

Syvertsen v Moskovits
2013 NY Slip Op 31945(U)
August 16, 2013
Sup Ct, New York County
Docket Number: 109131/08
Judge: Alice Schlesinger
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART **IA** PART 16

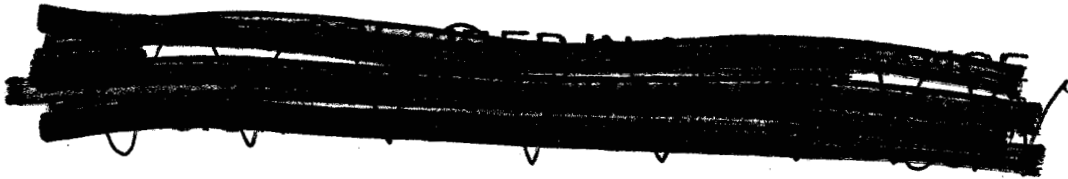
Index Number : 109131/2008
SYVERTSEN, EILEEN F.
vs.
MOSKOVITS, TIBOR
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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



MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 20 2013

COUNTY CLERK'S OFFICE
NEW YORK


_____, J.S.C.
ALICE SCHLESINGER

Dated: AUG 16 2013

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

- 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
EILEEN F. SYVERTSEN, as Administratrix of the
Estate of SUSAN SYVERTSEN, deceased,

Plaintiffs,

Index No. 109131/08
Motion Seq. No.002

-against-

TIBOR MOSKOVITS, M.D., DANIELA GIDEA-ADDEO,
M.D., NYU LANGONE MEDICAL CENTER, NYU
CANCER INSTITUTE/NYU CLINICAL CANCER
CENTER and 'JOHN DOES1-5" AND "JANE DOES
1-5" Names being fictitious but intended to be the
individuals who administered various radiation and/or
chemotherapy treatments to the deceased.

Defendants.

FILED

AUG 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
SCHLESINGER, J.:

In this medical malpractice action and in this motion for summary judgment made by all the defendants, the overriding question is, What was the cause of Susan Syvertsen's death? She was 41 at the time and she died alone in her apartment on March 3, 2007. She had called 911 for help at about 2:30 a.m. on the 3rd. To their credit, EMS arrived about ten minutes later, but they could not gain entrance to her apartment because the door was locked and there was no response. It took them about 45 minutes before they were able to enter the apartment. There they found Ms. Syvertsen lying on the floor lifeless. Next to her was a kind of coffee ground vomit. Why did she die?

Toward the end of 2006, Ms. Syvertsen had a colonoscopy because of symptoms she was experiencing. That test indicated that there was a tumor in her rectal area. It was decided, in consultation with her doctor, that the best treatment would be non-surgical.

Rather, she would undergo a concurrent course of radiation and chemotherapy. The actual diagnosis was that she had squamous cell carcinoma of the anus. It was a biopsy that confirmed this diagnosis.

On or about February 16, 2007, Ms. Syvertsen first came under the care of Dr. Tibor Moskovits, the first named defendant here. He is a medical oncologist and would be in charge of delivering the chemotherapy. She would receive radiation therapy from Dr. Daniela Gidea-Addeo, the second named defendant, who is a radiation oncologist. Both doctors were associated with New York University and their Clinical Cancer Center ("CCC").

On March 2, 2007, the decedent went to NYU to have her fifth radiation session under Dr. Gidea-Addeo's supervision and then the plan was for her to see Dr. Moskovits who would remove a therapeutic pump used to give Ms. Syvertsen a continual infusion of the chemotherapy. That was the plan. At approximately 8:30 a.m. while at Tisch, part of NYC Langone Medical Center, in their radiation oncology suite and after undergoing the treatment, the decedent complained of weakness, constipation and bloating. She made these complaints to the registered nurse there, Adelina Cabrera. She asked to rest. At that time, it does not appear that she made complaints of abdominal pain, none were recorded. It was decided that she would be taken to the Emergency Department at Langone, which was close to the radiation suite. She was then taken by wheelchair to the Emergency Department where she was registered. However, it appears that Dr. Moskovits decided that it would be better for her to come to the CCC where she could receive specialized treatment. The Center was a few blocks away so a car service was called to take Ms. Syvertsen to Dr. Moskovits' office. There, she was seen by a nurse Sarah

Mendez some time between 10:00 a.m. and 11:00 a.m. Mendez testified that she performed an abdominal exam of the patient and found no abnormalities. Ms. Syvertsen's complaints at that time were nausea, fatigue and constipation. Although no report of pain in the abdomen were noted, she did report discomfort in the rectal area.

Blood was taken for a CBC. This showed a normal blood count with a slightly low potassium level. An elevated white blood count was also noted. She was then being treated by nurse practitioner, Kathy Leonard. Dr. Moskovits and NP Leonard thought that Ms. Syvertsen's symptoms were consistent with dehydration, which they believed were common under these circumstances. Therefore she was given IV hydration.

Approximately from 12:40 p.m. to 3:30 p.m., the decedent slept, while being observed by medical personnel at the Center. Upon awakening, she reported feeling better and was discharged at approximately 4:00 p.m. Before the discharge, she was interviewed by a social worker, Deborah Keoppel, who wrote in her chart that Ms. Syvertsen complained of "severe rectal and abdominal pain ". At the discharge, she was given a prescription for a laxative Lactulose. She went to her home in Forest Hills by way of car service that had been called for her. As stated earlier in this decision, Ms. Syvertsen died the next day, March 3, 2007 in the early morning hours.

The following day March 4, 2007, an autopsy was performed in the office of the Medical Examiner. The Certificate of Death gave as the cause of death "Complications of perforation of rectal wall following radiation and chemotherapy for treatment of squamous cell carcinoma of probable anal origin". The Report of Autopsy said the same thing and specified under Final Diagnosis IA. Status Post Radiation and Chemotherapy (Anamnestic) and B. Necrosis of Tumor and Perforation of Bowel Wall. Also a lesion was measured to

be 5cm.x 3.5cm. Undoubtedly that was the malignant mass that had been diagnosed earlier. Finally, under Final Diagnosis II there was a finding of “erosions of the gastroesophageal junction”. The cause of death in the report was “complications of perforation of rectal wall following radiation and chemotherapy for treatment of squamous cell carcinoma of probable anal origin”. So why did she die?

On the basis of these somewhat sparse facts, the defendants are moving for dispositive judgment in their favor. They support their motion with signed statements from Dr. Michael Grossbard and Dr. Jonathan Haas.

Dr. Grossbard is board certified in Internal Medicine and Medical Oncology, the speciality he shares with Dr. Moskovits. Dr. Grossbard states that he is Chief of the Division of Hematology/Oncology at St. Luke’s Roosevelt and Beth Israel Hospitals. He is also a Professor of Clinical Medicine. Dr. Haas indicates that he is board certified in Radiation Oncology, a speciality he shares with Dr. Gidea-Addeo. He is Chief of Radiation Oncology at Winthrop University Hospital in Mineola, Long Island.

Dr. Grossbard begins his statement by saying that he has reviewed the plaintiff’s Bill of Particulars which recite the allegations made by the plaintiff in this action. He immediately gets right to his bottom line conclusion which is that in his opinion to a reasonable degree of medical certainty the medical oncology care rendered to and for Ms. Syvertsen was in all respects in accordance with accepted standards of care and that there were no departures from accepted standards of care by Dr. Moskovits or any of the NYU staff. He says further that the transfer of Ms. Syvertsen from the radiation oncology suite at Tisch to the CCC was also fully in accordance with accepted standards of care. Finally and significantly, he opines that no departure claimed with regard to medical oncology here

was a proximate cause of Ms. Syvertsen's death. Although he never states whether he has an opinion of what the cause of death was and if he does, what it is.

Dr. Grossbard, besides reading the Bill of Particulars also reviewed all relevant medical and hospital records and the ME's Autopsy Report. Further, he has reviewed all of the relevant deposition testimony in this case.

This doctor then details the events of March 2, 2007, which he points out was Ms. Syvertsen's fifth day of her planned treatment at NYU. He first discusses the decedent's complaints while at the radiology suite, her being taken to the Emergency Department and then her transfer, by car service to the CCC. He explains that her chemotherapy infusion cassette was to be removed that day as her first round of chemotherapy had been completed. Dr. Grossbard expresses his opinion that the decedent was taken to an appropriate treatment area and came under the care of an appropriate person, oncology nurse Sarah Mendez. He describes the complaints which Ms. Syvertsen made as being routinely encountered by patients suffering from similar illnesses. He goes on to explain that blood was taken and that the results were in no way a matter of concern. He tells us that all of these lab values and treatment plans were communicated to Dr. Moskovits by NP Leonard who was also caring for Ms. Syvertsen during the day.

Dr. Grossbard further points out that the patient was seen by a social worker, Deborah Koeppel late in the afternoon. He acknowledges that she wrote in her notes that the decedent complained of severe rectal and abdominal pain. But Dr. Grossbard refers to Ms. Koeppel's deposition, where she testified that this reference to these particular complaints were not complaints made as to her present conditions but rather were a part

of a prior history given by the patient. However, these complaints were ones listed under “presenting problem”.

Dr. Grossbard moves on to the Autopsy Report and in this regard discusses in some depth the kind of chemotherapy administered to the decedent for the kind of cancer that she had. He specifically refutes an allegation that it was a departure from accepted standards for these medical oncology providers not to have performed a physical examination of Ms. Syvertsen’s abdomen on March 2nd. He says first, that Nurse Mendez testified that she did do such an exam and it was normal. Second, he says that the complaints were predominately for conditions such as weakness and nausea and constipation. But most important, his opinion is with a reasonable degree of medical certainty, that any abdominal exam performed on March 2nd, would not have provided any significant clinical information which would have altered the assessment or the plan and treatment. Also, he points out that there was no pathology described in the Autopsy Report to show that there would have been any positive findings if such an exam had been done.

With regard to Dr. Moskovits not seeing the patient personally that day, Dr. Grossbard says that this was also acceptable. It was sufficient that he was appraised of her presenting complaints and lab results. Dr. Grossbard says that there was no event or complaint during those hours at the CCC that indicated a need for Dr. Moskovits to personally see Ms. Syvertsen.

In conclusion, this expert merely repeats his opinions that the medical oncology treatment provided for Ms. Syvertsen was appropriate and proper, that the transfer to the CCC for evaluation and treatment was also proper and that the treatment she received there was in accordance with accepted standards of care. His final opinion, as expressed

earlier, was that he did not believe that anything done or not done by the medical oncology team at NYU was a proximate cause of Ms. Syvertsen's death. So why did she die?

The second and last submission by moving defendants is an affirmation from Dr. Jonathan Haas. He also has reviewed the plaintiff's Bill of Particulars as well as other significant records in this case. At the beginning of his statement, similar to Dr. Grossbard, he states his opinion "that the radiation oncology and related care rendered to and for Ms. Syvertsen was in all respects in accordance with accepted standards of care and that there were no departures from accepted standards of care by Dr. Addeo, Nurse Cabrera or any NYUHC staff involved in the radiation oncology care of Ms. Syvertsen". He also states his opinion that the transfer of Ms. Syvertsen from the radiation oncology suite at Tisch to the CCC for evaluation and treatment was fully in accord with accepted standards of care. Finally, he gives his opinion that nothing done or not done by anyone associated with Ms. Syvertsen's radiation treatment was a proximate cause of the injuries claimed in this case, including Ms. Syvertsen's death. The three opinions given by Dr. Haas are all held, he states, to a reasonable degree of medical certainty.

Dr. Haas then reviews Ms. Syvertsen's illness and the combined chemotherapy and radiation regimen that was decided upon. He says "the plan for radiation care was entirely appropriate". The doctor then details the course of her treatment until she came to the radiation oncology suite on March 2, 2007.

Dr. Haas then discusses in great detail precisely what happened while Ms. Syvertsen was at Tisch for her radiation, what happened immediately after she received this treatment and also Nurse Cabrera's transfer of the patient, first to the Emergency Department and then to obtaining a car for her, so that she could go to the

CCC and receive treatment from Dr. Moskovits.

Dr. Haas opines that the complaints made by Ms. Syvertsen were not of an emergency nature and in fact were some what routine for patients undergoing radiation oncology. The doctor then talks about the circumstances surrounding Ms. Syvertsen's transfer out of the radiation oncology area. As noted earlier, the patient was first taken to the Emergency Department in a wheelchair by Nurse Cabrera, where she was registered. This Department is located one floor above the radiation oncology suite. Dr. Haas notes that Dr. Addeo contacted Dr. Moskovits to relate Ms. Syvertsen complaints. In this regard, she spoke to nurse practitioner, Kathy Leonard who advised Dr. Addeo that Ms. Syvertsen was scheduled to be seen that day in the CCC. Ms. Leonard also noted that the patient could be evaluated in the CCC rather than in the Emergency Department and suggested that she be sent there if she had not already been seen in the Emergency Department. This plan was communicated to Nurse Cabrera who told Ms. Syvertsen about it. Ms. Syvertsen then agreed to leave the Emergency Department and go by car to the CCC. That was the last contact that anybody connected with the radiation oncology suite had with Ms. Syvertsen that day, or because of the later tragic circumstances, any other day.

Dr. Haas then reviews the Autopsy Report focusing on the cause of death which was said to be a therapeutic complication and necrosis in and perforation of an anal tumor at the ano-vaginal septum. Dr. Haas gives his opinion that these findings were not caused by the radiation treatment given to Ms. Syvertsen. He then proceeds to explain in some detail the nature of this patient's cancer. After doing this, he states with a reasonable degree of medical certainty that the pathology described by the Medical Examiner relating to the tumor and described as the cause of death was not proximately caused by any

radiation treatments. He also points out that the Autopsy Report fails to describe any other pathology which in his opinion could have caused the death of Ms. Syvertsen. Here, he specifically states that with regard to an abdominal examination that it is claimed should have been done, there was no need to do one as the report describes no pathology in the abdominal, peritoneal, retroperitoneal or lower intestinal structures. He also states that any examination or manipulation of the patients rectum and anus would have been contraindicated. Much of what Dr. Haas discusses and comments on with regard to the Autopsy Report is very similar to what Dr. Grossbard says. Both doctors opine that there was no necessity for either of the defendant doctors, Dr. Addeo and/or Dr. Moskovits to actually examine the patient on March 2. Arguably that is an important opinion in the circumstances here, in light of the fact that neither defendant doctor did actually see or examine the decedent that day. So, why did she die?

The plaintiff strongly opposes this motion and points out what I would describe as some technical problems with the moving papers. However, I find no technical problems with them and in fact conclude that a Prima Facie case has been made out for summary judgment. I come to this conclusion because two medical experts in specialties relevant to this action have clearly expressed their opinions that there were no departures by any of the doctors or the staff of these institutions and that nothing that was done or failed to be done was a cause of Ms. Syvertsen's death. Although, as noted, neither one of these doctors is able to express an opinion as to what was the cause of death.

The plaintiff proffers several arguments as to why the motion should be defeated in the event that a Prima Facie case is found. In that regard, counsel submits a statement from Dr. Steven L. Valenstein, board certified in Internal Medicine and Medical Oncology.

He is also an Assistant Clinical Professor in Medicine at Columbia University. Finally, he is the Lab Director of the Columbia Doctors Medical Group in Hartsdale, NY.

Dr. Valenstein first lists a number of failures which he believes with a reasonable degree of medical certainty occurred at these institutions on March 2, 2007. He says they include failure to formulate a differential diagnosis in light of her complaints, failure to perform and record into the record a physical examination, or even to record the vital signs of this patient.

Dr. Valenstein makes it clear that he believes that Ms. Syvertsen was given inadequate care and treatment on the day in question. He points out that the social worker who interviewed the patient that afternoon, Deborah Koeppel recorded that she complained of severe rectal and abdominal pain. He believes that the record makes it clear that those complaints did not relate to historical complaints, but rather related to what was happening on that day. With regard to the abdominal pain that Ms. Syvertsen was experiencing, Dr. Valenstein also notes that there was testimony from her parents that a neighbor told them that when Ms. Syvertsen arrived home that day she was doubled over in pain and asked that neighbor to pick up the prescription for her.

This is a good time to point out that Dr. Valenstein does offer an opinion as to the cause of Ms. Syvertsen's death. He believes that she had sepsis which ultimately evolved into septic shock which caused the death. He believes that when she was at the hospital she had early signs of an infection. He also points out that the kinds of therapies that Ms. Syvertsen was receiving severely weakened her immune system which made her more susceptible to infection and increased her risk of sepsis. He also explains what he believes, more probably than not, was the mechanism of the infection in her body. He

believes that fecal material from the rectum ceded in to the blood vessels in the rectal wall and circulated in her blood until the septic process resulted in septic shock. He says further that the perforation of the rectal wall allowed this to happen.

Defense counsel in their Reply strongly takes issue with these opinions. Most significantly counsel points out that there is no medical record or other support for these opinions. Here, he discusses the Autopsy Report and urges that there is no evidence in that report that sepsis and/or septic shock was present or involved as the cause of death. As to the perforation of the rectal wall, counsel points out that Dr. Grossbard had noted that that lesion described in the autopsy was present even before Ms. Syvertsen's treatment began.

A second item that the plaintiff relies upon in her opposition, and that defense counsel later comments on, is a New York State Department Health report. The Department was asked by the family to investigate this tragedy which they did and issued a report. From their own perspective, each side claims that the report supports its position. In the first instance, the plaintiff notes those portions of the report which refer to deficiencies by the defendants. One of these was the notation that there was no evidence of any abdominal assessment or examination of the abdomen by anyone on the staff despite the fact that abdominal complaints were made. Here it should be noted that Nurse Mendez never recorded that she performed a physical examination of the patient. When she gave her deposition testimony, she explained that her practice is that when she does an examination which is normal, she does not make any notation. However, without any documentation, the Department concluded that no such examination was done.

The Department also comments unfavorably on the fact that there was no triage or

medical screening done by or at the Emergency Department. This relates to the fact that the patient was transferred after being registered there but never seen or examined.

The report finds no problem with the way in which the patient's complaints were dealt with by a nurse practitioner, rather than a physician, since a nurse practitioner is qualified and credentialed. However the Report does comment that there was no evidence of any focused examination of the patient by anyone. Again this relates to the failure to specifically examine Ms. Syvertsen's abdomen. Also with regard to removing the patient from the Emergency Department, this Report notes that there were no orders recorded from either the nurse practitioner or the doctor to in fact do that. Nor was there any evidence that the radiation staff communicated with the emergency medicine staff with regard to removing the patient. The report notes that the Emergency chart where this patient's name was entered was then marked "cancelled". But no reason or followup was written.

On the other side, the moving defendants point to parts of the Report which support their position, notes which discuss the significance of the Medical Examiner's report and how that relates to the cause of death. The first of these notes states that while a perforation of the colon was noted as a therapeutic complication of the combined therapy that she was receiving, the actual clinical correlation with her death, via hemorrhage, sepsis was not established. The next note involved what the Department characterized as "insufficient clinical evidence of this type of illness in the preceding 24 hours". The type of illnesses mentioned here are Hyperkalemia, Beta Hemolytic Strep and Clostridium. The Department also points out that while there was a perforation, there was no fluid found in the peritoneal cavity and no adrenal failure consistent with Sepsis.

In the final paragraph of their Report, the Department comments that this was an inconclusive Medical Examiner's report. Having said that, their conclusion is stated once more, that the hospital did not meet its standard in assessing the patient's abdominal pain. Further, in noting the WBC, which the report says was "elected" but I believe means "elevated" was not sufficiently addressed. Also, the Report says that a flat plate abdominal x-ray could have identified free air, but certainly and again, there should have been a more focused abdominal assessment. Whether this examination/assessment should have been done in the Emergency Department or elsewhere, the Department believes is not an issue. However, consistent with this Court's opinion, which has been noted several times, the Report ends with a statement "whether failure to perform these exams can be correlated with death can not be established." It should be noted here that all of the deficiencies which the Department cites were also found to be departures by Dr. Valenstein.

Basically, the defense does not believe that this Court should be deterred from granting its motion by the fact that no cause of death has been established. Counsel's position is that at no time on March 2nd did Ms. Syvertsen ever display any signs of early sepsis, signs which Dr. Valenstein himself describes. These include complaints of fever, chills, hyperventilation, inflammation, or rapid heart beat. Rather, counsel argues that her signs pointed to dehydration alone which was what in fact she was treated for. The moving defendants' position is that there were no departures by anyone since there were no signs of anything other than routine complaints, that when the patient left she was feeling better and showed no indication of the terrible events that would follow some hours later. Therefore, they urge that they have not only made out a Prima Facie case, they have made out a case for judgment in their favor. However, the plaintiff relies on Dr. Valenstein's

opinions, despite the fact that there is no absolute correlation with the documents prepared after her death.

This motion is not an easy one for this Court to decide. It is clear that there is no conclusive proof as to the cause of death here. However, there is certainly a suggestion in the Autopsy Report that Ms. Syvertsen did die from some infectious process. On the first page of the report, as the second diagnosis is written "erosions of gastroesophageal juncture". The predicate for that is found in a description of the digestive system which says that the "stomach contains approximately 90 cc of dark brown, sludgy material." Further under the portion discussing Gastrointestinal Tract X8(#1-6), the report talks about the necrotic tumor and the invasion of cancerous cells through the full thickness of the rectal wall. The report then says the following "Vascular and Peri-rectal Invasion are identified. Perirectal soft tissue shows abundant neutrophils" and finally the report says "Gastroesophageal junction showing deep erosions with numerous neutrophils."

Neutrophils, at least according to Google's Wikipedia are the most common form of white blood cells. In fact, it has been estimated that between 50 and 70% of all white blood cells are neutrophils. Whereas neutrophils are normally found in the blood, when infection is noted some where in the body, they rush to that site to fight.

No one here, which includes the moving defendant doctors, the experts on behalf of those doctors, the Department of Health and even plaintiff's expert Dr. Valenstein can say with absolute certainty what the cause of death was. However, I find that there is enough here to suggest that it was some kind of infection which then turned into something deadly. The fact that hours earlier Ms. Syvertsen made complaints, which likely included severe abdominal pain and had an elevated white blood count (whose number had virtually

doubled, since the last time it was tested) suggests that the decedent was then experiencing the effects of an early infection that was lodged somewhere in her gastrointestinal tract. But no one at either Tisch or the CCC did a serious assessment and examination of the abdominal area. Further, none of her vital signs were taken. Nor were no x-rays. Finally, no doctor examined her.

One could argue and the plaintiff does, that all of these failures either alone or together were responsible for an infection being allowed to become uncontrolled leading to her death. Again, no one knows precisely how or why Ms. Syvertsen died. She is no longer with us and therefore can not relate what she was feeling during those early morning hours of March 3, which caused her to call for emergency help at about 2:30 a.m.

I find that the plaintiff, Ms. Syvertsen's mother, Eileen, should be given an opportunity to prove to the satisfaction of a jury, if she is able, that the various departures or deficiencies here alleged against the moving defendants in failing to detect an infectious process, deprived her daughter of an opportunity to continue with her life. Therefore, the motion is denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by all the defendants is denied.

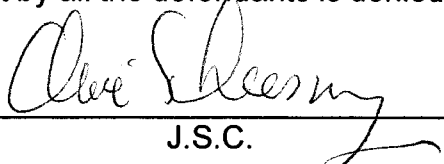
Dated: August 16, 2013

AUG 16 2013

FILED

AUG 20 2013

COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.
ALICE SCHLESINGER