SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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AMERICA GONZALEZ, deceased by EUGENIA FERNANDEZ and ANGELA GARCIA, Administrators of her Estate,

Index 805247/2014
Motion Seq. 001, 002

DECISION & ORDER

Plaintiff(s),

-against-

PATRIA GONZALEZ, M.D. and THE NEW YORK AND PRESBYTERIAN HOSPITAL.,

Defendants

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GEORGE J. SILVER, J.S.C.:

In this medical malpractice action, defendants Patricia Gonzalez, M.D. ("defendant Gonzalez") and New York Presbyterian Hospital ("defendant New York Presbyterian") move for summary judgment. Plaintiff does not oppose either party's motion. For the reasons discussed below, the court grants each of defendants' motions (Seq. 001, 002).

Plaintiff America Gonzalez ("plaintiff") presented to defendant Gonzalez for the first time on January 24, 2012, complaining of dizziness and ear throbbing. She was 90-year-old. Initially, the medical records reveal that plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. Defendant Gonzalez's review of systems was normal. Plaintiff weighed 120 pounds, and reported a history of eye surgery in 2006 and a medical history of hypertension, asthma, urinary incontinence, vertigo, hypertension, glaucoma, constipation, and hyperlipidemia. None of these ailments were noted as remarkable considering her age. Later in the records, it is noted that plaintiff reported that she took the prescription drug Senna glycoside to treat constipation. Following her initial visit, defendant Gonzalez referred plaintiff for a

mammogram, pap smear, bone density exam and to an ophthalmologist. Blood work was ordered, and plaintiff was instructed to follow up in four weeks.

On January 30, 2012, plaintiff presented to Doshi Diagnostics where she underwent a bone density exam and mammogram. The bone density exam revealed an osteopenic spine (i.e. plaintiff's bone mineral density was deemed lower than normal), and that plaintiff had a fracture risk of "x 4." Her mammogram was noted as being normal. On February 2, 2012, plaintiff presented to defendant Gonzalez complaining of palpitations. A Holter device was placed, which monitors a patient's heart function. Plaintiff returned the following day and the Holter device was removed. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. The blood work revealed normal liver function, but did reveal slight anemia. Plaintiff was instructed to follow up in one week.

On February 8, 2012, plaintiff presented to defendant Gonzalez complaining of muscle pain. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. Plaintiff weighed 119 pounds. Defendant Gonzalez diagnosed plaintiff with chronic severe back pain due to osteoarthritis, and it was recommended that she start using a walker. Plaintiff was also given a referral for physical therapy.

On February 23, 2012, plaintiff presented to defendant Gonzalez for a Vitamin B-12 injection. In March 2012, plaintiff presented to Dr. Elliot Feinman of the North Manhattan Eye Center, where she complained of feeling tired and reported a history of high blood pressure and arthritis for many years. Dr. Feinman suspected that plaintiff had glaucoma, but that it had been treated. On April 13, 2012, plaintiff presented to defendant Gonzalez complaining of a cough,

dizziness, and chest congestion for the past five days. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. Defendant Gonzalez counseled plaintiff on her diet, advising her to change her eating habits and dieting strategies when eating out. Defendant Gonzalez also counseled plaintiff on ways to manage her urinary incontinence, and on fall prevention.

On May 15, 2012, plaintiff presented to defendant Gonzalez complaining of neck pain. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. Plaintiff weighed 120 pounds. Plaintiff was given another Vitamin B-12 injection and instructed to follow up in 6 months.

On June 12, 2012, plaintiff presented to defendant Gonzalez complaining of vertigo and back pain. She also complained of dizziness with head movements, sensation of imbalance, and weight loss due to lack of appetite. Dr. Gonzalez's review of systems was noted as normal and the plaintiff denied suffering from depression, abdominal pain, and constipation. Her weight remained 120 pounds. Defendant Gonzalez prescribed Hydrochlorothiazide for her high blood pressure and recommended a mammogram.

On June 30, 2012, plaintiff presented to the emergency room at defendant New York Presbyterian Hospital complaining of dizziness for the past four days, but left before being evaluated by a doctor. She reported to triage that her primary care physician was defendant Gonzalez, who she would follow with on the following day

On July 16, 2012, plaintiff presented to a neurologist, Dr. Ramon Valderrama, regarding her complaints of dizziness. She reported a five-year history of dizziness that made her need to walk with a cane. She also complained of neck pain radiating down both of her upper extremities and radicular pain and paresthesia in the lower extremities. Plaintiff further complained of

decreased hearing and tinnitus. Plaintiff weighed 120 pounds. Dr. Valderrama's physical examination revealed decreased movement in the cervical spine, pain with percussion of the spinous process, evidence of spasm in the paraspinal muscles, decreased movement of the lumbar spine, and decreased sensation in the lower extremities. Dr. Valderrama diagnosed plaintiff with cerebrovascular disease and possible Menier's disease. He recommended an MRI and MRA of the brain, an MRI of the cervical spine, EMG studies, EEG, and Doppler studies.

On August 6, 2012, plaintiff presented to defendant Gonzalez with complaints of dizziness, sore throat, and asthma for the past fifteen days. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, constipation, and weight loss. She weighed 116 pounds. Defendant Gonzalez instructed her to follow up in four weeks.

On August 13, 2012, plaintiff presented to the emergency room at defendant New York Presbyterian complaining of cough, shortness of breath, anorexia, fatigue, weakness and chronic constipation. There was no evidence of pneumonia. She was instructed to follow up with her primary care physician. On August 27, 2012, plaintiff presented to defendant Gonzalez complaining of ongoing dizziness and lack of appetite. She further complained of a sensation that the room was spinning and she was losing weight. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, and constipation. She weighed 112 pounds. Plaintiff was instructed to follow up in four weeks. Plaintiff did not return as instructed.

On January 25, 2013, plaintiff presented to the emergency room at defendant New York Presbyterian complaining of pain radiating to the right upper quadrant. The notes indicate that the pain "started yesterday" and "x 5 days." Plaintiff was without symptoms while in the emergency

room and was noted as eager to go home. She described the pain as severe at times which would resolve spontaneously within an hour or would resolve after eating. An ultrasound was performed which revealed gallstones and lesions on the liver. The decedent was told she might have cancer and that she required further work up. She was instructed to follow up with defendant Gonzalez and was discharged with Antivert, Esomeprazole (for a gastric ulcer), Feosol (for anemia), and Maalox (for abdominal pain).

On February 4, 2013, plaintiff followed up with defendant Gonzalez. She reported a history of being discharged from the defendant New York Presbyterian's emergency room after presenting for abdominal pain. Defendant Gonzalez's review of systems was noted as normal and plaintiff denied suffering from depression, abdominal pain, and constipation. Her weight had improved to 115 pounds. Defendant Gonzalez reviewed the hospital discharge paperwork and diagnosed the decedent with an intra-abdominal hemangioma and ordered an MRI of abdomen for further evaluation. Plaintiff was instructed to follow up in four weeks.

On February 7, 2013, plaintiff presented to the emergency room at defendant New York Presbyterian complaining of dizziness for the past two hours, which was not resolved by Meclizine. The dizziness resolved in the emergency room. A CT Scan of the head revealed no stroke pathology. She did not complain about and abdominal pains during her visit.

On March 26, 2013, plaintiff presented to Doshi Diagnostic for an MRI of the abdomen with and without contrast to evaluate a hemangioma. The MRI revealed large masses in the liver, more dominant on the left side, and a large mass in the right lower chest. A CT with and without contrast was recommended.

On April 11, 2013, plaintiff presented to the emergency room at defendant New York Presbyterian complaining of dizziness and abdominal pain. The preliminary diagnosis was a

gastric ulcer with questionable liver metastases. The notes also include a diagnosis of hepatic metastases on January 25, 2013. The decedent reported a poor oral intake and poor appetite for the past two months, since February 2013. At the time, plaintiff had lost fifteen pounds in the past two months and developed sharp constant non-radiating pain. The plan was to obtain an oncology consult, CT Scan for possible masses, and follow up with her primary care physician and GI physician. A CT Scan with contrast on April 11, 2013 was compared with a CT Scan from 2009 and revealed suspicion for a gastric mass but did not mention the liver. An esophagogastroduodenoscopy was performed on April 12, 2013 which revealed one non-bleeding cratered gastric ulcer measuring 30 mm. Pathology was positive for adenocarcinoma (i.e. a malignant tumor).

On April 13, 2013, plaintiff was discharged from defendant New York Presbyterian with a diagnosis of a gastric ulcer and liver metastases. She was instructed to follow up with defendant Gonzalez, Dr. Rieber (a gastroenterologist), and Dr. Fein-Levy. After discharge, the hospital was contacted by Dr. Rieber who said the family is aware of the cancer diagnosis but does not want to pursue treatment. On April 22, 2013, plaintiff followed up with Dr. Rieber. Dr. Rieber noted, "Spoke to daughter and son told gastric cancer and probably metastases. Feels weak but no abdominal pain. Family states does not want chemo or to see oncologist. Told possibly several months [to live] but unsure how long and that oncologist to see would have better estimation." Plaintiff complained of fatigue and weakness but no pain. Dr. Rieber also noted, "Family states do not want to pursue therapy and only wants her to be comfortable."

Plaintiff returned home, and was not told of her cancer diagnosis until just before she died on May 25, 2013.

ARGUMENTS

Based on the record before the court, defendants argue that summary judgment must be granted, because plaintiff cannot establish that defendants' medical treatment deviated from accepted standards of care or that this treatment proximately caused plaintiff's alleged injuries.

In support of her motion, defendant Gonzalez submits that she has set forth a *prima facie* showing of entitlement to summary judgment as a matter of law based upon the expert affirmation of Dr. Reed Phillips. Dr. Phillips opines, within a reasonable degree of medical certainty, that defendant Gonzalez did not commit any departures from the standard of care in her treatment of plaintiff and further opines that plaintiff's injuries were not caused by the care of defendant Gonzalez. Dr. Phillips first opines that defendant Gonzalez took an appropriate history from plaintiff by positing as follows:

> It is my opinion within a reasonable degree of medical certainty that Dr. Gonzalez took an appropriate history from the decedent when she first presented on January 24, 2012 and at every visit thereafter. As a primary care physician, a history of the patients past surgical and medical conditions must be taken, either from the family, from the patient, or by obtaining the patient's past medical records if necessary. Here, Dr. Gonzalez was able to elicit the decedent's past medical and surgical history from the decedent herself. The decedent reported a surgical history of eye surgery in 2006 and a medical history of hypertension, asthma, urinary incontinence, Menier's vertigo, hypertension, glaucoma, constipation, and hyperlipidemia. Based on my review of the other records in this case, this was an appropriate history to have elicited from the decedent and contains all of the most pertinent diagnoses in this 90-year-old woman. Therefore, it is my opinion within a reasonable degree of medical certainty that Dr. Gonzalez elicited an appropriate history from the decedent. It is further my opinion within a reasonable degree of medical certainty that there were no diagnoses in the decedent's history which were not elicited that would have made a difference in Dr. Gonzalez's management of the decedent.

Dr. Phillips then opines that defendant Gonzalez fully appreciated plaintiff's symptoms and complaints at each office visit, and properly examined plaintiff when appropriate. Indeed, Dr. Phillips recounts each of plaintiff's visits with defendant Gonzalez, and concludes that proper care was rendered at all of them. Dr. Phillips notes that the instances where defendant Gonzalez was

unable to render proper care to plaintiff were occasioned by plaintiff's own neglect. For instance, Dr. Phillips specifically notes that defendant Gonzalez testified that she treated plaintiff for loss of appetite and weight loss, but was deprived of the opportunity to monitor plaintiff's appetite and weight loss due to plaintiff's failure to follow up as instructed. As such, Dr. Phillips, pronounces that defendant Gonzalez timely diagnosed, treated and monitored plaintiff's loss of appetite and weight loss based on her signs, symptoms, complaints and medical history. Likewise, Dr. Phillips opines that defendant Gonzalez appropriately recommended follow up appointments, and appropriately managed plaintiff throughout her care.

In addition to the lack of any departures from accepted standards of medical practice, defendant Gonzalez argues that she is entitled to summary judgment given the absence of any triable issues of fact demonstrating a causal nexus between any acts or omissions of alleged malpractice and plaintiff's injuries. Defendant Gonzalez highlights Dr. Phillips' expert opinion that there were no acts or omission by defendant Gonzalez that proximately caused plaintiff's stomach cancer or contributed to a delay in the cancer's diagnosis. To be sure, Dr. Phillips' expert opinion avers, within a reasonable degree of medical certainty, that plaintiff's stomach cancer was untreatable as it first became detectable by endoscopy (i.e. a procedure in which an instrument is introduced into the body to give a view of its internal parts). Dr. Phillips further opines that even if treatment was available to plaintiff, such treatment posed a substantial risk of death due to the exacerbated side effects from radiation therapy, chemotherapy, and surgical intervention for a 90-year-old woman. Defendant Gonzalez further submit that even if plaintiff's stomach cancer was incidentally detected once it became detectable in April 2012, the cancer would have been untreatable as plaintiff's children both testified that they did not permit their mother to even know

she had cancer because it was deemed untreatable. Thus, defendant Gonzalez contends that she has demonstrated a *prima facie* entitlement to judgment as a matter of law.

Defendant New York Presbyterian similarly contends that judgment in its favor is warranted based on its submission of the affidavits of medical experts as well as the medical records and testimony of the parties. Indeed, defendant New York Presbyterian annexes the affidavits of Dr. Jeffrey Schneider, board certified in oncology, and Dr. Mark Henry, board certified in emergency medicine, in support of its contention that it did not depart from good and accepted medical practice and was not the proximate cause of the plaintiff's alleged injuries. As such, defendant New York Presbyterian contends that it has also demonstrated a *prima facie* entitlement to judgment as a matter of law.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he or she did not depart from accepted standards of practice or that, even if he or she did, he or she did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g.*, *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 AD3d at 195). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once 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 material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see Roques*, 73 AD3d at 195). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, defendants set forth a *prima facie* case in favor of dismissal, as evidenced by the submission of defendants' medical records, and defendants' experts' affidavits, each of which attests to the good care of defendants within the requisite fields of expertise, and provides support for the contention that nothing each defendant did or did not do proximately caused injury to plaintiff. The affidavits are detailed and predicated upon ample evidence within the record. As defendants have made *prima facie* showings, the burden shifts to plaintiff.

Plaintiff, however, has failed "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*, 68 NY2d at 324, *supra*). To be sure, plaintiff has not submitted opposition of any kind to defendants' respective motions. As such, the record is devoid of plaintiff's submission of an expert affidavit attesting to the fact that defendants departed from accepted medical practice and that the departure proximately caused her injuries (*see Roques*, 73 AD3d at 195). In the absence of any opposition to rebut defendants' *prima facie* showings, there are no triable issues raised here that warrant resolution by a factfinder. Likewise, plaintiff has failed to demonstrate any excuse, let alone a

reasonable excuse, for failing to oppose defendants' motions for summary judgment (*see Korea Exch. Bank v. Attilio*, 186 AD2d 634 [2d Dept. 1992]; *see also, Smith v. Fritz*, 148 AD2d 438 [2d Dept. 1989]).

Accordingly, based on the foregoing, it is hereby ORDERED that defendants' motion for summary judgment are GRANTED, and plaintiff's complaint is dismissed.

This constitutes the Decision and Order of the Court.

July 3, 2018

HON. GEORGE J. SILVER