

McDonald v Tillmon
2012 NY Slip Op 31937(U)
July 20, 2012
Supreme Court, New York County
Docket Number: 101676/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 101876/2010
MCDONALD, TERRY
vs.
TILLMON, BERNADETTE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/1/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 22, were read on this motion to summary judgment.
Notice of Motion/Order to Show Cause — Affidavits — Exhibits 1-18
Answering Affidavits — Exhibits 19-21
Replying Affidavits 22

Upon the foregoing papers, It is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Order and Judgment

FILED

JUL 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/20/12

JOAN B. LOBIS 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

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

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

-----X
TERRY MCDONALD, as Administratrix of the Estate of
KIA GRANT, deceased, and TERRY MCDONALD,
Individually,

Plaintiff,

Index No. 101676/10

-against-

Decision and Order

BERNADETTE TILLMON, M.D., MANHATTAN'S
PHYSICIAN GROUP, LENOX HILL COMMUNITY
MEDICAL GROUP, LORI MONTAGNA, M.D.,
ALAN HUANG, M.D., DANA RAUSCH, M.D.,
MT. SINAI MEDICAL CENTER, JASON CHU, M.D.,
MADHURI KIRPEKAR, M.D., and ST. LUKE'S
HOSPITAL,

Defendants.

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

FILED

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Defendants Mount Sinai Hospital s/h/a Mt. Sinai Medical Center ("Mount Sinai"),
Lori Montagna, M.D., Alan Huang, M.D., and Dana Rausch, M.D., move, by order to show cause,
for an order, pursuant to C.P.L.R. Rule 3212, dismissing the complaint as to Mount Sinai.
Defendants also seek to have this court "so order" a stipulation discontinuing the case as to Drs.
Montagna, Huang, and Rausch. Plaintiff opposes that branch of the motion seeking summary
judgment as to Mount Sinai.

This action, sounding in medical malpractice, arises out of the death of Kia Grant.
Ms. Grant died of a pulmonary embolism ("PE") on April 7, 2009, at the age of thirty. On March
24, 2009, Ms. Grant presented to the Emergency Department at Mount Sinai with complaints of left
calf swelling and pain, and was examined by Drs. Montagna and Huang. The physicians at Mount
Sinai noted that Ms. Grant recently completed a six-hour flight and was taking an oral contraceptive,

Ortho Tri-Cyclen Lo, which are two risk factors for deep vein thrombosis (“DVT”).¹ To rule out DVT, the physicians ordered blood work, including a D-dimer, and performed a Doppler ultrasound exam on Ms. Grant. A D-dimer test assesses whether or not there are clotting factors in the blood, and Ms. Grant’s D-dimer test result returned as “elevated.” A Doppler ultrasound exam is a study that looks at the vascular structures of the body, and Ms. Grant’s Doppler ultrasound exam result was negative for proximal DVT. On March 25, 2009, Mount Sinai’s staff discharged Ms. Grant with the following instructions: (1) to return in one week for a repeat ultrasound; (2) to take 325 milligrams of aspirin daily; and (3) to return if there is any increased swelling, chest pain, or shortness of breath. On April 7, 2009, at 6:52 p.m., Ms. Grant was brought to Mount Sinai by ambulance with symptoms of shortness of breath, chest tightness, and dizziness; went into cardiopulmonary arrest at 7:57 p.m.; and expired at 8:21 p.m., after unsuccessful attempts to resuscitate her.

When defendants were deposed, they testified to additional information. Dr. Huang testified that although the negative Doppler ultrasound result ruled out proximal DVT, there was still concern for distal DVT due to an uncertainty regarding Ms. Grant’s blood work. He stated that there were a greater number of results that returned with the blood work than were originally ordered. For example, results came back for liver transplant monitor and lipase, neither of which were ordered for Ms. Grant. Despite this concern, the physicians did not reorder Ms. Grant’s blood work. Additionally, defendants testified that the Doppler ultrasound exam was performed on Ms. Grant’s left femoral popliteal venous system, the deep veins running through her left thigh to the back of the

¹ As explained in the deposition testimony of both Drs. Montagna and Huang, DVT is a clot in the deep veins of the leg and is a strong risk factor for the development of a PE if left untreated.

knee, even though she presented with left calf pain. Dr. Rausch, Ms. Grant's attending radiologist at Mount Sinai, stated in her deposition that it was common practice at Mount Sinai to evaluate this area of the leg if the clinical suspicion was for DVT in the lower extremity. Since the Doppler ultrasound exam was taken of the left femoral popliteal venous system, it only reflected what occurred proximally upwards from the knee, and did not reflect what occurred below the knee, including the calf. Also, Dr. Huang testified that he further instructed Ms. Grant to cease taking her oral contraceptives.

Ms. Grant's mother, plaintiff Terry McDonald, commenced this action on behalf of her daughter's estate by filing a summons and verified complaint on or about February 8, 2010. Plaintiff alleges that Mount Sinai is vicariously liable for Dr. Huang, Dr. Montagna, and Dana Rausch, M.D., all of whom departed from good and accepted medical practice in the care and treatment of decedent by failing to administer anticoagulants on March 24, 2009; failing to give Ms. Grant an appointment for a repeat ultrasound; failing to advise Ms. Grant's primary care physician of the discharge plan; failing to follow up with Ms. Grant to ensure that a repeat ultrasound was conducted; and failing to instruct Ms. Grant to immediately discontinue the use of oral contraceptives.

Defendants now seek summary judgment, arguing that no triable issues of fact exist that Mount Sinai did not deviate from the standard of care while treating Ms. Grant during her admission to the Emergency Department on March 24, 2009. "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). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

In support of their motion, defendants submit the affirmation of Kenneth N. Sable, M.D., who states that he is board certified in emergency medicine and duly licensed to practice medicine in New York State. In generating his opinion, Dr. Sable reviewed the relevant medical records, deposition testimony, and pleadings in the action. He opines, to a reasonable degree of medical certainty, that it is the standard of practice to have a limited Doppler ultrasound performed to rule out DVT, which was appropriately done by Mount Sinai in this case, and that the treatment rendered by Mount Sinai did not proximately cause Ms. Grant's injuries or death. He further opines that Ms. Grant was properly discharged on March 25, 2009, with instructions to have a follow-up ultrasound in one week; to take aspirin daily; to stop taking oral contraceptives; and to return if her complaints worsened. Dr. Sable sets forth that a D-dimer is a non-specific test that does not evaluate the patient for any particular condition; although it may assist in the evaluation of DVT in some situations, Dr. Sable opines that the D-dimer is not the standard of care in ruling out DVT.

Defendants have failed to establish a prima facie entitlement to summary judgment. Dr. Sable's affirmation is not sufficiently detailed as to establish that Mount Sinai did not depart from acceptable medical practice in rendering care to Ms. Grant. Dr. Sable's affirmation merely reiterates Ms. Grant's medical history, most of which is not specific to care rendered by Mount Sinai. In the three paragraphs pertaining to Ms. Grant's treatment at Mount Sinai, Dr. Sable merely states in a conclusory manner that there were no departures and that the standard of care was observed. Dr. Sable fails to address plaintiff's multiple allegations of departures against Mount Sinai in the bill of particulars. He neglects to explain why a Doppler ultrasound of the calf, the precise area of the leg that decedent complained of, was not examined. Although he states that a positive D-dimer is indicative of a broad range of issues, including inflammation and infection, and that it is not the standard of care, he fails to address the possible mix-up of Ms. Grant's blood sample that was suspected by her physicians. Additionally, Dr. Huang stated in his deposition that he remained concerned that Ms. Grant had a distal DVT due to the uncertainty of her blood work; however, Dr. Sable fails to address Mount Sinai's failure to rule out distal DVT. Dr. Sable also fails to mention the role of anticoagulants in the treatment of DVT. He does not address plaintiff's allegation that Mount Sinai failed to follow up with Ms. Grant for a repeat Doppler ultrasound or to advise her primary care physician of the discharge plan. Further, Dr. Sable fails to explain the findings on Ms. Grant's autopsy report, which states that she experienced cardiopulmonary arrest as a result of PE. Due to Dr. Sable's insufficient affirmation, summary judgment is denied, regardless of the sufficiency of plaintiff's opposition. See Wasserman v. Carella, 307 A.D.2d 225, 226-27 (1st Dep't 2003).

The court notes that defendants request that the Stipulation of Discontinuance as to

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Drs. Huang, Montagna, and Rausch be so-ordered. In Exhibit P of the motion, defendants attach a letter by plaintiff's counsel referencing a duly executed Stipulation of Discontinuance as to these three defendants; however, the stipulation itself is not attached. As there is no opposition by any party, the court will order the discontinuance. Accordingly, it is hereby

ORDERED that the branch of defendants' motion seeking summary judgment in favor of Mount Sinai Hospital s/h/a Mt. Sinai Medical Center is denied, and it is further

ORDERED that plaintiff's action against Lori Montagna, M.D., Alan Huang, M.D., and Dana Rausch, M.D., be discontinued, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties shall appear for a pretrial conference on August 21, 2012, at 9:30 a.m.

Dated: July 20, 2012

ENTER:

FILED

JUL 24 2012

NEW YORK
COUNTY CLERK'S OFFICE



JOAN B. LOBIS, J.S.C.