

Jones-Decamp v South Shore Family Med. Assoc.

2022 NY Slip Op 34611(U)

August 18, 2022

Supreme Court, Queens County

Docket Number: Index No. 717675/18

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE
Justice

IA Part MDP

CAROL JONES-DECAMP, individually and
as Administrator of the goods, chattels and credits
which were of ARTHUR O'BRIAN JONES a/k/a ARTHUR
O'BRIAN JONES, Jr., deceased,
Plaintiff,

Index No.: 717675/18

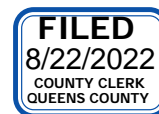
Motion Date March 30, 2022

Motion Seq. No. 1

-against-

SOUTH SHORE FAMILY MEDICAL ASSOCIATE,
P.C., DONNA MURPHY, P.A., ALLAN
DETWEILER, D.O., MICHAEL SANDS, P.A.,
CARY S. POLLACK, M.D., SAEED A.
SIDDIQUI CARDIOLOGY, P.C., SAEED A.
SIDDIQUI, M.D. and MICHELLE GOODGER,
D.O.,

Defendants.



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The following papers numbered as set forth below read on this motion by defendant Cary S. Pollack M.D. and the cross motion by defendants South Shore Family Medical Associate, P.C., Donna Murphy, P.A., Allen Detweiler, M.D. and Michael Sands, P.A. for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the action in its entirety.

Papers
Numbered

Notice of Motion – Affidavits – Exhibits	EF 33 – 56
Notice of Cross Motion – Affidavits – Exhibits	EF 57 – 82
Answering Affidavits – Exhibits	EF 85 – 86
Reply Affidavits	EF 87 – 88

Upon the foregoing papers it is ordered that this motion and cross motion are decided as follows:

In this medical malpractice action, plaintiff, individually and as administrator of the estate of Arthur O'Brian Jones a/k/a Arthur O'Brian Jones, Jr. (hereinafter the decedent), alleges that defendants South Shore Family Medical Associate, P.C. (hereinafter SSFMA), Donna Murphy, P.A., Allen Detweiler, M.D. and Michael Sands, P.A. (hereinafter SSFMA defendants) and defendant Cary S. Pollack M.D. were negligent in failing to timely and properly diagnose and treat the decedent's neuroendocrine cancer, which allegedly resulted in decedent's untimely death on December 27, 2016. This action was commenced by the filing of a summons and

verified complaint on November 16, 2018. Plaintiff's verified complaint contains causes of action for medical malpractice, lack of informed consent and wrongful death. Defendant Dr. Pollack and the SSFMA defendants now move and cross-move, respectively, for summary judgment in their favor and dismissing the action in its entirety. The court notes that although a cross motion against a party who is not a moving party is misnamed and inappropriate, since all parties have had sufficient opportunity to fully brief the issues, the cross motion will not be denied on that basis.

“In order to establish liability ... for medical malpractice a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.” (*Pezulich v Grecco*, 206 AD3d 827, 828 [2d Dept 2022], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; see *Hiltz v DiLorenzo*, 206 AD3d 631, 633 [2d Dept 2022].) On a motion for summary judgment in a medical malpractice action, defendant has the burden of “showing either that there was no departure from accepted medial practice, or that any departure was not a proximate cause of the patient's injuries.” (*Refuse v Wehbeh*, 167 AD3d 956, 958 [2d Dept 2018], quoting *Matos v Khan*, 119 AD3d 909, 910 [2d Dept 2014], see *Galluccio v Grossman*, 161 AD3d 1049, 1051 [2d Dept 2018].) “[T]he defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars.” (*Vargas v Lee*, — AD3d —, 2022 NY Slip Op 04661 [2d Dept 2022], quoting *Wiater v Lewis*, 197 AD3d 782, 783 [2d Dept 2021].) A physician may establish that he or she did not depart or deviate from accepted medical practice in his or her treatment of the patient, and that he or she was not the proximate cause of the plaintiff's injuries through the submission of medical records and competent expert affidavits. (See *Shirley v Falkovsky*, 170 NYS3d 496, 498 [2d Dept 2022]; *Joyner v Middletown Med., P.C.*, 183 AD3d 593 [2d Dept 2020].)

The burden then “shifts to the plaintiff to raise a triable issue of fact as to those elements on which the defendant met its prima facie burden of proof.” (*Gaston v New York City Health & Hosps. Corp.*, 170 NYS3d 886 [2d Dept 2022], quoting *Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863 [2d Dept 2021].) General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment. (See *Palagye v Loulmet*, 203 AD3d 729 [2d Dept 2022].) “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record.” (*Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715 [2d Dept 2022], quoting *Tsitritin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017].)

Here, Dr. Pollack submitted the affirmation of Dr. Malcolm Charles Phillips, a physician board-certified in internal medicine and sub-certified in cardiovascular disease. The SSFMA defendants submitted the affirmation of Reed E. Phillips, a physician board-certified in internal medicine and oncology. In support of the motion and cross motion, the respective expert doctors reviewed the pertinent medical records, pleadings and deposition testimony of the parties, and opined with a reasonable degree of medical certainty that defendants did not depart from the applicable standard of care and any alleged departures were not a proximate cause of the decedent's alleged injuries. In addition, Dr. Reed Phillips stated that Dr. Detweiler, owner of

SSFMA and supervising physician to his physician assistant Donna Murphy, did not render any medical treatment to the decedent and was not consulted regarding the care of the decedent.

In opposition to defendants' prima facie showing, plaintiff submitted an unsigned, unsworn and redacted copy of her medical expert's "affirmation." The affirmation is insufficient to raise a triable issue of fact as to Dr. Pollack and the SSFMA defendants' alleged malpractice as it lacks probative value. (*See Roye v Gelberg*, 172 AD3d 1260, 1262 [2d Dept 2019]; *Pagano v Cohen*, 164 AD3d 516, 518 [2d Dept 2018]; *France v Packy*, 121 AD3d 836, 838 [2d Dept 2014].) Plaintiff did not provide the court with an executed affirmation identifying her medical expert. In addition, her attorney's affirmation "failed to raise an issue of fact because it was not made on the basis of personal knowledge of the facts and was not supported by any evidence." (*Jean-Paul v Jamaica Hosp. Med. Ctr.* — AD3d —, 2022 NY Slip Op 04661 [2d Dept 2022], quoting *Minaya Delgado v City of New York*, 179 AD3d 454, 455 [1st Dept 2020].)

Turning to defendants' motion and cross motion insofar as it seeks summary judgment dismissing plaintiff's lack of informed consent claim, it is noted that Public Health Law § 2805-d (1) defines lack of informed consent as "the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." The right to recover for medical malpractice based upon lack of consent is "limited to cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnosis procedure which involved invasion or disruption of the integrity of the body." (Public Health Law § 2805-d [2].) In opposition to defendants' prima facie showing that there was no affirmative violation of the decedent's physical integrity (*see Samer v Desai*, 179 AD3d 860, 864 [2d Dept 2020].) plaintiff failed to raise a triable issue of fact as she did not address this issue. (*See Williams v Light*, 196 AD3d 668, 670 [2d Dept 2021]; *Pirri-Logan v Pearl*, 192 AD3d 1149 [2d Dept 2021].) Thus, this branch of defendants' motion and cross motion is granted, without opposition.

Accordingly, Dr. Pollack's motion and the SSFMA defendants' cross motion for summary judgment is granted in its entirety and plaintiff's complaint is hereby dismissed as to moving defendants.

The amended caption shall read as follows:

(SEE NEXT PAGE)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

CAROL JONES-DECAMP, individually and
as Administrator of the goods, chattels and credits
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March 30, 2022

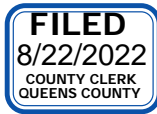
O'BRIAN JONES, Jr., deceased,
Plaintiff,

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SAEED A. SIDDIQUI CARDIOLOGY, P.C., SAEED A.
SIDDIQUI, M.D. and MICHELLE GOODGER,
D.O.,
Defendants.

Dated: August 18, 2022





PETER J. O'DONOGHUE, J.S.C.