Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Carisa M. McAteer, as Administratrix of the Goods, Chattels, and Credits of Justin Michael McAteer, deceased, and Carisa M. McAteer, individually,

Plaintiff,

-against-

Anthony Guida, M.D.,

Defendant.

Index No.: 31821/2011

Motion Sequence No.: 003; MG; CD
Motion Date: 7/2/15
Submitted: 1/10/18

Motion Sequence No.: 004; MD
Motion Date: 10/4/17
Submitted: 1/10/18

Attorney for Plaintiff:

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Attorney for Defendant:

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Clerk of the court

Upon the following papers numbered 1 to 107 read on these motions for summary judgment and to dismiss: Notices of Motions and supporting papers, 1 - 49; 50 - 68; Answering Affidavits and supporting papers, 69 - 105; Replying Affidavits and supporting papers, 106 - 107; it is

ORDERED that the motions by defendant Anthony Guida, M.D. are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by defendant to dismiss the action pursuant to CPLR 3404, or, in the alternative, to restore the case to the trial calendar and renew his prior summary judgment motion is denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Carisa McAteer's husband, Justin McAteer, then 30 years of age, by defendant Anthony Guida, M.D. The medical malpractice claims alleged against Dr. Guida arise from his treatment of Justin from approximately May 2007 to November 22, 2009. Plaintiff alleges that Dr. Guida was negligent in, among other things, failing to properly diagnose a pheochromocytoma.

According to the deposition testimony of plaintiff, Justin, her husband, began complaining of lower back pain in April 2007 after falling down stairs in their new home. Justin described his pain to plaintiff as constant and radiating to his hips and legs. Plaintiff explained that in the year before his death, Justin was "not himself." In addition to developing anxiety, Justin began experiencing sweating and shortness of breath during the night.

Plaintiff stated that Justin began treating with Dr. Guida in early 2008 for his back pain. Dr. Guida prescribed Cymbalta for depression and Benicar for high blood pressure. In addition to Dr. Guida, Justin also presented to pain management doctors Dr. Buonocore and Dr. Paticoff, who were referred by Dr. Guida, seeking treatment for back pain. Dr. Buonocore diagnosed Justin with problems in his spinal discs. Justin began treating with Dr. Paticoff in 2009, who prescribed him Methadone and a patch to put on his back. Plaintiff also testified that Justin received epidural shots from Dr. Paticoff and Dr. Buonocore. Plaintiff stated that she accompanied Justin and his mother to see Dr. Guida on one occasion, at which time they complained about Justin's lower back pain and anxiety.

Plaintiff testified that on the day before his death, Justin took his prescribed Methadone and blood pressure medication. Around 3:00 a.m., Justin suddenly awoke, sat up quickly in bed, and took a deep breath. Plaintiff asked Justin if he was okay, and Justin fell over the side of the bed onto the floor. After plaintiff called 911, Justin was breathing "very hard" and making noises, but he was unresponsive. Justin was transported to Good Samaritan Hospital Medical Center, where he was pronounced dead.

Dr. Guida testified that he first evaluated Justin on February 17, 2009 as a favor to Justin's sister, Jennifer, who worked for his medical office. Jennifer explained that Justin no longer had any pain medicine and could not get an appointment with his other doctors. Dr. Guida assessed Justin's problem and gave him medicine to tide him over until his visit with his original doctors. Dr. Guida further testified that on another occasion, Jennifer called to ask him for more pain medication for Justin. Dr. Guida became concerned and arranged to meet with Justin and his family on April 29,

2009. At this meeting, Justin told Dr. Guida that he was depressed, because he could not work and his doctors were not getting to the root of his back pain. Dr. Guida prescribed Cymbalta, an antidepressant that also treats radicular pain, and told Justin to confer with only one pain management doctor. Dr. Guida stated that he personally called Dr. Paticoff to ask for a favor in taking Justin on as a patient. Dr. Paticoff was reluctant, as Justin already had several pain management doctors, but agreed to treat him. Dr. Guida further testified that while plaintiff expressed concern with the amount of medicine Justin was taking, no one indicated Justin was experiencing profuse sweating, fatigue, shortness of breath, anxiety, or weight change.

Dr. Guida testified that physician's assistant Carissa Romano saw Justin on November 18, 2009. He stated that records indicate Justin was negative for, among other things, fever, chills, night sweats, fatigue, weight loss, shortness of breath, wheezing, coughing, congestion, chest pain, depression, and anxiety. Ms. Romano also performed an examination and found Justin constitutionally within normal limits, feeling well, and without complaints.

Dr. Guida explained that a pheochromocytoma is a tumor of the neuroendocrine tissue, usually found in the adrenal medulla, the middle part of the adrenal gland, which is responsible for making catecholamines adrenaline. Clinical symptoms include unrelenting headaches, elevated blood pressure, both episodic or fixed, rapid heart palpitations, and weight loss. Dr. Guida testified that records do not indicate the presence of a pheochromocytoma, as Justin was on a small or modest dose of blood pressure medication, his pulse rate was regular, and he did not complain of palpitations, sweats, weight loss, or headaches. In addition, Dr. Guida stated that plaintiff never indicated to him that Justin would wake in the middle of the night sweating and short of breath, or that he was anxious or "snippy."

Dr. Guida now moves for summary judgment dismissing the complaint against him on the grounds that he did not depart from good and accepted medical practices in the treatment rendered to Justin and for dismissal pursuant to CPLR 214-a and 3211 (a) (5). Dr. Guida submits, in support of the motion, copies of the pleadings, various discovery demands, the bill of particulars, plaintiff's discovery response pursuant to CPLR 3101 (d), the compliance conference order, the note of issue, the transcripts of the parties deposition testimony, the medical records of Guida & Savino, LLP and Joshua Paticoff, M.D., a record of the North Babylon Firehouse, a certified medical examiner's autopsy report, and the affirmation of Preston L. Winters, M.D. Dr. Guida also moves to dismiss the action pursuant to CPLR 3404, or, in the alternative, to restore the case to the trial calendar and renew his prior summary judgment motion. Dr. Guida submits, in support of the motion, copies of the pleadings, the bill of particulars, the note of issue, a certificate of note of the United States Bankruptcy Court for the Eastern District of New York, dated September 18, 2015, a discharge of debtor by the United States Bankruptcy Court for the Eastern District of New York, dated September 16, 2015, correspondence by Melissa Goldberg, Esq., dated February 21, 2017 and March 21, 2017, and the notice of motion, affirmation in support, and affidavit of service of defendant's summary judgment motion. In opposition, plaintiff argues that the stay is still in effect, that the case was never "marked off," and that both of defendant's motions were submitted after the stay was in effect. Plaintiff submits, in opposition, copies of the pleadings, the bill of particulars, the note of issue, the

transcripts of the depositions of the parties and Jennifer Gagliano, the bankruptcy docket, expert disclosure, the certified medical examiner's autopsy, microscopic, and toxicology reports, a record of the North Babylon Firehouse, the medical records of Guida & Savino, LLP and Dr. Paticoff, and a redacted affirmation.[1]

Addressing first defendant's motion to dismiss the action pursuant to CPLR 3404, the court notes that this section does not apply as this case was never "marked off" the calendar (*see* ***Ballestero v. Haf Edgecombe Associates, LP,*** 33 AD3d 952, 823 NYS2d 412 [2d Dept. 2006]). CPLR 3404 provides that a case in supreme court that is "marked off" the calendar and not restored within one year thereafter, the action is deemed abandoned and shall be dismissed for neglect to prosecute. Here, the action was stayed due to the filing of a petition in bankruptcy. Upon the filing of a debtor's bankruptcy petition, the automatic stay provisions of federal bankruptcy law (11 USC § 362 [a]) operate to suspend any non-bankruptcy court's authority, without further action, to continue judicial proceedings then pending against the debtor (*see* ***Emigrant Sav. Bank v Rappaport***, 20 AD3d 502, 799 NYS2d 533 [2d Dept 2005]). A stay is effective immediately upon the filing of a bankruptcy petition, without further action (*see* ***Carr v McGriff***, 8 AD3d 420, 781 NYS2d 34 [2d Dept 2004]). A stay is automatically removed at the time a discharge is granted or denied (11 USC 362 [c] [1] [c]). The issuance of a stay of the action is not the equivalent of marking the case "off" the calendar (*see* ***Barbu v Savescu***, 49 AD3d 678, 856 NYS2d 629 [2d Dept 2008]; ***Ballestero v Haf Edgecombe Assoc., L.P.***, 33 AD3d 952, 823 NYS2d 512 [2d Dept 2006]). According to the court's computerized records, the action was stayed on February 10, 2016, and the stay was removed on November 13, 2017. In addition, by order of the United States Bankruptcy Court of the Eastern District of New York dated September 16, 2015, a discharge of debtor under 11 USC § 727 was granted. Inasmuch as plaintiff's case was "stayed" until November 13, 2017, there is no basis for relief pursuant to CPLR 3404 and thus, defendant's motion to dismiss pursuant to CPLR 3404 is denied.

In regards to defendant's application to renew his prior motion for summary judgment, such a motion must be based on new or additional facts "not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]). In this case, a prior determination was not made on defendant's motion for summary judgment. Therefore, there is no decision to renew and thus, defendant's motion is denied.

Next addressing defendant's motion for summary judgment, it is firmly established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing

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[1]The unredacted affirmation has been furnished to the Court under separate cover.

party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989] ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (*see* ***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see* ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; ***Faccio v Golub***, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

After making this prima facie showing, the burden shifts to the plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (*see* ***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the prima facie burden (*see* ***Barrocales v New York Methodist Hosp.***, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; ***Stukas v Streiter***, *supra*). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant

physician's summary judgment motion" (***Alvarez v Prospect Hosp.***, *supra*, at 325; *see* ***Brinkley v Nassau Health Care Corp.***, 130 AD3d 1287, 993 NYS2d 73 [2d Dept 2014]; ***Kramer v Rosenthal***, 224 AD2d 392, 637 NYS2d 772 [2d Dept 1996]). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; ***Gressman v Stephen-Johnson***, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; ***Moray v City of Yonkers***, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]).

Here, defendant Dr. Guida established a prima facie case of entitlement to summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment he rendered to Justin (*see* ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, *supra*; ***Faccio v Golub***, *supra*; ***Dockery v Sprecher***, 68 AD3d 1043, 891 NYS2d 465 [2d Dept 2009]). In his affirmation in support of defendant's motion, Dr. Winters stated that he reviewed the pleadings; the bill of particulars; plaintiff's expert disclosure; the autopsy report; the deposition transcripts of plaintiff, of Dr. Guida, and of Jennifer Gagliano; the North Babylon Fire Department emergency medical services records; and the records of Dr. Guida, Dr. Joshua Paticoff, Dr. Steven Litman, Dr. Thomas Jan, Dr. Norman Haywood, Dr. Mahjabeen Ahmed, Dr. John Buonocore, and Dr. Borimir Darakchiev. Dr. Winters opined within a reasonable degree of medical certainty that Dr. Guida's medical treatment did not depart from any good and accepted medical practices.

Dr. Winters explained that pheochromocytomas are rare tumors of the adrenal gland and are typically characterized by resistant hypertension. While up to half of these tumors are asymptomatic, the most common symptoms are headaches, sweats, and palpitations. Dr. Winters opined that a 24-hour urine collection that measures catecholamines and metanephrines is used to diagnose a pheochromocytoma. However, this is not a routine test and would only be required if a patient presented with a "clinical picture suggestive of a pheochromocytoma," including headaches, sweats, or palpitations.

Dr. Winters also opined that Justin's May 16, 2007, January 21, 2008, February 2, 2008, February 28, 2008, and July 29, 2008 visits with Dr. Guida were focused on addressing his back pain, and that his September 30, 2008 visit with Dr. Guida was focused on a rash and tongue swelling. Dr. Winters explained that back pain, rashes, and tongue swelling are not indicative of a pheochromocytoma. Dr. Winters further opined that on February 17, 2009, Dr. Guida correctly referred plaintiff to a pain management specialist and neurosurgeon for his complaints of back pain. Dr. Winters also stated that Dr. Guida appropriately prescribed Xanax on May 4, 2009 to treat Justin's anxiety. Anxiety is a known side-effect of Cymbalta, which was appropriately prescribed on April 29, 2009 to treat Justin's complaints of depression and radicular pain. Dr. Winters stated that the medical records show on November 18, 2009, Justin did not complain of headaches and specifically denied sweats, palpitations, or anxiety when he was examined by physician's assistant Carissa Romano. Justin reported that he was feeling well and had no complaints and his blood pressure was within normal limits. Dr. Winters therefore opined that Justin's pheochromocytoma was asymptomatic.

Dr. Winters opined that on all relevant dates, Justin's complaints did not suggest a pheochromocytoma. He stated that Justin "never presented with signs or symptoms which would suggest a pheochromocytoma" during his treatment with Dr. Guida. Dr. Winters further opined that based on Justin's blood pressure obtained during his visits with Dr. Guida, Justin's hypertension was well-controlled with Benicar, as his readings remained within normal limits on each visit. Based upon his consistently normal blood pressure readings and lack of complaints of headaches, sweats, or palpitations, there was no reason for Dr. Guida to order testing for a pheochromocytoma. In addition, plaintiff never complained of sweats and denied experiencing sweats or palpitations to Dr. Paticoff in 2009. Therefore, neither Dr. Guida nor anyone at his office departed from good and accepted medical practice by failing to diagnose a pheochromocytoma.

While the autopsy report preliminarily suggested a pheochromocytoma pending toxicology results as the cause of death, toxicology results were reported eight days later, but not incorporated into the autopsy findings. Dr. Winters opined that the methadone levels in Justin's femoral arterial blood and liver were "substantially above the usual therapeutic levels, and were well within the range associated with death due to methadone toxicity." Dr. Winters also opined that the autopsy finding of vegetable matter in Justin's lungs strongly suggests that he aspirated after losing consciousness due to respiratory depression brought on by methadone toxicity. Aspiration of food into the lungs would not be expected with a pheochromocytoma. Dr. Winters concluded that Justin's cause of death was methadone toxicity and that the finding of a pheochromocytoma was incidental and unrelated to Justin's death.

Dr. Guida having met his initial burden on the motion, the burden shifts to plaintiff to raise a triable issue of fact (*see* ***Williams v Bayley Seton Hosp.***, *supra*; ***Makinen v Torelli***, *supra*; ***Stukas v Streiter***, *supra*). In opposition, plaintiff submits an expert affirmation, with the affirmant's name and signature redacted. The physician, board certified in internal medicine, stated that the "deficiencies of [d]efendant's records of [p]laintiff's treatment include incomplete records of vital signs, laboratory records, and EKGs." The physician compared the medical records to Ms. Gagliano's testimony that both she and Justin "repeatedly related symptoms" to Dr. Guida, including "excessive sweating, high blood pressure, racing heart, rapid breathing, anxiety, [and] lower chest and upper abdomen pain." The physician related these omitted symptoms to "consideration of a diagnosis of pheochromocytoma" and opined that Dr. Guida failed to diagnose a pheochromocytoma. The physician concluded that the "failure . . . to document such symptoms constitutes a departure from good and accepted medical practice." The affirmation fails to raise a triable issue of fact, as it is conclusory and fails to address the specific assertions of Dr. Winters, including the assertion regarding proximate cause (*see* ***Senatore v Epstein***, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; ***Barrocales v New York Methodist Hosp.***, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; ***Brinkley v Nassau Health Care Corp.***, 120 AD3d 1287, 993 NYS2d 73 [2d Dept 2014]; ***Forrest v Tierney***, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]).

Plaintiff also submits the transcript of the deposition testimony of Jennifer Gagliano, Justin's sister. Ms. Gagliano testified that she worked for Dr. Guida's office as a receptionist when Justin first presented to Dr. Guida's office in 2007 or 2008 with bank pain. Within six months or a year

of his passing, Justin complained to Ms. Gagliano about his night sweats, faster heart rate, anxiety, and rapid breathing. Ms. Gagliano testified that she was present when Justin told someone at Dr. Guida's office about his sweating. She also testified that she knew both Justin and plaintiff complained to someone at Dr. Guida's office about his fast heart rate, and that she was "pretty sure" Justin told someone at Dr. Guida's office about his rapid breathing. Ms. Gagliano further testified as to an occasion when she accompanied Justin to see Dr. Guida along with plaintiff and her nephew. Justin told Dr. Guida that he was depressed, and Dr. Guida prescribed Cymbalta. The family's complaints of Justin's symptoms of sweating, anxiety, and pain were also expressed to Dr. Guida. However, Ms. Gagliano's deposition testimony alone is insufficient to raise a triable issue of fact (*see* ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]).

Accordingly, defendant Dr. Guida's motion for summary judgment is granted.

Dated: 10/10/2018

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

____X____ FINAL DISPOSITION_____ NON-FINAL DISPOSITION