

Bray v Bellevue Hosp. Ctr.

2023 NY Slip Op 33150(U)

September 10, 2023

Supreme Court, New York County

Docket Number: Index No. 805170/2018

Judge: Erika M. Edwards

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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MAXINE BRAY, as Administrator of the Estate of JIMMIE L.
JOBE, Deceased,

Plaintiff,

INDEX NO. 805170/2018MOTION DATE 08/29/2022MOTION SEQ. NO. 001

- v -

BELLEVUE HOSPITAL CENTER and NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 121, 123, 128, 130, 134, 136, 138, 140, 142, 144, 146, 147, 148, 149, 157

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, the court grants in part Defendants Bellevue Hospital Center's ("Bellevue") and New York City Health and Hospitals Corporation's ("NYCHHC") (collectively "Defendants") motion for summary judgment dismissal of Plaintiff Maxine Bray, as Administrator of the Estate of Jimmie L. Jobe, Deceased's ("Plaintiff") Verified Complaint, to the extent that the court grants dismissal of Plaintiff's Second Cause of Action for negligent hiring and supervision and Third Cause of Action for lack of informed consent, but limits the scope of Plaintiff's First Cause of Action for medical malpractice and negligence claims by denying dismissal of such claims regarding Defendants' care and treatment of the Decedent from July 20, 2016, to May 3, 2018.

Plaintiff brought this action against Defendants, Mount Sinai Beth Israel ("Mt. Sinai"), NYU Langone Medical Center a/k/a NYU Hospital for Joint Disease ("NYU"), and Irene Loi, D.P.M. ("Dr. Loi") alleging medical malpractice, negligent hiring and supervision and lack of

informed consent related to their care and treatment of the Decedent. Plaintiff's Verified Complaint has since been discontinued against NYU and Dr. Loi and it was dismissed against Mt. Sinai. Subsequently, the court amended the caption to remove the names of the former defendants.

Plaintiff was a patient at Defendants' virology clinic for HIV management on a bi-weekly basis. He suffered from comorbidities, including HIV, Hepatitis and Kaposi's Sarcoma. He began complaining of pain and problems with his right great toe on March 30, 2015. Plaintiff alleges in substance that Defendants failed to timely and properly treat the Deceased Plaintiff's squamous cell carcinoma of his right great toe until it had metastasized, causing serious and prolonged pain, suffering and wrongful death. Plaintiff alleges in substance that Defendants failed to diagnose the deceased Plaintiff's cancer during their treatment of him in 2015 and 2016. As a result, he was forced to undergo several gradual amputations of his toe, foot, leg, and which ultimately resulted in his death.

Plaintiff further alleges in substance that Defendants failed to promptly and properly order or provide necessary tests, radiological screenings, treatments, surgeries or referrals to specialists when the cancer was at an earlier stage to afford the Decedent a more beneficial outcome. Plaintiff alleges in substance that Defendants should have conducted a biopsy of the Decedent's lesion and followed up with appropriate tests which would have diagnosed him with cancer sooner when their antibiotic treatments failed to resolve the condition. Additionally, Plaintiff alleges that Defendants failed to appreciate the significance of a nonhealing wound in an immunocompromised person with HIV and they administered improper chemotherapy. Plaintiff further alleges that all of these departures allowed the Decedent's cancer to worsen and spread, causing him prolonged suffering, multiple amputations and death.

Defendants now move under motion sequence 001 for dismissal of Plaintiff's Verified Complaint. Defendants rely on the expert opinions of Dr. Dominic Catanese, a podiatrist, and Dr. Glenn Hanna, an oncologist, and argue that there were no departures from good and accepted practice which were a substantial factor in causing or contributing to the Decedent's alleged injuries or death. Defendants further argue in substance that the Decedent treated at multiple facilities and failed to follow up with his referrals and appointments at Defendants' podiatry clinic on numerous occasions. Defendants argue that they had no opportunity to diagnose the Decedent's condition sooner and that they properly treated the Decedent at all times.

Defendants also argue that the Decedent's symptoms to his right great toe were alleviated by antibiotics. On May 24, 2016, the Decedent presented to the virology clinic and complained of pain to his right big toe, which had grown a new nail that had separated and was bleeding. He was prescribed anti-fungal medication.

He was next treated at the podiatry clinic on July 20, 2016, when his toe was hot, red, swollen and had subungual purulent drainage and a dystrophic toenail. Radiographic imaging revealed a hallux valgus deformity with soft tissue swelling, pes planus deformity, and degenerative arthrosis in his toe, but no osteomyelitis. He was diagnosed with a non-pressure ulcer of the skin on his toe and prescribed amoxicillin and tramadol. He was directed to have another radiographic imaging in two weeks, but Decedent failed to appear. However, on July 27, 2016, the Decedent returned to the podiatry clinic and there was no purulent drainage, erythema, swelling or pain upon palpation of the right big toe.

On September 9, 2016, while being treated at the virology clinic, the Decedent complained of pain and discharge from his right big toe since the night before, which led Defendants to believe it was a new condition. They prescribed the Decedent amoxicillin and

tramadol and instructed him to go to the podiatry clinic. On November 28, 2016, the virology clinic notes indicated that the onychomycosis was improving, there was no more active infection and that the Decedent follows with podiatry. The Decedent began treatment at Beth Israel Medical Center on March 1, 2017, for pain in his toe. His next toe-related treatment at Bellevue was on April 26, 2017, and April 27, 2017, for pre-operative clearance for a toe amputation at the request of Seaside Langone Orthopedics.

On May 1, 2017, after being treated at Beth Israel for weeks with long-term antibiotics, the Decedent had a partial toe amputation performed at NYU Langone by Dr. Loi because of concern for osteomyelitis and the Decedent's continued pain and discharge. Following the procedure, bone pathology of the amputated tissue indicated that there was no inflammation or osteomyelitis.

On June 26, 2017, an MRI at Beth Israel showed a lesion within the dermis and subcutaneous tissue of the distal first phalanx amputation stump and upon physical examination, there was a dehisced gangrenous wound with malodor. Additional studies of the Decedent's right foot on July 6, 2017, performed at Beth Israel showed no sign of osteomyelitis. On July 11, 2017, the Decedent had his right hallux amputated at Beth Israel and on July 18, 2017, the surgical pathology revealed a final diagnosis of Stage IV invasive squamous cell carcinoma.

The Decedent resumed treatment at Bellevue and Defendants' argue in substance that the Decedent gave informed consent for invasive, diagnostic, medical and surgical procedures, including additional amputations beginning on October 13, 2017, as well as immunotherapy and chemotherapy to treat the squamous cell carcinoma and improve his ambulation.

The Decedent's cancer spread and he began treating at Memorial Sloan Kettering Cancer Center on April 1, 2018. He was treated until May 22, 2018, but failed to return for follow-up

treatment. He returned to Beth Israel on May 27, 2018, where he was treated for right leg pain and increased drainage. The cancer had continued to spread, a tumor had invaded to his bone, and his right leg was amputated above the knee. The Decedent passed away at Beth Israel on November 18, 2018.

Defendants argue that Plaintiff's complaint should be dismissed because the Decedent failed to follow up with his appointments as instructed, he treated at multiple facilities, thereby preventing any continuity of treatment and Defendants' treatment of the Decedent was within the good and accepted standard of medical practice at all times.

Plaintiff does not oppose the portions of Defendants' motion seeking dismissal of Plaintiff's claims for negligent hiring and supervision and lack of informed consent. However, Plaintiff opposes the portion of Defendants' motion seeking dismissal of Plaintiff's medical malpractice and negligence claims in Count One of the complaint. Plaintiff relies on the opinions of Plaintiff's expert podiatrist and oncologist and argues in substance that Defendants failed to make a prima facie showing that they did not deviate from the accepted standards of medical practice and that material issues of fact remain to be tried.

Plaintiff argues in substance that on March 30, 2015, the Decedent first presented to Bellevue with complaints of a problem with his right great toe. There was discharge and he was presumed to have an infection and prescribed amoxicillin. Plaintiff further argues that the Decedent complained about his toe during his visits to the virology clinic on multiple occasions. On October 26, 2015, he had complaints of onychomycosis (fungal infection). On December 8, 2015, he visited the podiatry clinic where he was diagnosed with an ingrown toenail which was treated with a total nail avulsion. On December 16, 2015, there were no signs of infection, drainage, edema or purulence at the nail avulsion site.

Plaintiff further argues that on May 24, 2016, the Decedent was treated at the virology clinic with complaints of pain to his right great toe due to a chronic unhealed condition continuing from the past year. He was growing a new toenail that had separated from the nail bed and was bleeding. Again, it was presumed that he had an infection without conducting a bone biopsy or blood culture and he was prescribed antifungal medication.

Plaintiff further argues in substance that on July 19, 2016, the Decedent complained to the virology clinic of pain, serious drainage and malodor of his toe. He was told to soak his toe in an Epsom salt bath and to report to the podiatry clinic. On July 20, 2016, the Decedent was treated at the podiatry clinic for a red, hot, swollen right great toe with subungual purulent drainage and a dystrophic toenail. Imaging was performed and he was diagnosed with a non-pressure ulcer of the skin on his right great toe. He was presumed to have an infection without further workup.

On July 27, 2016, the Decedent returned to the podiatry clinic complaining of pain and drainage under his right hallux toenail for the past seven months, that the pain had been constant and that the toe had been red, hot and swollen for 1 ½ weeks. It was noted that he had subungual ulceration to his right hallux, with pain on palpation to the left distal hallux and nail border, and a dystrophic right hallux toenail. Again, only an infection was presumed without bone biopsy and/or MRI to consider neoplasm and he was prescribed Tramadol.

On September 9, 2016, the Decedent returned to the podiatry clinic with complaints of pain and discharge from his right great toe. Again, an infection was presumed and he was prescribed amoxicillin and tramadol without a bone biopsy or MRI.

Plaintiff argues in substance that on March 1, 2017, the Decedent began treatment at BIMC in the interim of his treatment at Bellevue. On April 24, 2017, he began treatment at

NYU, where the amputations began. On July 19, 2017, he was diagnosed with invasive squamous cell carcinoma, moderately differentiated, Stage IV, as the carcinoma had invaded the reticular dermis layer.

Plaintiff returned to Bellevue on October 13, 2017, where his treatment continued until May 3, 2018. He began treatment at Memorial Sloan Kettering Cancer Center on April 1, 2018, and he died at BIMC on November 18, 2018.

As such, Plaintiff argues in substance that issues of fact remain as to Defendants' deviations and proximate causation.

In reply, Defendants argue in substance that Plaintiff's experts failed to raise any triable issues of fact. Defendants further argue that Plaintiff's experts failed to refute many of Defendants' experts' opinions and that their opinions were conclusory and ignored several portions of the medical records.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish 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 Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the

defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here 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" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court dismisses Plaintiff's Second and Third Causes of Action for negligent hiring and supervision and lack of informed consent, respectively, as Plaintiff did not oppose these portions of Defendants' motion.

The court denies dismissal of Plaintiff's claims for medical malpractice and negligence, but limits the scope of such claims to Defendants' care and treatment of the Decedent beginning on July 20, 2016, when the Decedent returned to Bellevue's podiatry clinic with continuing problems with his right great toe after being prescribed antibiotics on multiple occasions, until his treatment at Bellevue ended on or about May 3, 2018.

The court finds that Defendants met their initial burden of establishing their entitlement to summary judgment dismissal of Plaintiff's complaint, but Plaintiff's experts raised several issues of material fact remaining to be tried. Such disputed issues of fact include, but are not necessarily limited to, whether Defendants departed from good and accepted standards of medical practice by failing to appreciate the Decedent's risk factors for, and signs and symptoms of squamous cell carcinoma, failing to perform appropriate clinical exams, failing to order the requisite imaging and procedure, including MRI and/or biopsy, and failing to refer the Decedent to an infectious disease and/or dermatology specialist to rule out cancer earlier. Additionally, the court finds that Plaintiff raised disputed issues of fact regarding whether such deviations from the standard of care proximately caused, exacerbated or contributed to the Decedent's injuries, death and diminished his chance of a better outcome if the cancer had been properly diagnosed and treated earlier.

However, the court finds that Plaintiff failed to raise material questions of fact based on admissible evidence as to any departures with Defendants' care and treatment of the Decedent prior to July 20, 2016, when he was treated for infections at Bellevue's podiatry and virology

clinics because it was reasonable for the providers to believe that the infections had healed with the antibiotic medications and there was a gap in the Decedent's complaints to the same toe at the podiatry clinic. However, once the Decedent returned to Bellevue's podiatry clinic on July 20, 2016, with similar and additional complaints to the same toe after a year of being treated, Plaintiff's experts opined in substance that further work up was necessary because the chronic infections were not resolved after multiple doses of antibiotics. Even though the Decedent failed to return for his appointment for an additional radiographic imaging, the court finds that Plaintiff raised disputed issues of fact as to whether there were departures in good and accepted standards of medical practice as of this date.

The court finds that Plaintiff failed to adequately refute Defendants' experts opinions regarding Defendants' treatment prior to July 20, 2016. Plaintiff's oncology expert agreed that the initial diagnosis of infection was reasonable. Additionally, the court declines to hold Bellevue's virology clinic to the same standard of medical practice as its podiatry clinic regarding treatment of the Decedent's toe conditions, particularly since the Decedent failed to follow up with the podiatry clinic as directed on numerous occasions. However, Plaintiff's experts successfully raised material issues of fact to be resolved by the trier of fact for Defendants' treatment of the Decedent beginning on July 20, 2016.

Therefore, the court dismisses Plaintiff's Second Cause of Action for negligent hiring and supervision and Third Cause of Action for lack of informed consent, but the court limits the scope of Plaintiff's First Cause of Action for medical malpractice and negligence claims and denies dismissal of such claims regarding Defendants' care and treatment of the Decedent from July 20, 2016, until May 3, 2018.

As such, it is hereby

ORDERED that the court grants in part Defendants Bellevue Hospital Center’s and New York City Health and Hospitals Corporation’s motion for summary judgment dismissal of Plaintiff Maxine Bray, as Administrator of the Estate of Jimmie L. Jobe, Deceased’s Verified Complaint, to the extent that the court grants dismissal of Plaintiff’s Second Cause of Action for negligent hiring and supervision and Third Cause of Action for lack of informed consent, but limits the scope of Plaintiff’s First Cause of Action for medical malpractice and negligence claims by denying dismissal of such claims regarding Defendants’ care and treatment of the Decedent from July 20, 2016, until May 3, 2018; and it is further

ORDERED that the court directs the parties to appear for a conference to discuss the status of the case, settlement and to set a trial date on October 12, 2023, at 9:30 a.m., in room #412, located at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.


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| <u>9/10/2023</u> | | | <u>ERIKA M. EDWARDS, J.S.C.</u> |
| DATE | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |