Jonyer v Dragomir
2009 NY Slip Op 31343(U)
June 11, 2009
Supreme Court, Nassau County
Docket Number: 11861/06
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JANET JONYER, Individually, and as the Administratrix of the Estate of CAROLE A. WENTZ, Deceased,

Plaintiff,

-against-

ILIE DRAGOMIR, M.D., NEIL THEODORE SMITH, M.D., STEVEN JAY LOMASKY, M.D., ENDOCRINOLOGY AND DIABETES ASSOCIATES OF LONG ISLAND, P.C., and SOUTH NASSAU COMMUNITIES HOSPITAL,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:11861/06
Motion Seq. No.: 02

DECISION AND ORDER

Papers Read on this Motion:

Defendants Lomasky and Endocrinology and Diabetes Associates of L.I.'s Notice of Motion	02
Plaintiff's Physician's Affirmation	xx
Plaintiff's Affirmation in Opposition	xx
Defendants Lomasky and Endocrinology and Diabetes Associates of L.I.'s Reply Affidavit	xx

This motion by Defendants Steven Jay Lomasky, M.D. and Endocrinology and Diabetes Associates of Long Island for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint against them is **denied**.

In this action, the Plaintiff seeks to recover damages for medical malpractice and Carole Wentz's death. The Plaintiff alleges that Defendants failed to diagnose and treat Wentz's hyperthyroidism between July 2003 and September 2004. The Defendant Dr. Lomasky and his practice seek summary judgment dismissing the complaint against them.

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d

Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

The pertinent facts are as follows:

Ms. Wentz saw the internist Dr. Ilie Dragomir at the Arsenio Medical Group on July 2, 2003. She weighed 198 pounds. Her exam was most significant for anxiety. Dr. Dragomir' impression was back pain, increased cholesterol and weight and anxiety. He prescribed Xanax, a diet and recommended medication for her cholesterol. On July 7, 2003 her blood revealed a thyroid stimulating hormone count ("TSH") of .74, which is normal. Thereafter, Ms. Wentz was seen by Dr. Dragomir monthly complaining primarily of diarrhea, anxiety, depression, insomnia and back pain.

At her visit on August 4, 2004, Ms. Wentz complained of a sore throat, nausea and vomiting, dizziness and anxiety and she was visibly upset. Her weight was down to 156 pounds. Dr. Dragomir prescribed Zoloft. On August 27, 2004, Ms. Wentz presented at South Nassau Communities Hospital's emergency room complaining that she had watery diarrhea for a month and had vomiting three days earlier. She was diagnosed with gastroenteritis and prescribed Cipro. On August 25, 2004, Ms. Wentz returned to Dr. Dragomir complaining of diarrhea four to five times a day and her weight was down to 150 pounds. Dr. Dragomir noted a hyperactive GI and increased anxiety. He documented diarrhea and

severe weight loss, possibly secondary to Irritable Bowel Syndrome. He planned to have blood work done and prescribed Flagyl, Donnatol, valium and a GI (gastrointestinal) workup.

On August 25th, Ms. Wentz was seen by Dr. Twersky, a gastroenterologist affiliated with Arsenio Medical Group. He noted her history of seven months of persistent diarrhea and her dramatic weight loss, as well as her complaints of palpitations, tremors, sweating and flushing. Her TSH of .02 was noted. He planned, *inter alia*, to do blood work and to hospitalize her for hemodynamic stabilization and endocrinology. On August 26, 2004 Ms. Wentz again presented to South Nassau Communities Hospital complaining of dizziness and palpitations. She reported three months of diarrhea, significant weight loss, tremors and muscle aches. The Defendant Dr. Smith admitted her and ordered thyroid testing the next morning and prescribed Lopressor and Flagyl. The thyroid testing established that Ms. Wentz was suffering from hyperthyroidism. Her TSH was .01. Dr. Smith planned to have a thyroid sonogram, thyroid uptake scan and an endocrinology consult done.

Per request Dr. Lomasky first saw Ms. Wentz on August 28, 2004. He diagnosed her with severe hyperthyroidism, most likely Graves Disease. He found no clinical suspicion of subacute thyroiditis, but felt that immediate treatment was needed. He discontinued Lopressor and prescribed Tapazole 10 mg orally three times a day and Inderal 60 mg every six hours.

Overnight, Ms. Wentz spiked a fever of 104, and she was vomiting and had increased diarrhea. At 9:20 AM, Dr. Lomasky's impression was severe hyperthyroidism. He had Ms. Wentz transferred to the ICU, discontinued Tapazole and began Propylthiouracil ("PTU") 150 mg every six hours, first dose stat, Saturated Solution Potassium Iodide ("SSPI") every six hours to be administrated one hour after PTU and increased the Inderal. Ms. Wentz was transferred to the ICU at 11:20 AM and it was noted that she was confused but following commands. On August 30th, Dr. Lomasky saw Ms. Wentz at 7:45 AM noting that while she had significant improvement overnight, her temperature was 101.5 and she

was tachycardic. His impression was thyrotoxicosis and he wanted to rule out intermittent illness, sepsis, hypokalemia, decreased white blood count and decreased platelets. He restated the current drug regimen and documented that since T4 has a halflife of 7 days, continued support care was required. That day, Ms. Wentz was seen by a host of specialists including a cardiologist for rapid atrial fibrillation, a gastroenterologist for an episode of bilious vomiting, a pulmonary doctor for bronchospasm, a nephrologist for hypokalemia, an infectious disease doctor to rule out sepsis and a hematologist for decreased white blood count and platelets. Dr. Lomasky was consulted again on the morning of August 31st. The medication regimen was noted as was the fact that the thyroid storm may cause mortality. By the morning of September 1st, Ms. Wentz's chart reflects that she may have suffered from aspiration or a pulmonary embolus. Fragmin for PE prophylaxis was started and she was intubated. She continued to deteriorate and expired in the early hours of September 3, 2004.

"To establish a *prima facie* case of liability in a medical malpractice action, a Plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the Defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury." *Sampson v Contillo*, 55 AD3d 588, (2d Dept 2008), citing *Nichols v Stamer*, 49 AD3d 832 (2d Dept 2008), quoting *Berger v Becker*, 272 AD2d 565, 565 (2d Dept 2000). "In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the Defendant physician [and/or hospital] were negligent." *Taylor v Nyack Hospital*, 18 AD3d 537 (2d Dept. 2005) citing *Alvarez v Prospect Hosp., supra*. Thus, a moving Defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the Plaintiff was injured thereby." *Chance v Felder*, 33 AD3d 645 (2d Dept 2006) quoting *Williams v Sahay*, 12 AD3d 366, 368 (2d Dept 2004), citing *Alvarez v Prospect Hosp., supra;*

Johnson v Queens-Long Island Medical Group, P.C., 23 AD3d 525, 526 (2d Dept 2005); *Taylor v Nyack Hospital, supra; see also, Thompson v Orner, supra*. A moving party must address the specific factual allegations set forth in the complaint and the Bill of Particulars. *Terranova v Finklea*, 45 AD3d 572 (2d Dept 2007); *Hutchinson v Berenstein*, 22 AD3d 527 (2d Dept 2005); citing *Seefeldt v Johnson*, 13 AD3d 1203 (4d Dept 2004); *Vinvini v Insel*, 1 AD3d 351(2nd Dept 2003); *Muscatello v City of New York*, 215 AD2d 463 (2d Dept 1995); *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 (1st Dept 1992]). And, an expert may not make conclusions which are directly contradicted by the evidence or are based on facts not in evidence. *See, Holbrook v United Hospital Medical Center, supra; see also, Kaplan v Hamilton Medical Associates, P.C.*, 262 AD2d 609, 610 (2d Dept 1999).

If the moving party meets his burden, "in opposition, 'a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the Defendant's omissions or departures were a competent producing cause of the injury.' "

Domaradzki v Glen Cove Ob/Gyn Assocs., 242 AD2d 282 (2d Dept 1997); *see also, Mosezhnik v Berenstein*, 33 AD3d 895 (2d Dept 2006). "To establish proximate cause, the plaintiff must present 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." *Alice v Liguori*, 54 AD2d 784 (2d Dept 2008), quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 (2d Dept 2005); *see also, Zak v Brookhaven Memorial Hosp. Medical Center*, 54 AD2d 852 (2d Dept 2008), citing *Lyons v McCauley*, 252 AD2d 516 (2d Dept 1998). " 'The plaintiff's evidence may be deemed legally sufficient even if [his] expert cannot quantify the extent to which the Defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury.' " *Alicea v Liguori, supra*, at p. 464-465, quoting *Flaherty v*

Fromberg, 46 AD3d 743 (2d Dept 2007) and citing *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 (2d Dept 2003); *Wong v Tang, supra; Jump v Facelle, supra.*

The moving Defendants have submitted the affirmation of Dr. Howard Kolodny, a board certified endocrinologist. Having reviewed Ms. Wentz's medical records and the complaint, bill of particulars and pertinent legal records, he opines to a reasonable degree of medical certainty that the care and treatment Dr. Lomasky provided to Ms. Wentz was in accordance with good and accepted medical standards and did not proximately cause or contribute to her injuries and death. He opines that Dr. Lomasky timely did a consult within 24 hours of being summoned, appropriately ordered Tapazole and Inderal and responded properly to her development of thyroid crisis by transferring her to the ICU, beginning PTU 150 mg every six hours and SSKI and increasing her Inderal. He opines that that drug regimen was properly continued up until Ms. Wentz's death and that no alterations were indicated. In conclusion, he opines to a reasonable degree of medical certainty that all of the treatment rendered by Dr. Lomasky was within good and accepted medical practice and did not deviate from accepted standards of care, to wit: Dr. Kolodny concluded that Dr. Lomasky properly "performed timely endocrinological consults; took a complete and accurate medical history; appreciated the significance of laboratory findings; performed comprehensive examinations; appreciated the significance of the patient's condition and findings on physical examination; rendered diagnoses; recommended timely and appropriate medications including Tapazole, PTU, SSKI and Inderal; and, communicated the patient's condition and treatment plan to the other attending physicians." Moreover, Dr. Kolodny opines that "irrespective of the treatment rendered at the time of Dr. Lomasky's initial consultation and thereafter, Ms. Wentz's body inherently required the lapse of several days to counter the effect of the already circulating thyroid hormone." He also opines to a reasonable degree of medical certainty that Dr. Lomasky's treatment of Ms. Wentz did not in any manner proximately cause or contribute to her

injuries or death.

Incorrect medication is a specific allegation in both the Plaintiff's complaint and her bill of particulars. Conspicuously absent from the expert affirmation submitted in support of Dr. Lomasky's motion is any discussion of the dose of chemotherapy, i.e., cancer treating medication, administered to Ms. Wentz when she was supposed to begin PTU. Dr. Kolodny has not discussed who was responsible for that, what the effects were or how this error was responded to. Dr. Lomasky's failure to address this alleged wrongdoing necessitates denial of his motion.

Assuming, *arguendo*, that Dr. Lomasky met his burden of establishing his entitlement to summary judgment thereby shifting the burden to the Plaintiff to establish the existence of a material issue of fact, the Plaintiff has clearly met her burden.

Having reviewed the decedent's medical records and the complaint and pertinent legal documents, the Plaintiff's expert, a board certified internist, opines that Ms.Wentz's symptoms warranted a prompt consult by Dr. Lomasky but he did not see Ms. Wentz for over 24 hours. He further opines that Dr. Lomasky acted negligently in prescribing Tapazole as opposed to PTU in his initial response to Ms. Wentz's diagnosis, in prescribing only 10 mg of Tapazole three times a day for a total of 30 mg per day which should have been 60 mg to prevent thyroid storm from developing, and in prescribing a total of 600 mg PTU four times a day instead of an initial dose of 600-1000 mg followed by 200-250 mg every four hours. He also opines that the administration of a chemotherapy drug in the face of thyroid storm was a departure from accepted standards of care given its unquestionable effects on the body's immune system, blood counts and the liver. Moreover, whether Dr. Lomasky was responsible for it and whether he responded appropriately when learning of it if he wasn't responsible was far from clear. The Plaintiff's expert opines to a reasonable degree of medical certainty that each of these departures were a substantial contributing factor in causing injury to Ms. Wentz and–at a

minimum–decreased her chance of a successful recovery from the severe hyperthyroidism she presented to the hospital with on August 26, 2004. He opines that if Dr. Lomasky had not departed from accepted practices and had Ms. Wentz received appropriate regimens of medication, it is more likely than not that she would not have proceeded to thyroid storm as she did or that the thyroid storm would have been brought under control in a timely fashion. He explains that the combined use of PTU, iodide and dexamethasone given in appropriate dosages restores serum T3 concentration to within the normal range in 24 to 48 hours, and the substitution of sodium iopade or iopanoate for iodide may be even more effective. Therefore, if such appropriate dosages had been given, Ms. Wentz's thyroidism would have been brought under control and she would not have gone on to the suffer systemic failures that she did and would not have died on September 3, 2004.

The conflicting views of the experts which are adequately supported by the facts creates an issue of fact for a jury to resolve. *Howard v Kennedy*, 60 AD3d 905 (2d Dept 2009), citing *Shields v Batiky*, 11 AD3d 672 (2d Dept 2004). Hence, the Defendant's motion for summary judgment is **denied**.

The parties are directed to appear for Trial in DCM on June 24, 2009 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: June 11, 2009
Mineola, N.Y. 11501

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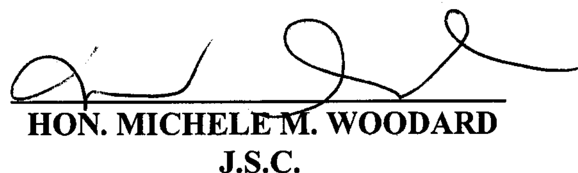

HON. MICHELE M. WOODARD
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