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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

Index Number : 111939/2007

GROBMAN, DEBORA K,

VS.

SOBEL, LOUIS I.

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by plaintiff to renew is denied in accordance with the accompanying memorandum decision.

FILED

MAR 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 25 2011

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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DEBORA K. GROBMAN,

Plaintiffs,

-against-

LOUIS I. SOBEL, M.D., LOUIS I. SOBEL, M.D., P.C., and EAST SIDE OPTICAL, INC.,

Defendants.

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Index No. 111939/07
Motion Seq. No. 002

SCHLESINGER, J.:

This is an action that had been terminated via two previous decisions. The first decision was rendered by this Court on June 24, 2009, wherein I granted summary judgment to the defendants. The second decision was rendered by the Appellate Division of this Department on June 29, 2010, affirming this Court's decision. *Grobman v Sobel, et al.*, 74 AD3d 679. Before this Court now is a motion brought by plaintiff Debora Grobman pursuant to CPLR §2221(e) to renew her opposition to Dr. Sobel's motion, and upon renewal, for an order denying summary judgment to the defendants.

At the outset it should be said that new counsel for the plaintiff acknowledges that he has a heavy burden in light of what has occurred. However, he urges the Court to exercise its discretion "in the interests of justice" to grant the motion so as to reopen the case and give his client her day in court.

The action itself concerns the plaintiff's contention that Dr. Sobel, plaintiff's long-time ophthalmologist, failed to treat her glaucoma condition properly. While it is clear that Dr. Sobel did in fact diagnose Ms. Grobman with glaucoma many years earlier in the 1990's, for reasons not necessary to discuss here Ms. Grobman elected to see another

ophthalmologist, Dr. Gregory Harmon, in February, 2006. It was Dr. Harmon who communicated to Ms. Grobman that her glaucoma was very serious and that her treatment had to be a lot more aggressive.

The moving defendant, in 2009, had argued in his own affidavit and in an affidavit by Dr. Paul Orloff, who had examined the plaintiff's eyes on September 26, 2008, that Dr. Sobel had appropriately and competently treated Ms. Grobman throughout the years beginning in the early 90's, to when she was diagnosed in 1996 with glaucoma, and in the ensuing years. They state she was properly tested and treated with medication.

The malpractice claim extended back to 2002. As a part of Dr. Orloff's affidavit, he said that during his examination he found that Ms. Grobman's vision was intact and, as far as he could see, there was no change in either her optic nerve or in her cup-to-disc ratio. He also stated that with regard to the numerous visual-field examinations she had undergone, he found that though there were some subtle and minor changes, they were not consistent with each other and did not support any change in treatment.

In my decision, I first found that the moving defendant, with the inclusion of the Orloff affidavit, did make out a prima facie case in support of summary judgment. I then turned to the opposition by the plaintiff. That opposition consisted of a submission of two affidavits, one by the aforementioned Dr. Gregory Harmon together with his records and the other by an unnamed, but well-credentialed, board certified ophthalmologist. I discussed the contents of these affidavits and concluded that there was a deficiency in the opposition on both of the issues common to medical malpractice actions; that is, departures from accepted standards of medicine and the existence of an injury resulting from that/those departures.

I did comment specifically on the unsatisfactory submission by Dr. Harmon. Dr. Harmon, in a very brief affidavit, had indicated that his diagnosis of Ms. Grobman's condition was that she was not suffering from open angle glaucoma but instead from normal tension glaucoma, the latter being a much more challenging diagnosis that requires more aggressive treatment. He also said that the failure to recognize the significance of visual-field tests was a departure which, in his opinion, "caused and contributed to permanent and irreversible injury to the optic nerve".

However, what was not said by Dr. Harmon was anything about his examination of the optic nerve itself or anything about Ms. Grobman's cup-to-disc ratios. I commented that such testing seemed to be more objective than visual-field testing, but Dr. Harmon made no mention of having done them. In contrast, both Dr. Orloff and Dr. Sobel did do these. I also pointed out that Dr. Harmon's records were conclusory in nature and gave no substantive information to the Court. As to the plaintiff's unnamed expert, the only information that he/she provided was that when there is a deficiency shown in visual-field reports, that situation must be dealt with. However, again there was no comment at all about the health of Ms. Grobman's optic nerve or her cup-to-disc ratio. Therefore, I found that the defendants' position in reply, that the plaintiff's opposition was insufficient to overcome its prima facie case because it was conclusory and nonspecific, was correct. Also, the opposition failed to show that there had been any actual damage to Ms. Grobman's vision or her eyes.

One year later, in affirming this Court's decision, the Appellate Division also found that the plaintiff had unsuccessfully contested the defendants' prima facie entitlement to summary judgment. They said specifically :

> Plaintiff's physicians offered no objective proof, based on examination, to contradict Sobel's objective proof that plaintiff's optic nerves and cup-to-disc ratios remained stable and in good health during the management and treatment of her condition ... Plaintiff's expert opined that the visual-field tests indicated permanent damage to the optic nerve, but also acknowledged that optic nerve injury would be evidenced by overall cupping and changes to the rim of the optic nerve, such as notching and evacuation, yet no offer of objective proof was made to substantiate such claimed damage. Plaintiff's proof was deficient, even though it remained within her power to supply such evidence. Instead, plaintiff left her argument to speculation. The Sobel defendants, by contrast, offered objective proof that fully refuted such speculative assertions . . .

74 AD3d at 680 (citations omitted).

In the renewal motion, counsel attempts, via a much longer affidavit from Dr. Harmon, to now provide what was clearly not provided earlier when the opportunity was presented. But more significantly, there is nothing materially new which counsel is now presenting to the Court. Dr. Harmon's records were always before the Court, as was a brief affidavit from him. But in the instant motion, in a not terribly convincing affidavit, Dr. Harmon first attempts to explain why he is now for the first time providing a more satisfactory explanation of his treatment of Ms. Grobman and then attempts to give that explanation. I find that he fails in both attempts.

With regard to his turnabout, and now enthusiastic support of his patient's claim, he explains in his affidavit (at ¶5) that at the time of the original motion he had "no inclination to insert [himself] into a medical malpractice action against [Ms. Grobman's] prior ophthalmologist." Therefore he "politely but firmly" refused to go further than he did

because he felt that his relationship should be solely one of physician and patient. Then he states that the demands of his practice, his work for the Glaucoma Foundation[1], and his teaching commitments made it difficult for him to find the time to address the action more completely. However, he goes on to explain that after it was brought to his attention that the action had been dismissed twice and "given the effrontery of the allegations by Dr. Sobel", together with his "strong belief" after reading the Courts' decisions that both Courts' rulings were based on a number of serious misconceptions and protocols for the management of glaucoma, he decided to become more seriously involved. (¶7-9). He stated that as one who has "dedicated his professional life to treating glaucoma and educating the public about it, this distortion of the facts about glaucoma [was] of great concern to [him]." (¶10).

What follows is a 22-page affirmation from Dr. Harmon, which includes the explanation described above in the first five pages, followed by his discussion of glaucoma and the nature of this disease in the next five plus pages, and finally on page 11 his discussion of the initial examination of Ms. Grobman on February 22, 2006 and the significance of his findings there. He also spends several pages discussing the value of visual-field testing to the diagnosis and treatment of glaucoma. Finally, in the last several pages of the affirmation, Dr. Harmon specifically takes issue with Dr. Sobel's statements made in furtherance of his own original motion for summary judgment.

However, with all of this, Dr. Harmon still is inconclusive about whether he examined the plaintiff's optic nerve, and if so, what his findings were. He is also non-specific about

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[1]It appears that the plaintiff Debora Grobman also is affiliated with the Glaucoma Foundation, I believe in a voluntary/administrative position.

her cup-to-disc ratios and their stability. While on page 11 he does say that the HRT test administered by him on February 22 revealed a scar on her retina as well as increased cup-to-disc-ratios of .580 in her right eye and .597 in her left eye, he includes no meaningful discussion of what that means or how it compares with normal ratios and how this has affected or caused injury to Ms. Grobman.

Above I indicated that I had found insufficient the explanation proffered as to why this fuller affirmation had not been provided originally. I also found that, even at this late date, six months after the Appellate Division decision, the affirmation still did not change my mind as to whether the plaintiff had successfully countered the defendants' prima facie case. As to the first point, the explanation that Dr. Sobel's allegations were such an affront to Dr. Harmon that it compelled him to respond in a fuller way, it should be noted that those allegations were made in the original motion and therefore the strong response that it evoked in Dr. Harmon presumably would and should have occurred when he read those allegations for the first time. In other words, when he was asked to help and oppose the motion, Dr. Sobel's affidavit had already been presented. Therefore, it is difficult for this Court to understand why he declined at that time to provide the information that he provided two years later.

Plaintiff's counsel provides several appellate court opinions in support of the argument that this Court should use its discretion to reopen the motion and to now deny defendant's motion for summary judgment. However, all the cases are easily distinguishable. *Tishman Const. Corp. of New York v City of New York*, 280 AD2d 374 (1st Dep't 2001), a case heavily relied upon by moving plaintiff, involved a somewhat extraordinary situation where the defendant City had tried unsuccessfully to challenge the

plaintiff's motion for summary judgment in a contract dispute by suggesting that the individual who acted on behalf of Tishman had accepted a bribe. But the courts hearing this information dismissed it as based on essentially insufficient and inadmissible evidence. Therefore, in the original motion, the City was denied the opportunity to assert the claims and defenses arising out of the alleged bribe. However, during the time that the matter was on appeal, the City was able to compel disclosure from the District Attorney, via an order of a Supreme Court Justice that directed the District Attorney to disclose the bank records and other records of this individual, which had been obtained with a grand jury subpoena and search warrant. Armed with new, significant, persuasive evidence, the City moved for leave to renew its motion to amend its answer, seeking to assert these various defenses based on the acceptance of bribes. The lower court denied the motion because it found that the defendant had not met its burden of demonstrating that it could not, with due diligence, have presented the new evidence at the time the initial motion was made or at least when the appeal was perfected. But the Appellate Division reversed.

First, they found that a motion for leave to renew is one intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the court's attention. However, the appellate court stated this requirement was a flexible one and that the court could in its discretion grant renewal in the interests of justice. The Appellate Division then went on to find that the interests of justice compelled a renewal here because the defendant had, in fact, provided a reasonable excuse for the unavailability of the records in the first instance and had not improperly delayed in obtaining a disclosure order from the Supreme Court. The court found no discernable

prejudice to the plaintiff as a result of the amended answer, and the proposed amendment clearly had merit in view of the public policy designed to protect taxpayers from contracts tainted by fraud.

None of the above can be said here. The current statement by Dr. Harmon was always available to be presented if he had a mind to do that. His explanation for not giving it does not comport with all the facts as we know them, nor does this Court find it particularly credible. Further, as discussed above, it is not ultimately convincing as to the alleged malpractice against Dr. Sobel or any injury actually suffered by plaintiff.

Two other cases cited by plaintiff, *Trinidad v. Lantigua*, 2 AD3d 163 (1st Dep't 2003) and *Mejia v. Nanni*, 307 AD2d 870 (1st Dep't 2003) are also easily distinguishable from the case now before this Court. In *Trinidad*, the higher court categorized the circumstances as "peculiar" because an affidavit of plaintiff's expert along with a Death Certificate, both sufficient to create issues of fact in this medical malpractice case, had inexplicably not been submitted to the court when the defendants' motion was originally heard. But the lower court did, under these circumstances, agree to accept the affidavit and Certificate, which changed the court's original ruling, and the Appellate Division affirmed.

Finally, in the *Mejia* case, the issue was about venue and the renewal relied on convincing proof that the defendants in fact lived in Westchester County where the case should have been venued. The Appellate Division characterized the new information as being sufficiently reliable and significant so as to allow for renewal and a change of venue.

Plaintiff has cited other cases, which this Court will not discuss so as not to burden the record, but they are all distinguishable. The only case cited by either side that in fact

sounds very similar to this case is a very recent decision cited in opposition by the defendants. That case, *Henry v. Peguero* , 72 AD3d 600 (1st Dep't 2010), involved a "no fault" case where the court had granted summary judgment to the defendant on the basis of the plaintiff's failure to show that he was seriously injured. At the time of the original motion, plaintiff submitted an affirmation by Dr. Mian who stated, in a conclusory fashion, that Mr. Henry's injuries were causally related to the motor vehicle accident. On his motion for renewal, plaintiff, similar to the plaintiff in this case, offered an addendum from the same Dr. Mian that contained more information and specifically disputed that the injuries suffered by the plaintiff resulted from a pre-existing condition or a degenerative process.

While the lower court accepted this new affirmation, the Appellate Division did not, finding that it was apparent that the supplemental medical statement was submitted in an attempt to remedy the weakness of the plaintiff's original opposition. However, the court said there (at p 602), quoting its earlier decision in *Matter of Weinberg,* 132 AD2d 190, 210, (1987), *lv dismissed* 71 NY2d 994 (1988), that:

> Renewal is granted sparingly.....; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.

The court further commented in the case before them (at p 603):

> Dr. Mian's addendum was not the result of any additional examination or medical testing; rather, the doctor's conclusion was based on the medical information previously available to him and could have been included in his original affidavit.

In fact, precisely the same thing could be said of the expanded affirmation proffered by Dr. Harmon here. Further, in *Henry* as I find in this case, the Appellate

Division also found that Dr. Mian's addendum did not sufficiently deal with one of the reasons why the lower court had granted summary judgment in the first place, that is, a two-week gap between the accident and the commencement of treatment. Again, the same result can be said to be the case here. As discussed earlier, Dr. Harmon's more recent affirmation continued to be conclusory and failed to adequately explain the mechanisms of injury and the injury itself from which the plaintiff allegedly suffers.

Therefore, this Court denies the motion for renewal. I do not find that the interests of justice or any other interest would be served by accepting Dr. Harmon's affirmation now. But it is clear and I do find that a reopening of the action at this date would very definitely prejudice the defendants.

Accordingly, it is hereby

ORDERED that plaintiff's motion for renewal is in all respects denied.

Dated: March 25, 2011

MAR 25 2011

J.S.C.

ALICE SCHLESINGER

FILED

MAR 28 2011

NEW YORK
COUNTY CLERK'S OFFICE