

Ulyanenko v Hedley

2013 NY Slip Op 32347(U)

September 30, 2013

Sup Ct, NY County

Docket Number: 102489/09

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16 PART _____

PRESENT: _____
Justice

Index Number : 102489/2009
ULYANENKO, SERGEY
vs.
HEDLEY, SHAWNA
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

FILED

OCT 03 2013

NEW YORK
COUNTY CLERK'S OFFICE

SEP 30 2013

Dated: *September 30, 2013*

Alice Schlesinger

ALICE SCHLESINGER, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
SERGEY ULYANENKO, as Administrator of the
Estate of NADIA ULYANENKO a/k/a NADEZDA
ULYANENKO, Deceased,

Plaintiff,

FILED

Index No. 102489/09
Motion Seq. No. 004

-against-

SHAWNA HEDLEY, M.D., and KURT CHRISTOPHER,
M.D.,

OCT 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.
-----X

SCHLESINGER, J.:

This action sounding in medical malpractice and wrongful death involves the tragic death of a 28 year-old woman, Nadia Ulyanenko. Her estate is suing Dr. Shawna Hedley, a gynecologist, who saw Ms. Ulyanenko one time. It is the claim of the plaintiff that during that visit, Dr. Hedley prescribed an oral contraceptive to the decedent without first taking a proper history from her and doing appropriate tests.

The one visit referred to earlier occurred on January 18, 2005. Ms. Ulyanenko had come back recently from London and was now in New York working for Lehman Brothers. She visited Dr. Hedley to have a gynecological examination and to have the doctor do STD testing and provide her with a birth control prescription. In England, she had been taking Eugynon 30, also known as Microgynon. Dr. Hedley researched this medication and found that it was virtually the same as Levlen, which is the drug used in the United States.

In April 2005, Ms. Ulyanenko returned to the doctor's office but did not see Dr. Hedley. On that date she complained of having vaginal discharge.

But it is the events of June 23, 2005, that form the basis for this action. On that date, Ms. Ulyanenko was found by EMS workers in a subway bathroom. There, she

reported that she was suffering from shortness of breath, vomiting, and seizure-like activity. She was taken by EMS to the Emergency Department at St. Luke's Roosevelt Hospital.¹

At the hospital a history was taken from the patient, stating that she was taking oral contraceptives. Soon after this history was taken and during attempts to put a line into her, Ms. Ulyanenko had a major seizure and became pulseless and suffered respiratory arrest. She was resuscitated but remained unresponsive until her death on July 10, 2005.

An autopsy was performed on July 12 and a report was prepared. The autopsy included results from molecular genetic testing. The office of the Medical Examiner determined that Ms. Ulyanenko had a clotting disorder known as Factor V Leiden, as well as MTHFR Hetrozygote and genetic mutations. The Medical Examiner concluded that the cause of death was a combination of this genetic mutation, together with the use of oral contraceptives, which caused a pulmonary thromboembolism to form that resulted in death. Later on, it appears that Ms. Ulyanenko's brothers were tested to see if they have the same Factor V Leiden genetic mutation, and they do.

Before the Court is a motion by defendant Hedley for summary judgment. She supports her motion with affirmations from two experts, Dr. Howard G. Nathanson, an obstetrician/gynecologist, and Dr. Paul Feffer, a board certified Internist and Medical Oncologist and Hematologist. Dr. Feffer states that having a Factor V Leiden mutation increases the risk of a DVT (deep vein thrombosis) by a factor of 20-30 times among

¹St. Luke's Roosevelt Hospital and a treating physician there Dr. Resa Lewiss, both originally named as defendants here, were removed by a Stipulation of Discontinuance dated December 18, 2012. Also, Dr. Kurt Christopher, who defense counsel asserts never saw Ms. Ulyanenko, was named but not served. I have no information as to the remaining defendant originally named, Dr. Elad Bicer, except that he was not included when the caption was amended on April 4, 2013.

women who use oral contraception. In other words, when a woman is on oral contraception and has this genetic factor, she will have a 20-30 times greater chance of having a DVT than somebody who is not taking oral contraception but has that mutation. Having said that, however, Dr. Feffer opines that it is not the standard of care for a doctor to test for this mutation unless there is a family history or a personal history of thromboembolic manifestations. If there is no such history, then testing, which the doctor says is both time-consuming and expensive, is not necessary.

Dr. Feffer also says that when oral contraceptives are discontinued, the risk of a thrombosis ends. Also, he says that the risk is not related to the length of time that the woman uses oral contraception. He emphasizes that it is not within the standard of care to even disclose to a patient the risk of blood clot formation if she has no personal or family history of blood clotting disorders because the risk is so rare.

Dr. Feffer then addresses what he believes happened here. He first notes that there was no personal or family history of a blood clotting condition. He then notes that Ms. Ulyanenko got her prescriptions filled at a Duane Reade drugstore at 196 Third Avenue in Manhattan. Defense counsel obtained copies of these prescriptions.

It is further noted by Dr. Feffer that only two of these prescriptions for Levlén were filled on January 19 and February 14, 2005. Each prescription had 28 pills. Dr. Feffer then assumes that the patient was not filling the prescription elsewhere and that therefore her prescription would have run out by the middle of March 2005. He further states that once she stopped taking the medication, or was off the pill, she was at no greater risk than anyone else for formation of a deadly blood clot. Therefore, this doctor concludes that Dr. Hedley's January 18, 2005 prescription for birth control pills was not proximately related

to the patient's development of the DVT, which led to the pulmonary embolism on June 25, 2005, and the patient's death about two weeks later. He opines finally that it was solely the Factor V Liden mutation that led to these terrible events.

The gynecological expert Dr. Nathanson also opines on what the standard of care is for somebody in Dr. Hedley's position vis-a-vis a new patient. He has been practicing for 40 years and has given countless prescriptions for birth control pills to his patients. His opinion to a reasonable degree of medical certainty is that Dr. Hedley's care of Nadia Ulyanenko was within good and accepted standards of gynecological care and was not the cause of the patient's death.

Dr. Nathanson proceeds to describe what proper practice under these circumstances requires. He states that a doctor must take a complete history from her patient and specifically ask that patient if she has any personal or family history of DVTs, strokes or blood clotting disorders. He notes that when the decedent arrived at St. Luke's Hospital, she was conscious and was asked about her personal history but said nothing about strokes in that history. The hospital wrote down that there was "no significant prior medical history".

Dr. Nathanson concludes that it is not within the standard of care to advise gynecological patients of the risks of oral contraception without a clear history of blood clotting disorders. He adds that this is not a common problem and therefore there was no need to provide this information or further testing. Finally, he says that he personally has never had a case of a patient experiencing a blood clot as a side effect of birth control pills.

I find that the two statements from the doctors in the moving papers create a prima facie case in favor of Dr. Hedley. That being the case, the burden shifts to the plaintiff to see if he is able to create issues of fact with regard to both departure(s) and causation.

The opposition, which is somewhat shrill, disagrees with my assessment of the prima facie case. Plaintiff's counsel in the first instance argues that the defendant has not made out a prima facie case, particularly on cause of death, as Dr. Feffer's opinion disputes the Medical Examiner's conclusion without providing a better one. Counsel also points out in the affirmation, which relies on Dr. Hedley's records and deposition testimony, that Nadia Ulyanenko had informed Dr. Hedley that her grandfather had died of a MI (myocardial infarction) and that the defendant had never followed up with a line of questions to determine what had caused the infarction.

Plaintiff supports his opposition with an affirmation from a board certified obstetrician/gynecologist. He has been practicing for over 35 years and has been affiliated, he tells us, with various hospitals over his career. He states that his practice included prescribing birth control pills.

In the expert affirmation, six departures committed by Dr. Hedley are listed. They include the following: failing to obtain a complete and proper history, and failing to learn of a family history of blood clots. This second claimed departure relies on the assumption that there was such a family history of blood clots. Counsel for the plaintiff points out that such a history was established in the course of discovery in examinations of the decedent's family members.

The expert opines that another departure by Dr. Hedley was her failure to diagnose that Ms. Ulyanenko had a Factor V Liden gene. He says in this regard that a "simple blood test" would have revealed this deficiency. He then goes on to say that it was a departure to prescribe these birth control pills in light of the fact that the patient had this deficiency. Finally, he states that it was a departure to fail to warn the patient that she was at high risk

because of the genetic deficiency and that due to such a failure, Dr. Hedley never received Ms. Ulyanenko's informed consent.

The papers contain reference to testimony given on an examination before trial on December 18, 2012, by a cousin of the decedent, Ms. Galina Marchenko. She testified (at p. 53) that one of the decedent's grandfather's had passed away at age 60 or 70, "from a heart attack that was caused by a clot or something like that." Further, she stated that during "family discussions" after Ms. Ulyanenko's death, this history had come up.

Also, and significantly in response to the argument that Ms Ulyanenko had not recently filled her birth control prescription, both the hospital records and the testimony of Dr. Resa Lewiss regarding her interaction with the patient in the Emergency Room, show that Ms. Ulyanenko was then taking birth control pills.

In reply, movant submits a rebuttal affirmation from Dr. Nathanson. There he accuses plaintiff's expert of misstating information about Levlen in the 2005 PDR (Physician Desk Reference). When it talks about risks, he says it refers to women who have increased risks of heart attacks due to themselves having an underlying risk of coronary artery disease. Dr. Nathanson also discusses different kinds of clots. He points out that clots formed by plaque in the blood generally cause heart attacks, but that blood clots are something different and they are the ones that cause pulmonary emboli and strokes. Therefore, he opines that the family history of a heart attack by the grandfather was not a family history that should have alerted Dr. Hedley to order the Liden test.

He concludes by stating that there is no evidence, specifically in the autopsy report, that Levlen was in the decedent's system and that, pursuant to the Duane Reade records, Levlen would have been long out of the patient's system in June.

The motion by Dr. Hedley is denied. First of all, the fact that the autopsy report did not show Levlen is irrelevant and misleading. Certainly, Ms. Ulyanenko was not given birth control pills while in a coma leading to her death at St. Luke's Hospital. Therefore, if she had been taking this medication through the date of her emergency visit, certainly by the time of her death and autopsy the medication would have been out of her system.

The fact remains, and it is an important fact, that the decedent, while still conscious, gave responsive information to Dr. Lewiss, who questioned her, advising that she was taking birth control pills. The official medical report includes birth control pills, together with a genetic mutation, as the cause of death. That is enough on the issue of causation.

With regard to departures, Dr. Hedley's records merely show the Myocardial Infarction history of the decedent's grandfather. Dr. Hedley testified that she asked no follow-up questions. In other words, she did not pursue how the attack had occurred or its underlying mechanism. Ms. Ulyanenko tragically is not here to give her side of the conversation. Therefore, in light of the testimony about the grandfather's death, which may have provided a relevant family history if pursued, together with the not very impressive testimony from the decedent's cousin that "a clot" was the mechanism of the grandfather's death, an issue of fact exists as to how thorough Dr. Hedley was in the first instance and, if she had been more thorough, whether she departed by not testing for this mutation.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by Shawna Hedley, M.D., is denied.

Dated: September 30, 2013

FILED

OCT 03 2013

NEW YORK

SEP 30 2013 COUNTY CLERK'S OFFICE

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER