

Stewart v Montefiore Med. Ctr.
2020 NY Slip Op 33083(U)
September 18, 2020
Supreme Court, Kings County
Docket Number: 520219/2017
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of September 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

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SHANNON STEWART,

Plaintiffs,

DECISION AND ORDER
Index No. 520219/2017

-against-

MONTEFIORE MEDICAL CENTER, a not-for-profit New York corporation,

Defendants.

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion _____

1

Memo of Law in Opposition _____

2

Reply _____

3

This is a motion brought on by Defendant, Montefiore Medical Center, for an Order granting summary judgment as to it and dismissing Plaintiff’s complaint. Plaintiff stands opposed to the application.

This is a case sounding in medical malpractice. Plaintiff alleges that the medical providers at Defendant’s Emergency Department, including non-party Laarni Manuzon, N.P., failed to timely diagnose and treat right foot cellulitis on June 12, 2015. Action was commenced by the filing of a summons and complaint on or about October 19, 2017. Issue was joined by

service of Defendant's answer on or about December 4th of the same year. A Bill of Particulars and several Supplemental Bills of Particulars were served on Defendant. Discovery proceeded; a Note of Issue was filed, and Defendant made the instant motion within the requisite period of time.

It is undisputed that Plaintiff presented to the Emergency Department of Defendant Hospital on June 12, 2015, at 12:18 a.m., complaining of pain in his right foot. He was triaged and assigned a "level four," or less urgent, on the Emergency Severity Index. The parties differ, however, as to Mr. Stewart's mode of locomotion during the day. Plaintiff alleges that he traveled by taxi, while Defendant maintains he told the various medical professionals he came into contact with, that he walked "all over," seeking cremation for his pet rabbit. Later that day, Mr. Stewart found his way to the New York Sports Club on the Upper East Side, where he worked out until closing time, either 11:00 p.m. or 12:00 a.m. Mr. Stewart remained in the Emergency Department for approximately five hours. He was examined by N.P. Manuzon and diagnosed with plantar fasciitis. He was given pain medication while in the hospital and sent home with prescriptions for same. He was directed to use warm soaks, avoid flat sole footwear, and to follow up at the Montefiore Podiatry Clinic. Two days later, Mr. Stewart presented to the Brooklyn Hospital Center Emergency Department complaining of fever (102.4), body aches and fatigue, and swelling in his right foot and right shoulder. He was diagnosed with right foot cellulitis and admitted to the hospital.

Plaintiff alleges that when he presented to Montefiore Medical Center, arriving via taxi, he told the triage nurse that he "thinks he has cellulitis. Approximately an hour and fifteen minutes later he was seen by "a lady in a white coat," who answered in the affirmative when asked if she was a doctor. (We now know that the person who diagnosed and treated Mr.

Stewart was N.P. Manuzon.). Plaintiff claims that his foot was red, swollen, and hot to the touch. N.P. Manuzon neither touched nor manipulated his foot, nor did she examine the bottom. His request for x-rays and blood work was refused. He was diagnosed by the Nurse Practitioner with plantar fasciitis and sent home with two prescriptions, which he apparently had difficulty filling. Two days later, Plaintiff presented to Brooklyn Hospital, complaining of fever and a swollen, red and hot right foot.

In support of its motion, Defendant submits medical affidavits from two physicians – Dr. Rahul Sharma, board certified in Emergency Medicine; and Dr. Bruce Farber, board certified in Infectious Diseases and Internal Medicine. Each physician opines that Defendant did not depart from acceptable medical standards in its treatment of Mr. Stewart. Dr. Sharma states that cellulitis is diagnosed by observation and examination. That the hospital record clearly states Plaintiff's foot was seen, touched and manipulated. That diagnostic testing (x-rays and blood work), suggested by Plaintiff, would not aid in a diagnosis of cellulitis. That, in fact, the x-rays taken at the Brooklyn Hospital, two days later, when Plaintiff presented with signs of cellulitis, revealed only a calcaneal spur, previously diagnosed at Defendant hospital, approximately eight months prior to the date which forms the subject matter of the complaint. At no time, while at Defendant hospital, did Plaintiff present with a red, hot, swollen foot. That there were no clinical signs of infection and that blood work was not necessary. That since there was no indication of an infection, a prescription for an antibiotic was not called for and that at all relevant times N.P. Manuzon was authorized to write the prescriptions given to Plaintiff.

Dr. Farber states that there is no raised suspicion for infection in an HIV positive patient who tells hospital personnel that his viral load is undetectable. That based on Plaintiff's vital signs, the initiation of a sepsis protocol was not warranted. That Plaintiff presented with no signs

and symptoms of cellulitis and that no signs were missed by the treating N.P. In sum and substance, Mr. Stewart was, at all times, treated appropriately, diagnosed correctly and discharged. That Defendant did not deviate from acceptable medical care nor did it cause damage to Plaintiff.

In opposition, Plaintiff submits a letter from Christopher Lucasti, D.O., an infectious disease physician and Dr. Gary Saphire, a podiatrist. Each letter merely summarizes Plaintiff's history and neither offers a detailed explanation as to how Defendant purportedly departed from appropriate standards of medical care, nor as to how Defendant caused damage to Plaintiff.

It is well settled that "the proponent of a summary judgment motion must make a *prima facie* showing of judgment as a matter of law" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this burden has been met, the party opposing the motion must produce competent evidence sufficient to rebut the moving party's showing (*see Alvarez v. Prospect Hospital*, 68 NY2d 325; *see Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]).

In this case, Plaintiff submits two letters to substantiate his position that Defendant was negligent in its treatment. It is noted that mere correspondence (letters) do not comply with the statutory requirement of medical affidavits (*see CPLR § 2106*). However, even if the Court were to consider said documentation as proof of malpractice, they are conclusory, vague and do not delineate the manner in which the purported departures occurred.

The courts in this state have been uniform in requiring non-conclusory expert affirmations/affidavits to successfully rebut a *prima facie* showing of entitlement to summary judgment. In *Gilmore v. Mihail*, the Appellate Division, Second Department held that Defendants were entitled to summary judgment in a medical malpractice case where the "affirmation of the plaintiffs' expert was conclusory and speculative, and failed to address the

specific assertions made by the defendants' expert" (*Gilmore v. Mihail*, 174 AD3d 686, 688 [2d Dept 2019]). Furthermore, the Second Department held that Defendants were entitled to summary judgment in a medical malpractice case where the "expert affidavit proffered by the plaintiff relied upon facts that were not supported by the record and, thus, was speculative and conclusory and insufficient to defeat the defendants' motion for summary judgment" (*Wagner v. Parker*, 172 AD3d 954, 955 [2d Dept 2019]).

For the forgoing reasons, Defendant's motion for summary judgment is granted in its entirety and the above captioned action is dismissed.

This constitutes the opinion, decision and order of this Court.

ENTER,



HON. MARSHA L. STEINHARDT
J.S.C.