

Moore v Moldashel
2017 NY Slip Op 30913(U)
April 24, 2017
Supreme Court, Suffolk County
Docket Number: 15012/12
Judge: Jr., Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X
TASHAWNA MOORE, as administratrix of the Estate
of JACQUELINE LYLES,

Plaintiff,

-against-

JANICE G. MOLDASHEL, MARUSHKA BINDRA,
TEDDY T. LEE, PHILLIPE TASSY, LYNDIA
MARTINS, JASON ROSENTHAL, NEUBERT
PHILIPPE, DANIEL G. MURPHY, STEVEN
HORMOZDI, JONATHAN WINICK, CARL-HENRY
SANCHEZ, MULCHAND CHUGH, LONG ISLAND
EMERGENCY CARE, P.C., MERCY MEDICAL
CENTER, ST. CATHERINE OF SIENA MEDICAL
CENTER and SOUTHSIDE HOSPITAL,

Defendants.

PLAINTIFF'S ATTORNEY:

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INDEX NO.:15012/12

CALENDAR NO.: 201600801MM

MOTION DATE: 2/9/17

MOTION NO.: 007 MD; 008 MG; 009 MG;
010 MG; 011 MG

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Upon the following papers numbered 1 to 75 read on these motions for summary judgment and so-order stipulations of discontinuance; Notice of Motion/ Order to Show Cause and supporting papers 1-25; 26-49; 50-59; 60-68; 69-75; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers___; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (motion sequence 007 and motion sequence no. 011) of defendants Jason Rosenthal, M.D., Neubert Phillipe, M.D., and Stephen Hormozdi, M.D., the motion (motion sequence no. 008) of defendant St. Catherine of Siena Medical Center, the motion (motion sequence no. 009) of defendant Janice G. Moldashel, M.D., and the motion (motion sequence no. 010) of defendant Mulchand Chugh, M.D., are consolidated for purposes of this determination; and it is

ORDERED that the motion (motion sequence no. 007) of defendants Jason Rosenthal, M.D., Neubert Phillipe, M.D., and Stephen Hormozdi, M.D., for summary judgment in their favor dismissing the complaint asserted against them is denied as moot; and it is further

ORDERED that the motion (motion sequence no. 011) of defendants Jason Rosenthal, M.D., Neubert Phillipe, M.D., and Stephen Hormozdi, M.D. for an order discontinuing the action against them is granted; and it is further

ORDERED that the motion (motion sequence no. 008) of defendant St. Catherine of Siena Medical Center for summary judgment in its favor dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the motion (motion sequence no. 009) of defendant Janice G. Moldashel, M.D., for an order discontinuing the action against her is granted; and it is further

ORDERED that the motion (motion sequence no. 010) of defendant Mulchand Chugh, M.D., for an order discontinuing the action against him is granted.

Tashawna Moore, as administratrix of the estate of Jacqueline Lyles, commenced this action against defendants to recover damages for negligence, medical malpractice, wrongful death, and lack of informed consent in connection with their treatment of Jacqueline Lyles, who died on January 9, 2010. Issue has been joined, discovery is complete, and a note of issue has been filed.

Defendants Jason Rosenthal, M.D., Neubert Phillipe, M.D., and Steven Hormozdi, M.D., now move for summary judgment dismissing the complaint asserted against them. In support of the motion, they submit, among other things, a copy of the pleadings; plaintiff's decedent's medical records; their own deposition transcripts and the deposition transcript of Tashawna Moore, decedent's daughter, and David Dunn, her fiancé; and the expert affirmations of Joseph Jeret, M.D. and David Barlas, M.D. Defendants Rosenthal, Phillipe, and Hormozdi also move for an order discontinuing the action against them. The motion is supported by a stipulation of discontinuance signed by plaintiff.

Defendant St. Catherine of Siena Medical Center moves for summary judgment dismissing the complaint asserted against it. In support of the motion, St. Catherine of Siena

Medical Center submits a copy of the pleadings; an expert affirmation of Timothy G. Haydock, M.D.; deposition transcripts of Tashawna Moore, Marushka Bindra, M.D., Teddy T. Lee, M.D., Philippe Tassy, M.D., Lynda Martins, Jason Rosenthal, M.D., Neubert Phillipe, M.D., Daniel G. Murphy, M.D., Steven Hormozdi, M.D., Jonathan Winick, M.D., Carl-Henri Sanchez, M.D., and David Dunn; affidavits of Dr. Janice G. Moldashel, M.D., and Mulchand Chugh, M.D.; and decedent's medical records.

Defendant Janice G. Moldashel, M.D., moves for an order discontinuing the action against her. Defendant Mulchand Chugh, M.D., moves for the same relief. Each motion is supported by a stipulation of discontinuance, signed by plaintiff.

Decedent's medical records indicate that she was treated on May 26, 1995 by Dr. David Baker and was positive for serum HIV antibodies. In April of 1996 she was receiving an antiviral drug, ZDV, at Stony Brook University Hospital, and in October of 2005 her T-cell count indicated advanced AIDS. On December 26, 2009, decedent presented to St. Catherine of Siena Medical Center's Emergency Room with complaints of pain on the right side of her head and pain behind her right eye, neck and occipital scalp. She was examined by Dr. Marushka Bindra, and had unremarkable CT scans of her brain and sinuses. She was discharged with a diagnosis of headache, dehydration and anemia and directed to follow-up with her neurologist. Medical records do not indicate that she disclosed she was HIV positive to hospital personnel. On December 29, 2009, decedent returned to St. Catherine of Siena Medical Center with continued complaints of headaches and she was seen by Dr. Teddy Lee. Her brain CT scan, chest x-ray and VQ scan were all normal. She was discharged with directions to see her doctor the next day. On December 31, 2009, decedent presented to hematologist Dr. Philippe Tassy, who diagnosed a migraine headache and referred her to Mercy Medical Center for a brain MRI. Decedent did not reveal to Dr. Tassy that she was HIV positive. On January 1, 2010, decedent presented to Mercy Medical Center Emergency Room with complaints of migraine headaches. A CT scan of her head was unremarkable. Hematology results showed mildly low red and white blood count, hemoglobin and hematocrit, with an elevated sedimentation rate. A lumbar puncture was attempted by Dr. Daniel Murphy, an emergency room attending physician, to rule out meningitis and subarachnoid hemorrhage, but no cerebrospinal fluid was able to be drawn. She was discharged by Dr. Lynda Martins with a diagnosis of headache and anemia and instructions to follow up with Dr. Tassy.

On January 3, 2010, decedent suffered a seizure and was transported to Southside Hospital by ambulance. She complained of acute pain in her lower back and a headache. She was examined by Dr. Hormozdi, who admitted her for intractable headaches. Dr. Jonathan Winick, a neurologist, was consulted. Decedent reported to Dr. Winick that she had had headaches since Thanksgiving following the death of her father, numerous emergency room visits, and negative CT scans. Dr. Winick diagnosed conversion reaction precipitated by the death of her father and ordered an MRI and magnetic resonance angiogram of her brain to rule out vascular abnormalities. Dr. Mulchand Chugh performed a psychiatry consult. He noted that decedent's father had suffered from prostate cancer, and that after his death decedent began to suffer from intractable headaches. He diagnosed adjustment disorder with depressed mood. He recommended grief counseling and medication for sleep and depression. Decedent was also seen

by internist Dr. Carl-Henri Sanchez, who ordered the pain medications Topamax and a brain MRI examination. At 3:00 p.m. decedent was examined by Dr. Philippe and his notes reflect a spinal tap at Mercy Medical Center, with no fluid being obtained, with worsening headache.

On January 4, 2010, an MRI indicated acute left frontal lacunar infarction, and Dr. Sanchez sought a consultation from Dr. Marie-Edouard Desvarieux, a cardiologist. Dr. Desvarieux's impression of decedent's condition was intractable headaches with acute left frontal lacunar infarct, with no hemorrhage or mass. On January 5, 2010, an electrocardiogram showed sinus bradycardia, non-specific T-wave abnormality, and prolonged QT. Cardiac enzymes were negative for myocardial infarction. On January 6, 2010, decedent was unable to keep food down and complained of increased headache. After decedent had a panic attack, Dr. Desvarieux ordered an electrocardiogram and a cardiac catheterization. Dr. Ginza Zarilli performed a pulmonary consult and decedent was transferred to intensive care. Dr. Zarilli noted acute vasospasms upon catheterization.

On January 7, 2010, decedent was "better" with elevated blood pressure. Service was transferred from Dr. Sanchez to Dr. Rosenthal. A cardiac consult with Dr. Alex Vidal, an electrophysiologist, noted prolonged QT secondary to cardiovascular accident and recommended avoiding heart rate-lowering agents. On January 8, 2010, medical records indicate decedent complained of nausea, dizziness, headache and back pain. On January 9, 2010, she developed ventricular tachycardia which resulted in cardiopulmonary arrest. At 7:00 p.m., decedent died. On January 15, 2010, autopsy results identified the immediate cause of death as cryptococcal meningitis with presumed cardiac arrhythmia as a contributing factor. Decedent's brain showed extensive cryptococcal meningitis.

Preliminarily, the Court addresses the motions of defendants Jason Rosenthal, M.D., Neubert Phillipe, M.D. and Stephen Hormozdi, M.D.; defendant St. Catherine of Siena Medical Center; defendant Janice G. Moldashel, M.D., and defendant Mulchand Chugh for orders discontinuing the action as against them. Pursuant to CPLR R. 3217(a), a plaintiff may voluntarily discontinue an action against a party by filing with the Clerk of the Court a written stipulation signed by the attorneys of record for all of the parties. The Court, as a matter of discretion, also has the authority under CPLR R. 3217(b) to grant or deny a motion by "a party asserting a claim" to voluntarily discontinue an action. "[O]rdinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance [under CPLR R. 3217] should be granted" (*Tucker v Tucker*, 55 NY2d 378, 383, 449 NYS2d 683 [1982]; see *Turco v Turco*, 117 AD3d 719, 985 NYS2d 261 [2d Dept 2104]; *Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961, 890 NYS2d 82 [2d Dept 2009]). However, CPLR R. 3217(b) "cannot be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion" (*Shamley v ITT Corp.*, 67 NY2d 910, 911, 501 NYS2d 810 [1986]).

As plaintiff and plaintiff's counsel executed stipulations of discontinuance and there is no opposition to the motions of Dr. Janice G. Moldashel, Dr. Mulchand Chugh, Dr. Jason Rosenthal, Dr. Neubert Phillipe, and Dr. Steven Hormozdi, the Court concludes all parties consent to the discontinuance of the action as against such defendants. Absent evidence that a voluntary discontinuance of plaintiff's claims against them will cause prejudice or other improper consequences, the motions of Dr. Janice G. Moldashel, Dr. Mulchand Chugh, Dr. Jason

Rosenthal, Dr. Neubert Phillipe, and Dr. Steven Hormozdi for orders dismissing the complaint against them are granted. The motion of defendants Dr. Jason Rosenthal, Dr. Neubert Phillipe, and Dr. Steven Hormozdi for summary judgment, therefore, is denied as moot. The caption shall be amended by deleting the above names, and the instant action is severed and shall continue as against the remaining defendants.

As to the remaining motion for summary judgment, in order to make a *prima facie* showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a *prima facie* case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a *prima facie* showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's *prima facie* showing (*see Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Turning to the motion by St. Catherine of Siena Medical Center, defendant has established its *prima facie* entitlement to summary judgment. St. Catherine of Siena Medical Center's expert, Dr. Timothy Haydock, opines that the doctors, nurses and staff at St. Catherine of Siena Medical Center did not deviate from the accepted standard of care in the field of emergency medicine. He also opines that the care and treatment rendered by the doctors, nurses and staff at St. Catherine of

Siena Medical Center was not the proximate cause of decedent's injuries and death. He further opines that the care and treatment rendered to decedent on December 26, 2009 and December 29, 2009 was "all appropriate" and was in accordance with the accepted standard of care in the field of medicine and was not the proximate cause of decedents alleged injuries and death.

Plaintiff, who did not oppose the motion, failed to raise a triable issue of fact. Accordingly, the motion of St. Catherine of Siena Medical Center for summary judgment dismissing the complaint asserted against it is granted.

Dated: April 24, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.

