

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 8
NASSAU COUNTY

JUDITH J. MITTHAUER, the Executrix of the
Goods, Chattels and Credits of AUDREY C.
WERNER, Deceased,

Plaintiff(s),

-against-

STEWART FOX, M.D., SHAHRIYOUR ANDAZ,
M.D., CHRISTOPHER DEBRADY, M.D., and
SOUTH NASSAU COMMUNITIES HOSPITAL,
Defendant(s).

MOTION #001
INDEX#13199/2005
MOTION DATE:
January 4, 2008

The following papers read on this motion:

Notice of Motion.....	1
Answering Affidavits.....	2

Upon the foregoing papers, it is ordered that the defendant's motion pursuant to CPLR 3212 for summary judgment is determined as hereinafter set forth.

The plaintiff, on behalf of her deceased mother, commenced this action alleging medical malpractice on behalf of the defendant for negligent acts and/or omissions that took place during a surgical procedure performed on Audrey C. Werner and for wrongful termination of life support, by removing her from a ventilator, without proper consent.

In support of the motion for summary judgment the defendant maintains that the care and treatment rendered was in accordance with accepted standards of care. The defendant asserts that the alleged negligent acts by co-defendants Dr. Stewart Fox, Dr. Shahriyour Andaz, and Dr. Christopher Debrady during the surgical procedure performed on Ms. Werner were not properly directed to the defendant Hospital. In addition, the defendant maintains that Ms. Werner was lawfully removed from life support by the proper execution of a DNR in conjunction with evidence of the Ms. Werner's daughters' wishes to discontinue the life support. The defendant submits the Hospital's protocol with regard to the withdrawal of life-sustaining treatment to demonstrate that the Hospital complied with its stated procedures. The affirmation of Loren J.

Harris, a board certified cardiothoracic surgeon, has been submitted. The doctor opines that, after reviewing the investigation conducted by the New York State Department of Health, Office of Professional Medical Conduct and New York Public Health Law, the care and treatment rendered to Ms. Werner was consistent with good and accepted practice and that nothing the defendant did or failed to do resulted in wrongful withdrawal of life support of Ms. Werner.

Once the moving party has met its burden of entitlement to summary judgment, it is then incumbent upon the opponent to come forward with sufficient evidence to create an issue of fact. (*Ryan v Xuda*, 243 AD2d 457, 663 NYS2d 220 [2nd Dept., 1997]). Here, the defendant has met the burden and shifted the burden to the plaintiff (*Zuckerman v City of NY*, 49 NY2d 557, 427 NYS2d 595 [1980]).

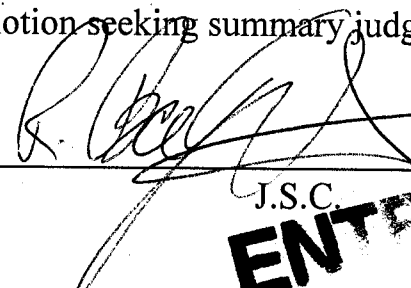
In opposition to the motion, the plaintiff Judith J. Mitthauer has submitted an affidavit indicating that she was neither properly informed of her mother's medical condition nor that removing her mother from life support would result in the termination of her mother's life. Further, the plaintiff claimed that the DNR form was not properly completed by herself or her siblings and therefore is null and void. The plaintiff offered no substantive opposition to the defendant's motion with regard to the alleged negligence that took place during the surgical procedure performed on Ms. Werner.

In the defendant's reply affirmation, the defendant introduces sworn witness testimony from the examination before trial of plaintiff, Judith J. Mitthauer and her two sisters Deborah E. Atria, Gay Stephanie Werner, indicating that the sisters were aware of Ms. Werner's grave prognosis and they, in fact, requested that the life-sustaining equipment be withdrawn from their mother. Also, the defendant submitted the testimony of two registered nurses Therese Silverman, R.N., and Jennifer Schwartz R.N. who interacted with the sisters and aided them in the process of removing Ms. Werner from life support.

In the instant matter, the Court finds, with regard to the surgical procedure performed on Ms. Werner that no question of fact is presented and on this issue summary judgment is granted. However, the plaintiff has presented evidence in admissible form to create a question of fact as to whether Ms. Werner was lawfully removed from the resuscitator.

As such, the branch of the defendant's motion seeking summary judgment is denied.

Dated: JAN 29 2008


J.S.C.
ENTERED
FEB 08 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE