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

PRESENT: Eileen Bransten Justice

PART 6

0124249/2001

CABRERA, LUIS
vs
TRANSIT AUTHORITY

INDEX NO. 124249/01

MOTION DATE 9/28/04

MOTION SEQ. NO. 04

MOTION CAL. NO. 07

SEQ 4

SUMMARY JUDGMENT

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

FILED
NOV 03 2004
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10-26-04

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

EILEEN BRANSTEN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

LUIS CABRERA, as Administrator of the Estate of ARMANDO CRUZ,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, SIDNEY CHARLES, and MT. SINAI MEDICAL CENTER,

Defendants.

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Index No. 124249/01
Motion Date: 09/28/04
Motion Seq. No.: 04

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendant Mt. Sinai Medical Center ("Mt. Sinai") moves for summary judgment dismissal of the action commenced by plaintiff Luis Cabrera, as Administrator of the Estate of Armando Cruz ("Mr. Cruz"). Plaintiff, New York City Transit Authority ("Transit") and Sidney Charles ("Mr. Charles") oppose this motion.

Background

Beginning in 1994, Mr. Cruz was repeatedly admitted to the psychiatric ward of Mt. Sinai to treat psychosis and polysubstance abuse of cocaine and heroin. Mt. Sinai's Affidavit in Support of Motion for Summary Judgment ("Aff."), at ¶ 9. Each time Mr. Cruz presented at Mt. Sinai, he was agitated with slow speech and intoxicated. *Id.* On each occasion, Mr. Cruz was given medication and discharged as stable. *Id.*

On November 16, 1999, Mr. Cruz presented to Mt. Sinai complaining that he had been hearing voices for one week telling him to push people or himself in front of a train. Aff., at ¶ 10. On November 17, Mt. Sinai admitted Mr. Cruz as an involuntary patient. *Id.* The admission evaluation for November 17 states that Mr. Cruz had suicidal and homicidal ideations, poor impulse control, psychomotor retardation, tremors, slurred speech, disorganized thought process and depression. Aff., at ¶ 11. Mt. Sinai gave Mr. Cruz medications, including Buspor, Serzone, Zyprexa and Methadone. *Id.*

On November 19, 1999, Mr. Cruz stated that he was still experiencing auditory hallucinations telling him to kill himself but that his mood was "okay." Aff., at ¶ 12. On November 20, 21 and 22 of 1999, Mr. Cruz denied suicidal ideations and, according to Mt. Sinai, did not exhibit any signs of suicidal behavior such as scratching, head-banging or hanging attempts. Aff., at ¶ 13. As a result, Mt. Sinai converted Mr. Cruz to "voluntary" status on November 23, 1999. Aff., at ¶ 4.

On November 30, 1999, Mt. Sinai began to make arrangements for Mr. Cruz to be an inpatient at Phelps Memorial Hospital in Westchester and to attend the Phelps Drug Rehabilitation Program. Aff., at ¶ 16. Mr. Cruz then refused to take his medications on December 1 and 2, 1999. Plaintiff's Affirmation in Opposition ("Opp."), at ¶ 17. On December 5, 1999, a doctor at Mt. Sinai determined that Mr. Cruz was in need of inpatient

treatment and was unable to function safely outside the hospital. Opp., at ¶ 19. Nonetheless, on December 6, 1999, Mt. Sinai allowed Mr. Cruz to leave its hospital in a cab without a chaperone. *Id.* Mr. Cruz returned to Mt. Sinai later that day stating that he would not attend drug rehabilitation. Opp., at ¶ 23. A nurse attended to Mr. Cruz but no psychiatrist saw Mr. Cruz that afternoon. *Id.* That very day, after leaving Mt. Sinai, Mr. Cruz attempted suicide by throwing himself in front of a train. Aff., at ¶ 5. Mr. Cruz died on December 26, 1999, of injuries sustained from his suicide attempt. Aff., at ¶ 5.

Plaintiff, the administrator of Mr. Cruz's estate, commenced this medical malpractice action on December 26, 2001. He claims that Mt. Sinai failed to appreciate and diagnose Mr. Cruz's suicidal ideations and take appropriate precautions to prevent Mr. Cruz from committing suicide. Aff., at ¶ 3. Specifically, plaintiff claims that Mt. Sinai committed malpractice during Mr. Cruz's admissions to Mt. Sinai from 1995 to 1999. Aff., at ¶ 3.

The depositions of Mt. Sinai's representatives Anna Choub, M.D. ("Dr. Choub") and Daniel Stewart, M.D. ("Dr. Stewart") concluded on February 25, 2004. Aff., at ¶ 9. Plaintiff filed the Note of Issue on March 2, 2004. Aff., at ¶ 4.

By motion papers dated June 24, 2004, Mt. Sinai now seeks summary judgment dismissal of the complaint and alleges, among other things, that: any claims of negligence prior to June 26, 1999 are barred by the statute of limitations; the decision to discharge Mr.

Cruz was a legally-protected exercise of professional judgment; and, Mt. Sinai did not depart from accepted standards of medical care in treating Mr. Cruz.

In support of its motion, Mt. Sinai submits the affidavit of Robert Sussman, M.D. ("Dr. Sussman"), a physician board-certified in psychiatry. *See generally*, Aff., Ex. K, Affidavit of Dr. Sussman ("Sussman Aff."). After review of all the records and depositions, Dr. Sussman concludes, with a reasonable degree of medical certainty, that Mt. Sinai comported with accepted standards of medical care in treating and releasing Mr. Cruz. Sussman Aff., at ¶ 4. Specifically, Dr. Sussman notes that Mr. Cruz presented to Mt. Sinai on twenty occasions over five years and that each time, upon release after detoxification, Mr. Cruz safely returned home. Sussman Aff., at ¶ 5. Dr. Sussman states that on November 16, 1999, Mr. Cruz evidenced no signs that he was more suicidal than on past admissions. *Id.* Dr. Sussman also opines that Mt. Sinai properly converted Mr. Cruz to voluntary status because Mr. Cruz reported that his suicidal and homicidal ideations had ceased and he was compliant with taking his medication. Sussman Aff., at ¶¶ 7,8. Finally, Dr. Sussman asserts that Mt. Sinai properly released Mr. Cruz from the hospital after careful examination because he exhibited clear speech, positive social interaction and good mood. Aff., at ¶¶ 10,11.

In opposition, plaintiff submits the affirmation of a physician board-certified in psychiatry and neurology. *See generally*, Opp., Ex. A. After review of all the medical records and transcripts, the doctor opines with a reasonable degree of medical certainty that Mt. Sinai departed from good and accepted standards of medical care. Opp., Ex. A, at ¶ 5. Furthermore, the doctor concludes that these departures were not merely exercises of professional judgment, but deviations from clearly defined medical standards. Opp., Ex. A, at ¶ 6. Specifically, the doctor states that Mt. Sinai failed to properly evaluate Mr. Cruz's medical condition before releasing him and then released him even though a doctor stated he could not function safely outside the hospital. Opp., Ex. A, at ¶ 8. Additionally, the doctor opines that Mt. Sinai departed from accepted standards of medical care by not providing a chaperone to accompany Mr. Cruz to Phelps Memorial. Opp., Ex. A, at ¶¶ 10,11,12. The doctor also asserts that Mr. Cruz should not have been released because he did not comply with his medications on December 1 and 2, 1999. Opp., Ex. A, at ¶ 15. Finally, the doctor points out that Mr. Cruz returned to Mt. Sinai on December 6, 1999, and would not comply with his treatment plan. Opp., Ex. A, at ¶ 18. The doctor opines that because upon his return to the hospital Mr. Cruz was only seen by a nurse and not a psychiatrist, Mt. Sinai departed from accepted standards of medical care. *Id.*

Analysis

Timeliness of Motion

The parties' preliminary conference order explicitly provides that summary judgment motions must be made no later than 60 days after the Note of Issue is filed. Mt. Sinai admits that it missed this Court's summary judgment deadline.

The court, in its discretion, may grant a party leave to serve a late motion for summary judgment at a time later than the date set by the court. CPLR 3212(a). Indeed, when the moving party shows "good cause" and the non-moving party does not show prejudice, the court has wide latitude in permitting late motions. *Keeley v. Berley Realty Corp.*, 271 A.D.2d 299 (1st Dep't 2000) (granting motion made one day late and denying cross-motion made "well after" 120-day period); *Rosario v. D.R. Kenyon & Son, Inc.*, 258 A.D.2d 265 (1st Dep't 1999) (denying late motion for failure to show "good cause"); *contrast, Brill v. City of New York*, 2 N.Y.3d 648, 652 (2004) (absent showing of "good cause," court may not permit late summary judgment motion). To satisfy the statutory "good cause" requirement, a moving party must provide a reasonable explanation for the delay. *Brill v. City of New York*, 2 N.Y.3d, at 652.

Here, Mt. Sinai has provided a reasonable explanation for its delay in making this motion. Mt. Sinai explains that it only finished the depositions of Drs. Choub and Stewart

one week before the Note of Issue was filed and did not receive the transcripts for several weeks. Mt. Sinai further states that it needed time for its expert to review the transcripts and that it mistakenly believed that it had the statutory 120-day period for filing a summary judgment motion. The delay in making this motion in no way prejudices plaintiff or other defendants because a trial date has not been set for this matter and there will be no delay in the proceedings. This case is readily distinguishable from *Brill v. City of New York*, wherein the Court of Appeals held that a late motion for summary judgment could not be considered. In *Brill*, the city waited to file its motion until one year after the Note of Issue was filed. Here, by contrast, although Mt. Sinai submitted its motion for summary judgment late in violation of this Court's 60-day rule, the motion was submitted within 120 days of the filing of the Note of Issue in accordance with CPLR 3212. Accordingly, Mt. Sinai is granted leave to file a late motion for summary judgment and the motion will be considered by the Court.

Statute of Limitations

Turning to the merits of the motion, Mt. Sinai asserts that claims of malpractice alleged to have occurred prior to June 26, 1999 are barred by the statute of limitations.

An action for medical malpractice must be commenced within two years and six months from the date the alleged malpractice took place. CPLR 214-a; *Massie v. Crawford*,

78 N.Y.2d 516, 519 (1991), *rearg. denied* 79 N.Y.2d 978 (1992); *Matter of Daniel J. v. New York City Health and Hosp. Corp.*, 77 N.Y.2d 630, 634 (1991). The statute is tolled, however, when the course of treatment that is allegedly negligent runs continuously and relates to the original condition or complaint. *Massie v. Crawford*, 78 N.Y.2d, at 519; *Matter of Daniel J. v. New York City Health and Hosp. Corp.*, 77 N.Y.2d, at 634. Once the defendant properly raises a statute of limitations defense, the plaintiff has the burden of proving that the continuous treatment doctrine applies and the statute runs from the last date of treatment. *Guglich v. Schwartz*, 305 A.D.2d 134 (1st Dep't 2003); *Chesrow v. Galiani*, 234 A.D.2d 9 (1st Dep't 1996).

Here, Mt. Sinai seeks dismissal of claims pre-dating June 26, 2998. Plaintiff does not oppose that part of the motion and does not allege any course of continuous treatment. Aff., Ex. D, at 3. Accordingly, all claims of negligence occurring before June 26, 1999 are dismissed as time-barred by the statute of limitations.

Summary Judgment

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep't

2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.* Specifically, the movant in a medical malpractice action must show that defendants departed from accepted standards of medical care and that defendants' departures were the proximate cause of plaintiff's injuries. *Margolese v. Uribe*, 238 A.D.2d 164 (1st Dep't 1997). If, for example, the nonmovant submits an affidavit from a competent expert showing the existence of a triable issue of fact, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290

A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dep't 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dep't 2000).

"It is a well-established principle of medical jurisprudence that no liability obtains for an erroneous professional medical judgment." *Vera v. Beth Israel Med. Hosp.*, 214 A.D.2d 384, 385 (1st Dep't 1995), *lv. denied* 87 N.Y.2d 802 (1995). In a psychiatric malpractice case, "for liability to ensue, it must be shown that the decision to release a psychiatric patient was something less than a professional medical determination." *Id.* A difference of opinion among psychiatrists as to the propriety of releasing a patient is not sufficient to sustain a *prima facie* case of malpractice. *Schoelkopf v. St. Vincent's Hosp.*, 222 A.D.2d 311 (1st Dep't 1995) (granting summary judgment), *lv. denied* 87 N.Y.2d 811 (1996); *see also, Vera v. Beth Israel Med. Hosp.*, 214 A.D.2d, at 388; *Fiederlein v. City of New York Health and Hosp. Corp.*, 80 A.D.2d 821 (1st Dep't 1981), *affd.* 56 N.Y.2d 573 (1982). If, for example, the record contains adequate material for the diagnosis, the doctor will not be held liable. *St. George v. State*, 308 N.Y. 681 (1954), *rearg. denied* 4 N.Y.2d 960 (1958).

Indeed, in several cases, courts have held that a doctor was not liable for releasing a patient even though the patient went on to commit suicide or homicide shortly thereafter.

See, e.g., Topel v. Long Island Jewish Med. Ctr., 55 N.Y.2d 682 (1981); *Hirsch v. State*, 8 N.Y.2d 125 (1960); *St. George v. State*, 308 N.Y. 681; *Vera v. Beth Israel Med. Hosp.*, 214 A.D.2d 384; *Darren v. Safier*, 207 A.D.2d 473 (2d Dep't 1994); *Scialdone v. State*, 197 A.D.2d 568 (2d Dep't 1993), *lv. denied* 83 N.Y.2d 754 (1994); *Davitt v. State*, 157 A.D.2d 703 (2d Dep't 1990); *Mohan v. Westchester County Med. Ctr.*, 145 A.D.2d 474 (2d Dep't 1988); *Krapivka v. Maimonides Med. Ctr.*, 119 A.D.2d 801 (2d Dep't 1986); *Taig v. State*, 19 A.D.2d 182 (3d Dep't 1963).

Nonetheless, liability "can and should ensue if that judgment was not based upon intelligent reasoning or upon adequate examination so that there has been a failure to exercise any professional judgment." *O'Sullivan v. Presbyterian Hosp.*, 217 A.D.2d 98, 103 (1st Dep't 1995); *see also, Seibert v. Fink*, 280 A.D.2d 661 (2d Dep't 2001); *Bell v. New York City Health and Hosp. Corp.*, 90 A.D.2d 270 (2d Dep't 1982).

In this case, plaintiff specifically alleges that Mt. Sinai departed from accepted standards of medical care by failing to perform an evaluation of Mr. Cruz before releasing him and failing to diagnose his suicidal ideations. Therefore, Mt. Sinai's actions may be the exercise of something other than professional medical judgment. Both parties have submitted expert medical evidence sufficient to support their respective conflicting positions. Dr. Sussman insists that Mt. Sinai exercised professional medical judgment in

accordance with a proper exam, and plaintiff's expert urges that Mt. Sinai failed to properly perform an evaluation or diagnose Mr. Cruz . The issue of which expert is correct is for the jury to decide after a trial. *Santiago v. Brandeis*, 309 A.D.2d 621 (1st Dep't 2003). This Court cannot hold as a matter of law that Mt. Sinai's motions definitively establish that there was no malpractice.

Accordingly, it is

ORDERED that Mt. Sinai's motion for summary judgment is granted in part to the *limited extend that plaintiff will not be permitted to assert any claims of negligence arising* before June 26, 1999; and it is further

ORDERED that Mt. Sinai's motion for summary judgment is denied in all other respects.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 26, 2004

NOV 03 2004
COUNTY CLERK'S OFFICE
NEW YORK

ENTER

Hon. Eileen Bransten

NOTICE OF APPEARANCE

October 26, 2004

Case Name: *Cabrera v. NYC Transit*

Index Number: 124249/01

Nature of Appearances: Settlement Conference **December 7, 2004 at 9:30 a.m.**

Date & Time: If it has not already been done, plaintiff is to immediately (within 10 days) make a demand for settlement purposes. Defendants are to consider the demand. Adequate time has been afforded to enable defendants to investigate settlement of the case. The parties are to appear prepared for substantive, serious settlement discussions and if the case does not settle should be prepared for a February 7, 2005 trial date. The parties and witnesses should clear their calendars for the February 7, 2005 trial.

The February 7, 2005 date should be used for purposes of CPLR 3101(d) expert exchange. Pursuant to the Preliminary Conference Order plaintiffs should exchange expert information no later than 45 days before February 7, 2005 and defendants no later than 30 days before the 1st.