

**Alp v Baboumian**

2011 NY Slip Op 31606(U)

June 15, 2011

Sup Ct, NY County

Docket Number: 111865/2009

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lobis  
*Justice*

PART 6

Carol Lee Alp

INDEX NO. 111865/09

MOTION DATE 3/22/11

Raymond Babounian, Jr.  
*-v-*

MOTION SEQ. NO. 001

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

1-19

*Pl's mot. 20-24*

*app to xmot: 25-27, 28;*

*29-33*

*Pl's reply: 34*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE COURT'S PREVIOUS DECISION

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE COURT'S PREVIOUS DECISION

**FILED**

JUN 16 2011

Dated: 6/15/11 NEW YORK COUNTY CLERK'S OFFICE JBL J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**FILED**

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

**JUN 16 2011**

-----X  
CAROL LEE ALP, as Administratrix of the Estate of  
MARISSA ALP, deceased, and CAROL LEE ALP, Individually,  
and PETER ALP,

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs,

Index No. 111865/2009

-against-

**Decision and Order**

NORAYR BABOUMIAN, M.D., SYED JAFRI, M.D., and  
BELINDA VELAZQUEZ, M.D.,

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Motion Sequence Numbers 001, 002, and 003 are consolidated for disposition. In Motion Sequence Numbers 001, 002, 003, defendant Norayr Baboumian, M.D., Syed Jafri, M.D., and Belinda Velasquez, M.D., s/h/a Belinda Velazquez, M.D., move, pursuant to C.P.L.R. Rule 3212, respectively, for summary judgment dismissing plaintiffs' claims for medical malpractice. Plaintiffs oppose the motions and cross-move for leave to serve amended bills of particulars. For the reasons stated below, the motions for summary judgment are denied, except that all claims against Dr. Velasquez arising out of care rendered at Cabrini Medical Center ("Cabrini") are dismissed, and the cross-motion is granted in its entirety.

On November 15, 2007, Marissa Alp, a twenty-five year old high school teacher, presented to Dr. Baboumian at his office complaining a sore throat. On examination, her pulse was 132 heartbeats per minute, above the normal range of 60 to 80. Her temperature was 99.1° F. Because of her high heart rate, Dr. Baboumian directed Ms. Alp to go to the emergency room at Cabrini, and she was admitted that same day. At Cabrini, Ms. Alp was diagnosed with tachycardia (rapid heart beat) and an enlarged left atrium. Cabrini's emergency room physicians noted that Ms. Alp had shortness of breath on exertion. She

was administered Atenolol (a beta blocker) to bring down her heart rate and an electrocardiogram ("EKG") was performed. From the emergency room, Ms. Alp was sent to the telemetry unit to more closely monitor her heart activity. A blood test revealed a white cell count of 19,000, which was consistent with Dr. Baboumian's concern that an infection was causing her sore throat and fever. Dr. Baboumian consulted with a cardiologist, an infectious disease specialist (to rule out septicemia), and a hematologist to rule out leukemia. He also called on an endocrinologist to rule out thyroiditis.

Dr. Jafri, the cardiologist, saw Ms. Alp in the early morning of November 16, 2007. He took her medical history and performed a physical examination. According to the medical records, Ms. Alp made no complaints of shortness of breath or fatigue, and had no history of rheumatic or congenital heart disease. Ms. Alp's temperature was 100.4° F and her heart rate had decreased to 80 beats per minute. According to Dr. Jafri's examination before trial ("EBT") testimony, he heard a pericardial rub, a sound produced by friction of two layers of the covering of the heart. Dr. Jafri diagnosed Ms. Alp with pericarditis due to a viral infection. He ordered an echocardiogram, which he did not review. Another doctor prepared a preliminary report of the echocardiogram prior to Ms. Alp's discharge. The preliminary report noted an ejection fraction of 56%, mitral regurgitation, and no plural effusion. The final report was not available until after Ms. Alp's discharge. It indicated, *inter alia*, an ejection fraction of 60%, normal ventricular function and size, a thickened mitral valve, a prolapse of the mitral leaflet, and severe mitral regurgitation.

The hematologist ruled out leukemia because Ms. Alp's white blood cell count had decreased rapidly. The endocrinologist ruled out thyroiditis after performing a sonogram. Dr. Velasquez,

the infectious disease specialist, saw Ms. Alp on November 17, 2007 for her sore throat and fever. Dr. Velasquez continued Ms. Alp on an antibiotic, which had been prescribed earlier. Dr. Velasquez approved Ms. Alp's discharge that afternoon, since there was no infection requiring continued hospitalization and the other consultants saw no reason to keep her at Cabrini.

With Ms. Alp cleared by the other specialists, Dr. Baboumian spoke to Dr. Jafri. He informed Dr. Jafri that Ms. Alp reported no chest pain, shortness of breath, or arrhythmia, and was "up and around." Dr. Baboumian relayed the details of the preliminary report of the echocardiogram. Dr. Jafri wanted to see Ms. Alp in his office the following Monday, November 19, 2007, for a repeat echocardiogram, but he believed that it was okay to discharge her. Dr. Jafri continued to believe that the arrhythmia was due to pericarditis and recommended that Dr. Baboumian prescribe an anti-inflammatory and an antibiotic. Ms. Alp was discharged on November 17, 2007.

Ms. Alp did not keep the appointment with Dr. Jafri. The medical records reveal that there was a problem with her health insurance. Records from Dr. Baboumian's office indicate that he tried to reach her on November 23 and November 30, 2007, but could not. The next contact that Ms. Alp had with any of the defendants was on November 28, 2007 when she saw Dr. Velasquez at the doctor's office, complaining of palpitations and a pulse of 130. Ms. Alp made no infectious disease-related complaints at that visit. Although not a cardiologist, Dr. Velasquez performed an EKG. She reported that EKG appeared normal. At her EBT, Dr. Velasquez testified that she would have told Ms. Alp to see a cardiologist, but did not remember if she had made a specific referral. Dr. Velasquez faxed a copy of the EKG to a cardiologist, who confirmed to her that it was normal. After missing a call from Ms. Alp, Dr.

Velasquez called her back and left a message. According to her medical records, which recounted the message, Dr. Velasquez told Ms. Alp that there was no need for further testing, because the EKG performed in her office as well as the one performed on November 17, 2007, were both normal. She told Ms. Alp to call her if further symptoms arose.

Tragically, Ms. Alp collapsed while out with her roommate on the night of December 21, 2007. She was taken by ambulance to the emergency room of St. Luke's-Roosevelt Hospital. She could not be revived and was pronounced dead shortly after 11:00 p.m. According to the autopsy report, the cause of death was cardiac arrhythmia due to myxomatous degeneration of the mitral valve with mitral valve prolapse.

Plaintiffs commenced this action with the filing of a summons and complaint on or about August 20, 2009; plaintiffs filed an amended complaint on or about October 6, 2009. In their bills of particulars, plaintiffs allege, *inter alia*, that each defendant failed to appreciate Ms. Alp's cardiac condition, which caused her death.

In their cross-motion, plaintiffs seek to amend the bills of particulars to include language that further amplifies their claims. They argue that the facts supporting these claims were not within their knowledge until after discovery was completed. They assert that the new language does not change the theory of the case nor require further discovery. In opposition, defendants argue that the motion is not timely and plaintiffs have not offered a reasonable excuse for the lateness. They also assert that new theories of malpractice are offered in the proposed amended bill of particulars. In reply, plaintiffs point

to language in the original bill that puts defendants on notice of the issues they seek to amplify with the proposed amendments.

Under C.P.L.R. Rule 3042(b), a plaintiff has an absolute right to “amend the bill of particulars once as of course prior to the filing of a note of issue.” Once the note of issue is filed, a plaintiff must seek leave of the court, but such “leave should be freely given in the absence of prejudice or surprise to the opposing party.” Romanello v. Jason, 303 A.D.2d 670 (2d Dep’t 2003) (citations omitted); see also Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d 364, 365 (1st Dep’t 2007). The burden of showing prejudice or surprise is on the opposing party. A.J. Pegno Constr. Corp. v. City of New York, 95 A.D.2d 655, 656 (1st Dep’t 1983). Defendants have not demonstrated prejudice or surprise. The amendments do not substantially add new theories. Furthermore, there has been no unreasonable delay in seeking the amendment since plaintiffs were not aware of the facts supporting the new allegations until discovery was completed. As such, the cross motion seeking leave to serve amended bills of particulars is granted.

Turning to the summary judgment motions, a party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden

shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted).

In support of his motion, Dr. Jafri relies on the affirmation of Edward Katz, M.D., who is board certified in internal medicine, cardiovascular disease, and adult echocardiography. Dr. Katz opines that Dr. Jafri's care was at all times in accordance with good and accepted medical practice. Ms. Alp had a normal ejection fraction and a left ventricle of normal size and contractility. Furthermore, her tachycardia had resolved and the results of her blood work were normal at the time of discharge. Dr. Katz opines that Dr. Jafri properly cleared Ms. Alp for discharge with the instruction that she report to him the following Monday, because she was not clinically symptomatic. Dr. Katz asserts that neither the preliminary report nor the final report warranted surgical intervention, cardiac catheterization, or even a surgical consult. Dr. Katz states that it is the standard of care to follow a patient like Ms. Alp with an echocardiogram every 6 to 12 months and, consistent with the standard of care, Dr. Jafri scheduled Ms. Alp for a follow-up appointment for the following Monday.

Dr. Baboumian relies on the affirmation of Monty M. Bodenheimer, M.D., a board certified internist with a sub-speciality in cardiovascular disease. After reviewing the relevant medical records, Dr. Bodenheimer opines that Dr. Baboumian's treatment of Ms. Alp did not deviate from the standard of care. Dr. Bodenheimer sets forth that it was proper for Dr. Baboumian to rely on Dr. Jafri's and Dr. Velasquez's impressions of Ms. Alp and conclusions that she was fit to be discharged. Dr. Bodenheimer further opines that there was no need for surgical intervention, because Ms. Alp showed significant clinical improvement during her admission. She was no longer tachycardic and her white blood cell count dropped.

Dr. Velasquez relies on the affirmation of Bruce Farber, M.D., who is board certified in internal medicine and infectious disease. Dr. Farber maintains that Dr. Velasquez did not depart from the standard of care in her treatment of Ms. Alp. Dr. Farber sets forth that Dr. Velasquez properly took Ms. Alp's medical history and continued her on the antibiotic. Dr. Farber asserts that from an infectious disease perspective, there was no need to keep Ms. Alp in Cabrini. Dr. Farber sets forth that when Dr. Velasquez next saw Ms. Alp, on November 28, 2007, it was at her office after Ms. Alp failed to keep her appointment with the cardiologist. Ms. Alp's complaints of a rapid heart beat and palpitations were not symptoms that Dr. Velasquez could evaluate as a infectious disease specialist. Dr. Farber admits that Dr. Velasquez, as an infectious disease specialist, would not normally administer an EKG, but sets forth that she read the results correctly and appropriately sought confirmation from a cardiologist. Furthermore, notwithstanding the normal results, Dr. Velasquez appropriately told Ms. Alp to consult with a cardiologist.

In opposition to all three motions, plaintiffs offer an affirmation from Ralph J. D'Angelo, M.D., a board certified cardiologist and internist. He opines that Dr. Jafri deviated from the standard of care by failing to review the final echocardiogram report once he was aware that the preliminary report revealed mitral valve prolapse and regurgitation. Dr. D'Angelo sets forth that these conditions required an immediate cardiac catheterization and a referral to a cardiac surgeon for mitral valve repair.

Dr. D'Angelo opines that Dr. Baboumian should have read the final echocardiogram report or conferred with the physician that prepared the report. The failure to do so was a deviation from the standard of care. Had Dr. Baboumian read the report or conferred with the authoring physician, Dr. Baboumian would have realized that Ms. Alp had a serious heart defect and, at the very least, informed her of the condition.

As to Dr. Velasquez, Dr. D'Angelo sets forth that she should have reviewed the final echocardiogram report or consulted with the authoring physician. He further asserts that it was a gross deviation from the standard of care to not readmit Ms. Alp to the hospital following her visit with Dr. Velasquez in late November. Dr. D'Angelo sets forth that it was also a gross deviation from the standard of care to fail to respond to Ms. Alp's call for the test results in a timely matter. He further asserts that Dr. Velasquez's voice mail message gave Ms. Alp a false sense of security and was a gross deviation from the standard of care.

In reply, counsel for Dr. Jafri argues that plaintiffs' expert's affirmation is conclusory, factually inaccurate, and that he cannot be held liable for care rendered after Ms. Alp was discharged from

Cabrini. Dr. Velasquez offers a supplemental affidavit from Dr. Farber, who sets forth that as an infectious disease specialist, she cannot be held liable for malpractice caused by a cardiologist. Dr. Farber asserts that Dr. Velasquez was not required to make sure that Ms. Alp followed up with a cardiologist after November 28, 2009.

Defendants have meet their prima facie burdens with expert opinion evidence demonstrating that Ms. Alp was not exhibiting any clinical signs that would warrant surgery or a cardiac catherization at the time of her discharge from Cabrini. Furthermore, Dr. Velasquez has met her prima facie burden with regard to her follow-up care by demonstrating that she appropriately read the second EKG and told Ms. Alp to consult with a cardiologist. Nevertheless, plaintiffs' expert has adequately rebutted the prima facie showing by setting forth that Ms. Alp presented to Cabrini with a serious heart condition that required an immediate cardiac catherization and eventual surgical intervention and that, by taking on cardiological treatment, Dr. Velasquez is liable for failing to readmit Ms. Alp to the hospital. The experts articulate clear differences as to the propriety of defendants' care for Ms. Alp. In light of the experts' conflicting opinions, summary judgment must be denied (see Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 [1st Dep't 2008]), with one exception: that Dr. Velasquez cannot be held liable for her actions at the Cabrini. See Dockery v. Sprecher, 68 A.D.3d 1043, 1046 (2d Dep't 2009); see also Parnell v. Montefiore Med. Ctr., 63 A.D.3d 573, 574 (1 Dep't 2009). At Cabrini, Dr. Velasquez took no role in treating Ms. Alp for anything other than infectious disease. Accordingly, it is hereby

ORDERED that defendant Norayr Baboumian, M.D.'s motion for summary judgment (Motion Sequence Number 001) and Syed Jafri, M.D.'s motion for summary judgment (Motion Sequence Number 002) are denied; and it is further

ORDERED that defendant Belinda Velasquez, M.D., s/h/a Belinda Velazquez, M.D.'s motion for summary judgment (Motion Sequence Number 003) is granted to the extent that all claims arising out of treatment that she rendered at Cabrini Medical Center are dismissed and the remainder of the motion is denied; and it is further

ORDERED that plaintiffs' cross motion to amend their bills of particulars is granted and the proposed amended bill attached to their motion papers is deemed served on defendants; and it is further

ORDERED that the parties shall appear for a scheduled pre-trial conference on June 21, 2011, at 9:30 a.m.

Dated: June 15, 2011

  
\_\_\_\_\_  
JOAN B/LOBIS, J.S.C.

**FILED**

JUN 16 2011

NEW YORK  
COUNTY CLERK'S OFFICE