

**Gomez v Beaton**

2021 NY Slip Op 32221(U)

November 5, 2021

Supreme Court, New York County

Docket Number: Index No. 805455/2017

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. zKELLEY PART **56M****

*Justice*

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MODESTO GOMEZ, as Administrator of the Goods,  
Chattels, and Credits which were of MAGDA GOMEZ,  
deceased,

Plaintiff,

-v-

HOWARD BEATON, M.D., JAMES SMITH, M.D., MELANIE  
ONGCHIN, M.D., BENJAMIN SAMSTEIN, M.D., JENNIFER  
MURPHY, M.D., NEW YORK-PRESBYTERIAN/LOWER  
MANHATTAN HOSPITAL, and NEW YORK  
PRESBYTERIAN HOSPITAL,

Defendants.

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INDEX NO. 805455/2017

MOTION DATE 06/15/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 149, 150, 151 were read on this motion to/for JUDGMENT - SUMMARY

In this action to recover damages for medical malpractice and wrongful death, based upon departures from good and accepted medical care, lack of informed consent, and the evidentiary doctrine of res ipsa loquitur, the defendants James Smith, M.D., Melanie Ongchin, M.D., Benjamin Samstein, M.D., New York-Presbyterian Lower Manhattan Hospital, and New York Presbyterian Hospital (collectively the hospital defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. As set forth in an affirmation of the plaintiff's counsel, submitted in response to the motion, "[w]hile plaintiff generally denies those allegations contained" in the hospital defendants' Statement of Material Facts that are not in dispute (see 22 NYCRR 202.8-g), "as plaintiff is not opposing these defendants' motion for summary judgment," he waives the submission of a Statement of Material Facts that are in dispute and, in effect, consents to the award of summary judgment to the hospital defendants. The motion is thus granted.

The facts of this dispute are set forth in detail in this court's November 5, 2021 order granting in part and denying in part the motion of the defendant Howard Beaton, M.D., for summary judgment dismissing the complaint insofar as asserted against him (MOT SEQ 002). The gravamen of the complaint is that Beaton, in the course of performing an elective laparoscopic cholecystectomy upon the plaintiff's decedent at New York-Presbyterian Lower Manhattan Hospital, negligently clipped and transected her right hepatic artery and common bile duct, thereafter converted the laparoscopic procedure into a laparotomy, and called the defendants Smith and Ongchin to assist him to complete the procedure. After the completion of that procedure, the decedent was transferred to defendant New York Presbyterian/Weill Cornell Medical Center (Weill Cornell), where the defendant Samstein performed reconstructive surgery the next day. The decedent remained in Weill Cornell for four days thereafter, and was then discharged to her home. Five days after her discharge, the plaintiff died in an ambulance en route to a hospital as a consequence of post-surgical sepsis and concomitant heart and respiratory failure.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (see *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). A medical defendant

moving for summary judgment dismissing a cause of action based on lack of informed consent must show either that the person providing the professional treatment disclosed alternatives thereto and informed the patient of reasonably foreseeable risks associated with the treatment and those alternatives, or that a reasonably prudent patient in the same position would nonetheless have undergone the treatment even if not fully informed, or that the lack of informed consent was not proximate cause of the injury (*see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]; *Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]). A physician or hospital seeking summary judgment dismissing a malpractice claim based on the evidentiary doctrine of *res ipsa loquitur* must demonstrate that the actual or specific cause of an accident was known, or that the event was of a kind that could and does occur even in the absence of someone's negligence, or that the event was caused by an agency or instrumentality that was not within the exclusive control of the particular defendant, or that the event was due to a voluntary action or contribution on the part of the plaintiff (*see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

The hospital defendants established their *prima facie* entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) by submitting the expert affirmation of Daniel Herron, M.D., and the expert affidavit of David Mulligan, M.D., both of whom opined that none of the hospital defendants departed from good and accepted medical practice and that no act or omission of any of the hospital defendants caused or contributed to the decedent's injuries or death. They also opined that the decedent was provided with a complete explanation of the risks and benefits of the procedure, and that she expressly gave her informed consent. In addition, they concluded that the sequence of events that caused the decedent's injuries and death could indeed have occurred in the absence of negligence. The hospital defendants' expert opinion testimony was supported by the facts in the record, addressed the essential allegations in the complaint and the bill of particulars, and was detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at

206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). The expert affirmation and affidavit fully “explain[ed] ‘what defendant[s] did and why’” (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010], quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Thus, the opinion testimony satisfied the hospital defendants’ burden on this summary judgment motion.

Inasmuch as the plaintiff expressly declined to oppose the motion, he failed to raise a triable issue of fact in opposition to the hospital defendants’ prima facie showing. Hence, the hospital defendants must be awarded summary judgment dismissing the complaint insofar as asserted against them.

Accordingly, it is

ORDERED that the motion of the defendants James Smith, M.D., Melanie Ongchin, M.D., Benjamin Samstein, M.D., New York-Presbyterian Lower Manhattan Hospital, and New York Presbyterian Hospital for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants James Smith, M.D., Melanie Ongchin, M.D., Benjamin Samstein, M.D., New York-Presbyterian Lower Manhattan Hospital, and New York Presbyterian Hospital.

This constitutes the Decision and Order of the court.

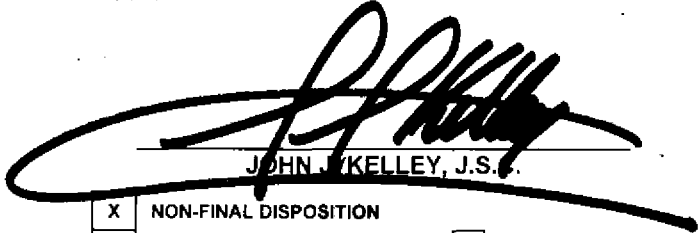
11/5/2021  
DATE

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
JOHN J. KELLEY, J.S.C.