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

PRESENT: LOBIS Justice — PART 6

BARRERAS, SANTA

- v -

BRIAN A. GOLDWASSER, M.D., ET AL.

INDEX NO. 116107/07

MOTION DATE 7-10-12

MOTION SEQ. NO. 03

MOTION CAL. NO. ____

The following papers, numbered 1 to 32 were read on this motion to/for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-21
Answering Affidavits — Exhibits	22-31A
Replying Affidavits	32

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

ORDER

Dated: 10/11/12

JOAN B. LOBIS J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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SANTA BARRERAS,

Plaintiff,

Index No. 116107/07

-against-

Decision and Order

BRIAN A. GOLDWEBER, M.D., BRIAN A. GOLDWEBER, M.D., LLC, FRANKLIN S. COHEN, M.D., SOMERSET SURGICAL ASSOCIATES, P.C., ABBE J. CARNI, M.D., ABBE J. CARNI, M.D., P.C., NORMAN SOHN, M.D., and MICHAEL A. WEINSTEIN, M.D.,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition. In Motion Sequence Number 003, defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C. (the "Carni Defendants") move, by order to show cause, for an order granting them summary judgment pursuant to C.P.L.R. § 214-a, Rule 3211(a)(5), and Rule 3212. In Motion Sequence Number 004, defendants Somerset Surgical Associates, P.C., Franklin S. Cohen, M.D., Norman Sohn, M.D., and Michael A. Weinstein, M.D. (the "Somerset Defendants") seek similar relief. Plaintiff Santa Barreras opposes the motions.

This case is one of a number of lawsuits commenced by patients of Brian A. Goldweber, M.D.,[1] a former anesthesiologist. In 2007, Dr. Goldweber became the focus of a New York City Department of Health ("DOH") investigation when a number of his patients were

[1] Co-defendant Brian A. Goldweber, M.D., has not appeared in this action and the claims against him were discharged in bankruptcy.

discovered to have contracted hepatitis after he treated them. DOH eventually determined that the manner in which Dr. Goldweber administered anesthesia caused hepatitis to be transmitted to some of his patients. It is believed that, after administering anesthetic propofol to a patient using a syringe and a multi-dose vial of propofol, Dr. Goldweber would sometimes reinsert that syringe into the vial in order to administer more propofol to the same patient, and would sometimes then reuse the same vial of propofol to dose subsequent patients. Contamination of the propofol vials is believed to have occurred when Dr. Goldweber reinserted syringes from patients who had hepatitis.

Plaintiff was Dr. Cohen's patient. Dr. Cohen worked out of the offices of Somerset Surgical Associates, P.C. ("Somerset P.C."). Abbe J. Carni, M.D., P.C. ("Carni P.C.") provided anesthesiologists for procedures performed at Somerset P.C. Dr. Goldweber had a contract to provide services on behalf of Carni P.C., and Carni P.C. arranged for Dr. Goldweber to perform anesthesiology services at Somerset P.C.

On June 23, 2004, Dr. Cohen performed a colonoscopy on plaintiff, with intravenous anesthesia provided by Dr. Goldweber. Nearly three years later, in June 2007, plaintiff received a letter from DOH, stating that it was investigating hepatitis infections in people who had received intravenous anesthesia from a particular anesthesiologist, and that plaintiff had been identified as having received anesthesia from this particular anesthesiologist. In the letter, DOH recommended that plaintiff be tested for hepatitis. According to plaintiff's deposition testimony, approximately one week later, Dr. Cohen's office contacted her to request that she report to the office for a hepatitis test, which she had on June 27, 2007. In a report dated June 28, 2007, the laboratory that tested plaintiff's blood reported that plaintiff had a positive hepatitis C virus ("HCV") signal-to-cutoff

("s/co") ratio of 2.47 and that plaintiff's blood was reactive for HCV antibodies. According to the laboratory report, it was noted that the patient's HCV s/co ratio was "low" (greater than 1.00 and less than 8.00), and that the Centers for Disease Control recommends supplemental testing such as recombinant immunoblot assay or nucleic acid amplified testing for confirmation of HCV. After the initial test results, Dr. Cohen referred plaintiff to a liver specialist, Anthony Borcich, M.D., who ordered further blood tests on July 12, 2007. In a laboratory report dated July 16, 2007, the blood collected on July 12, 2007 was reported as "nonreactive" for the HCV antibody test. In a second laboratory report dated July 25, 2007, the blood collected on July 12, 2007 was reported as testing positive for HCV RNA genotype 1a; testing below 50 IU/mL for the HCV RNA polymerase chain reaction ("PCR") assay; and testing below 5 IU/mL for the HCV transcription-mediated amplification ("TMA") assay. Plaintiff has not required treatment for HCV.

DOH's investigation yielded a report dated July 14, 2008. DOH investigated a possible cluster of hepatitis cases in June 2004; it is not disputed that plaintiff, though not identified in the DOH report by name, was one of the patients identified in this cluster. From the report, it can be discerned that four patients in Dr. Cohen's office had colonoscopies performed on June 23, 2004, and all were administered propofol anesthetic by Dr. Goldweber. DOH's report indicates that the first patient (Patient 3-1) was initially diagnosed with HCV after the procedure and is infected with HCV genotype 2, but the patient was not reached for an interview, so his outbreak association status could not be completely assessed. The second patient (Patient 3-2) was known to have chronic HCV, genotype 2b, prior to the colonoscopy performed on June 23, 2004 and was not receiving treatment for HCV at the time of the colonoscopy. DOH identified the second patient as a possible source patient, but noted that the second patient had since been treated for the HCV infection and

had an undetectable HCV viral load when testing was done in July 2007. The third patient (Patient 3-3) had a colonoscopy performed thirty (30) minutes after the second patient. DOH's report set forth that the third patient's "hepatitis C Ab EIA" test (HCV antibody test) in June 2007 was positive, with a signal to cut-off ratio of 2.47, which suggested a possible infection with HCV. However, when Patient 3-3 underwent subsequent RIBA testing in July 2007, the results were negative in both a commercial laboratory and DOH's laboratory. Similarly, an HCV viral load was undetectable in the July 2007 blood tests conducted at two different laboratories. DOH's report set forth that "[t]hese results suggest that the patient's EIA Ab test was a false positive. This patient was therefore considered HCV negative and was classified as 'not a case'[.]" The fourth patient (Patient 3-4) tested positive for HCV in April 2004, and genotype testing on the April 2005 sample revealed that the patient had HCV genotype 2b. The fourth patient's blood sample tested in July 2007 revealed an undetectable viral load. In comparing the descriptions and characteristics of the patients to plaintiff's known condition and test results, plaintiff is Patient 3-3 in DOH's study.

On December 5, 2007, plaintiff commenced this action by purchasing an index number and filing a summons and verified complaint. The complaint raises claims sounding in direct liability and/or vicarious liability for medical malpractice, negligence, lack of informed consent, and negligent hiring and retention; plaintiff also seeks punitive damages. Essentially, plaintiff claims that defendants' negligence caused her to become infected with HCV.

In connection with plaintiff's lawsuit and the discovery process, on March 1, 2011, plaintiff underwent a medical examination by H. Alan Schnall, M.D., a physician hired by the

Somerset Defendants. Dr. Schnall's report[2] from the examination was exchanged by the Somerset Defendants pursuant to C.P.L.R. § 3101(d). In addition to the test results detailed above, Dr. Schnall's report references a blood test on August 22, 2007, in which plaintiff's blood tested reactive to HCV antibodies with a result of 2.19 but her HCV RNA test result was not measurable by PCR.[3] As part of the examination, plaintiff's blood was drawn and tested by a laboratory. The laboratory reported that plaintiff's HCV antibody test was reactive at 1.12 (considered a low ratio); that it could not perform HCV RIBA analysis because the reagents were unavailable from the manufacturer; that it could not perform a genotype test because plaintiff's sample had an insufficient viral load; that plaintiff's HCV RNA test using the PCA method was less than 43 IU/mL; and that plaintiff's hepatitis C TMA test was less than below 5 IU/mL and less than .70 log IU/mL. In his report, Dr. Schnall described that these results indicated that plaintiff's HCV antibody test was barely reactive, her HCV RNA test by PCR and TMA assays was negative, and no genotype was identifiable. Dr. Schnall concluded that on the basis of the tests performed up to that point, he had no evidence that plaintiff has hepatitis C. He set forth that the HCV antibody that is present may reflect a false-positive marker, or may reflect previous acquisition and subsequent clearance of the HCV virus.

Attached to plaintiff's opposition papers is an affidavit from her dated June 26, 2012, in which she sets forth that after her appointment with Dr. Schnall, he called her to report the results of her blood work. She states that Dr. Schnall told her that she has HCV antibodies in her system

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[2] Though the Somerset Defendants included the laboratory's results from Dr. Schnall's examination with their motion for summary judgment, they did not annex his actual report; plaintiff did annex Dr. Schnall's report to her opposition papers.

[3] The results of the August 2007 blood test are not annexed to any of the papers submitted in support or in opposition to summary judgment.

and recommended that she have her blood tested periodically. Plaintiff states that Dr. Schnall informed her that she should regularly monitor her blood because of the presence of HCV.

Initially, in moving for summary judgment, defendants argue that plaintiff's claims are time barred.[4] The alleged injury (exposure to HCV) took place on June 23, 2004, the date of plaintiff's colonoscopy. She did not bring this suit until December 5, 2007. Defendants argue that under both the statute of limitations for medical malpractice actions (two years and six months, pursuant to C.P.L.R. § 214-a) and the statute of limitations for negligence actions (three years, pursuant to C.P.L.R. § 214), plaintiff's claims are untimely, because she filed her suit more than three years after the alleged exposure. Plaintiff argues, in opposition, that her claim did not accrue until she discovered that she had been exposed to HCV, thus rendering her complaint timely filed. Plaintiff further argues that the doctrine of equitable estoppel should serve to prevent defendants from relying on the defense of statute of limitations because defendants misrepresented that the anesthesiologists that they would provide to plaintiff were competent and board certified.

Should the court find that plaintiff's medical malpractice claims are time barred, plaintiff argues that her claims that defendants were negligent in the manner in which they stored and used anesthesia and anesthesia equipment sound in negligence, not medical malpractice, to which a three-year statute of limitations and C.P.L.R. § 214-c applies. Plaintiff asserts that the dangers of

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[4] For the purposes of that branch of the motion seeking summary judgment on the grounds that the statute of limitations has expired, the court is operating under the presumption is that plaintiff was exposed to and contracted HCV through Dr. Goldweber's unsanitary anesthesia technique on June 23, 2004; however, this fact has not been established and, as discussed infra, is disputed by defendants.

cross-contamination are well known in the medical field. She further sets forth that propofol in a multi-dose vial should only be used on one patient and that DOH found that Dr. Goldweber's technique of using a multi-dose vial on more than one patient was inappropriate. Also, plaintiff sets forth that DOH found that Dr. Goldweber improperly stored propofol against the manufacturer's labeling instructions; used the drug beyond its expiration time of six hours against the manufacturer's labeling instructions; and used single-use vials on multiple patients. Plaintiff maintains that these acts of negligence do not involve medical treatment.

The branches of defendants' motions which seek an order dismissing the medical malpractice causes of action predicated on departures from standards of good and accepted practice and a lack of informed consent are granted, since those causes of action are barred by the applicable 2 ½-year statute of limitations (C.P.L.R. § 214-a) because the alleged exposure occurred in June 2004 and the complaint was not filed until December 2007. The tolling provisions of C.P.L.R. § 214-c, applicable to personal injuries caused by the latent effect of exposure to substances, do not apply to medical malpractice causes of action. C.P.L.R. § 214-c(5). Plaintiff has not established that defendants should be equitably estopped from raising the statute of limitations as a defense since she has not demonstrated that specific subsequent actions by the defendants prevented her from timely asserting these causes of action. Putter v. North Shore Univ. Hosp., 7 N.Y.3d 548, 552 (2006). Accordingly, the medical malpractice and lack of informed consent causes of action are dismissed as to all of the moving defendants.

To the extent that plaintiff attempts to save her time-barred claims from dismissal by arguing that her claims about the handling, administration, and storage of propofol sound in

negligence, not medical malpractice, her attempt is unavailing. "[M]edical malpractice is simply a form of negligence, [and] no rigid analytical line separates the two." Scott v. Uljanov, 74 N.Y.2d 673, 674 (1989). When "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but [in] the ... failure in fulfilling a different duty," the claim sounds in negligence. Bleiler v. Bodnar, 65 N.Y.2d 65, 73 (1985). When the inquiry pertaining to whether a duty of care has been breached does not turn on an analysis of the medical treatment rendered to the patient, the claim sounds in negligence. Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 788 (1996); Rodriguez v. Saal, 43 A.D.3d 272, 275 (1st Dep't 2007). The "determinative question" is "whether the challenged conduct bears a substantial relationship to the rendition of medical treatment to a particular patient." Weiner v. Lenox Hill Hosp., 88 N.Y.2d at 788 (internal citation and quotation marks omitted); Wahler v. Lockport Physical Therapy, 275 A.D.2d 906, 907 (4th Dep't 2000). Thus, plaintiff's claims that Dr. Goldweber reused syringes or vials of potentially contaminated propofol do not sound in negligence, as plaintiff argues, because these claims directly relate to the treatment that Dr. Goldweber rendered to her. The claims asserted under the negligence cause of action are, in reality, claims sounding in medical malpractice, and are thus dismissed as time barred.

The remaining causes of action sounding in negligent hiring and/or retention are not time barred and are, theoretically, saved from dismissal by C.P.L.R. § 214-c; defendants also seek summary judgment on these causes of action. Defendants argue that plaintiff cannot prove that she contracted HCV on June 23, 2004, and thus cannot establish a departure or proximate cause with respect to Dr. Goldweber for which defendants could be held liable under theories of negligent hiring and/or retention.

As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), and as has recently been reiterated by the First Department, it is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad, 64 N.Y.2d at 853. In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

The Carni Defendants offer an affirmation from Alan Pollock, M.D., a physician licensed to practice medicine in New York and board certified in internal medicine with a subspeciality in infectious disease. Having reviewed plaintiff's pertinent medical records, the DOH report, and the parties' deposition testimony, and based on his own experience, Dr. Pollock opines that there is no medical evidence that plaintiff contracted HCV through Dr. Goldweber's alleged acts or omissions on June 23, 2004. Dr. Pollock contends that plaintiff never tested positive for HCV. He concludes that her June 27, 2007 blood sample, which tested positive for HCV antibodies, was a false positive, based on the fact that supplemental testing in July 2007 detected no hepatitis C RNA

(no virus present in the blood) using the PCR and TMA methods, and no evidence of antiviral antibodies using the RIBA method. Dr. Pollock sets forth that the results of the July 2007 tests demonstrate that plaintiff did not carry the virus at that time. He states that if plaintiff had contracted the virus on June 23, 2004, and cleared it on her own, she would have still tested positive for antibodies in July 2007. Moreover, he states, even if plaintiff subsequently tested positive for HCV antibodies, the results from the more accurate, sensitive, and confirmatory RIBA antibody test conducted in July 2007 proves that she had not contracted the virus as of May 2007.[5]

The Somerset Defendants also address the issue of whether plaintiff can prove that she acquired HCV during the June 23, 2004 colonoscopy, though they do not submit expert opinion testimony on this issue. The Somerset Defendants rely on the DOH report and plaintiff's July 2007 and March 2011 blood tests in support of their argument that plaintiff has no proof that she contracted HCV on June 23, 2004 from Dr. Goldweber.

In opposition to this line of argument, plaintiff concedes that, while she was initially told that her first blood test in June 2007 tested positive for hepatitis C, she has since learned that the results from the June 2007 test were a "false-positive" reading. Regardless, plaintiff argues that Dr. Schnall's report leaves open the possibility that plaintiff acquired HCV on June 23, 2004 because Dr. Schnall never positively stated that she does not have HCV. Further, as noted above, plaintiff contends that in March 2011, Dr. Schnall told her that she has HCV antibodies in her system and that

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[5] While Dr. Pollock does not explain the significance of May 2007, this date is presumably based on an average incubation period for acute HCV, which (as set forth in the DOH report) is between two and twenty-six weeks.

she should have her blood tested regularly due to the presence of hepatitis C. Further, plaintiff argues, Dr. Pollock's affirmation contradicts Dr. Schnall's findings. She points out that Dr. Pollock never addresses the patient who was treated prior to plaintiff (Patient 3-2) and the possibility of any transfer of HCV from that patient to plaintiff. She also points out that Dr. Pollock fails to address plaintiff's August 2007 or March 2011 blood results, whereas Dr. Schnall addressed four of plaintiff's blood studies and found that plaintiff has HCV antibodies. Plaintiff argues that where there are conflicting medical opinions, summary judgment should be denied. She argues that defendants have failed to come forward with any proof that plaintiff did not get the HCV antibodies in her system from being exposed to HCV during her colonoscopy. Finally, plaintiff argues, despite the "false positive" issue, she has a viable cause of action for her fear of having been exposed to HCV, her fear of having the HCV antibodies in her system, and her fear of what a "flare-up" can do to her in the future. She argues that she can recover for harm sustained solely as a result of negligently-caused psychological trauma, even if she was not physically harmed.

Although plaintiff submits an expert affirmation, her expert fails to address Dr. Pollock's opinion that plaintiff cannot prove that she was infected with HCV by Dr. Goldweber. Plaintiff's expert[6] (name redacted) concludes that plaintiff was exposed to HCV as a result of defendants' negligence without addressing defendants' arguments that there is no proof that plaintiff

[6] Defendants ask the court to reject plaintiff's expert's affidavit as inadmissible because it was notarized outside New York State and does not contain a certificate of conformity. The First Department has consistently held that the absence of a certificate of conformity as required by C.P.L.R. § 2309(c) and Real Property Law § 299-a is not, alone, a fatal defect. Hall v. Elrac, Inc., 79 A.D.3d 427, 428 (1st Dep't 2010); Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda, 69 A.D.3d 672, 673 (1st Dep't 2009). Cf. Scott v. Westmore Fuel Co. Inc., 96 A.D.3d 520, 521 (1st Dep't 2012).

was infected with HCV. The expert asserts that it is possible that HCV could have been transferred to plaintiff as a result of Dr. Goldweber's anesthesia technique, based on the prior patient's known HCV status. The expert opines that, all other potential sources of infection being ruled out, the improper and negligent administration of anesthesia during the colonoscopy caused HCV to be transmitted to plaintiff. The expert states that he or she bases this opinion on plaintiff's lack of other risk factors for the transmission of HCV and lack of any abnormal liver tests prior to the colonoscopy performed on June 23, 2004.

Plaintiff concedes that she has falsely tested positive to the HCV antibody test. Dr. Pollock sets forth that the more accurate, sensitive, and confirmatory negative RIBA antibody test results from July 2007 prove that plaintiff had not contracted the virus as of May 2007, regardless of the test results in June 2007. Dr. Pollock's detailed opinion, as set forth in his affirmation, is sufficient to make out a prima facie showing of entitlement to summary judgment. The records show that none of plaintiff's "reactive" results—which plaintiff argues cast doubt on Dr. Pollock's conclusion that plaintiff had not contracted HCV as of May 2007—were results from RIBA or RNA tests. Dr. Pollock directly addresses this in his affirmation by stating that even if plaintiff subsequently tested positive for HCV antibodies, the more accurate, sensitive, and confirmatory RIBA antibody test conducted in July 2007 proves that she had not contracted the virus as of May 2007. Plaintiff does not submit expert opinion evidence to refute Dr. Pollock's conclusion that the July 2007 tests revealed no hepatitis C RNA (no virus present in the blood) and no evidence of antiviral antibodies using the RIBA method, nor does plaintiff submit expert opinion evidence to refute Dr. Pollock's opinion that the results of the July 2007 RNA or RIBA tests were conclusive as to exposure prior to May 2007. Plaintiff's expert's conclusion that plaintiff was exposed to HCV

because all other sources were eliminated is conclusory because the expert fails to address the science behind Dr. Pollock's conclusions that there is no proof that plaintiff contracted HCV on June 23, 2004. Finally, plaintiff's attorney's argument that defendants fail to attach Dr. Schnall's report does not raise an issue of fact. Dr. Schnall's report is neither affirmed nor notarized and, as such, is inadmissible as expert opinion evidence. Even disregarding the admissibility of the report, however, and looking only at the conclusions, Dr. Schnall's report only points out what has already been shown in the records, i.e., that while plaintiff's HCV antibody test results were barely reactive, her HCV RNA test results by PCR and TMA assays were negative. Dr. Schnall directly sets forth that on the basis of the tests performed up to that point, he had no evidence that plaintiff has hepatitis C. Plaintiff's expert does not refute this conclusion. Defendants are entitled to summary judgment because plaintiff failed to proffer medical evidence or expert opinion testimony raising the true existence of a material issue of fact about whether plaintiff's blood test results show that she acquired HCV on June 23, 2004. Without demonstrating an issue of fact as to whether her blood test results show that she acquired HCV on June 23, 2004, plaintiff is unable to rebut defendants' prima facie showing of entitlement to summary judgment on the issue of proximate cause.

Given plaintiff's failure to rebut defendants' showing that she did not acquire HCV on June 23, 2004, there is no need to address defendants' remaining arguments regarding plaintiff's causes of action sounding in negligent hiring or retention, e.g., whether defendants had actual or constructive knowledge of Dr. Goldweber's propensity to break sterile technique, or whether Dr. Goldweber could be considered an employee for the purposes of these claims. Unless a material issue of fact has been raised as to plaintiff's injury and proximate cause, her claims for negligent hiring and/or retention cannot survive summary judgment.

Finally, plaintiff appears to be asserting that she has a viable claim for negligent infliction of emotional distress related to her alleged fear that she had contracted or that she would contract hepatitis. In New York, claims of emotional distress from fear of having contracted hepatitis have been evaluated using the principles arising out of a number of "AIDS phobia" cases. See, e.g., O'Sullivan v. Duane Reade, Inc., 2010 N.Y. Slip Op. 50757U (Sup. Ct. N.Y. Co. 2010); Jones-Lockridge v. Simhaee, 2010 N.Y. Slip Op. 33598U (Sup. Ct. Nassau Co. 2010). "A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness." Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008) (internal citations and quotation marks omitted). In "AIDS phobia" cases, where the plaintiff did not actually contract HIV, in order to assert a cause of action for negligent infliction of emotional distress, the plaintiff must show that he or she was actually exposed to HIV and that he or she suffered a psychic harm. Id. Actual exposure is demonstrated "with proof that, due to the negligence of another party, [plaintiff was] exposed to HIV through a scientifically accepted method of transmission of the virus . . . and that the source of the allegedly transmitted blood or fluid was in fact HIV positive." Id. (internal quotation marks and citations omitted).

Negligent infliction of emotional distress was not a cause of action that plaintiff pled in her complaint or particularized in her bills of particulars; for those reasons, alone, plaintiff's attempt to assert this cause of action should be rejected at this late stage of the proceedings. Additionally, in her opposition papers, plaintiff does not establish the elements of a cause of action

sounding in negligent infliction of emotional distress, i.e., that she was actually exposed to hepatitis or that she suffered a psychic harm. Plaintiff's expert only speculated that plaintiff could have been exposed to HCV because the patient treated before her was HCV. There is no objective evidence that the vial of propofol used on plaintiff was contaminated with HCV. There was also no detail about the psychic harm that plaintiff allegedly suffered. Thus, plaintiff's claim for negligent infliction of emotional distress would not be viable even if it had been properly pled.

Accordingly, it is hereby

ORDERED that defendants' respective motions for summary judgment are granted, and the complaint is dismissed in its entirety.

Dated: October 11, 2012

FILED
OCT 12 2012
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

JOAN B. LOBIS, J.S.C.