

Noorani v Karen Horney Clinic
2015 NY Slip Op 32123(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 800385/2011
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

FA
9/23/15
E

PRESENT: LOBIS
Justice

PART 6

NADIA NOURANI

INDEX NO. 800385/11

MOTION DATE _____

KARON HARNEY CLINIC

MOTION SEQ. NO. 3

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER, *and*
JUDGMENT

RECEIVED
SEP 23 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK
JOAN B. LOBIS, J.S.C.

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

Dated: 9/18/15

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
NEW YORK COUNTY: IAS PART 6**

-----X

NADIA NOORANI, MOTHER and
NATURAL GUARDIAN of M.M., INFANT

Plaintiff,

Index No. 800385/2011

-against-

**Decision, Order, and
Judgment**

KAREN HORNEY CLINIC and DR.
DANIEL COHEN,

FILED

Defendants. SEP 23 2015

-----X

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

COUNTY CLERK'S OFFICE
NEW YORK

This medical malpractice action arises from the treatment of infant plaintiff M.M. (“infant plaintiff”) by defendant Dr. Daniel Cohen (“defendant”) at defendant Karen Horney Clinic (“the clinic”). Infant plaintiff and her mother, plaintiff Nadia Noorani (“plaintiff”), allege that infant plaintiff sustained injuries as a result of defendant’s negligent prescription of medicine and failure to pay necessary attention to infant plaintiff. Defendants now move pursuant to Section 3212 of the Civil Practice Law and Rules (CPLR) for summary judgment. Plaintiffs oppose the motion. For the reasons stated below, the motion is granted, and accordingly the complaint is dismissed as to both defendants.

From January 29, 2007, to March 21, 2008, defendant, the staff psychiatrist at the clinic, saw infant plaintiff approximately once a month. Infant plaintiff first presented to the clinic with anxiety following her parents’ divorce when she was nine years old. Defendant diagnosed infant plaintiff with anxiety disorder and dysthemia and prescribed ten or twelve¹ milligrams of Prozac

¹ The parties’ papers differ as to the original dosage.

to be taken daily. Defendant alleges he first explained the risks and benefits of the medication to plaintiff, who on January 29, signed a "Medication Education Letter" in which she consented to the administration of psychotropic medication to infant plaintiff and acknowledged that she had been educated as to how to administer the medication, the target symptomology, the expected results, possible side effects, and possible interaction with other medications.

The medical records indicate that infant plaintiff's condition improved and remained stable between January and August 2007, at which time defendant suspended use of the medication with plans to reassess infant plaintiff's condition in a month. Plaintiff alleges that contrary to the records the medication was discontinued because infant plaintiff "was like a person high on drugs who was attending classes." The records indicate that, at the next visit, plaintiff expressed concerns that infant plaintiff had just started school and was in too stressful an environment to be off the medication. Defendant restarted her prescription.

Infant plaintiff subsequently reported feeling less anxious with no side effects from the medication. In December 2007, plaintiff reported that infant plaintiff was experiencing difficulty in school, anxiety and fear and had occasional meltdowns. Defendant increased her dosage to twenty milligrams a day, which he contends is still within the approved range for children. In March 2008, infant plaintiff reported difficulty sitting still and completing tasks, but added she was feeling calmer since restarting the medication. Plaintiff alleges that infant plaintiff became violent at school and that plaintiff tried to arrange another meeting with defendant in March 2008, but says she was told it was defendant's last day at the practice and he was unable to see her. Defendant has not treated infant plaintiff since. Plaintiff alleges infant plaintiff later went to a

private doctor, Dr. Nikolov, who discontinued use of Prozac and diagnosed infant plaintiff with pervasive developmental disorder, a form of autism, or Asperger's. Plaintiff alleges that she spoke to Dr. Waterhouse at the clinic and saw the head of the clinic, Dr. Paul, in person. Plaintiff claims that Dr. Paul admitted that the Prozac was causing an increase in infant plaintiff's blood sugar, but that he did not suggest an alternative treatment for her.

Plaintiffs filed a complaint alleging that defendant's malpractice resulted in infant plaintiff suffering severe and permanent injuries. Defendants' answer generally opposes the allegations in the complaint. After the completion of discovery, defendants filed the current motion for summary judgment. Defendants argue that plaintiffs have raised no triable issues of fact, that defendant's treatment did not deviate from accepted medical practice, and that even accepting the complaint's allegations as true, the complaint does not state a claim for malpractice.

In support of defendants' motion, Dr. Cohen first submits his own affidavit. Dr. Cohen is a board certified psychiatrist who specializes in adolescent psychiatry. In his affidavit, Dr. Cohen states that Prozac was the only FDA-approved anti-depressant for children at the time of infant plaintiff's treatment, and that the daily dosage he prescribed was within that recommended by the American Academy of Child and Adolescent Psychology (AACAP). As a result, he concludes to a reasonable degree of medical certainty that the prescription of Prozac and dosages administered were within the standard of care.

In addition, defendants submit the affidavit of Henry Paul, M.D., who is a board certified psychiatrist and executive director of the clinic. According to Dr. Paul, defendant's diagnosis of

generalized anxiety disorder and dysthymia was appropriate based on infant plaintiff's sadness, anxiety, and depression, and difficulty coping with school, grades, and her social life. He states that Prozac is an FDA and AACAP approved drug for treating children under the age of eighteen with those conditions. Dr. Paul asserts that infant plaintiff was closely monitored while taking the medication, as evidenced in the extensive progress notes about her condition. Additionally, Dr. Paul argues that plaintiff signed Quarterly Treatment Reports maintained by the clinic on infant plaintiff's progress, and that she agreed with the treatment plan including use of psychotropic medication. Dr. Paul also asserts that plaintiff consented to the increased dosage of medication in response to infant plaintiff's difficulty at school. Dr. Paul states that a twenty milligram dosage is specifically approved by the FDA and AACAP as appropriate for children under age eighteen. Dr. Paul opines to a reasonable degree of psychiatric certainty that use of Prozac to treat infant plaintiff's condition was well within the standard of care. He goes on to say that while he reduced infant plaintiff's dosage from twenty mg to ten mg following an evaluation on March 31, 2008, infant plaintiff's behavioral manifestations supported Dr. Cohen's earlier assessment. Dr. Paul opines that there were no departures from the standard of care in connection with infant plaintiff's treatment.

In opposition, plaintiffs argue that it was a deviation from accepted practice to prescribe Prozac to infant plaintiff. Plaintiffs state that although Prozac is one of the few antidepressants approved to treat youths, studies have linked the drug to suicidal thoughts and violent behavior and the FDA issued a public warning about the drug. In addition, plaintiffs allege that if defendant had properly diagnosed infant plaintiff with autism or Asperger's, he would not have prescribed Prozac, which they argue is contraindicated for infant plaintiff. Moreover, plaintiffs allege

defendants failed to warn plaintiff of the extreme side effects and failed to properly monitor the effects of the medication on infant plaintiff, resulting in social and behavioral consequences and mental trauma.

Plaintiffs submit the affidavit of plaintiff, who alleges that defendant did not fully disclose the risks of Prozac and that defendant misdiagnosed infant plaintiff, who actually suffers from Asperger's Syndrome. Plaintiffs allege that because of this misdiagnosis, defendants mistakenly prescribed Prozac, which in turn caused infant plaintiff's violent outbursts. Plaintiffs state that infant plaintiff lost critical years of brain development due to being prescribed the wrong medication at too young an age.

Additionally, plaintiffs submit an affirmation which they allege was written by a doctor, though they do not include the doctor's name or any credentials. The affirmation states in full:

I have seen the Plaintiff, NADIA NOORANI in consultation regarding her daughter, [M.M.]. Based on the information presented by NADIA NOORANI and on information presented in the documents regarding the care of [M.M.], I have come to the following conclusion with a reasonable degree of medical certainty:

The Karen Horney Clinic and Dr. Daniel Cohen did not respond appropriately to [M.M.]'s response to Prozac, constituting a deviation from accepted practice.

In reply, defendants point out that plaintiffs have conceded that Prozac is approved for children. They state that plaintiff's expert affidavit does not criticize defendant's treatment of infant plaintiff leading to the Prozac prescription, and only alleges that defendants did not respond appropriately to infant plaintiff's reaction to Prozac. Defendants contend that infant plaintiff

reacted positively to Prozac and state that the evidence submitted by plaintiffs is insufficient to raise a triable issue of fact. They argue that the affirmation is insufficient in that it is unsigned, no foundation is stated for the expert's familiarity with the relevant field of medicine, and the affidavit neither renders any opinion as to the appropriate standard of care nor addresses the evidence on which defendants rely. They also argue that the cases to which plaintiffs cite do not support their claim, and that the argument that defendants did not monitor infant plaintiff's progress is not viable because the records demonstrate, and plaintiffs do not contest, that she was seen at the clinic once a month.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. Courts grants the motion if, upon all the papers and proof submitted, it is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Addo v. Melnick, 61 A.D.3d 453, 456 (1st Dep't 2009). Summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice action, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008).

Expert opinion must be based on the facts in the record or those personally known to the expert. Rogues v. Noble, 73 AD.3d 204, 206 (1st Dep't 2010). The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Expert opinion should specify "in what way" a patient's treatment was improper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). For a prima facie case, the defendant must present expert opinion testimony that is supported by the record and addresses the plaintiff's essential allegations. Rogues v. Noble, 73 AD.3d at 206. Once a movant makes a prima facie showing, the burden then shifts to the non-moving party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit stating the defendant departed from accepted practice and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).

Here, defendants satisfy their prima facie burden. Through the affidavits of Dr. Cohen and Dr. Paul, defendants have established that it was reasonable for Dr. Cohen to diagnose infant plaintiff with anxiety disorder and dysthymia based on her symptoms, and that it was within the standard of care to prescribe Prozac to a child of her age with her illnesses. Further, defendants' affidavits, which are supported by the record, establish that infant plaintiff was monitored approximately once a month and that her condition seemingly improved as a result of the medication. Plaintiffs' statements that there are studies potentially linking Prozac to negative side

effects and that the FDA issued a warning about it are not sufficient to state a claim against defendants, particularly as they have not identified the studies or the warnings. Further, plaintiffs have not supported their allegation that Prozac was contraindicated for infant plaintiff. Plaintiffs have not alleged lack of informed consent in the pleadings and cannot raise it for the first time in response to a summary judgment motion. The elements of an informed consent claim are distinct from medical malpractice and must be pled as a separate theory of liability, so if plaintiffs wish to raise this issue now, they must move to amend the pleadings. See Pagan v. State of New York, 124 Misc.2d 366, 476 N.Y.S.2d 468 (N.Y. Ct. of Claims 1984).

As defendants have made a prima facie showing of entitlement to summary judgment, the burden shifts to plaintiffs to demonstrate through an expert affidavit that the defendant departed from accepted practice and proximately caused the injuries. Here plaintiffs do not meet that burden. Plaintiffs do not even show that the expert affidavit was written by a medical doctor. See Rogues 3 A.D.3d at 207. The affidavit states that defendants departed from accepted practice, but does not identify the departure adequately or opine that the alleged departure was the proximate cause of infant plaintiff's injuries. See id. The affidavit does not even allege what injuries the infant plaintiff purportedly sustained. This is insufficient to create a triable issue of fact.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed. The clerk is directed to enter judgment accordingly.

Dated: *Sept. 18, 2015*

ENTER:

FILED
SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK



JOAN B. LOBIS, J.S.C.