

Peck v Granite Tops Inc.

2011 NY Slip Op 30079(U)

January 11, 2011

Sup Ct, New York County

Docket Number: 109460-2006

Judge: George J. Silver

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

PRESENT: Hon. George J. Silver, Justice

PART 22

PECK, IAN

INDEX NO. 109460-2006

vs.

MOTION DATE _____

GRANITE TOPS INC.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits

1

Notice of Cross-Motion — Affidavits — Exhibits

FILED

Answering Affidavits — Exhibits

2

Replying Affidavits

3

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident defendants Granite Tops Inc. and Sordul Slawomir ("defendants") move pursuant to CPLR § 3212 for an order granting them summary judgment and dismissing plaintiff's wrongful death cause of action. Plaintiff alleges in his verified bill of particulars alleges that prior to the subject March 1, 2006 accident, the decedent underwent radiographic tests and was diagnosed with an adenocarcinoma of the right lung, stage I cancer, which was surgically resected and did not require adjuvant chemotherapy. Plaintiff further alleges that as a result of the March 1, 2006 accident the decedent sustained an exacerbation, aggravation and/or activation this latent/pre-existing condition which decreased the quality of her life, interfered with her immune system, hastened the recurrence of her lung cancer, decreased the quality of her life, interfered with her immune system, decreased her life expectancy and ultimately resulted in her death.

Plaintiff filed note of issue on or about April 24, 2009. Defendants' motion for summary judgment was filed on March 20, 2010. Pursuant to the court's case scheduling order, dated September 27, 2006, motions for summary judgment were to be made no later than 60 days after the after the filing of note of issue. Defendants' motion is, therefore, untimely. A party moving for summary judgment outside the statutory or court-imposed time limit must show good cause for the delay (CPLR § 3212 [a]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104 [1st Dept 2006]).

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST - REFERENCE SETTLE/SUBMIT ORDER/JUDG.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

As good cause of their delay, defendants contend that at the time plaintiff filed note of issue, discovery was still outstanding. Specifically, defendants contend that at the time plaintiff filed of the note of issue, plaintiff also provided them with an authorization to obtain the decedent's medical records. Defendants processed the authorization but only received records from the time of the decedent's initial lung cancer diagnosis in March 2005 until the accident date. In a letter dated July 7, 2009 defendants' counsel requested an additional authorization to obtain the decedent's medical records from the date of the underlying accident until the date of her death. This additional authorization was received and processed in August 2009. Defendants also submit an invoice from Memorial Hospital for Cancer and Allied Diseases dated September 11, 2009 which they contend refers to the decedent's medical records from the date of her accident until the date of her death. The invoice is for a total of \$1,404.00 and indicates that the medical records were mailed. Upon receipt, the medical records, which defendants describe as "over a foot thick," were forwarded to defendants' expert for review. However, the voluminous nature of the records, as well as the holiday season, prevented an expedited review by defendants' expert. Defendants claim that sometime after January 1, 2010 they were finally able to discuss the matter with their expert, at which time they came to the conclusion that a motion for summary judgment was warranted. Defendants argue that they thereafter promptly moved for summary judgment motion on March 20, 2010. Defendants also contend that their delay should be excused because their motion is meritorious and because plaintiff will not suffer any prejudice if the motion is considered.

In opposition, plaintiff argues that none of defendants' contentions rise to the level of good cause.

In reply, defendants contend that when the note of issue was filed they had no reason to believe that a motion for summary judgment would be necessary because, in light of plaintiff's motion to amend the complaint to add a wrongful death claim, it was "unfathomable" to them that the medical records would reveal that the decedent's cancer had actually returned months before the subject accident. Thus, defendants never made a motion to vacate the note of issue or to extend their time to file a dispositive motion.

The "good cause" called for by CPLR § 3212 (a) requires a satisfactory explanation for the untimeliness rather than simply permitting meritorious, nonprejudicial filings, however tardy (*Fofana v 41 W. 34th St., LLC*, 2010 NY Slip Op 1830 [1st Dept]). The standard for a good cause showing should not be an unreasonable one and untimeliness should not be used as a facile excuse to avoid reaching the merits (*Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338 [1st Dept 2007]). A motion court's exercise of discretion in determining that the moving party has established good cause for the delay will be overturned only if there has been an improvident exercise of discretion (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 733 NE2d 203, 711 NYS2d 131 [2000]). Because the court is aware of, and sensitive to, the practical realities of litigation involving expert witnesses, especially expert physicians, the court finds that defendants have established good cause for their delay in moving for summary judgment. Defendants received an informal opinion from their expert witness concerning when decedent's cancer recurred in January 2010 and moved expeditiously for summary judgment in March 2010. Without the opinion of their expert physician defendants could not have brought the instant motion. Therefore, in the interest of judicial economy, and because plaintiff has not established any prejudice from the delay (*Luciano v Apple Maint. & Servs.*, 289 AD2d 90 [1st Dept 2001]), the court will excuse defendants' delay and consider the motion.

In support of their motion defendants offer the affirmation of Dr. Michael L. Grossbard, the Chief of Hematology-Oncology at St. Luke's-Roosevelt Hospital Center and Beth Israel Medical Center. According to Dr. Grossbard, the decedent was diagnosed with adenocarcinoma of the right lung and underwent a right lung resection on March 17, 2005. A CT scan performed

on October 25, 2005 revealed internal development of multiple areas of nodular, pleural and fissural thickening in the right lung, suggestive of new pleural-based metastases and a sclerotic lesion within the T-9 vertebral body and a mixed sclerotic lytic lesion within the T-8 vertebral body. According to Dr. Grossbard, these findings, seven months post-resection, were suggestive of a recurrence of the decedent's lung cancer and metastatic disease of her spine. While a subsequent PET scan did not confirm cancer, Dr. Grossbard opines that PET scans are not definitive tests to rule in or rule out cancer and that a biopsy of the a lesion is required for this purpose. Dr. Grossbard believes that a biopsy would have confirmed the CT scan results, but one was never performed. Nor was a biopsy ordered after a February 20, 2006 CT scan, which Dr. Grossbard believes was also suggestive for a recurrence of the decedent's lung cancer and metastatic disease of the spine.

Following the March 1, 2006 accident, the decedent was not treated for a recurrence of her lung cancer and metastatic disease, nor was a biopsy performed. A biopsy, according to Dr. Grossbard, is not a major procedure and the multiple left-sided fractures sustained by decedent in the March 1, 2006 accident should not have limited the ability of the decedent's physicians to make a diagnosis of recurrent cancer in April or May 2006. The decedent underwent a third CT scan on July 1, 2006 which revealed worsening of right pleural metastases, as compared to the February 20, 2006 CT scan, and an increase in T-9 metastasis with a new L1 metastasis. A biopsy was performed on July 26, 2006 which confirmed the diagnosis of Stage IA non-small cell lung cancer with metastasis to decedent's spine. The decedent began chemotherapy on August 18, 2006 and continued chemotherapy until January 9, 2007. On January 16, 2007 the decedent presented to Memorial Hospital complaining of stomach pain in the upper quadrant and nausea. After an abdominal x-ray was interpreted as showing a gastric air bubble, the decedent was discharged. The decedent returned to the hospital by ambulance several hours later and was found to have a sigmoid colon perforation with gross fecal contamination throughout the abdomen. The decedent underwent emergency surgery and remained in critical condition until her death on February 13, 2007 of sepsis and multiple organ failure.

Dr. Grossbard further opines that there is a one percent risk that a patient, like the decedent, who is administered the chemotherapy agent Avastin, would sustain a bowel perforation. Avastin is not FDA approved for second-line therapy (therapy administered when initial first-line therapy fails) but was nevertheless given to the decedent for second line therapy. According to Dr. Grossbard, the fact that the decedent was receiving Avastin was not fully known when she presented to the hospital on January 16, 2007 and it was her discharge from the hospital on that day that proved fatal. Dr. Grossbard's opinion is that the decedent's perforated colon, sepsis, multiple organ failure and death were not related to the underlying motor vehicle accident.

Dr. Grossbard also opines that the CT scan taken seven months after the decedent's initial diagnosis and four months prior to the underlying accident revealed that the decedent's lung cancer had recurred and spread to her spine and that, therefore, the motor vehicle accident did not aggravate a latent disease or cause a recurrence of the decedent's cancer. Dr. Grossbard also opines that the decedent's life expectancy was not decreased as a result of the accident because her cancer was progressing prior to the accident and because the decedent outlived the average life expectancy of an individual diagnosed with metastatic lung cancer, which is one year. Dr. Grossbard also rejects plaintiff's claim that had the accident not occurred, the decedent would have been able to start chemotherapy sooner, thereby prolonging her life, since there was no order or recommendation for chemotherapy until the third CT scan on July 1, 2006, four months after the accident. Moreover, the decedent's injuries from the March 1, 2006 accident were not a direct contraindication to the administration of chemotherapy.

As Dr. Grossbard's affirmation establishes that plaintiff's decedent did not suffer a

recurrence of her lung cancer as a result of the underlying motor vehicle accident and that her death was caused by perforated colon unrelated to the accident, defendants have established their prima facie entitlement to summary dismissal of plaintiff's wrongful death claim (*see generally Smith v University Diagnostic Med. Imaging*, 43 AD3d 344 [1st Dept 2007]).

In opposition, plaintiff offers the affirmation of Dr. Stephen D. Nimer, Chief of Hematology at Memorial Sloan-Kettering Cancer Center and the decedent's treating hematologist at Memorial Hospital. It is Dr. Nimer's opinion that the decedent's repeated hospitalizations following the underlying accident, the sustained period of time she was off her feet in rehab, and the significant would pain she had during the course of her illness all contributed to decreasing her quality of life, interfered with her immune system, hastened a recurrence of her lung cancer and contributed to her death. Specifically, Dr. Nimer states that there was no evidence prior to or on March 1, 2006 of recurrent disease or a new metastasis because the findings on the October 2005 and February 2006 CT scans, though suggestive of a recurrence of the decedent's lung cancer, were ultimately found to be consistent with post-surgical changes, not recurrent disease. The pleural thickening reported on the October 2005 CT scan was believed to be scar tissue from decedent's resection surgery while the thoracic abnormality was of unclear etiology. Decedent's February 20, 2006 CT scan also suggested the possibility of a recurrence of the decedent's cancer and a new metastasis in her spine but Dr. Downey, the decedent's pulmonary surgeon, noted in a February 28, 2006 report that the radiographic abnormalities on the February 20, 2006 scan may be malignancy within the pleural space or may be consistent with post-surgical changes. Thus, Dr. Nimer concludes that there was no definitive evidence of recurrent disease, or a new metastasis, on the date the decedent was allegedly struck by defendants' vehicle. Dr. Nimer also disagrees with Dr. Grossbard's opinion that a biopsy was required following the February 20, 2006 CT scan because the scan did not confirm any cancer and decedent was being followed at close intervals. While Dr. Nimer agrees with Dr. Grossbard that a biopsy is the only definitive test for diagnosing cancer, Dr. Nimer also opines that a biopsy is used to rule in cancer when cancer is suspected and since a recurrence of decedent's cancer was not suspected prior to the decedent's accident, a biopsy was not indicated.

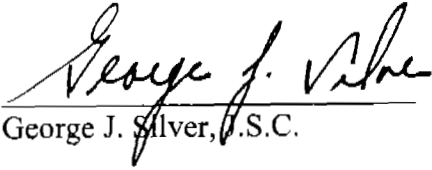
Dr. Nimer also disagrees with Dr. Grossbard's opinion that the motor vehicle accident did not hasten the recurrence of the decedent's lung cancer and did not cause a decreased life expectancy. Dr. Nimer contends that decedent's performance status, which is measured by ECOG measurement or the Karnofsky measurement, and which is predictive of a patient's response to medical treatment, was decreased as a direct result of the motor vehicle accident. This decrease in performance status negatively affected decedent's chances of responding to chemotherapy. Dr. Nimer's also disagrees with Dr. Grossbard's opinion that decedent outlived the average life expectancy of an individual diagnosed with metastatic lung cancer.

However, as defendants establish in reply, all of Dr. Nimer's opinions concerning when the decedent's cancer recurred are baseless in light of a March 9, 2006 ambulatory care phone/e-mail communication note by Dr. Downey in which he indicates that he spoke to decedent by telephone and informed her that she needed an MRI of her thoracic spine because her February 20, 2006 CT scan showed increasing metastasis in the T9 vertebral body. While Dr. Downey noted in his February 28, 2006 report that the abnormalities depicted decedent's February 20, 2006 CT scan could have been postsurgical changes, the report makes clear that his opinion was based upon his "own eye" and not a radiographic report, as such a report had not been made available to him at the time. Therefore, since the decedent's medical records establish that her lung cancer had recurred, at the latest, on February 20, 2006, prior to the underlying motor vehicle accident, it is hereby

ORDERED that defendants' motion for summary judgment is granted and plaintiff's

wrongful death cause of action is dismissed; and it is further

ORDERED that defendants are to serve a copy of this order with notice of entry upon plaintiff within thirty days of entry.


George J. Silver, J.S.C.

GEORGE J. SILVER
J.S.C.

Dated: **JAN 11 2011**
New York County

FILED
JAN 14 2011
NEW YORK
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