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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Antonia Mejia, as the Administratrix of the Estate of Jennifer Mejia, Deceased, and Antonia Mejia, Individually,

Plaintiff,

-against-

David Laffer, Melinda Brady, Suffolk County Police Department, Stan Xuhui Li, Eric Jacobson, Eric Jacobson, M.D., P.C., Mark C. Kaufman, and Family Medical Practice of Bay Shore,

Defendants.

Index No.: 10778/2012

Attorneys/Parties [See Rider Annexed]

Motion Sequence No.: 009; MD
Motion Date: 12/13/13
Submitted: 7/9/14

Motion Sequence No.: 010; MD
Motion Date: 12/20/14
Submitted: 7/9/14

Motion Sequence No.: 011; XMOT.D
Motion Date: 12/20/13
Submitted: 7/9/14

Upon the following papers numbered 1 to 42 read upon these two motions for summary judgment and cross-motion for leave to reargue: Notice of Motion and supporting papers, 1 - 14; 15 - 20; Notice of cross motion and supporting papers, 21 - 27; Answering Affidavits and supporting papers, 28 - 34; 35 - 36; Replying Affidavits and supporting papers, 37 - 38; 39 - 40; 41 - 42; it is

ORDERED that this motion by defendant, Stan Xuhui Li, M.D. (Li), and the separate motion by co-defendants, Eric Jacobson, M.D. and Eric Jacobson, M.D., P.C. (Jacobson), for an order awarding each of them summary judgment in their favor dismissing the complaint of plaintiff, Antonio Mejia, as administratrix of the Estate of Jennifer Mejia, deceased, and Antonio Mejia, individually, are denied; and it is further

ORDERED that the cross-motion by plaintiff is granted only to the extent it seeks an order granting leave to reargue a prior motion determined by order of this Court dated September 8, 2013 and, upon such reargument, such application is denied.

Plaintiff commenced this action to recover damages for the alleged conscious pain and suffering and wrongful death of decedent, Jennifer Mejia, who was working in the Haven Drugs pharmacy in Medford, New York on June 19, 2011, when David Laffer murdered her and three other people while robbing the pharmacy. Defendant Melinda Brady is alleged to have been an accomplice with Laffer in the crimes. Laffer was arrested, charged and ultimately convicted on his pleas of guilty to murder in the first degree, and he is currently serving four consecutive life sentences. Defendant Melinda Brady was also arrested, charged and convicted in connection with the incident. Among the allegations set forth in the complaint against defendants Li, Jacobson and Mark C. Kaufman (Kaufman) are that each practiced medicine and that in the course of treating patients Laffer and Brady they prescribed "an excessive number of prescription pain medications known to be addictive." It is also alleged that each defendant doctor "knew or should have known that persons addicted to prescription pain medications are prone to commit crimes", that such treatment was negligent, that it constituted a deviation from accepted medical practices, and that it was "a cause of the pain, suffering and death of Jennifer Mejia on June 19, 2011." As against defendant Family Medical Care of Bay Shore, P.C., sued in this action as Family Medical Practice of Bay Shore, P.C. (Family Medical), it was alleged that Kaufman owned and operated Family Medical and that he was an employee and agent thereof, and that Family Medical is vicariously liable for the actions of Kaufman. By order of this Court dated March 6, 2013, this Court dismissed plaintiff's claims for recovery in medical malpractice. To the extent that plaintiff alleges that the doctors created a risk of harm to the general public through the irresponsible dispensing of controlled substances to Laffer and Brady and with reckless disregard for the consequences of their addiction, however, such claims survived defendants' applications for dismissal under CPLR 3211. In addition, plaintiff was given leave to file and serve an amended complaint to add a cause of action for recovery under General Obligations Law §11-103.

Defendant Kaufman had previously moved for an order compelling disclosure of the medical records of co-defendants Laffer and Brady. Based on the limited record before this Court, it appears that requests were made to Laffer and Brady for authorizations to obtain their medical records but, to date, authorizations have not been provided. Furthermore, a copy of a letter purportedly from Laffer in which it is stated that he does not want his medical records "to be part of this civil trial" was submitted to the Court. By order of this Court dated December 6, 2012, the motion to compel such disclosure was denied, it having been determined that neither Laffer nor Brady waived the physician-patient privilege and that neither affirmatively placed his or her mental or physical condition in issue. Defendants Kaufman and Family Medical thereupon moved this Court for an order awarding summary judgment in their favor, arguing that plaintiff is unable to prove a *prima facie* case against them without the medical records. In support of the application, Kaufman submitted his own affirmation in which he stated that he had "no personal knowledge of medical care and treatment rendered, if such care and treatment [were] in fact rendered, to either David Laffer or Melinda Brady" and that he was "not in possession of any medical record(s) related to the medical

care and treatment, if such record(s) exist, of either David Laffer or Melinda Brady." It was also averred by Kaufman that he was not a custodian of records, independent contractor, employee "or in any way affiliated with Family Medical Practice of Bay Shore, P.C." Plaintiff cross-moved for an order compelling the release of the medical records of defendants Laffer and Brady. By order of this Court dated September 8, 2013, summary judgment was awarded to Kaufman and Family Medical, and the complaint and all cross-claims were dismissed against them. Plaintiff's cross-motion for an order compelling the disclosure of the medical records was denied.

Defendants Li and Jacobson now move for an order awarding summary judgment in each of their respective favors. Plaintiff has opposed the motions and has cross-moved for an order granting leave to reargue the previous award of summary judgment to defendants Kaufman and Family Medical.

On a motion for summary judgment, the moving party has the burden to establish "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Voss v Netherlands Ins. Co.,*** 22 NY3d 728, 734, 8 NE3d 823, 985 NYS2d 448 [2014], quoting ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]). If the moving party fails to meet this initial burden, summary judgment must be denied "regardless of the sufficiency of the opposing papers" (***Voss v Netherlands Ins. Co.,*** *supra* at 22 NY3d 734, quoting ***Vega v Restani Constr. Corp.,*** 18 NY3d 499, 503, 965 NE2d 240, 942 NYS2d 13 [2012]). In this action, while defendants Li and Jacobson both move for summary judgment dismissing the complaint and all cross-claims against each of them, neither defendant submitted an affidavit "by a person having knowledge of the facts" to show that the causes of action asserted by plaintiffs against each have no merit (*see* CPLR 3212[b]). Neither moving defendant has attempted to demonstrate his defenses to plaintiff's claims. Instead, both movants argue that plaintiff will be unable to prove his claims against them without the medical records. Thus, defendants improperly seek to shift the burden of proof on the motion to the plaintiff. In making their respective applications, defendants challenge plaintiff to produce evidence that Laffer was treated by them and that such treatment was causally related to the death of plaintiff's decedent. The law is well-established, however, that failure to make a *prima facie* showing of entitlement to summary judgment requires denial of the motions, as the burden will not be shifted to the non-moving party to persuade the Court against summary judgment (*see* ***Voss v Netherlands Ins. Co.,*** *supra,* 22 NY3d 728; *see also* ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923 [1986]). Accordingly, the motions by defendants Li and Jacobson must be denied.

Although the physician-patient privilege did not exist at common law, New York became the first jurisdiction to adopt the privilege by statute in 1828 (***Williams v Roosevelt Hosp.,*** 66 NY2d 391, 395, 488 NE2d 94, 497 NYS2d 348 [1985]). The physician-patient privilege is a legislative creation for which there have been a number of narrow exceptions enacted (*see*, e.g., Mental Hygiene Law §81.09[d], Penal Law §265.25), none of which are alleged to apply in this case. Thus, the general rule is that a patient's medical information is shielded from disclosure pursuant to the physician-patient privilege under CPLR 4504(a) (*see* ***Suchorzepka v Mukhtarzad,*** 103 AD3d 878, 960 NYS2d 157 [2d Dept 2013], citing ***Gunn v Sound Shore Med. Ctr.,*** 5 AD3d 435, 436, 772

NYS2d 714 [2004]). Furthermore, it has been held that there is no general public interest exception to the physician-patient privilege (***Matter of New York City Health and Hosp. Corp. v New York State Comm. of Correction,*** 19 NY3d 239, 244, 969 NE2d 765, 946 NYS2d 547 [2012], citing ***People v Sinski,*** 88 NY2d 487, 492, 669 NE2d 809, 646 NYS2d 651 [1996]).

The physician-patient privilege prohibits, in the absence of a waiver by the patient, disclosure by a physician of information acquired in attending a patient in a professional capacity, and which was necessary to enable the physician to act in that capacity (***Riccardi v Tampax, Inc.,*** 113 AD2d 880, 881, 493 NYS2d 798 [2d Dept 1985], citing CPLR 4504[a]). Here, the gravamen of the claim against the defendant physicians Li and Jacobson is that each of them negligently, intentionally and/or recklessly prescribed controlled substances to defendants Laffer and Brady with reckless disregard for their addiction and the consequences thereof. While plaintiff argues that the privilege does not apply under circumstances where the patient consulted with the defendant physician solely for the purpose of obtaining prescriptions and with no legitimate medical purpose, it must be recognized that when a physician prescribes drugs he is acting in his professional capacity, even under circumstances in which the activity is undertaken irresponsibly. Although plaintiff also argues that a "legitimate doctor-patient relationship" never existed between Laffer and Brady and the defendant physicians, and that Laffer and Brady consulted with the defendant physicians "solely for the purposes of obtaining narcotics and/or prescriptions", no evidence to support those contentions has been submitted to the Court. In fact, other than the allegations set forth in the complaint, nothing in the record before this Court establishes a factual basis upon which it is claimed that defendants Laffer or Brady were treated by or consulted with the defendant physicians. While plaintiff's counsel makes reference to trial testimony allegedly given during criminal proceedings involving defendants Li and Jacobson, no affidavit, no transcript of testimony, no allocution or other evidence has been submitted to establish a connection between the defendants Laffer and Brady and the defendant physicians. Thus, it has not been shown that the physical conditions of Laffer and Brady, for the purposes of obtaining their medical records, are material and necessary for the prosecution or defense of the action, since mere allegations in the complaint are insufficient to put the defendants' physical conditions in controversy within the meaning of Article 31 (*see* CPLR 3101; *see also* ***Koump v Smith,*** 25 NY2d 287, 250 NE2d 857, 303 NYS2d 858 [1969]).

Plaintiff also contends that Laffer and Brady, by virtue of having defaulted by failing to answer the complaint, forfeited their rights to assert the physician-patient privilege. This argument is misplaced. Although the statutory privilege under CPLR 4504 is phrased in terms of not allowing a medical professional to reveal information acquired in a professional capacity from a patient, it serves also to protect the patient from being compelled to disclose the substance of a communication made to the medical professional in an attempt to obtain treatment (***Williams v Roosevelt Hosp.,*** *supra* at 66 NY2d 395). Thus, medical records are protected from disclosure under the statute, though the statutory protection can be waived. A litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" (***Arons v Jutkowitz,*** 9 NY3d 393, 880 NE2d 831, 850 NYS2d 345 [2007], 409, citing ***Dillenbeck v Hess,*** 73 NY2d 278, 287, 536 NE2d 1126, 539 NYS2d 707 [1989]). The privilege exists, therefore, unless the party affirmatively

places his medical condition in issue. Accordingly, it follows that a party who has defaulted does not waive the physician-patient privilege by virtue of failing to affirmatively assert the privilege.

This Court has considered the remaining contentions of the parties and finds them to be without merit.

Dated: September 11, 2014

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

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