

**DiCicco v Manhattan Diagnostic Radiology, Inc.**

2013 NY Slip Op 30392(U)

February 21, 2013

Supreme Court, New York County

Docket Number: 112010/06

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**ALICE SCHLESINGER**

PRESENT: \_\_\_\_\_  
*Justice*

PART **A** PART 16

Index Number : 112010/2006  
ARMAN, ARMAND  
vs  
MANHATTAN DIAGNOSTIC  
Sequence Number : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment in favor of all the defendants dismissing the action.

**FILED**

**FEB 26 2013**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: **FEB 21 2013**

*Alice Schlesinger*  
**ALICE SCHLESINGER** 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  
COUNTY OF NEW YORK

-----X  
BRUCE M. DICICCO and ANNE FERNANDEZ  
as Limited Administrators of the Estate of  
ARMAND ARMAN deceased, and CLORICE  
ARMAN, Individually,

Plaintiffs,

-against-

MANHATTAN DIAGNOSTIC RADIOLOGY, INC.,  
ELIAS KAZAM, BERNARD KRUGER, LENOX HILL  
HOSPITAL, and GEORGE TOLIS, M.D.,

Defendants.  
-----X

SCHLESINGER, J.:

Armand Arman, the subject of this action, died from pneumonia on October 22, 2005. He was 76 at the time of his death<sup>1</sup>. However, there was no need to perform an autopsy because in reality he died from an incurable disease, malignant mesothelioma. This affliction was first diagnosed in July 2002. At that time the mesothelioma was confined to the peritoneal region. Later on, in 2004, various scans and analyses showed that it had spread to the pleural regions, in other words, the chest and lung area.

His estate has brought this action which sounds in wrongful death and medical malpractice. When it was first brought in 2006, his widow Clorice Arman was the plaintiff. She is no longer that. Rather, it is solely Mr. Arman's children who are pursuing the action as Limited Administrators of the Estate.

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<sup>1</sup>Pneumonia was the diagnosis under which he was admitted for the last time at Lenox Hill Hospital on October 8, 2005. He remained there until October 21, when he went home and died the next day.

**FILED**

**FEB 26 2013**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Index No. 112010/06  
Mot. Seq. Nos. 003, 004, 005 & 006

[\* 3]

Before the Court are motions made by all the defendants for summary judgment. Also, additional alternative relief is sought in the nature of a *Frye* hearing in the event summary judgment is not granted. With regard to this alternate relief, the claim simply is that this disease, malignant mesothelioma, from which Mr. Arman was suffering is incurable and that any theory to the contrary could be characterized as "junk science".

This Court held oral argument on Wednesday, January 16, 2013, and at that time I indicated that I intended to grant dispositive relief to all the defendants except the first two named, specifically Manhattan Diagnostic Radiology ("MDR") and Dr. Elias Kazam. However, for reasons having to do with events that followed oral argument, I will be granting dispositive relief in favor of these defendants as well. Finally, Dr. George Tolis and Lenox Hill Hospital have also requested sanctions and/or costs in the event that their motion is granted. I will discuss this further, but I do decline to grant such sanctions and costs.

As stated above, Mr. Arman was given the terrible diagnosis of malignant mesothelioma in July 2002. His long-time doctor, an internist and an oncologist, defendant Dr. Bernard Kruger gave him this diagnosis after ordering a CT scan of Mr. Arman's chest and upper abdomen. It was Dr. Kazam who did these radiographic studies. After the CT scan noted an infiltrative peritoneal process, an ultrasound guided biopsy of the peritoneum was also performed by Dr. Kazam. The pathologic analysis of the samples biopsied then confirmed malignant neoplasm consistent with malignant mesothelioma.

Mr. Arman, for the next two plus years, saw a number of doctors and underwent a number of invasive procedures. With regard to the latter, these were mainly procedures whereby pleural effusions were removed from his lungs so as to make it easier for him to

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breathe. However, it was not until September 2005 that Mr. Arman, despite the urging of his many doctors, consented one month before his death to undergo chemotherapy. Further, it was only in July 2005 that he consented to palliative radiation therapy to his right lateral chest. This radiation therapy was for a two-week period that ended on August 11, 2005.

The allegations of malpractice and wrongful death stem from events that began on March 5, 2004. Specifically on that date, Dr. Kazam, working at the offices of Manhattan Diagnostic Radiology, Inc., performed a thoracentesis that involved invading the chest area and removing fluid from Mr. Arman's right side. For the first twenty minutes of this procedure, Dr. Kazam removed approximately 1700 ml of a dark yellowish fluid. During the final ten minutes of the procedure, the doctor removed 500 ml of a slightly clearer fluid.

After the procedure was completed, the patient left. However, the circumstances of how, when and why he left the office with his wife Clorice at his side are not entirely clear. We do know that he did leave the office before Dr. Kazam had the opportunity to fully assess Mr. Arman's post-procedure condition. After leaving the office, Mr. Arman wished to go home, but his wife insisted that they instead go to see Dr. Kruger. While at Dr. Kruger's office, Mr. Arman complained of increasing weakness and he in fact lost consciousness there. An ambulance was called and he was taken to defendant Lenox Hill Hospital's emergency room.

Soon thereafter defendant Dr. George Tolis, a cardiothoracic surgeon, was called, and after speaking with Dr. Kruger, Dr. Tolis performed an emergency thoracotomy. During this procedure, the surgeon evacuated a hematoma and removed liters of blood from the patient's right chest (about 2.6% of Mr. Arman's total blood). Dr. Tolis also

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cauterized the intercostal artery in order to stop any further bleeding. He then placed two drainage tubes in Mr. Arman's chest. Finally, before concluding this emergency surgery, he performed two biopsies taking tissue from the patient's diaphragmatic pleurae and from the chest wall pleurae. It seems to be the consensus of all concerned here that the reason for the emergency thoracotomy was Dr. Kazam's puncture of the intercostal artery during his thoracentesis earlier that day.

While Mr. Arman was recovering from the events of March 5, Dr. Tolis performed a second procedure on him, a right talc pleurodesis. The rationale for this procedure was that the talc would cause the lungs to stick to the chest wall. The idea was to avoid any additional accumulation of fluid between the lung and the chest wall.

While at Lenox Hill Hospital, there were additional complications. For example on March 14, Mr. Arman developed a pneumothorax. He was finally discharged from the hospital two days later on March 16, 2004. Dr. Tolis saw Mr. Arman the next time on March 25, 2004, when the doctor noted that his patient was healing well. Dr. Tolis saw him again on April 29, 2004, when he noted that the patient was continuing to do well with no reaccumulation of fluid in his chest. The final time Dr. Tolis saw Mr. Arman was on September 28, 2004 when he noted the following:

Wounds have healed and he had clear chest sound bilateral. There were decreased breath sounds on right lower lung field and abdomen unchanged; still palpable masses. There was swelling in his lower left extremity; will obtain ultrasound of bilateral lower extremities to look for DVT's, will discuss with Dr. Kruger.

As indicated earlier both Dr. Kazam and Manhattan Diagnostic Radiology are moving for summary judgment, as is Dr. Tolis and Lenox Hill Hospital.

Finally, Dr. Bernard Kruger, Mr. Arman's long-time doctor since 1993, is also moving. These two had a social relationship, as well as a professional one. As noted earlier, it was Dr. Kruger who gave the fatal diagnosis to Mr. Arman. Dr. Kruger, as well, was the physician who oversaw Mr. Arman's treatment while he was in the United States. However, Mr. Arman, a successful businessman, also lived part of each year in France. Thus, his medical condition was monitored by both French and American doctors.

What is important to note here is that while the diagnosis was made in the summer of 2002, various pathological tests and scans from fluids and tissues taken from Mr. Arman's body on March 4, 2004, by Drs. Kazam and Tolis revealed clearly that the malignant mesothelioma had spread to the patient's pleurae. This is an important fact because in the opposition papers presented by the plaintiff, opinions are expressed that Dr. Kazam and Dr. Tolis via their procedures, and most particularly in Dr. Tolis' case via the March 11 talc procedure, caused the spread of the disease. Significantly, the fact that the spread had already occurred is not even noted and dealt with by the physicians supporting the plaintiffs' opposition. But the point cannot be ignored.

Each of the summary judgment motions, and the alternative request for a *Frye* hearing, is supported by affirmations by various doctors. The first one, which deals with Dr. Kazam and his radiology practice, is from Dr. Hearn Charles. Dr. Charles is board certified in Radiology with a Certificate of added qualifications in Vascular and Interventional Radiology. He is an Assistant Professor at New York University Langone Medical Center. He states that he performs thoracentesis procedures daily.

He proceeds to give his opinions about issues in the case after reviewing all the significant records provided for in the course of discovery. Dr. Charles focuses exclusively

and appropriately on the events that occurred on March 5, 2004. He opines that in all respects Dr. Kazam performed within good and acceptable medical practice. Specifically, he states that: 1) the intercostal arterial injury is a known complication of a thoracentesis; 2) before performing this procedure Dr. Kazam obtained informed consent; 3) Dr. Kazam performed the procedure appropriately by using the Trocar technique; 4) it was acceptable to perform this procedure in his office rather than in a hospital; 5) Dr. Kazam administered the proper topical anesthesia Lidocaine for the skin for insertion of the needle in preparation for drainage catheter placement; and finally 6) it was acceptable to do the procedure despite the patient being on the medication Plavix, which added a slightly increased risk of potential bleeding.

It is understandable that Dr. Charles would discuss each of these allegations because all of them are asserted in the Bill of Particulars provided by the plaintiffs. However, in opposition to this motion, plaintiff submitted what purported to be an opinion from an expert radiologist that was far more limited; it only took issue with Dr. Kazam's performance of the procedure wherein he punctured the artery and the period directly after the procedure wherein Mr. Arman was allowed to leave the facility before Dr. Kazam could examine him and deal with any potential problems.

This opposition affirmation was obviously a faxed copy, as opposed to an original document. Both the name and signature were omitted. However, this individual identified himself as a board certified Radiologist, with an added Certificate in Interventional Radiology. The affirmant recited that he was affiliated with a New York hospital and that he performed thoracentesis procedures regularly. Thus, he allegedly reported to the Court that he was knowledgeable as to the details of this procedure, including its risks and

benefits. His affirmation solely applied to Dr. Kazam's and MDR's motion for summary judgment. This doctor opined that Dr. Kazam committed malpractice in two ways. The first involved the perforation of the arterial blood vessel during the thoracentesis. Here, he clearly differed from Dr. Charles that this was simply a risk of the procedure. Instead, he stated that proper practice required the radiologist performing this invasive procedure to first identify the blood vessels, so as to be able to refrain from injuring them. He goes on to say that an artery would not be injured but for the absence of appropriate safeguards. Therefore, with a reasonable degree of medical certainty he opined that the fact that the injury had occurred is evidence that such proper safeguards had not been utilized. In other words, Dr. Kazam clearly did not properly identify the vessels, because if he had, he could not have perforated an artery.

The second departure allegedly claimed by this physician was Dr. Kazam's failure to appropriately care for his patient after the completion of the procedure so as to prevent him from leaving the office before the doctor had the opportunity to perform a pre-discharge examination to assess any possible complications from the thoracentesis. We know now that there were serious post-procedure complications.

This doctor allegedly opined that a radiologist such as Dr. Kazam must closely supervise his patients before they are discharged. He notes that here Mr. Kazam was allowed to sit in some waiting area after the procedure, which purportedly facilitated Mr. Arman's claimed unauthorized departure. Finally, this affirmation contains the opinion that the failure by Dr. Kazam to properly assess his patient before the patient left the facility led to the need for the life-saving emergency procedures that resulted in a two-week admission to Lenox Hill Hospital where Mr. Arman suffered seizures and pain. The physician appears

to point out the obvious, that but for the puncture of the artery, there would have been no need for emergency follow-up procedures and a situation where half of Mr. Arman's blood supply was lost.<sup>2</sup>

In reply to plaintiffs' opposition to Dr. Kazam and MDR's motion, defense counsel accuses it of being conclusory. She particularly makes this accusation with regard to the opposition doctor's opinion that the perforation of the artery was negligent. However, I disagree. I do not see how one can say that the opposition opinion as to the perforation of the artery being a departure and not merely a risk of the procedure is any more conclusory than Dr. Charles' statement in his moving papers that "intercostal arterial injury is a known complication of a thoracentesis procedure and does not demonstrate any negligence."

I find these statements by the two radiologists are two sides of the same coin. In other words, neither doctor explains in any detail either why the puncture of the artery is simply a risk of the procedure or on the other hand that it is not simply a risk but rather constitutes negligence. No specifics or further explanation of these opinions are given by Dr. Charles in the first instance or by the unnamed radiologist in the second. One might also add that both doctors giving opinions had the same records before them and therefore presumably would be in the same position to provide additional explanations for their opinions. But they do not.

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<sup>2</sup>This physician additionally relies on the second expert statement submitted by counsel for the plaintiff for an opinion that because of Kazam's malpractice and the need for additional invasive procedures at Lenox Hill Hospital, the disease spread to the chest area. However, as noted earlier in this decision and will be discussed again, there is simply no basis for this opinion regarding a spread of the malignancy in light of the biopsies and fluid analysis from materials taken on March 4, 2004, which clearly showed that the spread had already occurred.

As to the second departure involving Mr. Arman's leaving the office because he was allegedly allowed to do so, defense counsel complains that this opinion is unsupported, that Mr. Arman acted on his own, and that Dr. Kazam was helpless in preventing his departure. However, no explanation is given by Dr. Kazam or anyone else at the facility at the time in issue as to why the patient could not have been seated in some recovery room, other than in street clothes, and told precisely that he had to be properly assessed before he could leave. As to an injury flowing from this alleged departure, it seems clear that if the perforated artery had been detected while Mr. Arman was still at the facility, immediate steps could and would have been taken to ameliorate this condition.

On the basis of this affirmation, I was prepared to make a finding that legitimate issues of fact existed vis-a-vis the above two departures. However, I was disturbed that counsel for the plaintiffs had never submitted the original affirmation. During oral argument, I specifically questioned him on this issue. I asked him point blank if he had actually seen the original hard copy containing the signature of this physician. He said that he had. Therefore, I directed this attorney to supply me with the hard copy bearing the requisite signature. I gave him one week to do this.

When six days had passed and I had still not received the document, I faxed a reminder to counsel, with copies to all of his adversaries. There, I reiterated my direction that the signed affirmation was to reach me by the close of business the following day.

But it did not. Nor has it ever. That evening there were several conference calls with all counsel, the advocate for the plaintiffs being a partner in the firm representing them. I believe he was supposed to be supervising the attorney who was "of counsel" to the firm and who had prepared the opposition and attended oral argument. The partner

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knew that attorney very well but had no idea what had happened. I told all counsel that under the new changed circumstances I could no longer rely in any way on the alleged affirmation from the New York expert radiologist. I issued a decision dated January 28, 2013, indicating that plaintiffs were in default and if they wished to vacate the default, they would have to move pursuant to CPLR §5015(a).

After this Court had completed the instant written decision, but before signing it, I received an Order to Show Cause from plaintiffs' counsel seeking to vacate their default. However, I declined to sign it pursuant to §2106 of the CPLR. Therefore, I am considering the motions by defendants Kazam and MDR submitted without viable opposition from the plaintiffs. Those motions will thus be granted on the ground that no credible, reliable opposition has been submitted to challenge the *prima facie* case established by Dr. Charles on behalf of those defendants. However, plaintiffs may still seek to vacate their default and the decision which flowed from it with a proper Order to Show Cause.

With regard to the other moving defendants, plaintiffs have submitted in opposition a completely unsatisfactory affirmation by a Tennessee Internist and Pulmonologist. However, before discussing this opposition, it is advisable to first discuss the moving papers that support the motions by Dr. Tolis, Lenox Hill and Dr. Kruger. In support of Dr. Tolis and Lenox Hill's motion is an affirmation from Dr. Darryl Hoffman, a Cardiothoracic Surgeon at Beth Israel Medical Center in New York and an Assistant Professor of Clinical Medicine at Albert Einstein. He opines that not only did Dr. Tolis not commit medical malpractice by the two surgeries he performed at Lenox Hill Hospital, but rather, by performing the exploratory thoracotomy on March 5, 2004, Dr. Tolis saved Mr. Arman's life. Had the procedure not been done, Mr. Arman would have likely died from shock in the Emergency Room at the hospital.

He goes on to opine that it was appropriate for Dr. Tolis to put in the chest tubes at the conclusion of the thoracotomy. He also discusses the March 11 procedure, the one involving talc. Dr. Hoffman says that this was to prevent the fluid from reaccumulating in the chest area and to ameliorate Mr. Arman's frequent shortness of breath. In this regard he points out that later tests and scans appear to show that this was successfully accomplished.

However, the most important part of this affirmation is Dr. Hoffman's noting that it was absolutely clear that the patient's cancer had already spread to Mr. Arman's chest at the time of both procedures on March 5. This fact was established by MDR's analysis of the fluid taken by Dr. Kazam during his thoracentesis, as well as the pathology results taken from biopsies obtained at Lenox Hill Hospital after the thoracotomy. This point is extremely significant because it dispels any notion that any actions by either Dr. Tolis or Dr. Kruger caused the disease to worsen and/or to result in Mr. Arman's death. I find that Dr. Hoffman's affirmation has successfully made out a *prima facie* case in favor of the motions by Lenox Hill Hospital and Dr. Tolis for summary judgment.

With regard to Dr. Kruger, an affirmation from Dr. Roman Perez-Soler is submitted. He is a Medical Oncologist and, among other things, now is the Gutman Professor of Medicine and Chairman of the Department of Oncology at Montefiore Medical Center. The claim against Dr. Kruger is that he committed malpractice in failing to properly monitor Mr. Arman and make sure that he underwent radiation and chemotherapy. These omissions, the plaintiffs claim, resulted in Mr. Arman's worsening condition and ultimate death.

However, Dr. Perez-Soler says that this is rank speculation because any kind of therapy, radiation or chemotherapy would have at most slowed the progress of this cancer.

But it would not have prevented the final outcome of death. Specifically, he points out that Mr. Arman lived 39 months after the diagnosis, which far exceeded the normal life expectancy under these conditions. He says that Dr. Kruger's medical treatment of Mr. Arman met the standard of care at all times. It is also noted that Mr. Arman was monitored closely by doctors in both France and the United States and was seen every three or four months by these doctors after his diagnosis in the summer 2002. Finally, Dr. Perez-Soler points out that Dr. Kruger did refer Mr. Arman to a Dr. Chahimian, an Oncologist who specializes in mesothelioma, for palliative chemotherapy. But he states that it was clearly the decedent's choice to forego any such therapy until several months before his death, when in July 2005 he underwent several weeks of radiation therapy.

Dr. Perez-Soler is also the main proponent for the alternate relief sought, a *Frye* hearing. In no uncertain terms he expresses his opinion that the disease from which Mr. Arman was suffering is incurable and that all that could be done for him would be to provide palliative care. I find that this doctor has succeeded in making out a *prima facie* case in favor of Dr. Kruger for summary judgment.

Now getting back to the inadequate and inappropriate opposition to these motions submitted by the plaintiffs. First of all, the affirmation lacks any signature by the affiant. Second and at least as important, pursuant to CPLR §2106, this physician who apparently lacks a license to practice medicine in New York State is not allowed to submit an affirmation under such circumstances. He must submit an affidavit instead. But he has not.

But most important, all his opinions are conclusory and, even more critical, fail to refer to the medical records here. In fact, this physician ignores the records. He opines

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that the actions and or inactions of Dr. Tolis via his March 11 talc procedure and Dr. Kruger's alleged failure to monitor and recommend therapy caused injury to Mr. Arman. But the medical records of this patient prove conclusively that this is not the case. As stated earlier, pathological reviews here unequivocally show that the spread of the disease to the chest area had definitely occurred before March 5, 2004. This Tennessee doctor does not even comment on these tests. Presumably he takes such an ostrich approach vis-a-vis the tests because he has no way of refuting them. Similarly, as to Dr. Kruger, Mr. Arman's records make clear two things: 1) that Mr. Arman was closely monitored by French and American doctors, and 2) that Mr. Arman refused any kind of therapy despite the urging of his doctors. Those aspects of the decedent's treatment are stated in the record but similarly ignored by this physician.

Therefore, I find that this Tennessee physician, besides giving an unsworn statement which may or may not be signed, besides stating in a conclusory fashion that he has written a number of articles, all unnamed, which dispute Dr. Perez-Solar's opinion that this disease is incurable, and most importantly because he completely ignores the medical records and takes positions that are in conflict with those records, he has not succeeded in responding to the moving defendants' papers. In other words, via this affirmation, the plaintiffs have been unsuccessful in showing that there are legitimate factual issues as to either malpractice claims or wrongful death claims or causation of any injury. Therefore, Dr. Tolis, Lenox Hill Hospital, and Dr. Kruger are each entitled to summary judgment.

Finally, the Court turns to the request by Dr. Tolis' attorneys for sanctions, which this Court agreed to consider at an earlier time when plaintiffs' counsel was considering

15] withdrawing all claims against Dr. Tolis and Lenox Hill Hospital. I said then that if the claims were not withdrawn and defendants moved for summary judgment and the plaintiffs failed to oppose or provided flimsy opposition, I would in fact consider sanctions. In this regard, I do note that considerable expense has been incurred by these moving defendants with regard to this motion. However, I would like to think that the plaintiffs believed or at least were convinced by others, that they had a good faith legitimate argument in favor of keeping these defendants in the case, even though there is no such valid opposition. Therefore, after considering, I decline to impose such sanctions and/or costs.

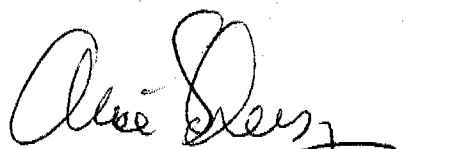
Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendants Manhattan Diagnostic Radiology, Inc. and Elias Kazam are granted, but with the proviso that plaintiffs may move to vacate their default as discussed above; and it is further

ORDERED that the motions for summary judgment by defendants Bernard Kruger, Lenox Hill Hospital and George Tolis are granted, except that the request for sanctions is denied.

Dated: February 21, 2013

**FEB 21 2013**

  
ALICE SCHLESINGER

**FILED**

**FEB 26 2013**

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