

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SANDRA DE LA CRUZ, Administratrix of the
Estate of ANDY HENRIQUEZ,

Plaintiff,

- against -

THE CITY OF NEW YORK, NYC DOCS C.O.
MIGUEL ACOSTA, NYC DOCS C.O. NICHOLAS
ALVAREZ, NYC DOCS C.O. WANDA ROSA,
NYC DOCS C.O. MAGALIE PEREZ, ROMMEL
MONTILUS, M.D., PA JOAN DOWNES, RPA
TREVOR GOLBOURNE, WIN MOUK &
CORIZON HEALTH, INC., MYOE MINN, M.D. &
JOON PARK, M.D.,

Defendants.

**AFFIRMATION IN
SUPPORT OF CITY'S
MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

13 CV 7391 (PAE) (HBP)

City file No. 2013-039447

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ANSHEL DAVID, an attorney admitted to practice in New York and before this Court and an Assistant Corporation Counsel of the City of New York, affirms the truth of the following under the penalties of perjury, upon information and belief based upon the records maintained in this office:

1. I submit this affirmation in support of the City defendants' motion for partial summary judgment dismissing the civil rights claims of deliberate indifference as against defendants Montilus, Downes, Golbourne, Mouk, Minn, and Park. This action arises out of the death by an aortic aneurysm of Andy Henriquez, a nineteen-year-old detainee at Rikers Island, while awaiting trial for felony murder. The foregoing defendants are medical personnel employed by defendant Corizon, a private entity under contract to provide medical services at Rikers Island. The evidence in this case demonstrates that certain of the defendants provided medical treatment or medication in response to decedent's requests; that none of the defendants

failed to address any medical complaint or request made to them by decedent; that none had actual knowledge before decedent's death of the medical condition which was the cause of death, and that none were aware of any complaints by decedent which would have indicated a serious cardiac condition. There is no evidence that any of the defendants engaged in the intentional denial of medical care or wanton infliction of pain necessary to support an allegation of deliberate indifference. See, Estelle v. Gamble, 429 U.S. 98, 104-05 (1976); Caiozzo v. Koreman, 581 F.3d 63, 72 (2nd Cir. 2009).

PROCEDURAL HISTORY

2. Plaintiff invokes federal question jurisdiction under 42 U.S.C. § 1331 in that their claims purport to be based on 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments to the United States Constitution. Following service of the original complaint, plaintiff served six amended complaints, adding additional defendants, but no new claims or factual allegations.¹ The City answered for Corizon and its employees who are named defendants, denying any misconduct alleged by plaintiff.² By order dated July 22, 2014, the Court set a briefing schedule for the instant motion.³

EVIDENCE PERTINENT TO THIS MOTION

Deposition of Plaintiff Sandra De La Cruz, held May 6, 2014. (Exhibit D)⁴

3. Sandra De la Cruz is the mother of the decedent Andy Henriquez (9). Ms. De la Cruz visited the decedent with decedent's girlfriend, Carmelita Rosa, on Saturday April 6,

¹ For the sake of brevity only the Fifth Amended Complaint is annexed as Exhibit A.

² The City defendants' Answer to the Fifth Amended Complaint is annexed as Exhibit B.

³ A copy of the briefing schedule is annexed as Exhibit C.

⁴ All page numbers in this section refer to Exhibit D.

2014. (17). Decedent appeared pale and to be in pain. He had difficulty walking and he would lay on the table and place his hand on his head and chest. He had difficulty speaking and breathing; his chest, legs and head hurt. (19). Decedent asked Ms. De la Cruz to call 311 to obtain medical assistance. (20). On their way home from the visit, Ms. Rosa called 311 to request medical assistance (21-22).

4. On Sunday April 7, 2014, at 4:36 pm, decedent called Ms. De la Cruz and told her that he had seen a doctor the night before (22), that he was told that the pain was caused by a twisted muscle (23), and that he was given medication. (23). Decedent told Ms. De La Cruz that he was feeling better. (34).

Deposition of Trevor Golbourne, held May 12, 2014. (Exhibit E) ⁵

5. On April 4, 2013, Trevor Golbourne was employed part-time by Corizon as a Registered Physician Assistant ("RPA"). (4-6). On April 4th Golbourne was called to the decedent's cell due to complaints of a cramping leg. Decedent had done 250 squats (8) (15). Golbourne was accompanied by LPN Mouk and an escort from the Department of Correction (13-14). Golbourne examined decedent in his cell (9,25) and concluded that he had full mobility in his joints and was moving with full strength (9). He walked Mr. Henriquez to a stretcher (9). He took decedent to the clinic according to Corizon protocol (9, 15-16). Decedent did not complain of chest pain (17-18). Golbourne reviewed decedent's electronic medical chart for information pertinent to decedent's medical complaints. (25). Golbourne prescribed Robaxin, a muscle relaxant, and advised Mr. Henriquez not overdo to exercise. (8-9, 28).

⁵ All page numbers in this section refer to Exhibit E.

6. After administering the muscle relaxer, Golbourne kept decedent in the clinic for an hour for observation. At the end of that time, the leg decedent left the clinic without any difficulty walking or complaints of pain. (9).

Deposition of Win Mouk, held May 12, 2014. (Exhibit F) ⁶

7. On April 4, 2013, Win Mouk was employed part-time by Corizon as a Licensed Practical Nurse.(4-6). In response to a medical emergency call, he went to decedent's cell with Golbourne and a correction officer. They transferred decedent to the clinic (20, 26). Decedent complained of diarrhea and weakness in his right leg. Goldbourne and Mouk prescribed medication and Mouk took Henriquez's vital signs and tested for blood in the urine, which was negative. Mouk continued to monitor Henriquez in clinic for an hour to an hour and a half. (26-28, 32).

Affidavit of Win Mouk, (Exhibit G)

8. Mouk was not aware at the time of his treatment of decedent that decedent was affected by an aortic dissection, aortic aneurysm, or any other cardiac condition. Mouk did not become aware that Mr. Henriquez may have been affected by an aortic dissection, aortic aneurysm, or any other cardiac condition at any time prior to his death on April 7, 2013.

9. Other than the requests for medical assistance which resulted in the aforementioned clinic visit on April 4, 2013, Mouk was not aware of any requests for medical assistance which may have been made by decedent, or by others on decedent's behalf, to Department of Correction personnel at any time prior to his death April 7, 2013.

Affirmation for Dr. Myoe Minn, Exhibit H.

⁶ All page numbers in this section refer to Exhibit F.

10. On April 6, 2013, Dr. Minn performed sick call rounds at the Otis Bantam Correctional Center at Rikers Island. Dr. Minn was not aware at any time prior to Mr. Henriquez's death that he was affected by an aortic dissection, aortic aneurysm, or any other condition affecting his heart or aorta. Other than the requests for medical assistance which resulted in Mr. Henriquez's clinic visit on April 6, 2013, Dr. Minn was not aware of any requests for medical assistance which may have been made by Mr. Henriquez or by others on Mr. Henriquez's behalf to Department of Correction personnel at any time prior to his death April 7, 2013.

Deposition of Joan Downes, held April 23, 2014. (Exhibit I) ⁷

11. Ms. Downes was employed by Corizon as a Physicians' Assistant. (7, 10-11). She was certified in Advanced Cardiac Life support. (12). On the night of April 6, 2013 she was under the supervision of Dr. Joon Park at the Otis Bantam Correctional Facility at Rikers Island. (27). Dr. Park directed Downes to examine decedent. (28). Henriquez's mother had called 311 to request a medical assistance for decedent. The request was transmitted to Dr. Park by the Department of Correction Operation Unit. (28). Henriquez told Downes he had requested medical assistance earlier in the day but was not having much pain at the time he met with Downes. He was feeling some discomfort in his chest. (34). Downes examined Henriquez and rendered a diagnosis of costochondritis. (38-39). Downes was not under a duty to consult with a medical doctor on her diagnosis. (50). She gave Henriquez a prescription for Naprosyn, a pain killer, and Robaxin, a muscle relaxant. (58-60).

12. Ms. Downes based her diagnosis of costochondritis on the history she took from decedent and on her physical examination of decedent.(39, 50). The history included

⁷ All page numbers in this section refer to Exhibit I.

information that decedent had been exercising recently (38). Decedent also advised Downes that the pain he was experiencing was not radiating, that he was not experiencing nausea or vomiting, and that he was not having difficulty breathing. (38). Decedent's pain increased when decedent moved. On physical examination, Ms. Downes found that there was tenderness in the intercostal spaces between ribs 3, 4, and 5. (39). Downes' finding that the tenderness was reproducible in an area of decedent's chest indicated to her that it was musculoskeletal pain rather than cardiac pain. Decedent did not appear to Downes to be uncomfortable. (43). Decedent indicated to Downes that he was not experiencing severe, stabbing chest pain as Downes would have expected to result from an aortic dissection. (43).

Affidavit of PA Joan Downes, Exhibit J.

13. P.A. Downes was not aware at any time prior to his death on April 7, 2013 that Mr. Henriquez was affected by an aortic dissection, aortic aneurysm, or any condition affecting his heart or aorta.

14. Other than the requests for medical assistance which resulted in the aforementioned clinic visit on April 6, 2013, P.A. Downes was not aware of any requests for medical assistance which may have been made by decedent or by others on decedent's behalf to Department of Correction personnel at any time prior to his death April 7, 2013.

Deposition of Dr. Joon Park, held June 18, 2014. (Exhibit K)⁸

15. Dr. Park is a licensed medical doctor with a specialty in family medicine. (5). He was employed by Corizon. (5). On April 6, 2013, he worked a 4:00 P.M. to midnight shift at Rikers Island. Just after the start of his tour, he received an email from Department of Correction Operations Unit requesting that he evaluate decedent. (7, 12-13,18). Park directed a

⁸ All page numbers in this section refer to Exhibit K.

Correction Officer to bring decedent to the clinic for evaluation. (7). Decedent was examined by Physicians' Assistant Joan Downes. (6). Under Corizon policy, Physicians' Assistants are allowed to make diagnoses, determine treatment, and write prescriptions without review by a medical doctor. (20-21). Toward the end of his tour, Dr. Park inquired if decedent had been examined. Downes told Park that she had examined decedent.(7, 26-27). Downes advised Park that Henriquez had typical chest pain. (27-28).

Affirmation of Dr. Park, (Exhibit L) ⁹

16. Dr. Park was not aware at any time prior to Mr. Henriquez's death that he was affected by an aortic dissection, aortic aneurysm, or any other condition affecting his heart or aorta. Other than the requests for medical assistance which resulted in Mr. Henriquez's clinic visit on April 6, 2013, Dr. Park was not aware of any requests for medical assistance which may have been made by decedent or by others on decedent's behalf to Department of Correction personnel at any time prior to his death April 7, 2013.

Deposition of Dr. Rommel Montilus, held April 23, 2014. (Exhibit M) ¹⁰

17. Dr. Montilus was a licensed medical doctor specializing in internal medicine. (7). He was an employee of Corizon. (14). On the morning of April 7, 2013, Dr. Montilus was assigned to make sick call rounds in punitive segregation area where decedent was housed. (26). The sick call round consists of visiting each cell in a housing area and inquiring of the inmate as to whether the inmate has any medical needs.(31). In the course of a typical sick call round, Dr. Montilus would see one hundred and fifty to two hundred inmates. (31). While making sick call rounds in the punitive segregation areas, Dr. Montilus carries a "bing sheet."

¹⁰ All page numbers in this section refer to Exhibit M.

The bing sheet is a dated list of inmates and cell numbers in a particular housing area. The bing sheet is provided to Dr. Montilus by Department of Correction personnel. (21-23). If the inmate indicates he has no medical issues, Dr. Montilus would enter an "ok" on the bing sheet. (42) If there is to be an entry in an inmate's electronic medical record, Dr. Montilus would note that on a separate sheet of paper. (42). The bing sheet used by Dr. Montilus on April 7, 2013 showed an inmate named Darnell Jackson in cell number "5" in the OBCC 2 South housing area. Dr. Montilus entered "RX" on the Bing sheet following Jackson's name, which indicated that Dr. Montilus intended to enter a prescription for Jackson. (44).¹¹ Dr. Minn made sick call rounds on April 6, 2013. (55). Dr. Montilus identified the bing round sheet for April 6, 2013, apparently signed by Dr. Minn, which incorrectly listed Darnell Jackson as the inmate in cell #5. There was an indication of "ok" for the inmate in cell #5.¹²

Affirmation of Dr. Montilus. (Exhibit P)¹³

18. Dr. Montilus was not aware at any time prior to Mr. Henriquez's death that he was affected by an aortic dissection, aortic aneurysm, or any other condition affecting his heart or aorta. Dr. Montilus was not aware of any requests for medical assistance which may have been made by Mr. Henriquez or by others on Mr. Henriquez's behalf to Department of Correction personnel at any time prior to his death April 7, 2013.

Transcript and Translation of Telephone Call from Andy Henriquez to Plaintiff and Carmelita Rosa, April 7, 2013. (Exhibit Q)¹⁴

¹¹ The bing round sheet for April 7, 2013 is annexed as Exhibit N.

¹² The bing round sheet for April 6, 2013 is annexed as Exhibit O.

¹⁴ All page numbers refer to Exhibit Q.

19. Sandra De la Cruz and her son Andy Henriquez greet each other (2). After they exchange greetings (2), Ms. De la Cruz tells Andy that he sounds better (2). He agrees (“Yeah”) says that he “went to the clinic” (2). She asks if they gave him the pump (2). He says they told him it wasn’t that, that they gave him a pill (2). She asks him what’s wrong, and he says that they say his chest muscles dislocated (3). She says that it’s the exercises, that his muscles are contracted, that he is pushing himself too much (3), and Andy agrees (“Yeah”) (3). She says how good it is that he feels better, and she is much calmer now, and he responds: “Yeah” (3). She asks him if he ate anything, and he responds that he doesn’t eat what they are serving, that he’s not going to eat, and that he has a biscuit and cornflakes stored away (3). She asks if they gave him pills for the pain, and he responds: “Yeah” (4). She asks if it is true that he can breathe better, and he confirms that it is so: “Yeah, yeah. Of course” (4). She says how good it is (that he can breathe better), that she is much calmer now, thank God (5). She says how good it is that he’s better, that she was very worried, and he agrees (“Yes, mom”) (5).

20. After they exchange greetings (6), Ms. Rosa asks how he is, and he responds that he is well, that it’s great there (6). She asks if he feels better, and he responds that they took him to the clinic yesterday (6). She asks what they told him, and he responds “nothing”, that they gave him pills and stuff for the pain (7). She asks him if he ate, and he says he doesn’t eat what they serve, and that he has a biscuit, cornflakes, and milk (8). He tells her that he really wants to masturbate, and that he is panicky because of his chest (11). She advises him not to masturbate in case he gets the pain again, and he says he has pills for the pain (11), and she says he is going to wind up doing it (12).

Deposition of Captain Winston Declet, held May 9, 2014 (Exhibit R)¹⁵

21. Upon transfer to the Otis Bantam Correctional Center on April 5, 2013, decedent was housed in cell # 5.

CLAIMS OF DELIBERATE INDIFFERENCE SHOULD BE DISMISSED FOR LACK OF EVIDENTIARY SUPPORT

22. As is set forth more fully in the City's Memorandum of Law, submitted herewith, a claim of deliberate indifference to a prisoner's medical needs must be supported by evidence that the defendant medical provider was actually aware of and disregarded a risk to health and safety arising from a serious medical condition. Caiozzo v. Koreman, 581 F.3d 63, 72 (2nd Cir. 2009). The Second Circuit has also recognized that the deliberate indifference standard incorporates a "shocking and callous disregard of the well-being" of the prisoner/victim. Arroyo v. Schaffer, 548 F.2d 47, 51 (1977); See, Nielsen v. Rabin, 746 F. 3d 58 (2nd Cir. 2014)(physician refused to treat inmate for painful broken collar bone and torn labrum because correction officers told her not to treat because the inmate had attacked a female officer).

23. Decisions of other Courts of Appeal illustrate the egregious departure from appropriate medical standards necessary to support a deliberate indifference claim. See, Arnett v. Webster et al., 658 F. 2d 742 (7th Cir. 2011) (rheumatoid arthritis medication withheld from inmate because not in prison's formulary); Roc v. Elyea et al., 631 F. 2d 843 (7th Cir. 2010) (prisoner denied hepatitis C treatment because prison's procedures only permitted treatment to prisoners serving sentences of at least two years); Loosier v. Unknown Medical Doctor, 2010 U.S. App. LEXIS 11040 (5th Cir. 2010) (doctor refused to provide treatment for broken neck due

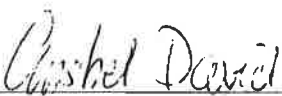
¹⁵ Page numbers refer to Exhibit R. Only pages 30-35 are attached. The entire transcript would be provided to the court upon request.

to plaintiff's status as prisoner); Hoelt v. Dr. Menos et al., 2009 U.S. App. LEXIS 18787 (7th Cir. 2009) (prisoner's serious dental needs not treated because patients had to seen in order in clinic).

24. In the instant case, there is no evidence of conduct which rises to the level of deliberate indifference. There is no evidence that any of the Corizon defendants were aware of decedent's aneurysm condition or of the chest pain and difficulty breathing that resulted from it. There is no evidence that any of the defendants did not believe their medical judgments to be within the applicable standard of care or did not believe their actions to be in accord with applicable Corizon protocols. Under Caiozzo, supra, and subsequent Second Circuit decisions, defendants' good faith belief in the propriety of their actions disposes of plaintiff's claims under 42 U.S.C. §1983.

WHEREFORE, the City respectfully requests that this motion be granted in all respects together with such other and further relief as the Court shall deem just and proper.

Dated: New York, New York
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