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Lanzetta v Montefiore Med. Ctr.
2021 NY Slip Op 21026
Decided on February 16, 2021
Supreme Court, Bronx County
Higgitt, J.
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Decided on February 16, 2021

Supreme Court, Bronx County

Joseph Lanzetta, as Executor of the Estate of PASQUALE LANZETTA, Deceased, Plaintiff,

against

Montefiore Medical Center, ROBERT POTENZA, M.D., and HOWARD HOCHSTER M.D., Defendants.

27712/2019E

Gerald D. Grunsfeld, Esq., Lazar Grunsfeld Elnadav LLP, Brooklyn, NY, for plaintiff

Michael J. Morris, Esq., Garson & Jakub LLP, New York, NY, for defendant Hochster

Gregory M. Shapiro, Esq., Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains, NY, for defendants Montefiore Medical Center and Potenza

John R. Higgitt, J.

In this action, sounding in medical malpractice and negligence, plaintiff seeks to recover damages for the pain and suffering experienced by his decedent during the period of approximately 20 days that decedent lived after being administered certain life-sustaining medical treatment by defendants. Plaintiff asserts that the life-sustaining treatment was administered in contravention of both the terms of decedent's living will, and the directives of decedent's duly-appointed health care agent. Plaintiff's claim is, in effect, one for wrongful prolongation of life. Such a claim is neither cognizable under New York's common law nor recognized by statute. Thus, the moving defendant's motion for summary judgment must be granted.

Between March 17, 2017 and May 6, 2017, plaintiff's decedent, an elderly gentleman named Pasquale Lanzetta, received medical care and treatment at a hospital owned and operated by defendant Montefiore

Medical Center. Defendant Hochster was decedent's primary care physician, and Hochster provided care and treatment to decedent during that time period. Decedent died on May 6, 2017.

Plaintiff commenced this medical malpractice and negligence action against defendants, alleging that certain life-sustaining care and treatment defendants provided to decedent contravened both a living will he executed in 1993 and the directives of his duly-appointed health care agent. Specifically, plaintiff alleges that decedent's children were informed by defendants on April 15, 2017 that decedent's condition had deteriorated to the point that no recovery was possible and he would soon die; that the 1993 living will constrained defendants to provide only that care and treatment necessary to keep decedent comfortable, and withhold any life-sustaining treatment (e.g., intravenous hydration, antibiotics); that decedent's health care agent notified defendants on or about April 15, 2017 that, going forward, decedent should receive only care and treatment necessary to minimize his pain and discomfort; that defendants possessed copies of the 1993 living will and a 2016 health care proxy designating the health care [*2]agent to make decedent's health care decisions; that defendants nevertheless administered to decedent multiple doses of antibiotics and intravenous fluids; and that decedent's life was wrongfully prolonged for approximately 20 days as a result of the unauthorized measures taken by defendants, causing decedent to endure unnecessary pain and suffering.[FN1]

Defendant Hochster seeks summary judgment dismissing the complaint as against him and any cross claims against him. Although he

raises several grounds for summary judgment in his favor, only one need be addressed because it is dispositive: that plaintiff's claim sounds in "wrongful life" and therefore is not cognizable (*see* NYSCEF doc. no. 18, aff. in support of motion, at ¶¶ 28-31; NYSCEF doc. no. 42, reply, at ¶¶ 25-28).[FN2]

A "wrongful life" claim typically refers to a medical malpractice or negligence claim by a parent (or other guardian) on behalf of an impaired child based on the theory that the child would have been better off had he or she never come into being (*see B.F. v Reproductive Medicine Assocs. of New York, LLP*, 136 AD3d 73, 76 [1st Dept 2015], *affd* 30 NY3d 608 [2017]). A "wrongful life" claim is not cognizable in New York "because, as a matter of public policy, an infant born in an impaired state suffers no legally cognizable injury in being born compared to not having been born at all" (30 NY3d at 614). As the Court of Appeals stated in its seminal "wrongful life" decision, *Becker v Schwartz* (46 NY2d 401, 412 [1978]), "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make."[FN3]

In *Cronin v Jamaica Hosp. Med. Ctr.* (60 AD3d 803 [2009]), the Second Department concluded that a plaintiff's action for medical malpractice and negligence premised on the theory that the medical personnel of the defendant hospital wrongfully prolonged the plaintiff's decedent's life by resuscitating him twice in violation of do-not-resuscitate orders essentially sounded in "wrongful life." The *Cronin* Court stated that

the defendant, which had moved for summary judgment dismissing the complaint, made a prima facie showing of entitlement to judgment as a matter of law on the ground that the plaintiff's decedent had not sustained any legally cognizable injury as a result of the defendant's conduct, and that the plaintiff had failed to raise a triable issue of fact (*id*. at 804). Notably, the *Cronin* Court held that "the status of being alive does not constitute an injury in New York" (*id*., citing *Alquijay v St. Luke's-Roosevelt Hosp. Ctr.*, 63 NY2d 978, 979 [1984]; *Becker v Schwartz*, 46 NY2d at 412). The claim pursued by the plaintiff in *Cronin* has been characterized as one for wrongful prolongation of life (*see* Hodge, *Wrongful Prolongation of Life — A Cause of Action That May Have Finally Moved Into the Mainstream*, 37 Quinnipiac L. Rev. 167, 183-191 [2019]; Saitta & Hodge, *Wrongful [*3]Prolongation of Life — A Cause of Action That Has Not Gained Traction Even Though a Physician Has Disregarded a "Do Not Resuscitate" Order*, 30 Temp. J. Sci. Tech & Envtl. L. 221, 235 [Winter 2011]; 77 CJS Right to Die § 39).

Cronin, which is binding on this court (*see People v Turner*, 5 NY3d 476, 482 [2005]; *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-666 [2d Dept 1984]), compels the conclusion that plaintiff's decedent did not sustain a legally cognizable injury as a result of defendant Hochster's alleged failure to provide treatment in conformity with the directives in the 1993 living will and the directions of decedent's health care agent.

Plaintiff does not address *Cronin*; rather, plaintiff contends that defendant Hochster may be liable in tort under two statutes: Public Health

Law §§ 2982 and 2994-f.

Public Health Law § 2982 is part of article 29-C of the Public Health Law ("the health care agents and proxies act"), which governs health care agents and proxies (*see* Public Health Law §§ 2980-2994). Under the health care agents and proxies act, an adult (i.e., the principal) may execute a health care proxy designating an agent to make health care decisions for the principal should he or she lose the capacity to make those decisions him- or herself (*see* Public Health Law §§ 2981-2983). A health care provider who is provided with a health care proxy relating to a patient must place the proxy in the patient's medical record, and, subject to certain exceptions, comply in good faith with the health care decisions of the health care agent (*see* Public Health Law § 2984[1], [2], [3], [4], [5]).

The health care agents and proxies act does not expressly create a private right of action in favor of a principal (or his or her estate) against a health care provider for violating the statutory duty to comply in good faith with the health care decisions of the principal's health care agent. Therefore, plaintiff can seek damages based on a violation of the health care agents and proxies act only if a private right of action is fairly implied in the act or its legislative history (*see Cruz v TD Bank, N.A.*, 22 NY3d 61, 70 [2013]). The following three factors must be evaluated in gauging whether a private right of action is fairly implied from a statutory scheme: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a

right would be consistent with the legislative scheme" (*id*., quoting *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]).

Plaintiff satisfies the first two factors relevant in determining whether a private right of action is fairly implied in the health care agents and proxies act because plaintiff's decedent was one of the class for whose particular benefit the act was enacted — adults who wish to appoint health care agents to make health care decisions for those adults should they lose the capacity to make health care decisions (*see* Governor's approval mem., 1990 New York State Legislative Annual, at 364; mem. in support of Sen. Michael J. Tully, Jr., 1990 New York State Legislative Annual, at 361-363) — and recognition of a private right of action would arguably promote a legislative purpose of the act — ensuring that an adult's medical treatment wishes will be honored if he or she loses the capacity to make medical treatment decisions (*see* Governor's approval mem., 1990 New York State Legislative Annual, at 364; mem. in support of Sen. Michael J. Tully, Jr., 1990 New York State Legislative Annual, at 361-363). However, plaintiff does not satisfy the third factor, which is the most important in determining whether an implied right of action exists: whether creation of such a right would be consistent with the legislative scheme (*Cruz v TD Bank, N.A*., 22 NY3d at 70).

The health care agents and proxies act was rooted in research by and discussions of a task [*4]force that had been convened by then-Governor Mario M. Cuomo to study "the ethical and legal issues raised by the process by which medical care decisions are made in cases involving persons without decision-making capacity" (mem. in support of Sen.

Michael J. Tully, Jr., 1990 New York State Legislative Annual, at 362). The health care agents and proxies act, which was "based on th[e] [task force's] effort," was designed to accomplish the following goals: (1) protect and enhance the ability of competent adults to have their medical treatment wishes honored in the event that they lost their capacity to make medical treatment decisions; (2) provide guidance to patients, their families, and health care providers regarding health care proxies and their enforceability; and (3) establish important safeguards concerning the appointment of health care agents and the exercise of authority by them (*id*.; *see* Governor's approval mem., 1990 New York State Legislative Annual, at 364). Ultimately, the health care agents and proxies act "establish[ed] a process for the appointment of an agent, se[t] out the parameters of the agent's authority, and provide[d] standards for the exercise of that power" (mem. in support of Sen. Michael J. Tully, Jr., 1990 New York State Legislative Annual, at 363).

While the health care agents and proxies act "provides a whole range of procedural safeguards to ensure that the patient's rights and best interests are protected" (*id*.),[FN4] neither Senator Tully, who sponsored the act, nor the Governor suggested in their respective legislative memoranda that a damages action was an appropriate remedy for a health care provider's failure to honor a health care agent's directives, which failure prolonged a patient's life. Moreover, at the time the Legislature passed the act, the common law in New York provided that the status of being alive did not constitute an injury (*see Alquijay v St. Luke's-Roosevelt Hosp. Ctr*., 63 NY2d at 979; *Becker v Schwartz*, 46 NY2d at 412), and the Court of Appeals has cautioned against inferring a significant alteration to existing

law from legislative silence (*Cruz v TD Bank, N.A.*, 22 NY3d at 72). If the Legislature had intended to impose new liability on health care providers for failing to comply with the directives of health care agents, it would have provided so in the health care agents and proxies act (*see generally id.*).

Plaintiff's reliance on Public Health Law § 2994-f, which is part of the Family Health Care Decisions Act ("FHCDA") in article 29-CC of the Public Health Law, is misplaced. The FHCDA, which provides a procedure for the selection of a surrogate health care decisionmaker for a hospitalized individual who lacks the capacity to make his or her own treatment decisions, is inapplicable when, as here, the hospitalized individual has, by way of a duly-executed health [*5]care proxy, designated a health care agent (*see* Public Health Law § 2994-b[2] ["Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article [i.e., 29-CC], the attending practitioner shall make reasonable efforts to determine whether the patient has a health care agent appointed pursuant to article [29-C]. If so, health care decisions for the patient *shall be governed by such article*, and shall have priority over decisions by any other person except the patient or as otherwise provided in the health care proxy."] [emphasis added]).[FN5]

Ultimately, the right of a competent adult to have his or her medical treatment wishes honored in the event that he or she loses the capacity to make medical treatment decisions is important, and the law recognizes that right and provides substantial processes that allow a competent adult to exercise that right. New York law does not, however, recognize a cause of

action seeking damages for wrongful prolongation of life. Whether the law ought to do so under our common law is a matter for the appellate courts; whether it ought to do so by statute is a matter for the Legislature.

Accordingly, it is hereby

ORDERED, that defendant Hochster's motion seeking summary judgment is granted, and the complaint as against him and the cross claims against him are dismissed; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in defendant Hochster's favor dismissing the complaint as against him and the cross claims against him.

This constitutes the decision and order of the court.

Date: February 16, 2021

Bronx, New York

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John R. Higgitt , J.S.C.

Footnotes

Footnote 1: According to both the complaint and the bill of particulars with respect to defendant Hochster, had defendants followed the directives in the 1993 living will and the directions of the health care agent, decedent "almost certainly would have died by April 17, 2017."

Footnote 2: Although defendant Hochster's other arguments in support of his motion need not be reviewed, it must be noted that he disagrees with plaintiff's contention that he provided treatment to plaintiff's decedent that contravened a governing advanced directive.

Footnote 3: A parent (or other guardian) may sue to recover damages for "wrongful birth," i.e., "the increased financial obligation arising from the extraordinary medical treatment rendered [to an impaired] child during minority" (*Foote v Albany Med. Ctr. Hosp.*, 16 NY3d 211, 215 [2011] [internal quotation marks omitted]).

Footnote 4: The procedural safeguards highlighted by Senator Tully relate to the right of an individual to limit the scope of the authority of the health care agent (Public Health Law § 2982[1]); the requirement that the agent exercise his or her authority consistent with the principal's expressions of intent, and the principal's known values and preferences (Public Health Law § 2982[2]); the prohibition on certain persons likely to have a conflict of interest from serving as an agent (Public Health Law § 2981[3]); the requirement that the principal be determined to have lost the capacity to make health care decisions before the agent will be empowered to act on the principal's behalf (Public Health Law §§ 2982[4], 2983); the termination of the agent's authority upon the principal regaining capacity (Public Health Law § 2983[7]); the rights of the principal to object to the agent's decision, and revoke the health care proxy (Public Health Law §§ 2983[5], 2985); and the prohibition on health care providers and insurers requiring a health care proxy as a condition of providing treatment or insurance (Public Health Law § 2988).

Footnote 5: Public Health Law § 2994-f itself is clear that the statute's

application is limited to the realm of the FHCDA: "An attending practitioner informed of a decision to withdraw or withhold life-sustaining treatment made *pursuant to the standards of this article* [i.e., article 29-CC] shall record the decision in the patient's medical record, review the medical basis for the decision, and shall either: (a) implement the decision, or (b) promptly make his or her objection to the decision and the reasons for the objection known to the decision-maker, and either make all reasonable efforts to arrange for the transfer of the patient to another physician, nurse practitioner or physician assistant, if necessary, or promptly refer the matter to the ethics review committee" (emphasis added).

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