

Obando v New York City Health & Hosp. Corp.

2011 NY Slip Op 31982(U)

July 14, 2011

Supreme Court, New York County

Docket Number: 107170/07

Judge: Douglas E. McKeon

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

PRESENT: Douglas E. McKeon
Justice Supreme Court
Justice

PART 38

Obando, Roberto

INDEX NO. 107170/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

NUCHHC et al.

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the annexed Memorandum Decision.

FILED

JUL 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/14/11



Douglas E. McKeon J.S.C.
Justice Supreme Court

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ROBERTO OBANDO,

Plaintiff,

-against-

MEMORANDUM DECISION

Index No.: 107170/07

NEW YORK CITY HEALTH AND HOSPITAL
CORPORATION, IGOR AVAGYAN M.D., P.C., and
AVAG MEDICAL P.C.,

FILED

JUL 15 2011

Defendants.

-----X
HON. DOUGLAS E. MCKEON:

NEW YORK
COUNTY CLERK'S OFFICE

Motion, by Igor Avagyan M.D. and Avag Medical P.C., for an order pursuant to
CPLR 3212 for summary judgment is granted.

This is an action wherein plaintiff claims that the defendant Dr. Avagyan failed to
diagnose and treat plaintiff's lung cancer from September 2004 through October 2005.
Plaintiff also relies on the doctrine of *res ipsa loquitur*.

Plaintiff has a long history of shoulder pain and his medical history includes many
comorbidities, for which he mainly treated at Metropolitan Hospital. Over the years, he
responded well to pain medication, injections and therapy to treat his shoulder pain.

Plaintiff testified at his deposition that he suffered a fractured right clavicle in a
2003 motor vehicle accident. He began treating at Dr. Avagyan's clinic for physical
therapy after this accident and was examined by Dr. Avagyan, an internal medicine
specialist, for the first time on September 2, 2004. Plaintiff denied smoking and a history
of smoking at his visits.

Mr. Obando began treatment with Dr. Alberto Rozo, an osteopath, on August 24, 2005. A chest x-ray was ordered due to worsening pain. The test revealed an abnormal opacity in the lung. After plaintiff complained of hemoptysis (coughing up of blood from the respiratory tract) for the first time on October 12, 2005, one month after he discontinued treatment with Dr. Avagyan, a whole body CT scan revealed that the plaintiff had a mass at the right apex of the right upper lung which was suggestive of a malignant tumor. Plaintiff underwent further tests and treatment at Parkway Hospital, including surgery, chemo and radiation therapy.

The action against the New York City Health and Hospitals Corporation has been discontinued and a settlement agreement was reached. Thus, plaintiff's remaining claims involve the treatment rendered by Dr. Avagyan.

Defendants' expert opined that Dr. Avagyan did not breach any standard of care in screening for lung cancer as no standard screening procedure is recommended. This is supported by medical literature annexed to defendants' motion papers and goes un rebutted by plaintiff. At the visits with Dr. Avagyan, plaintiff, by self-report, was not a current smoker and he had not smoked in the past. Dr. Avagyan could not have "dismissed" Mr. Obando's history of smoking if he was unaware of it based on Mr. Obando's own representations. During the course of the treatment with Dr. Avagyan, plaintiff never complained of chest pain, weakness, fatigue, weight loss, or depression. In fact, he even denied these symptoms during a visit with Dr. Rozo on August 24, 2005.

Dr. Rozo gives his expert opinion in support of plaintiff's motion. The basis of his opinion is that plaintiff presented with a classic sign/symptom of a Pancoast tumor and a CT scan should have been done to rule the condition in or out. However, he fails to state why the defendants should have ordered testing based upon a possible history of smoking, which plaintiff denied according to the medical records, and shoulder pain when, in fact, this is not within the requisite standard of care and there was another explanation for the pain, for which the plaintiff was treated successfully over the years with pain medication, injections, and therapy. Furthermore, Dr. Rozo does not support the argument that any alleged delay in diagnosis decreased the plaintiff's life expectancy. Dr. Rozo merely states that the plaintiff has been "deprived of a substantial possibility of recovery." This sweeping conclusion, without medical support, is speculative. The suggestion of a possibility is insufficient to defeat defendants' motion.

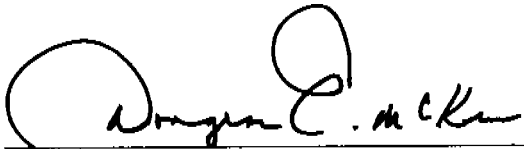
Submission of this case to the jury on the theory of *res ipsa loquitur* is not warranted as plaintiff failed to prove the essential elements of the doctrine. *See Dermatossian v. New York City Transit Auth.*, 67 NY2d 219 (1986).

As defendants have met their initial burden to tender sufficient evidence to demonstrate that, as a matter of law, there is an absence of material fact and plaintiff has failed to raise sufficient issues to require a trial, defendants' motion is granted. *See Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986); *Zuckerman v. City of New York, et al.*, 49 NY2d 557 (1980).

The Clerk of this Court is respectfully directed to enter judgment in favor of the defendants Igor Avagyan M.D. and Avag Medical P.C.

So ordered.

DATE: New York, New York
July 14, 2011



Douglas E. McKeon, J.S.C.

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