D'Angelo v Kujawski
2021 NY Slip Op 33610(U)
January 14, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 620413-2016
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 620413-2016

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ROSE D'ANGELO, as Administrator of the Estate of NICHOLAS D'ANGELO,

Plaintiff,

-against-

MARK C. KUJAWSKI, THERESA D. PHIN and KUJAWSKI & KUJAWSKI,

Defendants.

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MOTION DATE:	10/15/19
SUBMITTED:	06/10/20
MOTION SEQ. NO.:	4 & 5
MOTION DEC.: 004	MD
005	MG

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff e-filed on September 12, 2019 and supporting papers; and (2) Notice of Cross-Motion by Defendants Mark C. Kujawski and Kujawski & Kujawski e-filed on February 21, 2020 and supporting papers; (3) Plaintiff's Affidavit/Affirmation in Reply e-filed on May 6, 2020 and supporting papers; and (4) Moving Defendants' Reply Affidavit/Affirmation e-filed on June 10, 2020 and supporting papers (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that plaintiff's motion (004) and the cross-motion by moving defendants (005) are hereby consolidated for purposes of this determination; and it is

ORDERED that the motion by plaintiff for an Order awarding her partial summary judgment with respect to the issue of liability, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the cross-motion by moving defendants Mark C. Kujawski and Kujawski & Kujawski (the Kujawski defendants) for an Order awarding them summary judgment dismissing the plaintiff's complaint as asserted against them, pursuant to CPLR 3212, is granted.

Plaintiff, Rose D'Angelo, as Administrator of the Estate of Nicholas A. D'Angelo, commenced this action with the filing of a summons and complaint on December 15, 2016 seeking damages arising out of the Kujawski defendants legal representation with respect to a medical malpractice and wrongful death claim brought on behalf of her son against the Northport Veterans Administration Medical Center, New York.[1] In her verified amended complaint Ms. D'Angelo claims the defendants failed to appreciate the significance of the medical records in their possession and they negligently failed to obtain proper medical review of the records before filing the notice of claim (*see* NYSCEF Doc. No. 39, ¶25). Plaintiff now moves for partial summary judgment on the issue of liability. In support of the motion plaintiff submits, among other things, copies of the pleadings, an affidavit from her medical expert, Dr. Donald H. Marks, M.D., Ph.D., a copy of her retainer agreement, several documents related to a Federal action including a Notice of Claim and information on certain medications which were administered to her son at the Northport Veterans Administration Medical Center (Northport VA).

The Kujawski defendants have cross-moved for summary judgment dismissing the complaint. In support of the cross-motion the moving defendants submit, among other things, copies of the pleadings, certain letters authored by defendant Mark C. Kujawski to the plaintiff and the Northport VA, Mark C. Kujawski's and Dr. Marks' deposition transcripts and the expert affirmations of Scott La Point, M.D. and Gregory Pape, M.D., FCCP.

In sum and substance, plaintiff alleges that her son Nicholas A. D'Angelo, deceased, suffered from poor medical management during his February 2010 admission to the Northport VA which ultimately resulted in his death. According to her medical expert, Dr. Marks, Mr. D'Angelo sustained a narcotic-type overdose caused by the medical personnel treating him which lead to respiratory arrest and his death on February 28, 2010. In addition Dr. Marks cites the absence of a "crash cart" for nineteen minutes from the onset of respiratory arrest as a contributing factor in Mr. D'Angelo's death.

Defendants claim that the Northport VA's administration of narcotics and other medications was not a deviation or departure from the medical standard of care and, as such, did not cause or contribute to Mr. D'Angelo's death. The Kujawski defendants claim the absence of a departure in the medical treatment of Mr. D'Angelo precludes plaintiff from prevailing in the legal malpractice claim. In addition, the Kujawski defendants argue that at the time of their representation of the plaintiff they had insufficient medical records to sufficiently assert a medical malpractice claim based on the alleged overdose of narcotic medications.

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 442, 835 NYS2d 534 [2007], quoting ***McCoy v Feinman***, 99 NY2d 295,

[1]Defendant Theresa D. Phin has not moved for summary judgement.

301–302, 755 NYS2d 693 [2002]). Furthermore, "to establish causation, a plaintiff must show that he or she would have prevailed in the underlying action...but for the lawyer's negligence" (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, *supra* at 442). "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" (***Schiff v Sallah Law Firm, P.C.***, 128 AD3d 668, 669, 7 NYS3d 587 [2d Dept 2015]; ***Tortura v Sullivan Papain Block McGrath & Cannavo, PC***, 21 AD3d 1082, 1083, 803 NYS2d 571 [2d Dept 2005]). Moreover, "[t]o obtain summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of its legal malpractice cause of action" (***Boone v Bender***, 74 AD3d 1111, 1113, 904 NYS2d 467 [2d Dept 2010], *lv denied* 16 NY3d 710, 922 NYS2d 272 [2011]; ***Boglia v Greenberg***, 63 AD3d 973, 974, 882 NYS2d 215 [2d Dept 2009]).

The basic facts of this case appear to be uncontested. On May 27, 2011 Plaintiff retained the Kujawski defendants to pursue a medical malpractice and wrongful death action against the United States Department of Veterans Affairs (DVA). Defendants obtained Letters of Administration for Ms. D'Angelo necessary to pursue her deceased son's claims. On July 29, 2011 and November 30, 2011, pursuant to the Federal Tort Claims Act, defendants submitted a claim and revised claim, respectively, to the DVA.

The initial claim was denied and the defendants asked for reconsideration. Thereafter, the DVA issued its Notice of Final Denial on July 23, 2013. On December 20, 2013 defendants wrote the plaintiff to inform her that they would no longer represent her and that to preserve her claim she would need to file a complaint against the United States on or before January 27, 2014 (*see* NYSCEF Doc. No. 15). The plaintiff *pro se* timely commenced the action. Some months later she retained new counsel who filed an amended complaint alleging, *inter alia*, the Northport VA committed medical malpractice in:

> ... negligently and improperly ordering and/or administering medication; in negligently and improperly ordering and/or administering contraindicated medications; in causing respiratory distress; in failing to timely and properly call a 'code;' in failing to timely and properly have a crash cart within Unit 33 of the hospital; in negligently and improperly delaying the commencement of a "code".... (*see* NYSCEF Doc. No. 46, p. 8).

In response to the amended pleading the DVA moved to dismiss the action alleging plaintiff failed to properly present the facts and circumstances of the alleged medical malpractice in the Notice of Claim which was prepared and filed by the Kujawski defendants. In the Federal District Court's November 16, 2016 decision dismissing plaintiff's complaint the Hon. Sandra J. Feuerstein, USDJ wrote:

> The Notice of Claim makes no reference to medication, or the

> negligent administration thereof, as being a contributing factor to decedents death... (*see* NYSCEF Doc. No. 47, pp. 8-9).

Plaintiff in this legal malpractice proceeding alleges that the defendants failed to have decedent's medical records properly reviewed and thereafter, failed to particularize in the Notice of Claim that the negligent administration of medication contributed to his death.

Plaintiff acknowledges that her son's full medical record was not made available until July 2015, but refers to the Federal District Court Opinion and Order which determined that sufficient information in the medical records was received by the plaintiff in March of 2010 to alert her to a claim of a medical departure arising from the administration of medications. The District Court noted in the Opinion and Order:

> However, on approximately March 4, 2010, Plaintiff received medical records from the DVA indicating, inter alia, that Zofran was administered on February 28, 2010, and that decedent was prescribed Fentanyl and Oxycodone. According to Plaintiff, "the excessive administration of Oxycodone, coupled with the administration of Fentanyl and Zofran created a synergistic effect that caused respiratory suppression/distress, and ultimately respiratory arrest. (*see* ***Id.***, at p. 9).

The District Court acknowledged plaintiff's claim that she was unaware of her son's alleged over medication until she received records in September 2014 which indicated that he was administered Narcan. The Court considered that issue in a foot note:

> Even accepting as true Plaintiff's argument that she was not aware of the specific medications Decedent received prior to his death, as the Notice of Claim makes no reference to medication being a contributing factor to Decedent's death, it still fails to satisfy the FTCA's presentment requirement. [Citation omitted] (*see* ***Id.***, at p.10).

Plaintiff quotes defendant Mark Kujawski's deposition at length as evidence of his failure to explore the issue of improper medication overdose. Mr. Kujawski stated that his law partner made preliminary contact with a doctor at National Medical Consultants. Mark Kujawski did not know if medical records were sent to the doctor in this case, although the law firm often sent records as requested. Mark Kujawski also testified that the claim was rejected by their doctor because he did not believe there was a departure in the applicable standard of care.

Mr. Kujawski admitted that the firm had two (2) Redweld-type folders full of Mr. D'Angelo's medical records and the Court can only presume that they included the records received by the plaintiff on March 4, 2010. Plaintiff has never claimed that the Kujawski defendants were

negligent in failing to obtain the entire medical record of her son. In fact, the party responsible for obtaining the records is never identified, although it may be inferred that the plaintiff herself was charged with this duty.

The Kujawski defendants assert that they had difficulty finding a medical expert to substantiate plaintiff's claims. Mark Kujawski sets forth the efforts undertaken with a medical consulting firm and the preliminary investigation that was conducted. As a result of that investigation the Kujawski defendants were advised that there were not any medical departures sufficient enough to send the case to a medical expert. It was only after the Kujawski defendants consulted with another doctor, who was already working with the firm on another case and who also failed to find any departures in care in this matter, that plaintiff was advised on December 20, 2013 of the outcome of their investigation and their inability to continue their representation of her claims.

Defendants claim that ultimately the DVA produced 3000 pages of medical records, but at the time the Notice of Claim was filed in 2011 the DVA had yet to provide a complete medical record. In fact, by the DVA's own admission, only 361 pages of Mr. D'Angelo's medical records were provided to the plaintiff. The critical medication administration records were not made available to the plaintiff until July 2015. The Kujawski defendants maintain that during their representation of the plaintiff they never received a complete medical record to consider an over-medication liability theory. Their argument is pinned to an understanding that plaintiff was to provide all the records and she was unable to obtain them.

Interspersed among plaintiff's exhibits are approximately ten pages of her son's medical records. Plaintiff has not produced copies of the medical records she allegedly gave to the defendants and which she claims they negligently failed to properly review for a medical departure in the care and treatment of her son.

In support of her legal malpractice claim the plaintiff submits a letter authored by Dr. Marks from Hoover, Alabama dated April 17, 2015 which is incorporated by reference into his affirmation dated September 5, 2019 (*see* NYSCEF Doc. No. 38). Taken together the document purports to set forth Dr. Marks medical opinion to a reasonable degree of medical certainty that plaintiff's son died because, *inter alia*:

> He developed respiratory suppression from excessive narcotic type medications, which led to respiratory suppression.

Dr. Marks noted that at the time he issued the letter he had not reviewed the complete medical records. Plaintiff argues that Dr. Marks' opinion as to the cause of the decedent's respiratory arrest, together with the Federal District Court's Opinion and Order, is sufficient to establish that, but for the Kujawski defendants' alleged malpractice, the plaintiff would have prevailed in the underlying medical malpractice/wrongful death case.

Plaintiff contends that at the time the Notice of Claim was prepared the Kujawski defendants

had sufficient medical records to have had a proper review performed which would have revealed that decedent died of a medication overdose administered by the Northport VA medical staff. Plaintiff alleges that the Kujawski defendants' departure from the legal standard of care resulted in the filing of a deficient Notice of Claim and dismissal of her claims in Federal Court.

Plaintiff further maintains that the issue of the Kujawski defendants' possession of medical information sufficient to assert an excessive administration of drugs as a medical departure in the Notice of Claim was already decided by the Federal District Court as set forth herein above, under the law of the case doctrine. In ***People v Maslowski***, (187 AD3d 1211, 133 NYS3d 278 [2nd Dept. 2020]) the appellate court stated:

> "Law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion, but does not restrict its authority" (*People v Cummings*, 31 NY3d 204, 208 [internal quotation marks omitted]; *see People v Evans*, 94 NY2d 499, 504). "To be sure, 'the law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case'" (*People v Cummings*, 31 NY3d at 208, quoting *People v Evans*, 94 NY2d at 504). The doctrine "'contemplates that the parties had a "full and fair" opportunity to litigate the initial *determination*'" and "serves as 'a concept regulating pre-judgment *rulings* made by courts of coordinate jurisdiction in a single litigation'" (*People v Bilsky*, 95 NY2d 172, 175, quoting *People v Evans*, 94 NY2d at 502, 503).

As can be plainly seen the defendants in this action were not a party to the Federal action and, therefore, had no opportunity to fully and fairly litigate the issue of their conduct in the review of plaintiff's medical malpractice claim. The doctrine of law of the case applies to legal determinations necessarily resolved on the merits in a prior decision involving the same questions presented *in the same case* (*see* ***PE-NC, LLC v. Gonzalez***, 172 AD3d 1394, 102 NYS3d 232 [2nd Dept. 2019]). (*Emphasis supplied*).

Lacking the ability to rely on the Federal District Court's decision to determine the issue of defendants' negligence, this Court conducted a review of the papers submitted to determine if plaintiff has met her *prima facie* burden for summary judgment. On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d

595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, the Court concludes, with respect to plaintiff's motion, that there remain issues of fact including, but not limited to, defendants' alleged negligence, what records the Kujawski defendants had in their possession and when they had the records, and the scope of defendants' duty to investigate the claim. These issues of fact preclude the granting of summary judgment to the plaintiff. That finding, however, does not end this Court's review and determination. Plaintiff's ability to prove the underlying medical malpractice claim must be considered within the context of the cross-motion.

The Kujawski defendants have cross-moved for summary judgment claiming that plaintiff cannot establish a legal malpractice claim because she cannot sufficiently demonstrate that she would have been successful in the underlying medical malpractice claim, but for defendants' alleged negligence.

As stated earlier, in a legal malpractice action plaintiff must first establish an attorney's failure to exercise ordinary reasonable skill and knowledge possessed by members of the legal profession. The attorney's negligence must also be the proximate cause of the damages. In ***Sang Seok NA v. Schietroma*** (172 AD3d 1263, 101 NYS3d 368 [2nd Dept. 2019]), the appellate court stated:

> To establish proximate causation, the plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the defendant attorney's negligence. [Citations omitted].

In support of their cross-motion for summary judgment defendants have submitted the affidavits of Gregory Pape, MD who is a diplomate of the American Board of Internal Medicine with a sub-certification in both Critical Care Medicine and Pulmonary Medicine and Scott LaPoint, MD who is a diplomate of the American Board of Pathology.

Dr. La Point asserts that the documents relied on by plaintiff's expert are insufficient to form an accurate opinion as to the cause of Mr. D'Angelo's death. The complete medical record shows that Mr. D'Angelo was administered the exact same dose and timing of his opiate medications as were administered for many years during his prior hospitalizations. In Dr. La Point's medical opinion the medications administered to the plaintiff's son (fentanyl, oxycodone and Zofran) did not cause or contribute to his death.

In a separate affidavit Dr. Pape concurs with Dr. La Point's expert opinion and also claims

that the alleged absence of a crash cart for the first 19 minutes of the respiratory code did not contribute to the patient's death. Dr. Pape concludes that no aspect of the patient's care by the Northport VA was a deviation from the medical standard of care, including the administration of opiates.

Dr. Pape further states that the deceased had a history of taking very high doses of opiates on a daily basis and that the hospital was correct in continuing the patient on these narcotics. He also states that when a patient arrests and has received narcotics it is common to administer Narcan in the event that narcotics are contributing to the adverse medical condition given that Narcan does no harm to such a patient. In addition, Dr. Pape dismisses the negligence claims based on the Northport VA's use of Zofran and the handling of the patient's code. He concludes that to a reasonable degree of medical certainty the patient did not die from a narcotic overdose, nor did Zofran cause or contribute to Mr. D'Angelo's death.

Plaintiff expert's opinion was first introduced in their motion for partial summary judgment. It is clear that the opinions expressed in the unsigned draft letter lack medical certainty due to Dr. Marks having incomplete medical records and the conditional nature of his declarations. While the Court accepts these statements as the expert's initial insight, they lack a sufficient evidentiary foundation to raise an issue of fact.

Plaintiff's expert affirmation which references the draft letter report contains general allegations of medical malpractice that are conclusory in nature and unsupported by competent evidence tending to establish the validity of the underlying medical malpractice claim. Dr. Marks' September 5, 2019 affirmation does nothing to cure the preliminary nature of his April 17, 2015, letter. At that time he still had insufficient records to form a medical opinion to a reasonable degree of medical certainty. In fact, the plaintiff has failed to demonstrate what records were reviewed by their expert or that they could form a basis for the medical opinion being asserted.

More to the point, Dr. Marks testified at his examination before trial on November 18, 2019 that he never received the complete medical records.

> A. ...But that in order to really go forward completely with the case, I needed a complete – in order to go forward with the case and give a complete report, I would need a complete set of medical records and that eventually, there would be other things involved such as depositions of the doctors and nurses involved in the case. But that I was able to give a preliminary report, which I did send him.
>
> Q. And a complete set of medical records that you never received. Correct?
>
> A. Yes.

(*see* NYSCEF Doc. No. 79, pp. 100 - 101).

The Court has been unable to discern any evidence that at anytime Dr. Marks had a complete medical record to rely upon when making his opinions or even a partial record that could be reasonably relied upon to make an informed medical opinion. Without an acceptable expert opinion plaintiff is unable to support her motion for summary judgment on liability. However, Dr. Marks offers a second opinion in opposition to defendants' motion for summary judgment which must be considered.

Dr. Marks opinion is augmented by both his deposition testimony and a further affirmation (*see* NYSCEF Doc. Nos. 79 and 98). In his affirmation Dr. Marks states that in or about March 2015 he received additional medical records that confirmed his January 2014 views as to the cause of Mr. D'Angelo's death and could provide plaintiff's attorney with an opinion to a reasonable degree of medical certainty. Dr. Marks also then identifies websites including "drugs.com and cdc.gov" as authoritative. He contradicts defendants experts as to their opinion that the use of Zofran was appropriate.

Defendants medical experts' joint affidavit concluded that Zofran alone or taken with fentanyl or oxycodone is not a respiratory suppressant/depressant and directly contradict Dr. Marks' statements. They also agree that Zofran is not contraindicated for patients taking fentanyl or oxycodone. Any ill effects of Zofran would have occurred approximately one-half to one hour after administration. Zofran was administered at 12:17 p.m., but Mr. D'Angelo did not arrest until almost three hours later.

Given the contradictory views raised by the experts it would appear that if the Court accepts Dr. Marks opinion as supported by the medical evidence, there would be an issue of fact which would preclude the granting of summary judgment to the defendant. Dr. Marks asserts in his reply affirmation that after receiving additional hospital records in or about March 2015 his medical opinion was confirmed. However, he has never reviewed the complete medical record. It is clear from his testimony and affidavits that Dr Marks never had a complete record upon which to base his opinion. In addition, Dr. Marks fails to outline what new medical records he reviewed and how these records supported his initial evaluation and removed the doubt raised in his own initial report. Considered cumulatively Dr. Marks' opinions are conclusory in nature and not supported by the available facts (*see* ***Jacob v Franklin Hospital Medical Center***, 2020 NY Slip Op 06506 [2nd Dept 2020]).

In light of this determination the Court finds that defendants herein are entitled to summary judgment (***Boone v Bender***, 74 AD3d 1111, 1113, 904 NYS2d 467 [2d Dept 2010], *lv denied* 16 NY3d 710, 922 NYS2d 272 [2011]) . The Court finds that the Kujawski defendants have satisfied their burden with respect to causation and plaintiff has not established an issue of fact sufficient to overcome this conclusion. Stated otherwise, plaintiff has failed to show that she would have prevailed in the underlying action but for the Kujawski's alleged malpractice (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 442, 835 NYS2d 534 [2007]).

Accordingly, the Kujawski defendants' motion for summary judgment is granted.

This constitutes the decision and Order of the Court.

Dated: January 14, 2021
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION