

Berke v Acharya

2023 NY Slip Op 33029(U)

August 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 511400/2018

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 30th day of August 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

BETTY M. BERKE, as Executor of the Estate of KENNETH L. BERKE, Deceased and BETTY M. BERKE, Individually,

Index No.: 511400/2018

Plaintiffs,

-against-

DECISION & ORDER

NIRAJ N. ACHARYA, M.D.,

Defendant.

The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Motion and Affidavits (Affirmations) Annexed And Exhibits.....	88-103
Answering Affidavit (Affirmation) and Exhibits.....	106-109
Reply Affidavit (Affirmation) and Exhibits.....	113
Stipulation of Adjournment.....	104-105; 110

In this action to recover damages for medical malpractice and lack of informed consent, plaintiffs alleged that, on May 2, 2017, defendant's failure to consider a gastrointestinal bleed in his differential diagnosis and to order a repeat

complete blood count (CBC) to be performed between 12:30PM and 10:30PM that same day delayed the decedent's blood transfusion and subsequently caused his cardiac arrests and death. Upon filing the note of issue, defendant moved for summary judgment dismissing the complaint. Plaintiff only opposed the medical malpractice branch of the motion. As a result, the lack of informed consent cause of action is dismissed.

The elements of a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. *See Templeton v. Papathomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022); *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). "When moving for summary judgment, a defendant . . . must establish the absence of any departure from good and accepted medical practice or that . . . plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). To sustain the burden, a defendant "must address and rebut any specific allegations of malpractice set forth in plaintiff's bill of particulars." *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017).

In opposition, a plaintiff must "raise a triable issue of fact regarding the element or elements on which [a] defendant has made its prima facie showing." *Aliosha v. Ostad*, 153 A.D.3d 591, 61 N.Y.S.3d 55 (2d Dept. 2017). To do so, a

plaintiff must submit the affidavit of “a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician’s opinion that the alleged departure was a competent producing cause of plaintiff’s injuries.”

Shectman v. Wilson, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). *See Burns v. Goyal*, 145 A.D.3d 952, 44 N.Y.S.3d 180 (2d Dept. 2016) (“Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.”).

Defendant’s expert affirmation was sufficient to establish prima facie entitlement to judgment as a matter of law. The expert opined that Brooklyn Methodist Hospital’s residents, nursing staff, and laboratory personnel provided suboptimal care to the decedent, which delayed the diagnosis of decedent’s GI bleeding and caused the first cardiac arrest. The expert asserted that the decedent did not have the clinical manifestations of a GI bleed on May 2, 2017, such as red blood in his stool or black, tarry stool. Nor did the decedent have red blood in his vomit or vomit that appeared like coffee grounds. The standard of care was to monitor the decedent and not transfuse unless his hemoglobin dropped below seven or there was evidence of severe, active bleeding, both of which decedent did not have. The decedent’s symptoms, such as nausea, vomiting, and jaundice, had other potential causes, including food allergies, viruses, food poisoning, medications, migraines, and more severe conditions such as appendicitis and

intestinal blockage. Thus, an upper GI bleed was very low on defendant's differential diagnosis, if at all.

In opposition, plaintiff's expert acknowledged that the hospital staff rendered substandard care to the decedent. Still, the expert asserted that defendant did not comport with good and accepted medical practice, which caused the decedent to suffer a delay in transfusing blood and cardiac arrest on May 3, 2017, and thereafter that exacerbated his cardiac condition, causing a subsequent cardiac arrest on May 18, 2017, and death on May 21, 2017. Specifically, the expert argued that the decedent's nausea and vomiting complaints were not isolated. These complaints and the decedent's abnormal CBC, namely, the abnormally low hemoglobin (HGB) of 10.2 g/dl, an abnormally low hematocrit (HCT) of 30.4%, and a low red blood count (RBC) of 3.2, indicated a possible bleed. Thus, defendant should have included gastric bleeding in the differential diagnosis and ordered an earlier CBC. As the parties have produced conflicting expert affirmations on the issue of medical malpractice, the matter must be submitted to a jury. *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022); see *Loaiza v. Lam*, 107 A.D.3d 951, 968 N.Y.S.2d 548 (2d Dept. 2013).

Accordingly, defendant's motion for summary judgment is granted only to the extent that the lack of informed consent branch of the motion is dismissed. Issues of fact exist as to the medical malpractice cause of action.

Plaintiff's counsel is directed to electronically serve a copy of this decision/order with notice of entry on the defendant's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

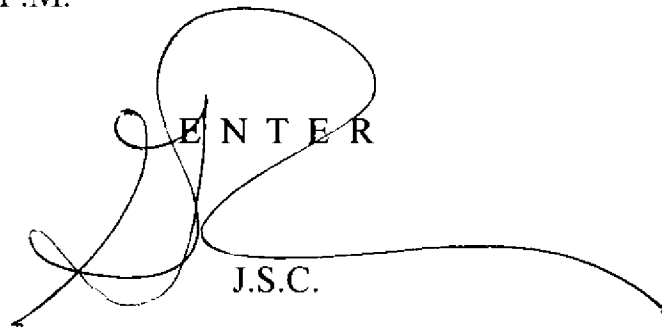
The parties and claim representatives shall appear for an Alternative Dispute Resolution conference on November 15, 2023, at 12P.M.

For Clerks use only

MG ___

MD ___

Motion Seq.#: 6



ENTER
J.S.C.

HON. GENINE D. EDWARDS