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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

Index Number : 104158/2009
VIRUET, BLANCA
vs.
MOUNT SINAI MEDICAL CENTER, INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 104158/09

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for dismissal/summary judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-F | No(s). 1

Answering Affidavits — Exhibits A-B | No(s). 2

Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

JUL 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 11, 2012

MARTIN SHULMAN J.S.C.

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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BLANCA VIRUET,

Plaintiff,

Index No. 104158/09

-against-

THE MOUNT SINAI MEDICAL CENTER INC., THE MOUNT SINAI HOSPITAL, RON PALMON, MD., BLAIR LEWIS, M.D., DANIEL LABOW, M.D. and "JOHN DOE" 1-3 (the fictitious names of persons yet to be identified),

Defendants.

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Martin Shulman, J.:

Defendant Blair Lewis, M.D. ("Dr. Lewis") moves to dismiss the complaint in this medical malpractice action pursuant to CPLR 3211 (a) (5) and for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion.

Background

The complaint in this action alleges that "on or about April 20, 2006 to on or about October 6, 2006, and prior and subsequent thereto," the above-named defendants rendered internal and gastroenterological medical care to plaintiff at defendants The Mount Sinai Medical Center Inc. and/or The Mount Sinai Hospital's (collectively the "Hospital") medical facility, specifically, a colonoscopy (complaint, motion at Exh. A, ¶¶ 83-84; 86-87). Plaintiff further alleges that on or about April 20, 2006 to on or about October 6, 2006 Dr. Lewis rendered the aforementioned medical care (*id.* at ¶ 98).

Plaintiff asserts that the medical care, treatment and/or services Dr. Lewis and the other defendants rendered to her were performed in a careless and negligent manner and not in accordance and conformity with proper medical

practice and procedure (*id.* at ¶143). The complaint alleges that Dr. Lewis and the other defendant medical providers were careless and negligent in *inter alia*, perforating plaintiff's colon walls and negligently suturing and obstructing her colon (*id.* at ¶148).

In support of the motion, Dr. Lewis submits an affidavit alleging that he has never treated plaintiff. Specifically, he states that he did not perform or supervise the colonoscopy in question and was not present in the room at any time during the procedure. Dr. Lewis' affidavit further alleges that he never provided an evaluation, examination, treatment or supervision of any procedure with regard to the plaintiff, either on April 20, 2006, or prior and/or subsequent thereto (Defendant's affidavit, motion at Exh. E, ¶8).

Dr. Lewis further avers he never filled out or prepared any records or documents concerning plaintiff's care and treatment nor does he maintain any private treating records with respect thereto (*id.* at ¶9). Additionally, Dr. Lewis asserts that he has never billed plaintiff for any services rendered to her for any alleged treatment (*id.* at ¶10).

As an additional ground for dismissal, Dr. Lewis also alleges that plaintiff failed to file her complaint within the applicable limitations period. The treatment at issue took place on April 20, 2006 (motion at Exh. D). Under CPLR § 214-a, the applicable statute of limitations, any claims based on the aforementioned treatment must be filed by October 20, 2008, two and a half years after initial treatment. Since plaintiff filed her summons and complaint on March 11, 2009, Dr. Lewis argues that the complaint is time barred as to him.

Summary Judgment

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept.), *aff'd* 62 NY2d 938 (1984); *Andre v. Pomeroy*, 35 NY2d 361 (1974). The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." *JMD Holding Corp. v. Congress Fin. Corp.*, 4 NY3d 373, 384 (2005). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Summary judgment is appropriate where the nonmovant's opposition to the motion is entirely conjectural and there is no genuine issue of fact to be resolved. *See, Shaw v. Time-Life Records*, 38 NY2d 201, 207 (1975). As set forth in *Spearmon v. Times Square Stores Corp.*, 96 AD2d 552, 553 (2d Dept. 1983):

> It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon trial. Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted].

Further, "[w]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by

admissible evidence the existence of a factual issue requiring a trial of the action ... and the submission of a hearsay affirmation by counsel alone does not satisfy the requirement." *Id.*, 49 NY2d at 560. *See also, Vermette v. Kenworth Trucking Co., a Div. of Paccar, Inc.*, 68 NY2d 714 (1986); *Marinelli v Shifrin,* 260 AD2d 227, 228-229 (1st Dept 1999)("It is well settled that 'the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts' [citation omitted] and, therefore, the affidavit of counsel is of no probative value in opposing a motion for summary judgment [citation omitted]"); *Spearmon v. Times Square Stores Corp., supra.* "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted (citation omitted". *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 (1975); *SportsChannel Assocs. v Sterling Mets*, L.P., 25 AD3d 314, 315 (1st Dept 2006).

Analysis

To succeed on a motion for summary judgment, Dr. Lewis "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *JMD,* 4 NY3d at 384. Dr. Lewis establishes his prima facie entitlement to summary judgment dismissing the complaint by submitting a sworn affidavit stating that he "never treated or provided medical services to Ms. Viruet in any capacity, at the Mount Sinai Medical Center, [his] private office, or any other Hospital, clinic or private office" (motion at Exh. E, ¶10). Moreover, he states that he never billed for any services rendered to the plaintiff for any alleged treatment (*id.).*

Upon Dr. Lewis establishing his prima facie case the burden shifts to plaintiff to "present facts in admissible form sufficient to raise genuine, triable issues of fact." *Mazurek v Metropolitan Museum of Art*, *supra*; *Zuckerman v City of New York, supra*. Here, plaintiff merely submits an affirmation from counsel which lacks probative value. Plaintiff's counsel insists a triable issue is created by a one page document in plaintiff's voluminous medical chart entitled "Post-Operative Ambulatory Surgery Instructions" which confirms the date of plaintiff's procedure was April 20, 2006 and purportedly identifies the surgeon as "Lewis/Palmon". Adam Aff. in Opp. at Exh. B. Dr. Lewis claims that he neither signed this record nor does it bear his handwriting.

From this single medical record, plaintiff's counsel posits that it is possible plaintiff's medical chart contains mistakes as to the identity of medical personnel involved in plaintiff's procedure and as to the length of the continuous care defendants provided. Accordingly, plaintiff's counsel urges that further discovery is needed.

Plaintiff fails to meet her burden of rebutting Dr. Lewis' prima facie case. Specifically, she fails to offer an affidavit of a person with knowledge refuting Dr. Lewis' claims and her claims regarding the accuracy of the medical records are merely speculative. As this court can discern no triable issues of fact, Dr. Lewis' motion for summary judgment is granted and the complaint is dismissed with prejudice as to him.

Finally, even if Dr. Lewis had treated plaintiff, the record indicates such treatment occurred on April 20, 2006. As a result, plaintiff's complaint filed on

March 11, 2009 is barred by the statute of limitations of 2 years and six months. See CPLR § 214-a. Indeed, plaintiff's opposition does not even address Dr. Lewis' statute of limitations argument other than to speculate about the length of her continuous care. For all of the foregoing reasons it is hereby

ORDERED that defendant Blair Lewis, M.D.'s motion for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment in favor of defendant Blair Lewis, M.D. dismissing this action with prejudice, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff and Dr. Lewis.

Dated: New York, New York
July 10, 2012

HON. MARTIN SHULMAN, J.S.C