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SHORT FORM ORDER

COPY

INDEX No. 09-3787
CAL No. 11-02547MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 2-24-12 (#020 & #021)
MOTION DATE 3-30-12 (#022)
MOTION DATE 4-30-12 (#023, #024 & #025)
ADJ. DATE 7-20-12
Mot. Seq. # 020 - MG # 023 - MG
021- MG # 024 - MG
022 - MG # 025 - MG

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KATHY FORTUNE, as Administratrix of the Estate of BOBIE JOLIENE FORTUNE, decedent,

Plaintiff,

- against -

GOOD SAMARITAN HOSPITAL, JOAN MARIE KENNEDY, N.P., ADHI SHARMA, M.D., BRIANNA VITE, P.A., SARA TREGERMAN, M.D., NORMAN CRUZ, N.P., GREGG M. SZERLIP, D.O., ALICE CAMACHO, M.D., LONG ISLAND MEDICAL ASSOCIATES, INC., CVS PHARMACY, INC.,

Defendants.

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Upon the following papers numbered 1 to 96 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (020) 1-16 ; Notice of Cross Motion and supporting papers (021) 17-28; (022) 29-43; (023) 44-56;(024) 57-70; (025) 71-87; Answering Affidavits and supporting papers 88-91; Replying Affidavits and supporting papers 92-94; 95-96 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (020) by the defendant, CVS ALBANY, L.L.C. s/h/a CVS Pharmacy, Inc. and CVS Albany, L.L.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against it is granted with prejudice; and it is further

ORDERED that motion (021) by the defendant, Alicia U. Camacho, M.D. s/h/a Alice Camacho, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against her is granted with prejudice; and it is further

ORDERED that motion (022) by the defendant, Long Island Medical Associates, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against it on the issue of vicarious liability as to defendant Alicia U. Camacho, M.D. is granted with prejudice; and it is further

ORDERED that motion (023) by the defendant, Adhi Sharma, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted with prejudice; and it is further

ORDERED that motion (024) by the defendant, Long Island Medical Associates, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims as asserted against on the basis that it is not vicariously liable for the acts of Gregory M. Szerlip s/h/a Gregg M. Szerlip, D.O., and that there are no independent claims, or any theory of negligence, as to Long Island Medical Associates, is granted with prejudice; and it is further

ORDERED that motion (025) by the defendant, Gregory M. Szerlip, D.O. s/h/a Gregg M. Szerlip, D.O., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against him is granted with prejudice.

In this medical malpractice action, the plaintiff, Kathy Fortune, as Administratrix of the Estate of Bobie Joliene Fortune, decedent, alleges that the defendants negligently departed from good and accepted standards of medical care and treatment of plaintiff's decedent, causing her to suffer drug toxicity resulting in her death on August 3, 2007. It is further alleged that the defendants failed to inform the decedent of the risks and benefits concerning the medications prescribed to her. A derivative claim has also been asserted by the plaintiff.

It is undisputed that the decedent, Bobie Joliene Fortune, was an 18 year old female who worked as a waitress and was a part time college student. She died as a result of a drug overdose, be it intentional or accidental. The decedent was taking multiple drugs prescribed by multiple physicians. The toxicology report indicated that her body contained Metaxalone (Skelaxin), a non-narcotic pain medication; Cyclobenzaprine (Flexeril) a non-narcotic medicine for muscle spasm and pain; Duloxetine (Cymbalta), an antidepressant; Diphenhydramine (Benadryl), an antihistamine; Salicylate (Aspirin); and THC (Marijhuana) metabolites. Skelaxin was prescribed by Dr. Camacho on July 20, 2007. Cymbalta was prescribed in December 2006 by defendant Dr. Szerlip, who then prescribed it again four months later in increasing doses through July 12, 2007. On August 2, 2007, Dr. Szerlip ordered Cymblata and prescribed Skelaxin. On July 30, 2007, Dr. Tregerman prescribed Flexeril at an emergency room visit at Good Samaritan Hospital. On August 2, 2007, Dr. Szerlip

increased the dosage of Cymbalta.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Counsel for the plaintiff affirms that a Stipulation of Discontinuance as to defendants Adhi Sharma, M.D. Alice Camacho, M.D., and CVS Pharmacy and CVS Albany, L.L.C. has been provided. A copy of that Stipulation has not been provided to this court, however, none of the defendants have opposed their co-defendant's respective motions or the Stipulation of Discontinuance.

Accordingly, motion (020) by the defendants CVS Albany L.L.C. s/h/a CVS Pharmacy, Inc. and CVS Albany, L.L.C.; motion (021) by the defendant, Alicia U. Camacho, M.D.; and motion (023) by the defendant, Adhi Sharma, M.D., are granted and the complaint and any cross claims asserted against each are dismissed with prejudice.

In motion (022), Long Island Medical Associates, Inc., seeks dismissal of the complaint as asserted against it on the basis that it is not vicariously liable for any alleged negligence by co-defendant Alicia U. Camacho, M.D. The record supports that Dr. Camacho was licensed to practice medicine in New York State, and that she has been employed by Long Island Medical Associates since 2000, and worked with her colleague, Gregg Szerlip, M.D. The plaintiff does not oppose this application by Long Island Medical Associates, and has stipulated to dismiss the action against Dr. Camacho.

Accordingly, motion (022) by Long Island Medical Associates, Inc. is granted and the complaint and any cross claims asserted against it on the issue of vicarious liability as to defendant Alicia U. Camacho, M.D. are dismissed with prejudice.

Turning to motion (024), the defendant, Long Island Medical Associates, Inc., seeks summary judgment dismissing the complaint and any cross claims as asserted against it on the basis that it is not vicariously liable for the acts of Gregory M. Szerlip, and that there are no independent claims, or any theory of negligence, as to Long Island Medical Associates. In motion (025), defendant Gregory M. Szerlip, D.O. seeks summary judgment dismissing the complaint on the bases that he did not depart from good and accepted standards of medical care and treatment and did not proximately cause any injury to the decedent or her death.

Dr. Szerlip submitted a supporting affidavit wherein he averred that he is a physician licensed to practice medicine in New York State, specializing in anesthesiology and pain management, and that he is board certified in pain management. He set forth his educational background, training and work experience. He opined within a reasonable degree of medical certainty that he did not depart from good and accepted standards of medical practice in his care and treatment of Bobie Joliene Fortune, and that there is nothing that he did or did not do which caused her injury or death.

Dr. Szerlip described the various medications being used by the decedent, including Celebrex, Cymbalta, Flexeril, and Skelaxin. He initially evaluated the decedent on November 13, 2006, when she presented with lower back, right hip, and right knee pain for over two months, which pain she was self-treating with 6 to 8 Tylenol per day, as well as 2 to 3 Aleve pills every couple of hours, without relief. Dr. Szerlip stated that the decedent had some difficulty getting onto the examining table, and during physical examination, he noted that she had multiple right lumbar paravertebral muscle spasms. He ordered a lumbar MRI. He diagnosed her with right hip and knee pain, and ruled out lumbosacral radiculopathy; right lumbar paraspinal muscle spasms; lumbago, ruled out lumbar disc displacement; and possible depression with somatization. As a pain management physician, it is within his ability to treat the depression as well. He prescribed Celebrex 200 mg, two pills the first day, and one pill thereafter every day. The MRI was performed on November 29, 2006 and was negative. An MRI of her right knee demonstrated mild degenerative changes of the posterior horn of the medical meniscus.

Dr. Szerlip continued that when the decedent returned on December 4, 2006 for follow-up care, she advised him that the Celebrex was effective in reducing her pain, but she appeared to be mildly depressed. He continued the Celebrex and ordered Cymbalta 20 mg. daily, with no refills, to address her nerve pain, with the additional benefit of helping her mild depression. Dr. Szerlip stated that there is no known toxic reaction or deadly interaction between taking Cymbalta, as prescribed, with Celebrex, as prescribed. Although instructed to return in three weeks, she returned in four months on April 19, 2007. She advised him that she stopped taking the Cymbalta as it did not help with the pain. Due to the delay in her return visit, he started treatment over again, obtaining a new baseline with regard to the dosage and frequency of the medications he was prescribing.

Cymbalta 30 mg was prescribed as the 20 mg did not help. Since Cymbalta can be prescribed up to 120 mg daily, this increase in dosage, he stated, did not create a risk of a toxic reaction or deadly result to the patient. She was instructed to return in three weeks, and presented on April 30, 2007, advising that the Cymbalta was helping her pain. She was continued on the Cymbalta 30 mg, with no refills, and was instructed to return in one month.

When Dr. Szerlip saw her on May 31, 2007, her medication was continued after evaluation. On July 12, 2007, she advised him that her right knee pain is "great" and that she was performing wrestling, which she was advised by him not to participate in, but she refused. Therefore, he increased Cymbalta to two 30 mg per day, anticipating increased pain due to the wrestling. He continued that good practice provides that the drug dosage be increased slowly. He added that she advised him that she had been seen at Good Samaritan emergency department for torticollis of the neck on July 9, 2007. He stated that if she had obtained a prescription from another health care provider, he would have noted it in her record. He instructed her to return in four weeks, and next evaluated her on August 2, 2007, and learned from her chart that she presented to Long Island Medical Associates, Inc. on July 21, 2007 with complaints of lower back pain, and muscle spasm, as well as significant neck pain. When he reviewed the chart note for that date, it indicated that the only current medication was Cymbalta 30 mg., and that she was prescribed Skelaxin (a muscle relaxer used to relieve muscle spasms and pain) 800 mg. daily. Dr. Szerlip continued that the dosage of Skelaxin prescribed on July 21, 2007, and opined that it was in accordance with good and accepted medical practice, as it was a minimum dosage and could be taken four times a day. He continued that Cymbalta 30 mg. two a day, and Skelaxin 800 mg. would not result in toxic drug reaction or deadly drug interaction.

Dr. Szerlip stated that on August 2, 2007, the decedent advised him that she was "loving life" and that the Skelaxin was helping tremendously. Her depression was greatly reduced, and her muscular skeletal symptoms had deceased. She showed no signs of being over-medicated from the Cymbalta 60 mg. and Skelaxin 800 mg., and had no harmful side effects. There were no complaints of cognitive, neuromuscular, or anatomic nerve system issues, such as confusion, disorientation, agitation, irritability, exaggerated reflexes, muscle rigidity, tremors, loss of coordination, fear, perfuse swelling, rapid heart beat or increased blood pressure. If she did offer such complaints, he would have charted it and would have made changes in her medications. He stated that he did not prescribe Flexeril to the decedent, and that there is no known drug interaction between Flexeril and Skelaxin, nor is there a toxic reaction between the two which would result in death. He concluded that he did not depart from good and accepted medical practice during his care and treatment of the decedent, and did not cause or contribute to her death, which, based upon the Medical Examiner's report, was attributed to a combination of a number of prescription drugs, as well as illegal drugs.

At his deposition, Dr. Szerlip testified that he is licensed to practice medicine in New York and New Jersey. He is employed by, and is an officer in GMS Medical Services, which provides anesthesia services for Long Island Medical Associates since 1995, pursuant to a contract or agreement. He worked there in an office-based capacity. A 1099 form was provided by Long Island Medical Associates to GMS Medical Services. He was then paid by GMS.

Based upon the foregoing, and as supported by the record, it is determined Gregory Szerlip, M.D. has established prima facie entitlement to summary judgment dismissing the complaint as asserted against him.

In opposing this motion, the plaintiff has submitted the affirmation of Kristina Jones, M.D., a physician licensed to practice medicine in New York State, who is a board certified psychiatrist. She set forth her current

work experience as an instructor in psychiatry, and stated that she maintains a private practice in psychopharmacology and psychiatry, and teaches courses in psychopharmacology to NYU psychiatry residency students. She set forth the records and materials which she reviewed and opined that there were many departures by Dr. Szerlip in his care and treatment of the decedent. Dr. Jones stated that three things may have occurred with the medication in the decedent: the presence of both Skelaxin and Flexeril could both have acted as sedatives, causing respiratory depression and death; that the combination of Cymbalta with Flexeril could have led to Serotonin Syndrome, causing her death; the decedent may have been taking all three drugs prescribed by different physicians, leading to a combination of respiratory depress and/or Serotonin Syndrome; or, and additive drug interaction may have occurred as the Cymbalta inserts and pharmacy data indicate it should not be taken with other CNS (central nervous system) Depressants, such as Flexeril.

Dr. Jones did not opine within any reasonable degree of medical certainty with regard to the conclusory suppositions and opinions she sets forth. Dr. Jones stated that the combination of the Cymbalta prescribed by Dr. Szerlip, and the Flexeril by Dr. Tregerman from Good Samaritan emergency room, could have lead to Serotonin Syndrome, accounting for her report to her stepfather that she was feeling feverish and dizzy. Dr. Jones speculates, however, concerning whether the decedent was taking the Skelaxin and Flexeril as prescribed. She continued that the police report details only the narcotics prescribed rather than the number of pills of Cymbalta, Flexeril, and Skelaxin, and therefore it is hard to say whether the decedent was taking those medications as prescribed, or if she took over the amount prescribed. Dr. Jones does not state that Dr. Szerlip prescribed Flexeril to the decedent, or that he was made aware by the decedent that she was taking such medication. Dr. Szerlip prescribed Cymbalta and Skelaxin. Dr. Jones does not comment upon any possible effect of other drugs listed in the toxicology, such as Benadryl and Aspirin.

While Dr. Jones stated that Cymbalta is specifically dangerous to prescribe to a patient with a history of bipolar, as it is thought to precipitate a manic episode, she has not demonstrated that the decedent was manic or that this was the proximate cause of her death. She continued that she is concerned that though the decedent had been prescribed Cymbalta 30 mg. with Flexeril, and even Skelaxin without incident, the increased dose of Cymbalta may have made an interaction with Flexeril more likely to cause serotonin syndrome or respiratory depression. However, Dr. Jones does not support this theory, and has not demonstrated how Dr. Szerlip had reason to know that the decedent was taking Flexeril, as he did not prescribe it. She does not support her opinion that the dosages for Cymbalta and Skelaxin, as prescribed by Dr. Szerlip, were the proximate cause of the decedent's death. Dr. Jones does not demonstrate that the decedent presented to Dr. Szerlip with any signs or symptoms of serotonin syndrome or respiratory depression.

In conclusion, Dr. Jones stated, the decedent's care was fragmented between many physicians in two locations, and that documentation that each practitioner knew what the other was doing is problematic or non-existent. She continued that it is possible that the decedent followed the orders by Dr. Szerlip and Dr. Tregerman, not realizing that the two drugs in combination might cause respiratory depression and result in death. Dr. Jones does not set forth the levels of the drugs found in the toxicology report to indicate the levels present in the decedent's body to support any of her opinions. While Dr. Jones offers numerous opinions concerning departures from the standard of care, she has not established that any action by Dr. Szerlip was the proximate cause of the decedent's death. Her conclusory opinions are based upon much speculation and supposition, and are not supported by evidentiary proof in the record.

Consequently, the plaintiff has failed to raise a factual issue to preclude summary judgment from being granted to Long Island Medical Associates on the bases that they are vicariously liable for any acts of negligence by defendant Szerlip, that there were any independent acts of negligence by Long Island Medical Associates, or that Dr. Szerlip negligently departed from good and accepted standards of care and practice, proximately causing the death of the decedent.

Accordingly, motion (024), by Long Island Medical Associates, Inc. for summary judgment dismissing the complaint and any cross claims asserted against it on the bases that it is not vicariously liable for the acts of Gregory M. Szerlip , and that there are no independent claims, or any theory of negligence, as to Long Island Medical Associates, and motion (025) by Gregory M. Szerlip, D.O. for summary judgment dismissing the complaint on the bases that he did not depart from good and accepted standards of medical care and treatment and did not proximately cause any injury to the decedent or her death, are granted, and the complaint and any cross claims asserted against them are dismissed with prejudice.

Dated: August 17, 2012

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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