

**Altman v Robbins**

2009 NY Slip Op 33463(U)

March 5, 2009

Supreme Court, New York County

Docket Number: 103794/2008

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

Jean B. LOBU

PART 6

Index Number : 103794/2008

ALTMAN, BARBARA

vs.

ROBBINS, HOWARD D.P.M.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 1/27/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-6  
7-10  
11-13 ; 14-15

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER

**FILED**

MAR 09 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/5/09

Jh  
J.S.C.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
HAROLD ALTMAN, as Administrator of the Estate  
of BARBARA ALTMAN,

Plaintiff,

Index No.103794/08

-against-

**Decision and Order**

HOWARD ROBBINS, D.P.M. and  
THE HEALING CENTER,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendants Howard Robins, D.P.M., s/h/a Howard Robbins, D.P.M., and Howard F. Robins, Inc., d/b/a The Healing Center, s/h/a The Healing Center (collectively, "Robins"), move, pursuant to C.P.L.R. Rules 3211 and 3212, for an order granting Dr. Robins summary judgment and dismissing plaintiff's claims, on the basis that these claims are without merit as a matter of law and that no triable issues of fact exist.

On or about March 13, 2008, plaintiff's decedent commenced this action sounding in medical malpractice and lack of informed consent by the filing of a summons and verified complaint. Issue was joined by Dr. Robins' service of an answer on or about May 23, 2008. The instant motion to dismiss plaintiff's claims was filed on behalf of Dr. Robins on May 29, 2008. Ms. Altman died during the pendency of this motion, and the case was stayed until substitution of the administrator of the estate was effected.

Dr. Robins is a podiatrist licensed to practice podiatric medicine in the State of New York. Plaintiff's decedent's verified complaint alleges that she became Dr. Robins' patient on or

about August 30, 2006. The complaint alleges that Dr. Robins treated plaintiff's decedent with "ozone therapy"<sup>1</sup> as a post-ovarian cancer surgery treatment. The complaint further alleges that Dr. Robins held himself out to Ms. Altman as competent and licensed to render medical treatment for post-ovarian cancer surgery; that Dr. Robins acted outside his licensure as a podiatrist; that Dr. Robins departed from good and accepted standards of podiatry and breached his duty to provide good care in accordance with his podiatric license; and, as to the informed consent claim, that Dr. Robins failed to apprise Ms. Altman of the reasonably foreseeable risks and alternatives to the ozone therapy treatment and that, had she been so apprised, she would not have permitted Dr. Robins to perform the treatment. The injuries alleged include, inter alia, ovarian tumor regrowth, pain, hospitalizations, and emotional distress.

The facts of this case are hotly disputed. Plaintiff alleges that plaintiff's decedent sought treatment from Dr. Robins after having researched alternative treatments for cancer using the Internet. In an affidavit dated July 7, 2008, Ms. Altman set forth that Dr. Robins had instructed her to sign documentation stating that she was receiving ozone therapy as part of her participation in a "foot study." She alleged that she needed to sign this document in order to obtain ozone therapy for her ovarian cancer. Ms. Altman averred that she received ozone therapy treatments—each of which lasted ten minutes—twice a week for six months starting in August 2006. She alleged that the treatments were intended to treat her ovarian cancer, and not to treat any podiatric condition. She stated that she paid \$2,873.57 for the treatments; annexed as an exhibit to plaintiff's opposition papers are copies of the checks allegedly used to pay for the treatment.

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<sup>1</sup> It appears from the papers submitted on this motion that ozone therapy is an experimental technique, not approved by the Food and Drug Administration, by which ozone gas is administered to a patient intravenously.

In contrast, Dr. Robins avers that Ms. Altman sought his treatment for a fungus on her toenails. Ms. Altman refused “traditional medications” used to treat foot fungus, such as Lamisil, so Dr. Robins invited her to participate in a foot study which utilized ozone therapy to treat the fungus on her toenails. Defendant states that he recommended that Ms. Altman undergo ozone treatment three times a week for twelve weeks, after which time he would re-evaluate her toenails. She commenced the ozone therapy on September 6, 2006, and she had further treatments on September 8; October 13, 16, and 27; and, November 7. By affidavit, Dr. Robins maintains that he never represented to Ms. Altman that he was treating her for ovarian cancer, that he never held himself out as being qualified to do so, and that, “[a]s a podiatrist, [he] is not qualified to treat patients for cancer.” He claims that her appointments for the treatment were inconsistent, and that she never completed her therapy. Dr. Robins claims that Ms. Altman asked for a refund for the unused ozone therapy sessions because she was moving and could not afford the therapy, and that Ms. Altman received a full refund for the unused therapy sessions. He contends that his treatment did not depart from accepted standard of podiatric care and did not “cause or contribute to any adverse outcome in this patient.”

Dr. Robins’ medical records of his treatment of Ms. Altman reflect that Ms. Altman’s first appointment was on August 30, 2006. She had a fungus on her toenails. It was noted that she had undergone ovarian cancer surgery, and that ninety percent (90%) of the cancer had been removed. Under “holistic recommendations,” Dr. Robins wrote:

as patient refuses any traditional meds (i.e. Lamisil) I will permit her to join Foot Study #1 on fungus toenails. Receiving 3 tx a week for 12 weeks and reevaluate . . . Pt should be under care of MD for her CA. She should see a nutritional counselor as well.

Plaintiff's decedent signed a form indicating that the title of the study was "Ozone/Oxygen therapy and It's [sic] Effect on Various Foot and Ankle Conditions." The purpose of the study was stated as "[t]o determine if the healing of various foot and ankle conditions is improved when ozone/oxygen therapy is used in conjunction with traditional treatment plans." Specifically, Ms. Altman's condition to be studied was "[c]hronic fungal and yeast infections of the toenails and skin." Ms. Altman also signed a form titled "The Healing Center - 5 Year Study," indicating the purpose of the study, the method, and the materials to be used. Ms. Altman signed a third form titled "Informed Consent for Participation in Five-Year Ozone-Oxygen Study," which set forth, *inter alia*, a description of the therapy; that the therapy was not FDA approved; that the alternatives to and risks of the treatment had been explained; and, that the cost of each infusion of ozone would be \$95.

Dr. Robins asks this court to grant him summary judgment on the basis that plaintiff's claims are without merit as a matter of law. On a C.P.L.R. Rule 3211 motion to dismiss, "the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994), citing C.P.L.R. § 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Id., at 87-88 (citations omitted). Based on plaintiff's pleadings, "in affording [plaintiff] the benefit of all favorable inferences to which [she is] entitled," (Schrank v. Lederman, 52 A.D.3d 494, 496 [2d Dep't 2008]) it cannot be said, as a matter of law, that plaintiff's claims are without merit. Plaintiff's complaint, on its face, makes out a cognizable claim for medical malpractice and lack of informed consent. To the extent Dr. Robins moved under Rule 3211, his motion must be denied.

Alternatively, Dr. Robins' further claims that no triable issues of fact exist and that he is entitled to judgment as a matter of law. Pursuant to C.P.L.R. Rule 3212 and Alvarez v. Prospect Hosp.,

the proponent of a summary judgment motion 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. Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.

68 N.Y.2d 320, 324 (1986) (internal citations omitted). Dr. Robins has not, by his own medical records and affidavit, demonstrated the absence of all material issues of fact. The entries in Dr. Robins' medical chart regarding his care and treatment of plaintiff's decedent may conceivably be self-serving, if he indeed endeavored to treat plaintiff's decedent's cancer with ozone therapy. See Gomez v. Katz, \_\_\_ A.D.3d \_\_\_, 2009 N.Y. Slip Op. 1082 (2d Dep't Feb. 10, 2009). Without an affidavit by an outside expert or any other evidence (depositions have not been conducted, nor does it even appear that a bill of particulars was ever demanded or exchanged), Dr. Robins is essentially asking the court to determine on these papers and at this early stage of the litigation that his version of the facts—that he did not act outside his licensure as a podiatrist and that he did not treat plaintiff's cancer with ozone therapy—is more credible than plaintiff's decedent's version of the facts as set forth in the pleadings. The existence of issues of credibility requires denial of Dr. Robins' motion.

Defendants' motion is denied in its entirety. The parties are directed to appear for a preliminary conference on April 14, 2009, at 10:00 a.m., in courtroom 305, at 100 Centre Street, New York, New York. This constitutes the decision and order of the court.

Dated: March 5, 2009

  
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 JOAN B. LOBIS, J.S.C.