SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH REEVES MCMAHON** **PART** **IAS MOTION 30**

Justice

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DANIELLE WILLIAMS,

Plaintiff,

- v -

LENOX HILL HOSPITAL, MOUNT SINAI WEST

Defendant.

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INDEX NO. 805025/2016

MOTION DATE 02/24/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 98, 99, 100, 101, 106, 107, 108, 109

were read on this motion to/for DISMISS.

Defendant Mount Sinai West f/k/a Roosevelt Hospital ("Mount Sinai West") moves for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the Action against it with prejudice. The Motion is hereby granted in part and denied in part.

Plaintiff Danielle Simone Williams ("Plaintiff") brings this medical malpractice Action as the Administratrix of the Estate of Tonya Bonita Williams (the "Decedent"). The Decedent was treated at Mount Sinai West on two occasions, the first on October 24, 2013 ("October 2013 Admission") and the second on January 13, 2014 ("January 2014 Admission"). The record shows that Decedent was HIV-positive since 1992 and had several medical issues, including systemic lupus erythematous, cirrhosis and pneumocystis pneumonia. Prior to her October 2013 Admission, Decedent was admitted to Defendant Lenox Hill Hospital ("Lenox Hill") on September 28, 2013 for upper right quadrant pain and underwent a cholecystectomy and liver biopsy, which indicated cirrhosis. After she was discharged from Lenox Hill on October 5,

2013, Decedent returned to Lenox Hill on October 20, 2013 with complaints of nausea, vomiting, loose, dark stool and right upper quadrant pain. Decedent was diagnosed with colitis, given medication and scheduled for a colonoscopy prior to her discharge on October 22, 2013.

Decedent's October 2013 Admission to Mount Sinai West

On October 23, 2013, Decedent presented to the emergency department ("ED") at Mount Sinai West with complaints of nausea, vomiting, dark stool and sharp right upper quadrant pain. During her October 2013 Admission, Decedent was given morphine for her abdominal pain and Zofran for her nausea and vomiting, as well as Ciprofloxacin and Flagyl. Decedent also received consultations in gastroenterology, surgery and rheumatology. Mount Sinai West maintains that Decedent conceded she failed to take Prednisone every day as recommended to treat a lupus flare-up that occurred two months earlier. According to Mount Sinai West, the rheumatologist's differential diagnosis included autoimmune hepatitis and lupus nephritis. It was recommended that Decedent be started on intravenous Solu-Medrol.

Plaintiff and Defendant Mount Sinai West dispute whether the Decedent had respiratory symptoms or had difficulty breathing during her October 2013 admission. According to Plaintiff, the Mount Sinai West records show that Decedent had shortness of breath, which substantially worsened between October 25th and October 28th, and that films taken of her lungs showed chronic pulmonary abnormalities. Defendant Mount Sinai West denies that Decedent had difficulty breathing and represents that her Chest CT Scan, taken on October 26, 2013, revealed mild right and left small pleural effusions, pulmonary hypertension and ground glass opacities in the upper lobes. Mount Sinai West maintains that the record does not mention any findings indicating an infectious process of the lungs, including pneumonia. According to

Defendant, Decedent's abdominal CT scan revealed a diffusely edematous bowel and shock bowl extending from the esophagus to the rectum.

By November 2, 2013, Decedent tolerated a regular diet and denied having abdominal pain. Decedent's colitis was deemed to be secondary to a lupus flare-up and it was recommended that Decedent cease taking antibiotics and begin taking oral steroids. Decedent was discharged from the Mount Sinai West on November 4, 2013 with diagnoses of gastropathy, lupus, hypertension, and hyperlipidemia. Decedent was also instructed to follow up with her primary care physician, gastroenterologist and rheumatologist.

Decedent's January 2014 Admission to Mount Sinai West

On January 13, 2014, Decedent presented to the Mount Sinai West ED with tachycardia, increased dyspnea, tachypnea, a fever of 100.2, sepsis and respiratory distress. Decedent had a pulse oximetry in the low 90s and reported having a productive cough that developed a week earlier. Decedent received a chest x-ray that showed basilar atelectasis/opacity that worsened in comparison to the imaging taken during her October 2013 admission. Decedent's chest CT scan also showed that the right hemidiaphragm had volume loss of the right middle and lower lobe that was consistent with worsened consolidation/atelectasis compared to the October 2013 film. Plaintiff represents that cultures that were ordered on January 13, 2014 later showed preliminary findings of "gram negative coccobacilli" and "Haemophilus influenzae Beta lactamase positive." According to Mount Sinai West, Decedent was given general antibiotics and was admitted to the Medical Intensive Care Unit with a diagnosis of pneumonia and acute respiratory failure.

A request was placed with the Interventional Radiology Department on January 14, 2014 for a consult and CT-guided lung biopsy based upon the Hospital's concern for atypical infection. Interventional radiologist Adie Friedman, M.D. ("Dr. Friedman") consulted with

Critical Care/Pulmonology Attending John Cardasis, M.D. ("Dr. Cardasis") to choose the best method to determine the organism causing Decedent's pneumonia. Dr. Friedman testified that Dr. Cardasis felt that the best way to isolate the organism was to perform a lung biopsy. According to Dr. Friedman, both he and Dr. Cardasis decided that a CT-guided lung biopsy was the best method to isolate the organism.

On January 15, 2014, Dr. Friedman performed a CT-guided thoracentesis/chest tube placement for increased right pleural effusion as well as a CT-guided percutaneous right lung biopsy. Defendant represents that prior to the procedure, Decedent gave informed consent after she received an explanation of the risks involved with the procedure, which included bleeding, vascular injury, infection and pneumothorax. Plaintiff argues that a review of the signed consent form shows that the form itself does not list or identify any of the complications or risks that were allegedly explained to the Decedent. An additional Chest CT scan was performed which revealed a significant size increase in the right pleural effusion and Decedent's doctors decided to proceed with the planned lung biopsy.

Dr. Friedman first performed a thoracentesis procedure during which a needle was placed in the pleural space between the lungs and chest wall. This procedure was performed without complications and Dr. Friedman was able to aspirate 530 milliliters of cloudy yellow fluid from the pleural space. After additional images were taken to identify a suitable site for the right lower lobe lung biopsy, Dr. Friedman initiated the biopsy. As noted in the Mount Sinai West's records, the Decedent developed shortness of breath and massive hemoptysis after the first pass of the needle. The biopsy needle was removed and the rapid response team was activated. The Decedent was then intubated due to massive hemoptysis and desaturation. After the Decedent

initially improved, she became hemodynamically unstable and an emergency medical code was activated.

Decedent was successfully resuscitated, stabilized and brought back to the Intensive Care Unit ("ICU"). Dr. Friedman testified that Decedent was conscious during the procedure until she experienced hemoptysis and shortness of breath and that Decedent's hemoptysis was caused by the needle biopsy that he performed. The Decedent remained mostly unconscious until she went into cardiac arrest and was pronounced dead at 9:15 pm on January 16, 2014. Defendant Mount Sinai West notes that blood cultures that were performed in the ED were found to be positive for gram-negative coccobacillary bacteremia and that a final blood culture result taken on January 16, 2014 showed the bacteria believed to be Haemophilus influenzae.

Decedent's Death Certificate states that her immediate cause of death was "hemorrhagic and respiratory complications following lung biopsy for evaluation of sepsis due to hemophilus influenzae pneumonia in asplenic individual following splenectomy for treatment of splenic lacerations due to blunt impact of torso." The "Work Copy Only" of the Death Certificate in the Mount Sinai West Chart states that Decedent's cause of death was "respiratory failure due to multi-lobar pneumonia related to HIV."

Defendant Mount Sinai West's Motion for Summary Judgment

Defendant Mount Sinai West submits two expert affirmations in support of its motion for summary judgment, the first by Barry Zingman, M.D. ("Dr. Zingman"). Dr. Zingman states that within a reasonable degree of medical certainty, Mount Sinai West's care of Decedent "conformed to the accepted standards of medical practice" and "such treatment was not a substantial factor in the cause of any of the patient's alleged injuries." Dr. Zingman notes that there is no evidence that Decedent presented with signs or symptoms of pneumonia during her

October 2013 Admission. Dr. Zingman states that Mount Sinai West appropriately ordered and performed a chest CT scan, which did not show the presence of fluid or infiltrates. According to Dr. Zingman, it was completely appropriate for Mount Sinai West to consider lupus as the possible cause of the Decedent's symptoms since she improved on steroids, which would have not have occurred if Decedent had pneumonia. Dr. Zingman states that Mount Sinai West was acting within the standard of care when it referred Decedent to a gastroenterologist, rheumatologist and primary care physician for close-monitoring. Dr. Zingman opines that given her immunocompromised state, Decedent would likely not have survived to her January 2014 admission if her bacterial infection existed during her October 2013 Admission and her symptoms would have developed much sooner than one week prior to January 13, 2014.

In his affirmation, Dr. Zingman explains that Decedent presented to Mount Sinai West in January 2014 with symptoms of "newly developed" pneumonia and septic process. According to Dr. Zingman, the treating physicians at Mount Sinai West used their best judgment to manage Decedent's pneumonia and "it was entirely within their discretion to treat her condition with either antibiotics alone or with a more aggressive approach to evaluate the cause of her infiltrates." Specifically, Dr. Zingman maintains that consideration of a lung biopsy for diagnosing pneumonia in highly immunocompromised patients, including Decedent, is within the standard of care. Dr. Zingman opines that such a biopsy was appropriate and within the standard of care in order to diagnose a difficult infection and timely effectuate treatment.

Plaintiff also submits the affirmation of Jason Hoffman, M.D. ("Dr. Hoffman"). Dr. Hoffman opines that Mount Sinai West was within the standard of care when its physicians decided to perform a CT-guided biopsy. Dr. Hoffman states that Mount Sinai West property performed the biopsy and timely called a code when Decedent experienced shortness of breath

and became hemodynamically unstable. Dr. Hoffman explains that Decedent's sepsis and comorbidities placed her at critical risk and increased the urgency with which physicians needed to determine the source of her infection. Dr. Hoffman notes that Decedent's hemoptysis was not caused by any negligence or omission by Mount Sinai West and that the treating physician properly responded to Decedent's hemoptysis by removing the biopsy needle and calling for the response team. Dr. Hoffman notes that Decedent's hemoptysis resolved on its own.

Plaintiff's Opposition to Defendant Mount Sinai West's Motion

In opposition to Defendant Mount Sinai West's Motion, Plaintiff submits the affirmation of Philip Nizza, D.O. ("Dr. Nizza"), who states that Dr. Zingman's summary of Decedent's condition during her October 2013 Admission contains factual inaccuracies. Dr. Nizza states that Decedent's chart shows she complained of shortness of breath that worsened during her admission, which required her to be given oxygen. Dr. Nizza also maintains that Decedent's Chest CT showed acute infiltrates and ground glass opacities that can be associated with pneumonia. Dr. Nizza states that "while Mt. Sinai's care during the October/November 2013 admission might not represent deviation from standard of care, it was suboptimal in establishing a diagnosis responsible for all of her complaints present during that admission."

Turning to the January 2014 Admission, Dr. Nizza opines that while consideration of a lung biopsy to diagnose pneumonia in highly immunocompromised patients is sometimes within the standard of care, it was not within the standard of care with respect to the Decedent under the circumstances of this particular hospital admission. Since Decedent presented to Mount Sinai West with shortness of breath, pulmonary hypertension, severe hypoxia and extensive lung disease on January 13, 2014, Dr. Nizza states that the lung biopsy was contraindicated. Dr. Nizza further states that based on Mount Sinai West's failure to properly consider the risks and

benefits of performing a lung biopsy on Decedent, the decision to perform the lung biopsy was a deviation from the accepted standard of medical care.

Dr. Nizza also states that Decedent was properly given antibiotics while in the ED since it was "absolutely clear almost from the time of admission" that she presented with a form or pneumonia or other lung infection. Dr. Nizza references Mount Sinai West's chart, which indicates that preliminary results from two blood culture sets taken in the ED were charted before 5:00 pm on January 13, 2014 showed the presence of gram negative bacteria. Dr. Nizza maintains that

> With gram negative organisms already identified on January 13, 2014, there was no need to perform the risky biopsy of January 14, 2014, because its sole purpose, according to both the Mt. Sinai Chart and Dr. Friedman's testimony, was to isolate the particular organism causing Decedent's then-suspected pneumonia. (Dr. Nizza Affirmation, Page 22).

Dr. Nizza refutes Dr. Hoffman's statement that the lung biopsy was necessary to diagnose Decedent's infection since her prior antibiotic regimen was insufficient. Rather, Dr. Nizza states, Mount Sinai West could not have possibly known that such antibiotics were not working since Decedent was given antibiotics less than twenty-four hours prior to the time when her physicians decided to perform a lung biopsy. Dr. Nizza opines that Mount Sinai West deviated from the standard of care by "rushing" to perform a procedure with life-threatening risks and "essentially no benefit, without allowing sufficient time for the antibiotics to take effect." Finally, Dr. Nizza rebuts Dr. Zingman's statement that Mount Sinai West's treatment during the January 2014 Admission was not the proximate cause of Decedent's injuries by pointing to Dr. Friedman's testimony, the autopsy report and death certificate which "conclusively refute this assertion."

Defendant's Reply and Plaintiff's Sur-Reply

In Exhibit B to its Reply, Mount Sinai West produced a "Lab Order Detail" which shows that blood cultures were collected on January 13, 2014 at 13:44 and received by the lab on January 13, 2014 at 16:41. According to Mount Sinai West, the Lab Report Detail shows that the Gram stain result that showed "gram negative coccobacilli in the aerobic and anaerobic bottles" was entered into the Laboratory Information System on January 15, 2014 at 12 PM. The Lab Order Detail shows that the results of the Gram Stain were called into Nurse J. Votta, RN ED on January 15, 2014 at 12:01 and 12:04 PM. Defendant Mount Sinai maintains that the Gram stain result was the earliest positive result documented in the Lab Order Detail for those particular culture sets.

Defendant Mount Sinai West also provides the affirmation of Emilia Mia Sordillo, M.D., Ph.D., ("Dr. Sordillo") who opines that the blood culture results were arrived at and reported in a timely manner. Dr. Sordillo also states in her affirmation that the filing of Gram negative coccobacilli were made on and reported by telephone on January 15, 2014 and that the preliminary identification of *Haemophilus influenzae* was made on January 16, 2014, "both results occurring after the lung biopsy of January 14, 2014". Mount Sinai maintains that since these findings were made after Decedent's lung biopsy was decided up and conducted, Dr. Nizzo's findings were speculative and conclusory.

The Court notes that while it typically does not permit the filing of a sur-reply or sur-reply expert affirmation, it did permit such filing in this Action based on Mount Sinai West's production of the Lab Report Detail. In his sur-reply affirmation, Dr. Nizzo maintains that while the Lab Report Detail was not previously disclosed, such document does not change his findings. Rather, Dr. Nizzo states, the Lab Report Details affirms his finding that Mount Sinai West departed from the standard of care in performing the lung biopsy. Since the tissue collected

during the biopsy would not have grown faster than the blood culture that was already taken and the patient was steadily improving with antibiotics, Mount Sinai West performed a biopsy with life-threatening risk and no medical benefits. According to Dr. Nizzo, the correct course of action was to wait for the blood culture results taken on January 13, 2014.

DISCUSSION

Summary Judgment Standard

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Dallas-Stephenson v. Waisman,* 39 AD3d 303, 306 [1st Dept., 2007]. Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (*See Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]).

The Court finds that based upon the affirmations of Dr. Zingman and Dr. Hoffman, Defendant Mount Sinai West has shown prima facie that it did not depart from the standard of

care during its treatment of Decedent in the October 2013 Admission and any departure was not the proximate cause of Decedent's injuries. The Court further finds that by the submission of the affirmations of Dr. Zingman and Dr. Hoffman, Defendant Mount Sinai West has made a prima facie showing that it did not depart from the standard of care during Decedent's January 2014 Admission and that any departure was not the proximate cause of Decedent's injuries.

"Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to 'rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.'" *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants." *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]. "To defeat summary judgment, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted).

Here, Plaintiff's expert, Dr. Nizzo, conceded in his affirmation that Defendant Mount Sinai West did not depart from the standard of care during the Decedent's October 2013 Admission. While Dr. Nizzo describes the treatment of Plaintiff during that admission as "suboptimal", such is not the standard in a medical malpractice action. Therefore, Plaintiff's allegations of malpractice based on Mount Sinai West's treatment of Decedent during the October 2013 Admission are hereby dismissed.

However, the Court reaches a different conclusion with regards to Plaintiff's allegations surrounding the January 2014 Admission. The Court finds that Plaintiff has sufficiently rebutted

Mount Sinai West's prima facie showing by providing medical evidence attesting that Mount Sinai West departed from the accepted medical practice during Decedent's January 2014 Admission and that such departure was a proximate cause of Decedent's alleged injuries. Dr. Nizzo's opinion regarding Mount Sinai West's treatment of Decedent during her January 2014 Admission, particularly Mount Sinai West's decision to perform a lung biopsy, sufficiently conflicts with the opinions of Dr. Zingman and Dr. Hoffman to create an issue of fact. *See Lin v. Yi Xie*, 178 AD3d 514, 515 [1st Dept 2019]. Therefore, Defendant Mount Sinai West's Motion to dismiss Plaintiff's allegations regarding Decedent's January 2014 Admission is hereby denied.

The Court further finds that an issue of material fact exists as to whether Decedent gave informed consent prior to undergoing the CT-guided thoracentesis/chest tube placement and lung biopsy. Dr. Zingman states in his affirmation that prior to the procedure, Mount Sinai West obtained informed consent from the Decedent after explaining the risks of the procedure, including bleeding, vascular injury, infection and pneumothorax. In opposition to Dr. Zingman's statement, Dr. Nizzo opines that "any 'informed' consent obtained by Mt. Sinai in connection with the biopsy was defective and must represent another deviation from standard of care because, by definition, one cannot consent to a procedure with such risks but not potential benefit." Based on these conflicting expert opinions, the Court finds that Plaintiff sufficiently showed the existence of a material issue of fact with regard to informed consent. Therefore, Defendant Mount Sinai West's Motion to dismiss Plaintiff's allegations of lack of informed consent is denied.

Accordingly, it is hereby

ORDERED that Plaintiff's allegations against Mount Sinai West for medical malpractice based on Decedent's October 2013 Admission are hereby dismissed; it is further

ORDERED that Defendant Mount Sinai West's Motion to dismiss Plaintiff's allegations of lack of informed consent is hereby denied; it is further

ORDERED that the remainder of Defendant Mount Sinai West's Motion is hereby denied.

This is the decision and order of the Court.

3/1/2021
DATE

JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE