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

PRESENT: COBIS Justice PART 6

GBN NISHNO

-v-

BRUCE GOLDWEBER, M.D.

INDEX NO. 107176/08

MOTION DATE 8/2/11

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to 25 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 23
Answering Affidavits — Exhibits	24
Replying Affidavits	25

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 20 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 10/19/11

J.S.C.

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
NEW YORK COUNTY: IAS PART 6

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GEN NISHINO,

Plaintiff,

-against-

BRIAN A GOLDWEBER, M.D., BRIAN A. GOLDWEBER, M.D., P.C., ABBE J. CARNI, M.D., ABBE J. CARNI, M.D., P.C., PROFESSIONAL ANESTHESIA, P.A., EDWARD S. GOLDBERG, M.D., and EDWARD S. GOLDBERG, M.D., P.C.,

Defendants.

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Index No. 107146/08

Decision and Order

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

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition. In Sequence 002, defendants[1] Abbe J. Carni, M.D. ("Dr. Carni") and Abbe J. Carni, M.D., P.C. ("Carni P.C.") (collectively the "Carni Defendants") move, by order to show cause, for an order pursuant to C.P.L.R. Rule 3212 granting them summary judgment and dismissing plaintiff Gen Nishino's complaint with prejudice. In Sequence 003, defendants Edward S. Goldberg, M.D. ("Dr. Goldberg") and Edward S. Goldberg, M.D., P.C. ("Goldberg P.C.") (collectively the "Goldberg Defendants"), move for similar relief.

This case is one of many involving patients of defendant Brian A. Goldweber, M.D., a former anesthesiologist. In 2007, Dr. Goldweber became the focus of a New York City Department of Health ("NYCDOH") investigation after a number of his patients were discovered to have contracted hepatitis B and C after their treatment with him. These patients all underwent

[1] Defendants Brian Goldweber, M.D., and Brian Goldweber, M.D., P.C., have been discharged in bankruptcy and have not appeared in this action. Defendant Professional Anesthesia, P.A., also has not appeared.

anesthesia in August 2006. The NYCDOH eventually determined that the manner in which Dr. Goldweber administered anesthesia caused a hepatitis outbreak among these patients.

Mr. Nishino did not treat with Dr. Goldweber in August 2006. He treated with him and co-defendant Dr. Goldberg on June 1 and June 5, 2006. On those days, respectively, Dr. Goldberg performed an esophageo-gastroduodenoscopy and a colonoscopy at his office while Dr. Goldweber administered intravenous anesthesia using propofol. The procedures themselves were uneventful. Approximately one year later, by letter dated June 7, 2007, the NYCDOH informed plaintiff that it was investigating hepatitis B and C infections in patients who had received intravenous anesthesia from a particular anaesthesiologist in August 2006. The letter set forth that NYCDOH was contacting all patients who received intravenous anesthesia from this anaesthesiologist between December 1, 2003 and May 1, 2007. In the letter, NYCDOH recommended that plaintiff be tested for hepatitis B and C and human immunodeficiency virus ("HIV") as a precaution. On June 15, 2007, plaintiff was tested for hepatitis B and C and HIV by William Perlow, M.D. The results of the blood tests were negative and were reported by the testing laboratory on or about June 18, 2007. Plaintiff testified that he learned of the results approximately two weeks to one month after the test.

In bringing this lawsuit, plaintiff alleges that Dr. Goldweber negligently and recklessly exposed him to hepatitis B and C when he administered intravenous propofol that was tainted with hepatitis during the June 5, 2006 colonoscopy performed by Dr. Goldberg. As a result of the exposure, plaintiff developed a fear of contracting hepatitis B and C, fear of subsequent permanent liver disease, and a fear of death. Boiled down, plaintiff's claim against Dr. Goldweber

is for negligent infliction of emotional distress from Dr. Goldweber having potentially exposed him to hepatitis. As to the Carni Defendants, for whom Dr. Goldweber worked, and the Goldberg Defendants, plaintiff raises claims sounding in their vicarious liability for the negligent acts of Dr. Goldweber and their negligent hiring and/or supervision of Dr. Goldweber. Plaintiff also seeks punitive damages.

Essentially, the Carni Defendants and the Goldberg Defendants argue that they are entitled to summary judgment because plaintiff cannot make out a prima facie claim for negligent infliction of emotional distress against Dr. Goldweber, so therefore the other claims predicated on that negligence must fall away. The Carni Defendants, citing to Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008), argue that in order to establish a prima facie cause of action for negligent infliction of emotional distress, plaintiff must demonstrate that he was actually exposed to the hepatitis virus and that he has suffered a "psychic harm with residual physical manifestations" as a direct result of Dr. Goldweber's negligence. Based on Ornstein, which involved a case of alleged exposure to HIV, the Carni Defendants sets forth that plaintiff, who has not tested positive for hepatitis, must come forward with proof that due to the negligence of Dr. Goldweber, he was actually exposed to hepatitis "through 'a scientifically accepted method of transmission of the virus . . . and that the source of the allegedly transmitted blood or fluid was in fact'" positive for hepatitis. Id., quoting Bishop v. Mt. Sinai Med. Ctr., 247 A.D.2d 329, 331 (1st Dep't 1998). They maintain that plaintiff is unable to show that the source of the allegedly tainted intravenous anesthesia was positive for hepatitis. Further, the Carni Defendants argue that plaintiff is unable to demonstrate psychic harm with residual physical manifestations, as he testified that after he received the negative results of the hepatitis testing, he was "completely relieved," his fears were eliminated,

and he never sought mental health treatment to address his alleged fears. The Carni Defendants maintain that there is no record of any physical manifestation of plaintiff's alleged fears. The Goldberg Defendants set forth a similar argument to that of the Carni Defendants.

The Carni Defendants submit an expert affirmation from Allan Pollock, M.D., who sets forth that he is duly licensed to practice medicine in the State of New York and board certified in internal medicine and infectious diseases. He states that he reviewed plaintiff's pleadings; Dr. Goldberg's and Dr. Perlow's medical records; NYCDOH's July 14, 2008 report of its investigation into the hepatitis outbreak associated with Dr. Goldweber; the November 2, 2009 Determination and Order of the New York State Department of Health Board of Professional Conduct in the matter of Dr. Goldweber; and plaintiff's deposition testimony. Dr. Pollock opines, to a reasonable degree of medical certainty, that Dr. Goldweber did not expose plaintiff to the hepatitis virus on either June 1, 2006 or June 5, 2006. Dr. Pollock points out that the study conducted by the NYCDOH identified only two clusters of patients treated by Dr. Goldweber—in June 2005 and August 2006—that had hepatitis C with a high enough degree of relatedness as to indicate "outbreak associated" cases. Therefore, he opines that plaintiff was not exposed to hepatitis on June 1 or June 5, 2006. Dr. Pollock further points out the lack of evidence in the records that any patients who underwent procedures on the day of or days prior to plaintiff's procedures carried the virus or that the vial of propofol used to anesthetize plaintiff was contaminated with the virus. Dr. Pollock opines that there was no other scientifically accepted method, other than contaminated intravenous propofol as explained in the NYCDOH report, through which Dr. Goldweber could have transmitted hepatitis to plaintiff. Accordingly, Dr. Pollock concludes that there is no evidence that plaintiff was exposed to hepatitis on either June 1 or June 5, 2006.

The Goldberg Defendants submit an affirmation from H. Alan Schnall, M.D., who sets forth that he is board certified in internal medicine with a sub-certification in gastroenterology. Dr. Schnall sets forth that he reviewed plaintiff's medical records, the bills of particulars, and the deposition transcripts. He opines that Dr. Goldberg's care was in accordance with accepted standards of medical practice and that his treatment did not proximately cause the injuries that plaintiff claims. Dr. Schnall opines that negative testing for hepatitis and HIV in June 2007 is proof that plaintiff was not exposed to these viruses in June 2006. He further opines that, inasmuch as plaintiff did not contract hepatitis, there is no evidence that Dr. Goldweber deviated from the standards of accepted medical practice nor proximately caused plaintiff's alleged injuries.

In response to defendants' respective motions, plaintiff opposes summary judgment on procedural grounds only. He sets forth that as to the Carni Defendants' motion, the papers are defective, and therefore inadmissible, because the depositions are not signed by the deponents or the transcriber; the medical records and the NYSDOH reports do not contain a certification of authentication as required by C.P.L.R. Rule 4518(c); Dr. Pollack's affirmation was not affirmed to be true under penalty of the law of perjury as required by C.P.L.R. Rule 2106; and the contract between Dr. Carni and Dr. Goldweber is unexecuted by Dr. Carni. As to the Goldberg Defendants' motion, plaintiff posits that the papers are defective, and therefore inadmissible, because neither Dr. Goldberg's attorney nor his expert affirm the truth of the contents of their affirmations; plaintiff's deposition transcript is submitted unsigned; the NYCDOH reports are unauthenticated as required by C.P.L.R. Rule 4518(c); the deposition transcript of Dr. Carni is truncated and unsigned; and Dr. Goldberg did not submit his own affirmation in support of the motion. Given plaintiff's position that

the motions are defective, he argues that the court should deny summary judgment regardless of the sufficiency or lack thereof in plaintiff's opposition papers.

"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 eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the papers in opposition. Winegrad, 64 N.Y.2d at 853. 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).

On a summary judgment motion, the First Department has determined that the court may consider an unsigned deposition transcript as admissible evidence as long as it is certified by the court reporter as accurate. See, e.g., Martin v. City of N.Y., 82 A.D.3d 653, 654 (1st Dep't 2011); White Knight Ltd. v. Shea, 10 A.D.3d 567, 567-68 (1st Dep't 2004); Morchik v. Trinity Sch., 257 A.D.2d 534, 536 (1st Dep't 1999); Zabari v. City of N.Y., 242 A.D.2d 15, 17 (1st Dep't 1998). Further, "[a]n unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion." Morchik, 256 A.D.2d at 536. Finally, if the transcript is mailed to a witness but he or she "fails to sign and return the deposition within sixty days, it may be used as fully as though signed." C.P.L.R. Rule 3116.

Plaintiff's deposition transcript is certified by the transcriber. In their reply papers, the Carni Defendants submit Dr. Carni's and Dr. Goldberg's signature pages and errata from their depositions; these transcripts were signed by the witnesses even though defendants failed to include these pages with their motion papers in chief. Further in reply, defendants submit copies of the letters sent to Dr. Goldweber and plaintiff requesting that they sign and return their deposition transcripts, and aver that neither witness did so within the sixty (60) days set forth in Rule 3116. No one has come forward refuting the contents of any of the deposition transcripts. Under these circumstances, the court will consider the deposition transcripts as admissible evidence.

The fact that the medical records are uncertified pursuant to C.P.L.R. Rule 4518(c) is of no moment, because plaintiff's medical condition (as negative for hepatitis) has never been disputed. The medical records are essentially irrelevant to defendants' efforts to show that there is no evidence that plaintiff was ever negligently exposed to hepatitis by Dr. Goldweber. As to the NYSDOH records, they are not certified and are thus inadmissible, but again, the experts do not need these records to support their opinions that there is no evidence that plaintiff was exposed to hepatitis when Dr. Goldweber treated him.

Plaintiff's arguments that the affirmations supporting the respective motions are deficient are without merit. Dr. Pollock affirmed his statements "to be true pursuant to CPLR 2106." Since the statements are affirmed to be true pursuant to Rule 2106, and Rule 2106 contains the language "under the penalties of perjury," the affirmation is sufficient for the court to accept it with the "same force and effect as an affidavit." C.P.L.R. Rule 2106. The Goldberg Defendants' attorney and expert "affirmed" their statements under the penalties of perjury but did not use the words

"affirmed to be true." However, use of the word "affirmed" is sufficient for the court to accept the affirmation since there is no interpretation of "affirmed" in the context of the affirmation that could mean anything other than "affirmed to be true." The cases that plaintiff cites in support of his position that the affirmations are deficient are distinguishable. See Rodriguez v. Chassin, 235 A.D.2d 832 (3d Dep't 1997) (affirming administrative agency's rejection of counsel's statement that was neither subscribed and affirmed nor notarized and sworn); Offman v. Singh, 27 A.D.3d 284 (1st Dep't 2006) (expert's statement affirming that "the integrity" of a report was "true to the best of [her] knowledge and information" was not in compliance with Rule 2106). Further, in their reply papers, in an exercise of caution, the Goldberg Defendants offer to the court the same affirmations from their attorney and expert with the words "to be true" added. The court will accept the Goldberg Defendants' attorney's and expert's affirmations as admissible.

Having dispensed with the procedural challenges to the summary judgment motion, the remaining question is whether the moving defendants have made out a prima facie entitlement to summary judgment. In New York, a cause of action for negligent infliction of emotional distress arising from fear of contracting HIV cannot be maintained unless plaintiff can show that he or she was actually exposed to that disease and that he suffered a psychic harm. Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008). Actual exposure is demonstrated with (1) proof that, due to the negligence of another party, plaintiff was "exposed to HIV through a scientifically accepted method of transmission of the virus" (id. [internal quotation marks and citation omitted]) and (2) "that the source of the allegedly transmitted blood or fluid was in fact HIV positive." Id. These principles have also been applied to cases involving alleged exposure to hepatitis. See, e.g.,

O'Sullivan v. Duane Reade, Inc., 2010 N.Y. Slip Op. 50757U (Sup. Ct. N.Y. Co. 2010); Jones-Lockridge v. Simhaee, 2010 N.Y. Slip Op. 33598U (Sup. Ct. Nassau Co. 2010).

The moving defendants have established, through competent evidence, that plaintiff cannot show that Dr. Goldweber exposed him to hepatitis or that the allegedly tainted propofol was positive for hepatitis. Plaintiff has not come forward with any substantive opposition establishing a material issue of fact. Since plaintiff has failed to show proof of actual exposure, the cause of action for negligent infliction of emotional distress against Dr. Goldweber must fail. There is no issue that all of the remaining claims against the Carni Defendants and the Goldberg Defendants are premised on the viability of the claim against Dr. Goldweber for negligent infliction of emotional distress; accordingly, these claims are dismissed as well.

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment in Motion Sequence Numbers 002 and 003 are granted, and the complaint is dismissed against Abbe J. Carni, M.D.; Abbe J. Carni, M.D., P.C.; Edward S. Goldberg, M.D.; and Edward S. Goldberg, M.D., P.C.; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: 10/19/11

FILED

OCT 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

JOAN B. LOBIS, J.S.C.