Martinez v Gupta
2012 NY Slip Op 30781(U)
March 26, 2012
Supreme Court, Suffolk County
Docket Number: 26705/2010
Judge: William B. Rebolini
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Jose Martinez, as Administrator of the Estate of Bernarda Martinez,

Plaintiff,

-against-

Raj Gupta, M.D. and Geeta E. George, M.D.,

Defendants.

Index No.: 26705/2010

Motion Sequence No.: 002; MD
Motion Date: 1/20/12
Submitted: 1/25/12

Motion Sequence No.: 003; MD
Motion Date: 1/20/12
Submitted: 1/25/12

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Clerk of the Court

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Upon the following papers numbered 1 to 38 read upon this motion for summary judgment: Notice of Motion and supporting papers (002), 1 - 16; Notice of Cross Motion and supporting papers (003), 17 - 31; Answering Affidavits and supporting papers, 32 - 34; Replying Affidavits and supporting papers, 35 - 36; 37 - 38.

In this action premised upon the alleged medical malpractice of the defendants Raj Gupta, M.D. and Geeta E. George, M.D, the plaintiff, Jose Martinez, as administrator of the estate of the decedent, Bernarda Martinez, pleaded causes of action for negligence and for Martinez's wrongful death. The plaintiff's decedent had been previously treated at North Shore Hospital for breast cancer. It is alleged that the defendants, although aware of the results of CT scans of decedent's chest on June 4, 2008, October 24, 2008, and April 30, 2009, failed to diagnose metastatic breast cancer in her lungs until September 29, 2009, thus causing and permitting the cancer to progress from Stage I to Stages III-IV, causing the decedent great pain and suffering, depriving her of the chance for recovery and ultimately causing her death on January 20, 2010. During an attempt to place a port for the purpose of administering chemotherapy drugs on January 11, 2010, a puncture occurred to her left carotid artery causing a pulsatile blood flow, airway obstruction and aspiration for which the decedent required intubation and transfer to the intensive care unit where her condition worsened. Death ensued from acute respiratory distress and septic shock, most likely secondary to aspiration.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (see, Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (see, CPLR §3212[b]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept., 1989]), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v. Associated Fur Mfrs.,46 NY2d 1065 [1979]).

Defendant Raj Gupta, M.D. seeks dismissal of the second cause of action premised upon the wrongful death of the decedent on the bases that none of his departures were the proximate cause of the death of Bernarda Martinez, as the port would have had to be placed regardless of when the cancer was diagnosed and that the complications which arose from the port placement were entirely independent of the cancer.

In support of his application, Dr. Gupta has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, his answer and plaintiff's verified bill of particulars; the unsigned but certified copies of the transcripts of the examinations before trial of Jose Martinez dated February 25, 2011, Hilda Martinez dated March 17, 2011 which are considered as the plaintiff did not object to its submission (see, Zalot v. Zieba, 81 AD3d 935 [2nd Dept., 2011]); the unsigned and

uncertified copy of the transcript of the examination before trial of Raj Gupta dated June 24, 2011 (see, Ashif v. Won Ok Lee, 57 AD3d 700 [2nd Dept 2008]), which is considered as adopted as accurate by the moving party; the unsigned and uncertified transcript of the examination before trial of Geeta George, M.D. dated August 5, 2011, which is not in admissible form, is not accompanied by proof of service pursuant to CPLR §3116, and is therefore not considered (see, Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2nd Dept., 2008]; McDonald v. Mauss, 38 AD3d 727 [2nd Dept., 2007]; Pina v. Flik Intl. Corp., 25 AD3d 772 [2nd Dept., 2006]); uncertified copies of the decedent's medical records; the expert affirmation of Mark A. Fialk, M.D dated December 14, 2011 and an uncertified and illegible copy of the decedent's death certificate.

Defendant Geeta E. George, M.D. seeks dismissal of the entire complaint on the bases that any delay in treating the decedent's cancer was not the proximate cause of her alleged injuries; that the decedent did not die due to the cancer; and when she experienced a complication from the placement of the port, she developed pneumonia and respiratory failure which ultimately led to her death.

In support of his application, Dr. George has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint and plaintiff's verified bill of particulars; unsigned but certified copies of the transcripts of the examinations before trial of Jose Martinez dated February 25, 2011 and Raj Gupta, M.D. dated June 24, 2011 and the signed and certified copy of the transcript of Hilda Martinez dated March 17, 2011, all of which are not in admissible form in that they fail to comport with CPLR §2101(a) and are thus inadmissible; an unsigned and uncertified partial transcript of the examination before trial of Geeta George, M.D. dated August 5, 2011; uncertified copies of the Southside Hospital record of July 28, 1997 and Hudson Valley Medical Center and the office records of defendant George; the expert affirmation of Reed E. Phillips, M.D. dated December 19, 2011 and an uncertified and illegible copy of a death certificate.

The uncertified medical records submitted by the moving defendants are not in admissible form to be considered on a motion for summary judgment as required pursuant to CPLR §3212 (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]. Expert testimony is limited to facts in evidence (see, Allen v. Uh, 82 AD3d 1025 [2nd Dept., 2011]; Hornbrook v. Peak Resorts, Inc., 194 Misc2d 273 [Sup. Ct., Tomkins County 2002]; Marzuillo v. Isom, 277 AD2d 362 [2nd Dept., 2000]; Stringile v. Rothman, 142 AD2d 637 [2nd Dept., 1988]; O'Shea v. Sarro, 106 AD2d 435 [2nd Dept., 1984]). Thus, both motions (002) and (003) are deemed to be insufficient as a matter of law. It is further determined that even if all the evidentiary submissions were in admissible form to be considered on a motion for summary judgment, that the plaintiff has raised factual issues which preclude summary judgment.

The plaintiff objects to the expert affirmations submitted by the defendants in support of their respective motions on the basis that the defendants have failed to comply with CPLR §3101(d). The plaintiff asserts that the defendants did not provide expert disclosure prior to the filing of the Note of Issue and Certificate of Readiness. It was only when the motions were served upon plaintiff that the expert affirmations were supplied. Despite plaintiff's objection, this Court has considered the expert affirmations submitted by the defendants in support of their applications. CPLR §3101(d)(i) does not require a party to respond to a demand for expert witness information at any specific time, nor does

it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (see, Barchella Contracting Co., Inc. v. Cassone, 88 AD3d 832 [2nd Dept., 2011]; Shopsin v. Siben & Siben, Esq., 289 AD2d 220 [2nd Dept., 2001]). Here, the plaintiff has not demonstrated prejudice caused by the opposing parties' submission of their expert affirmations with the motion for summary judgment, nor has the plaintiff demonstrated willful or intentional conduct by the defendants.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (see, Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept., 1998], *app denied* 92 NY2d 818). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, Derdiarian v. Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v. Rafla-Demetrious, 221 AD2d 674 [2nd Dept.,1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, Fiore v. Galang, 64 NY2d 999 [1985]; Lyons v. McCauley, 252 AD2d 516 [2nd Dept., 1998], *app denied* 92 NY2d 814; Bloom v. City of New York, 202 AD2d 465 [2nd Dept., 1994]).

Dr. Gupta testified to the extent that he is a physician licensed to practice medicine in New York and is board certified in internal medicine, pulmonary disease and sleep medicine. He was previously board certified in critical care until 1997. Dr. Gupta stated that the decedent was referred to him by Dr. George and that she was not diagnosed with lung cancer until after she finished treatment with him on November 24, 2009. He had no opinion concerning whether or not the cancer was present in June 2008 when he first treated the decedent. Dr. Gupta's records, he stated, contained the report from a chest CT scan dated June 4, 2008 which showed a nine millimeter nodule in the left upper lobe. He stated that he had no opinion concerning whether that nodule was the cancer which was ultimately diagnosed in the decedent. He ordered a PET scan which he indicated in his note of June 27, 2008 was to rule out neoplastic involvement with regard to that node, but he added to the note, "but I doubt it." He testified that he doubted it because she had no family history of lung cancer and did not smoke. When he reviewed the CT scan, he thought it looked like a confluence of shadows which he thought was an inflammatory process. He thereafter ordered a chest CT scan, performed on October 24, 2008, which indicated that the nodule in the left upper lobe appeared to have enlarged since June 2008. Dr. Gupta testified that he did not agree with the radiologist because he felt the nodule was the same size as before, so he decided to continue observing it. He added that even if the nodule enlarged by two millimeters, "that it was not a hell of a lot." He stated that it could be cancer, but the three month interval between exams was not long enough. Although the radiologist reported that the nodule was suspicious for malignancy, Dr. Gupta stated that it was no more suspicious than it was before to him and the radiologist's impression did not increase his suspicion of cancer.

Dr. Gupta continued that Dr. George ordered a PET scan which was conducted on March 19, 2009 and was negative, but not definitive, in ruling out cancer. Dr. Gupta testified that the PET scan showed metabolic activity in the nodule, however, the reading of two was not positive or hot. Hot, he

described, was a level fourteen, fifteen, or forty. He then ordered a chest CT scan which was done on April 30, 2009 and indicated that the previously noted nodule in the left upper lobe is larger and spiculated, suggestive of a malignancy. He decided to wait until October 2009 for further evaluation. He stated that although the nodule increased in size, the PET scan was negative. He testified that the nodule had increased to 16 millimeters in size. There was also new nodule in the LUL (left upper lobe) measuring 1.5 centimeters, and a new nodule measuring two millimeters in the LLL (left lower lobe). Dr. Gupta opined that the 16 millimeter nodule was the cancer that was eventually diagnosed. He continued that he believed he told the decedent in May 2009, that the choice was to go for a biopsy, or wait and see if the nodule increased further in size. He saw the decedent next on July 23, 2009 at which time the plan was to continue waiting.

Dr. Gupta indicated that the next chest CT, performed on September 29, 2009 and ordered by Dr. George, indicated that the lesion increased by two centimeters, increasing his suspicion for cancer. There was also enlargement of the left hilum. He ordered a PET scan for October 8, 2009, which showed an increase of metabolic activity in the lesion. He then performed a biopsy and washing for cytology. He continued that usually four biopsies are done, but she began to bleed with the first biopsy and the biopsy was inconclusive. Thereafter, an open biopsy or needle biopsy was recommended. He never saw the decedent after November 24, 2009. He spoke with Dr. George regarding the possibility that she could have metastasis of the breast cancer, which meant her overall outlook was not good. He testified that if he treated her aggressively and she had complications, she could die sooner. The other option was to wait before beginning treatment by radiation, chemotherapy and resection. He stated that resection would have a small benefit. Dr. Gupta continued that he was doubtful that had treatment been initiated in June 2008, whether the decedent's prognosis would have been better. He further testified that had her cancer been diagnosed in June 2008, her prognosis would have been worse. She still would have died because she would have had the complication of the procedure, only sooner. He did not refer the decedent to any other specialists and opined that she had cancer from May 2009, because that is when the tumor began to increase in size.

Mark A. Fialk, M.D., affirms that he is licensed to practice medicine in New York and is board certified in internal medicine, hematology, oncology, hospice and palliative care. He submitted his affirmation in support of Dr. Gupta's application for summary judgment dismissing the second cause of action for wrongful death of the plaintiff's decedent. He set forth the materials and records which he reviewed and offered his opinion within a reasonable degree of medical certainty that the alleged negligence and delay in the diagnosis and treatment of the decedent's metastatic breast cancer by Dr. Gupta did not proximately cause the death of the decedent.

Dr. Fialk continued that Ms. Martinez was treated for Stage III B metastatic breast cancer in 1997 for which she underwent a modified radical mastectomy, chemotherapy and radiation, then followed with the oncologist, Dr. George, for monitoring. He stated that Dr. Gupta first saw the decedent on June 27, 2008 for evaluation of abnormal findings in her left lung. He continued that biopsy of the mass in the left lung on December 23, 3009 determined that it was cancerous. The pathology report indicated that the mass was actually breast cancer which had metastasized to the lung, as demonstrated by the presence of estrogen and progesterone receptors, consistent with breast cancer. There was a positive GCDFP-15 marker, which is specific for breast cancer. The CK 20 marker was

negative and is usually positive with lung cancer. Thus, opines Dr. Fialk, metastatic breast cancer is not curable and the standard of care for treatment would have included chemotherapy whether diagnosed in June 2008, or in late 2009.

Dr. Fialk continued that before chemotherapy can be started, a port has to be placed surgically in the neck. The decedent was admitted to Hudson Valley Hospital Center on January 10, 2010 for port placement. However, when Dr. Jack Yee was unable to successfully pass the guide wire while attempting venopuncture on January 11, 2009, he punctured the left carotid artery causing a pulsatile blood flow which required pressure to the neck. These significant complications caused concern for airway obstruction necessitating that the decedent be intubated. Dr. Fialk stated that these events represented major unexpected complications that significantly compromised the respiratory status of the decedent. The tube was removed on January 13, 2010. She was diagnosed with pneumonia on January 14, 2010 and had to be re-intubated due to respiratory failure. Dr. Fialk stated that the decedent contracted hospital-based pneumonia due to the intubation necessitated due to the complications arising during the port placement. She then remained in hypoxic respiratory failure and developed acute respiratory distress syndrome (ARDS) resulting in cardiac arrest. Dr. Fialk opined that the decedent's death was not caused by any delay in the diagnosis or treatment of the metastatic breast cancer and that the alleged departures did not cause or contribute to the decedent's death.

Geeta E. George testified to the extent that she had no opinion concerning whether the lung tumor diagnosed in the decedent's upper lobe in December 2009 was present in June 2008. She then stated that she had no proof that it was there in June 2008 as the PET scan of June 2008 was normal, despite the CT scan of the lung on June 4, 2008 which demonstrated a nine millimeter nodule in the left upper lobe of the lung. She continued that the nodule could have been a scar or related to bronchiectasis. She stated that it was possible after the PET scan that she still did not consider the potential diagnosis of lung cancer. She added that usually, if cancer were present, the PET scan would be positive and she would order further tests. She stated that biopsy, or removal of the nodule, are the only things that would rule out cancer. Since the PET scan did not rule out the potential diagnosis of cancer, she continued to follow the decedent.

Dr. George continued that she saw the CT report of October 24, 2008 and disagreed with the impression that the nodule in the left upper lobe appeared to have enlarged since the June 2008 CT scan because the films were read by different radiologists. She reviewed the films and stated that she spoke to one of the radiologists, whom she could not identify and was told that the nodule had not grown and was still nine millimeters. Her plan was to monitor the decedent. She ordered a CA 27.29 test, which is a tumor marker blood test which may indicate whether or not there is a tumor. Dr. George testified that the decedent's CA 27.29 tumor marker test was 65, which was a high reading indicating that she had a possible malignancy. She therefore scheduled a PET scan for March 2009. On July 25, 2009, she learned that Dr. Gupta ordered a CT on April 30, 2009, which indicated that the previously noted nodule in the left upper lobe was larger and spiculated, which meant it was the description of a possible malignancy. The presence of a new nodule in the left lower lobe was an indication of cancer. Dr. George followed up for a visit on September 15, 2009. Although the lung biopsy identified no tumor, her impression was that of metastatic breast cancer because she had spoken to Dr. Gupta who advised her that he took only a little biopsy as it was close to a blood vessel and she

began to bleed. Following an October 27, 2009 visit, the plan was to get another biopsy, or to start chemotherapy after the holiday. Dr. George stated that the course of chemotherapy would shrink the tumor, that is was not curable, but it was treatable and controllable and that the patient would do fine and could live for years. A CT scan of the abdomen on December 30, 2009 revealed a lesion in the left ilium bone consistent with bony metastatic disease.

Dr. George stated she had no way of knowing whether the decedent's prognosis would have been better if the cancer in her lung would have been diagnosed in June 2008 or in October 2008, or in April 2009. When Dr. George became aware in September 2009 that the mass in the decedent's lung had grown, she told the decedent that she believed that she might have cancer in her lung. Prior to that, the mass had not grown, she had no definitive diagnosis and the decedent had no symptoms, so she did not want to alarm the decedent by telling her that she might have cancer. Dr. George continued that the only time she could be certain that the decedent had cancer was in September 2009, when the mass grew.

Dr. George's expert physician, Reed E. Phillips, M.D, affirms that he is licensed to practice medicine in New York and is board certified in oncology. He does not indicate the records or materials he reviewed and upon which he bases his opinion. He opines to a reasonable degree of medical certainty that the cancer found in Ms. Martinez's left lung was metastatic breast cancer for which she had been treated in 1999. He further opines that the decedent did not die as a result of any delay in diagnosis of the cancer in her lung, but died from complications of chemotherapy port placement for treatment of the cancer, which treatment would have been necessary irrespective of when the cancer was diagnosed. Dr. Phillips stated that the December 23, 2009 pathology report from the biopsy showed that the nodule was metastatic primary carcinoma of breast origin. It is his opinion that the decedent suffered from metastatic breast cancer. Dr. Phillips continued that, assuming arguendo, that there was a delay in the diagnosis of the cancer, there was no change in staging or prognosis, and the treatment for the cancer would have been the same and would have included chemotherapy, no matter when the cancer was diagnosed.

Dr. Phillips continued that Jack Yee, M.D., a non-defendant, while performing a procedure to place a port at Hudson Valley Hospital Center on January 11, 2010, had difficulty passing the guide wire and punctured the left carotid artery. The blood flow was stopped by applying pressure to her neck. Due to concerns about airway obstruction, as evidenced by a drop in oxygen saturation, anesthesiology intubated the decedent and noted a large hematoma in her neck. On January 13, 2010, the decedent was extubated, but promptly re-intubated on January 15, 2010, due to aspiration pneumonia and septic shock. During the remainder of the admission, her condition steadily deteriorated and she died on January 20, 2010. Dr. Phillips stated that it is his opinion that the decedent's metastatic cancer did not cause the pneumonia and respiratory failure which caused her death, that the port would have had to be placed for treatment and the complication during the attempted insertion of the port was not related to any alleged delay in diagnosing her cancer.

Based upon the foregoing, even if defendants' moving papers were in admissible form, the defendants have failed to establish, except by conclusory and unsupported assertions, that the purported delay in diagnosing the decedent's metastatic breast cancer, which delay they do not address,

did not cause or contribute to the complications resulting from the puncture of the aorta during the attempted placement of the port on January 10, 2010. Moreover, even if movants had established their *prima facie* entitlement to summary judgement, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (Bengston v. Wang, 41 AD3d 625 [2nd Dept., 2007]).

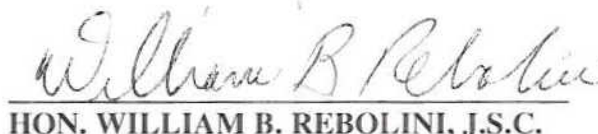
In opposition to the motion plaintiff submitted the affidavit of his Alan Fein, M.D. who affirms he is licensed to practice medicine in New York and is board certified in internal medicine, critical care medicine and pulmonary disease and that he reviewed the decedent's medical records. It is Dr. Fein's opinion to a reasonable degree of medical certainty that the delay in diagnosis and treatment of the cancer by Dr. Gupta and Dr. George was a substantial factor in diminishing the decedent's chance of a better outcome and avoiding death following placement of the chemotherapy port. Dr. Fein continued that the decedent's lung function was compromised and she died due to cardiac arrest caused by acute respiratory distress syndrome resulting from pneumonia. The plaintiff's expert opines that the delay in diagnosis and treatment of the lung cancer allowed the cancer to grow and affect lung function, her overall health and the ability to heal and fight infection. Thus, she was at a greater risk to undergo the chemotherapy port placement procedure and at a weakened capacity to recover from the complications of that procedure. Thus, the plaintiff's expert has sufficiently raised factual issue concerning whether or not the delay in diagnosing the decedent's metastatic breast cancer compromised her ability to recover from the complications associated with the port placement procedure and placed her in a weakened capacity affecting her lung function and overall heath and impaired her ability to fight infection, which goes to the issue of proximate cause.

Accordingly, it is

ORDERED that motion (002) by the defendant, Raj Gupta, M.D., pursuant to CPLR §3212 for partial summary judgment dismissing the second cause of action for wrongful death asserted in plaintiff's complaint, is denied; and it is further

ORDERED that motion (003) by the defendant, Geeta E. George, M.D., pursuant to CPLR §3212 for summary judgment dismissing the complaint of this action is denied.

Dated: 3/26/2012



HON. WILLIAM B. REBOLINI, J.S.C.

______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**