was no reason to include C. difficile in his differential diagnosis.

As for the treatment at Jamaica Hospital generally, Dr. Partridge opines that "the decision to delay surgery until the patient stabilized was appropriate. The abdominal CT scan with contrast which was done while the plaintiff was still in the emergency department showed a partial small bowel obstruction, diffuse thickening of the descending sigmoid colon with adjacent fat stranding and fluid extending in the cul-de-sac, and the presence of pericecal fluid and abdominal ascites. These findings were suggestive of colitis, of an infectious, inflammatory or vascular etiology. An underlying neoplasm could not be excluded." He further opines "the patient needed to be stabilized and it was good medical judgment to address the partial

obstruction by inserting the Salem sump, a nasogastric tube, used to empty the stomach and small bowel above the obstruction [and]... to give the patient antibiotics and IC hydration [and that][u]nfortunately, the chart indicates that the patient pulled the tube out, preventing them from evacuating the fluid and thus delaying her stabilization [and that] [n]otes from the next day indicate that patient's condition was stabilizing before the episodes of diarrhea were noted."

He also opines that the C. difficile was timely and properly diagnosed and treated, and that at the time Mrs. Allan was admitted to Jamaica Hospital "she was not exhibiting symptoms that would indicate C. difficile. A typical presentation for C. difficile is diarrhea and abdominal discomfort, which can present as either bloating or pain, in a patient who has a history of prolonged antibiotic usage. However this patient had the opposite presentations she was constipated - which is contrary to the hallmark presentation for this condition." He states that "[t]he only way to diagnose C. difficile is by having laboratory testing done on stool samples to confirm the presence of the specific bacterial toxin. Therefore, not only was the patient's constipation inconsistent with the hallmark of symptom of C. difficile, diarrhea, but it also necessarily prevented her from producing stool to send to be tested for C. difficile. Therefore, in addition to testing not being indicated at this time, her constipation prevented a stool sample from being collected for testing."

He notes that as "[t]he records reflect that the patient did not develop diarrhea until October 9, 2012, the patient did not present with the signs of C. difficile due to her constipation, and therefore, testing was not indicated. A note entered on October 9th at 4:22 a.m. reflects two episodes of diarrhea. The assessment and plan at this point was properly updated to include orders for stool samples for testing for C. difficile. The chart reflects that upon the patient

presenting with diarrhea, orders were entered and appropriate samples were obtained and sent for testing in a timely manner. Furthermore, the same note reflects that the patient was immediately put on IV Flagyl to treat the suspected C. difficile. Flagyl is a common antibiotic used to treat C. difficile, and in my expert opinion, appropriately ordered and given. This was all done despite the fact that oral contrast given for the repeat abdominal CT scan the day before the loose stools can cause diarrhea by itself. Therefore, it is my opinion that C. difficile was timely and appropriately diagnosed and treated."

He also opines that "the exploratory laparatomy was timely and properly performed by Dr. Schubl on October 10 at 6:48 a.m. The procedure was indicated based upon the findings of the obstruction, inflammation, infection and failure to respond to non-operative management. Dr. Rao's note, at 6:00 a.m. that day, indicates surgical clearance was given at that time and the surgery was then performed."

As for causation, he opines with a reasonable degree of medical certainty that Mrs. Allan had already developed C. difficile when she was admitted to Jamaica Hospital and that the administration of antibiotics at Jamaica Hospital was not the cause of C. difficile. He also opines, however, that "since the patient presented with constipation as opposed to diarrhea, it is my opinion that C. difficile was properly not being primarily considered as part of the patient's differential diagnoses [and that]...there was no way to diagnose C. difficile until stool samples could be obtained, which was, at the earliest October 9." Dr. Partridge also opines that "this patient was appropriately treated and evaluated. None of the care and treatment provided by the defendants proximately caused the patient's claimed injuries, and her death was unavoidable given her condition prior to her presentation."

Plaintiff opposes the motion, and submits the affirmation of a physician licensed to practice medicine in New York State and New Jersey who is board certified in internal medicine and gastroenterology, whose identity is redacted. Plaintiff's expert opines, with a reasonable degree of medical certainty, that Jamaica Hospital "failed to provide timely and appropriate surgical intervention for Mrs. Allan on October 7, 2012 and/or October 8, 2012. By the time Mrs. Allan was admitted to Jamaica on the afternoon of October 7 she was suffering an infectious process that required surgical treatment on an urgent, stat basis." The expert states that "[s]he was more sick that she had been at Bezalel and St. John's and more urgently required appropriate medical treatment, which by this time required an exploratory laparotomy." The expert opines that "[t]he delay of appropriate surgery until October 10, 2012, made her suffering worse from October 7th until October 10th, and also caused her to lose any reasonable opportunity for survival." The expert notes that "[i]n the Jamaica Hospital chart, there is an entry on October 8, 2012 of a possible exploratory laparotomy for Mrs. Allan that afternoon, with c. diff. colitis included in the differential diagnosis [and that] the surgery was certainly medically necessary on October 8th, as well as on October 7th when her condition was also critical [but it]...was not conducted until October 10th, by which time it was too late."

With regard to Mrs. Allan's medical history, plaintiff's expert states that after Mrs. Allan was admitted to Jamaica Hospital on October 7, 2012, "she was found to have an elevated white blood count (the WBC count was 20, the sample collected on 10/07/12 was not reported back until 10/08/12) as well as abdominal distention and abdominal pain. In addition, she had a history of nausea and vomiting for 2 weeks. There was also a CT scan done at 4:19 am on October 8, 2012, which showed severe colitis of the recto-sigmoid and a distal bowel

obstruction." He opines that "[this] medical history and clinical presentation indicated that Mrs. Allan needed immediate exploratory surgery." The expert also opines that "the opinion of Jamaica [Hospital's] medical expert that because no stool sample was available on October 7th or October 8th to confirm the diagnoses of [C. difficile] surgery was not indicated before October 10th, is simply wrong (This was apparently recognized by some Jamaica personnel on October 8th, when the entry was made in the Jamaica record about a possible 'ex lap later in the afternoon.' This was, of course, before the availability of a stool sample, which was not obtained until October 9th)."

Plaintiff's expert further opines that "the opinion of Jamaica's medical expert that the patient had to be further 'stabilized' before surgery could be performed is also wrong. In fact, as the Jamaica [Hospital] record indicates the patient was hemo-dynamically stable. Moreover, by October 7th and October 8, Mrs. Allan presented a medical emergency that required an exploratory laparotomy even without confirmation of the c. diff. colitis diagnosis or further 'stabilization.' The delay in performing this surgery before October 10th, to -wit, on October 7th or October 8th, cost Mrs. Allan her life." As for causation, the expert opines that "[t] hese aforesaid departures by Jamaica from good medical practice caused and/or contributed to an overgrowth of bacterial resistant organisms in Mrs. Allan's intestinal tract, resulting in her prolonged suffering and finally her wrongful death at Jamaica [Hospital] on October 10, 2012."

Discussion

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 the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the Bill of Particulars. Id The expert opinion relied on by defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010). A defendant's expert opinion must also "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

In this case, Jamaica Hospital and Dr. Rao have met this burden based on the opinion of Dr. Partridge that in view of her symptoms upon admission at Jamaica Hospital, including the absence of diarrhea, Mrs. Allan was properly diagnosed and treated, that she needed to be stabilized before exploratory surgery was performed, and that her care and treatment at Jamaica Hospital was not a substantial factor in causing her injuries and death.

Accordingly, the burden shifts to plaintiffs "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact… General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical

malpractice, are insufficient to defeat defendant['s]... summary judgment motion." Id.

In addition, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dept 2007) (internal citations and quotations omitted). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002). On the other hand, "[t]he law is well settled that when competing experts present adequately supported but differing opinions on the propriety of the medical care, summary judgment is not proper." (See Rojas v. Palese, 94 AD3d 557 (1st Dept 2012).

Here, plaintiff has met this burden with respect to the medical malpractice claim, based on her expert's opinion that Mrs. Allan's condition upon admission to Jamaica Hospital including her elevated white blood count, abdominal distention and abdominal pain, the results of a CT scan, and a history of nausea and vomiting for 2 weeks, required that exploratory surgery be done earlier (by October 7th or 8th as opposed to October 10th) and that she did not need to be stabilized before such surgery. As for causation, plaintiff's expert also raises an issue of fact as to whether the delay in diagnosing Mrs. Allan's condition by performing the surgery caused and/or contributed to an overgrowth of bacterial resistant organisms in Mrs. Allan's intestinal tract, resulting in her prolonged suffering and her death. That said, however, as plaintiff's expert does not identify any specific departures by Dr. Rao, summary judgment must be granted in his favor.

As for the claim of lack of informed consent, "[l]ack of informed consent means the

failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (Public Health Law § 2805-d[1]. To prevail on a claim for lack of informed consent "it must ... be established that a a reasonably prudent person in the patient's position would not have undergone the treatment ... if [he] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought" (Public Health Law § 2805–d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003)(defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment").

Here, defendants have met these burden by submitting Jamaica Hospital's medical records showing that Mrs. Allan was counseled as to the risks, benefits and alternatives to surgery, and that she signed a consent form to the exploratory laparoscopy, possible laparotomy, and possible bowel resection on October 8, 2012 (Defendants' Motion, Exhibit L at 52, 259), and that consent was obtained from Mrs. Allan's daughter for a subsequent surgery performed under emergency conditions (Id at 21).

When the evidence is sufficient to meet defendants' burden, a plaintiff must demonstrate

that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). "Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan v. Pilnik, 15 NY3d at 908.

Here, plaintiff fails to point to any evidence supporting this claim and, in any event, cannot meet her burden as plaintiff's expert has not opined as to the sufficiency of the information provided to plaintiff in connection with obtaining consent.

Accordingly, the lack of informed consent claim must be dismissed.

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing (i) without opposition, the complaint and any cross claims against defendant Jeffrey C. Chan, M.D.,(ii) the complaint and any cross claims against defendant Nagaraj D. Rao, M.D.; and (iii) the lack of informed consent claim; and is otherwise denied; and it is further

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint and all cross claims against defendants Jeffrey C. Chan, M.D. and Nagaraj D. Rao, M.D.; and it is further

ORDERED that the caption as amended shall read as follows:

MARLENE HENRY, as Administratrix of the Estate of LYNETTE ALLAN, Deceased,

Index No. 805298/14

Plaintiff

-against-

RAJBIR S. CHOPRA, M.D.,
JAMAICA HOSPITAL MEDICAL CENTER,

Defendants.

and it is further

ORDERED, that within 15 days of the efiling of this order, defendant Jamaica Hospital Medical Center shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119) and the County Clerk (room 141B), who are directed to mark the court records to reflect the removal of defendants Jeffrey C. Chan, M.D and Nagaraj D. Rao, M.D. from the caption; and it is further

ORDERED that such service upon the General Clerk's Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/supctmanh); and it is further

ORDERED that the pre-trial conference scheduled for April 30, 2020 shall be advanced to March 26, 2020 at 10 am, and the parties shall appear at that time and date in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: February 3, 2020

J.S.C.
HON. JOAN A. MADDEN
J.S.C.