

**Assad v New York Presbyt. Hosp.**

2013 NY Slip Op 31792(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 106127/06

Judge: Alice Schlesinger

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

## ALICE SCHLESINGER

### IA PART 16

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

PART \_\_\_\_\_

Index Number : 106127/2006  
ASSAD, RAGAA  
vs.  
PRESBYTERIAN HOSPITAL  
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 and the clerk is directed to sever and dismiss all claims against the moving defendant Sandra Russo, M.D.*

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

# FILED

AUG 06 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: AUG 02 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

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

-----X  
RAGAA ASSAD, as Administrator Ad Prosequendum  
of BISHOY ASSAD, deceased.

Plaintiffs,

Index No. 106127/06  
Motion Seq. No.003

-against-

NEW YORK PRESBYTERIAN HOSPITAL f/k/a  
COLUMBIA PRESBYTERIAN MEDICAL CENTER  
COLUMBIA PRESBYTERIAN MEDICAL GROUP,  
GWEN NICHOLS, M.D., SANDRA RUSSO, M.D.,  
MEMORIAL SLOAN-KETTERING CANCER CENTER,  
and ESPERANZA PAPADOPOULOS, M.D.,

**FILED**

AUG 06 2013

Defendants.

-----X  
COUNTY CLERK'S OFFICE  
NEW YORK

SCHLESINGER, J.:

In this medical malpractice action, one defendant, Dr. Sandra Russo, is moving for summary judgment pursuant to §214-a and §3212 of the CPLR before the Note of Issue has been filed, arguing that the claims against her are barred by the two and one-half year Statute of Limitations. The action was commenced on May 4, 2006<sup>1</sup>. Dr. Russo asserts that she treated the decedent Bishoy Assad only during one brief period, from late July 2003 until August 21, 2003. Her position, therefore, is that since she never had any contact with Mr. Assad after August 21, 2003, an action sounding in malpractice had to have been brought no later than February 21, 2006. But it was not.

When Mr. Assad came under the care of Dr. Russo, he was suffering from a sizable mediastinal mass that was causing him chest pain and difficulty in breathing. In 2001, he had been diagnosed with acute T-cell Lymphoblastic Lymphoma/Leukemia. At that time, his doctor, also a defendant here, Dr. Gwen Nichols, prescribed chemotherapy. This

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<sup>1</sup>It should be noted that Bishoy Assad tragically died on May 22, 2004 when he was 27 years old.

treatment did work for a period of time, until in 2003, Mr. Assad had a relapse. Dr. Nichols then referred him to the moving defendant Dr. Russo for a course of radiation to shrink the mass.

Attached to the motion is an affidavit from Dr. Russo. She says, and her records confirm, that she treated Mr. Assad in late July through August 21, 2003. She states in ¶5 of her affidavit that the initial radiation dose for evaluation of treatment planning was written as 4,500 cGy. On August 7, 2003, she states the dose was reduced to 3,600 cGy. Her final plan, she states, was to treat Mr. Assad with 3,600 cGy of radiation therapy. However, before the treatment could be concluded, she states (in ¶5 ), "Mr. Assad abruptly ended his treatment on August 21, 2003."

As stated earlier, Dr. Russo says that she never saw or treated Mr. Assad again. She does say that on August 22, 2003 and August 25, 2003, she urged him to return to complete his radiation course. But he did not. In this regard, Dr. Russo points to her chart where she documented Mr. Assad's last treatment on August 21, 2003, in her "Radiation Oncology Completion Summary."

There is opposition to this motion by the decedent's family. It is their position, primarily articulated by the decedent's brother Dr. Albert Assad in an affidavit, that Bishoy Assad continued to treat with Dr. Russo until his death in May 2004. He says further that his brother did contemplate future treatment by Dr. Russo. He points out that the decedent returned multiple times to Columbia Presbyterian for treatment up until April 23, 2004, when he went to their emergency room. Dr. Assad also states his belief that at that emergency room visit, both Dr. Russo and Dr. Nichols were called to consult about the patient's condition. However, the medical records do not indicate that Dr. Russo actually came or otherwise provided any type of care or treatment.

Counsel for the plaintiff argues that he is entitled to the benefits of the continuous treatment doctrine. He urges the Court to consider factors other than that the decedent stopped receiving radiation on August 21, 2003. Specifically, the opposition points to the fact that Dr. Russo prescribed two medications for Mr. Assad, Ranitidine and Dexamethasone. These prescriptions allowed for two refills that did not expire until July 28, 2004.

Counsel also argues that Dr. Russo was sufficiently connected to Dr. Nichols to extend Dr. Russo's treatment to include that of Dr. Nichols. It was Dr. Nichols' plan to treat the symptoms that Mr. Assad was experiencing while waiting for a stem cell transplantation. This was her long-term treatment plan; the doctors would care for the patient while they were searching for a suitable donor. That is why Mr. Assad was referred to Dr. Russo for a course of radiation therapy. Furthering this argument, counsel points to a follow-up visit with Dr. Nichols on October 16, 2003, where she informed Mr. Assad and his family that they were still searching for a donor and were trying to maintain his remission until such time as one could be found.

Therefore, plaintiff urges two predicates for a finding of continuous treatment. The first is that the prescriptions given by Dr. Russo did not expire until after Mr. Assad's death and could be refilled. The second is that there was a sufficient nexus between Drs. Nichols and Russo so as to extend the time that the decedent was still receiving treatment from Dr. Russo.

However, in Reply it is pointed out that Dr. Russo never renewed plaintiff's prescription of the named medications. She could have refilled them, but she was not asked to and she did not. In fact, Dr. Russo said that these medications were only to be

used during the time Mr. Assad was receiving radiation to cope with the side effects of that therapy.

Further, both she and her counsel explain that there was no professional connection or agency relationship between Dr. Russo and Dr. Nichols. It is pointed out here that, despite the fact that both physicians worked at New York Presbyterian Hospital, they shared no office. More importantly, they pursued completely different specialities; Dr. Nichols is a medical oncologist while Dr. Russo is a radiation oncologist.

Also as part of the Reply, Dr. Russo in a second affidavit points out that in radiation therapy, one does not interrupt the therapy and return later to continue. It is a course of therapy, which means you begin it at a particular time and continue until it is concluded. But that did not happen here. Rather, the decedent interrupted and ended that therapy on the advice of his brother Dr. Assad and perhaps others. From Dr. Russo's perspective, at least, her treatment of the decedent ended on August 21, 2003. Of course, if Mr. Assad had responded to Dr. Russo's urgings to return and finish this treatment, there may well have been a different result. But that did not happen here.

The continuous treatment doctrine rests on the idea that while a patient is still receiving treatment from his physician for a particular condition, he should not be in the position of having to decide whether or not to bring a lawsuit against that physician. However, once the treatment is at an end, the patient is no longer in that awkward and difficult position. So the inquiry that the Court always has to make is when precisely the treatment for the condition ended with that doctor. Here I find that it ended on August 21, 2003.

Further, I am unable to find an agency relationship between Drs. Nichols and Russo under these circumstances. In fact, these circumstances are very similar to a District Court case that was decided in 2001 by Judge John Martin in the Southern District of New York, *Haq v. NY Presbyterian Hospital Cornell Medical Center*, 2001 WL 1135705. There the plaintiff had a serious heart condition. Because of issues connected with that condition, she underwent surgery by the moving defendant, Dr. Leonard Girardi. Dr. Girardi had performed the surgery in August 1997 and last saw the plaintiff for aftercare in October 1997. The court reasoned that an action had to have been brought in April 2000 to be timely pursuant to the 2 ½ year Statute of Limitations. But no action was commenced until August of that year.

In part, Judge Martin held that there was no agency relationship between the plaintiff's cardiologist Dr. Edmund Herrold and Dr. Girardi, despite the fact that both were employees of Cornell Medical College. Rather, this Court found that a relationship between doctors who are colleagues at the same hospital and who care for the same patient, which care involves consultations and referrals, did not constitute a sufficient nexus so as to extend Dr. Herrold's care for the longer period of Dr. Girardi's care and thereby toll the Statute of Limitations.

As to the prescriptions, opposing plaintiff cites to a decision which this Court rendered in 2009, *Marchak v. Cooper*, 25 Misc.3d 1224(A). However, that case is clearly distinguishable on its facts. There the plaintiff testified that he had called the defendant Dr. Cooper's office a number of times to obtain refills of prescriptions. Finally, after the plaintiff attempted an email communication, a nurse practitioner in the defendant's office who was allowed to renew prescriptions did in fact do that for Mr. Marchak. Therefore, I

stated that in providing that service to the patient, it could be argued that the nurse practitioner was acting as an agent for Dr. Cooper. If that were so, an issue the jury would decide would be whether, when the nurse practitioner provided the plaintiff with the refills, those actions extended the treatment time with her principal, Dr. Cooper. But here, as referred to earlier, Dr. Russo only gave Mr. Assad prescriptions for medication once, and they were to be used during her radiation therapy. While each prescription allowed for two refills, no actual refills were requested. Therefore, that is a very different situation from *Marchak*, where the plaintiff actually had contact with the defendant's office that resulted in his obtaining the two refills.

Therefore, I find that since Dr. Russo's treatment, a course of radiation therapy, ended on August 21, 2003, a lawsuit against her alleging medical malpractice had to have been brought within 2 ½ years from that date, by February 21, 2006. Since the action was not commenced until May 4, 2006, I find that it is untimely and barred by the Statute of Limitations and that all claims against Dr. Sandra Russo must be dismissed.

Accordingly, it is hereby

ORDERED that the motion by defendant Sandra Russo, M.D., is granted, and the Clerk is directed to sever all claims against Dr. Russo and enter judgment dismissing them; and it is further

ORDERED that the remainder of the action shall continue, and counsel shall appear for a status conference in Room 222 on September 4, 2013 at 11:00 a.m. to arrange for the completion of all discovery. The Note of Issue shall be filed by December 4, 2013.

Dated: August 2, 2013

**FILED**

*Alice Schlesinger*  
**ALICE SCHLESINGER**

AUG 02 2013

AUG 06 2013

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 NEW YORK