

Henderson v Ciobanu
2014 NY Slip Op 30462(U)
February 26, 2014
Supreme Court, New York County
Docket Number: 800352/11
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOBIS
Justice

PART 6

HENDERSON, STANLEY

INDEX NO. 800352/11

MOTION DATE 12/3/13

NICULAE CIOBANU, M.D.,
ET AL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1-2	_____
3, 4	_____
5	_____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

FEB 28 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

RECEIVED
FEB 8
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/26/14

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST 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
STANLEY HENDERSON, as Administrator of the
Estate of GENEVIVE SMITH, Deceased,

Plaintiff,

Index No. 800352/11

-against-

Decision and Order

NICULAE CIOBANU, M.D., JOSE CORVALAN,
M.D., SAINT VINCENTS CATHOLIC MEDICAL
CENTER, ST. VINCENT'S MANHATTAN, SAINT
VINCENTS CATHOLIC MEDICAL CENTERS OF
NEW YORK, INC., SAINT VINCENTS CATHOLIC
MEDICAL CENTERS OF NEW YORK, MARIA
ENECILLA, M.D., HOTEL ASSOCIATION OF THE
CITY OF NEW YORK HEALTH CENTER, INC.,
NEW YORK TRADES COUNCIL HARLEM HEALTH
CENTER, INC., THE NEW YORK HOTEL TRADES
COUNCIL AND HOTEL ASSOCIATION,

FILED

FEB 28 2014

NEW YORK

Defendants.

COUNTY CLERK

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

Plaintiff Stanley Henderson is suing on behalf of the estate of his deceased mother, Genevieve Smith. He alleges that the Defendants in this case, Niculae Ciobanu, M.D., Jose Corvalan, M.D., Saint Vincents Catholic Medical Center, St. Vincent's Manhattan, Saint Vincents Catholic Medical Centers of New York, Inc., Saint Vincents Catholic Medical Centers of New York, Maria Enecilla, M.D., Hotel Association of the City of New York Health Center, Inc., New York Trades Council Harlem Health Center, Inc., and The New York Hotel Trades Council and Hotel Association, failed to properly evaluate, diagnose and treat his mother's colorectal cancer. Defendant Niculae Ciobanu, M.D., moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, the motion is denied.

3

On Tuesday, January 11, 2011, Genevieve Smith, then age 75, was admitted to St. Luke's-Roosevelt Hospital Center with complaints of abdominal pain. An abdominal CT scan showed that Ms. Smith had a cancerous mass in her ascending colon. A colonoscopy performed the next day revealed that the mass was likely malignant, which pathology confirmed as a moderate to poorly differentiated adenocarcinoma. Ms. Smith was not deemed to be a candidate for resection. She was discharged approximately one week later.

Ms. Smith was readmitted on January 28, 2011. Her bilirubin level was extremely elevated. Testing showed her liver had innumerable hypodense lesions throughout all its lobes and segments, consistent with metastatic disease. Ms. Smith died from biliary obstruction due to her cancerous liver on February 5, 2011.

Dr. Nicolae Ciobanu had served as Ms. Smith's hematologist from early 2006 until approximately three weeks before her admission to St. Luke's in January 2011. Ms. Smith had been referred to Dr. Ciobanu for chronic anemia by her primary care physician at New York Trades Council Harlem Health Center. At her initial visit, on February 8, 2006, Ms. Smith reported that she had been anemic for the past five to six years. She also indicated that she had sickle cell trait. Dr. Ciobanu ordered blood tests, including one to confirm her sickle cell trait. At the time of the visit, Ms. Smith's hemoglobin/hematocrit levels were 10.5/32.1. He prescribed folic acid supplements.

Dr. Ciobanu saw Ms. Smith on a monthly basis for the next year. During that time he regularly tested her hemoglobin and hematocrit levels. In April 2006, based upon falling levels, he increased her folic acid dosage. In his deposition, he testified that he knew she was on blood

pressure medication, but never learned what particular medication she was taking for that condition.

In treating Ms. Smith's anemia, Dr. Ciobanu made various adjustments to her prescriptions and their dosages. In May 2006, Dr. Ciobanu added iron supplements and vitamin C to Ms. Smith's regimen because her hemoglobin and hematocrit levels had not improved. He also noted that she was mildly tired. Over the summer, her levels began to improve, but dropped again by September. Dr. Ciobanu increased Ms. Smith's folic acid dosage. At Ms. Smith's November appointment, Dr. Ciobanu reminded her to take her vitamin C. In his progress notes, he wrote that Ms. Smith was "known to have sickle cell disease [sic]."

Ms. Smith last saw Dr. Ciobanu on January 11, 2007, before a thirty-three month gap in treatment. At that time, Ms. Smith's hemoglobin/hematocrit levels were 10.8/32.9. Ms. Smith informed Dr. Ciobanu that her insurer would be covering appointments every three months rather than monthly.

Ms. Smith next saw Dr. Ciobanu for treatment on October 22, 2009. In documenting the visit, he described a "female patient with history of anemia, documented as sickle cell trait." At that visit, Ms. Smith brought recent test results that showed an elevated carcinoembryonic antigen (CEA) level of 3.5 and an elevated calcium level of 11. She also had abnormal liver function tests. Dr. Ciobanu noted that Ms. Smith's "weight may have dropped." Medical records of Ms. Smith's other providers at the time showed a twenty-pound unintended weight loss, but Dr. Ciobanu testified that he had not weighed Ms. Smith in his evaluations until the October 22 visit, at which time she weighed 155 pounds. Nor did he inquire whether she was continuing her folic acid prescription after

5]

she resumed regular visits with him.

Dr. Ciobanu ordered additional tests. Based on the results, he found Ms. Smith's CEA level was still elevated but had fallen to 3.2, and her liver function had improved. He testified that he tested her alpha-fetoprotein because, given the length of time between visits, "what was in my mind was possible primary liver cancer." But the test came back normal.

The next day, on October 23, 2009, Dr. Ciobanu called Ms. Smith and Dr. Maria Enecilla, her primary care physician, regarding Ms. Smith's abnormal CEA level. He asked Dr. Enecilla to provide copies of Ms. Smith's 2009 chest CT scan and colonoscopy results. Dr. Enecilla responded the same day that she did not have the colonoscopy report. Dr. Ciobanu testified at his deposition that he did not follow up further.

On October 26, 2009, upon referral by her primary care physician, Ms. Smith underwent an esophagogastroduodenoscopy (EGD) to explore her upper gastrointestinal tract. The EGD showed a small hiatal hernia and mild gastritis. Dr. Ciobanu noted at Ms. Smith's next visit on December 31, 2009, that she had referred to having had a colonoscopy, but no report was available.

Ms. Smith continued to see Dr. Ciobanu through 2010. On March 5, 2010, Dr. Ciobanu repeated Ms. Smith's CEA level. This time, it was 5.5. His progress notes once again refer to Ms. Smith having had a colonoscopy the prior fall, but indicate that the results were unknown. In his deposition, Dr. Ciobanu conceded that he never saw any colonoscopy reports, "[b]ut in my

[*6]
mind, as medical reasoning, it appeared that it was normal.”

Dr. Ciobanu again alerted Dr. Enecilla about Ms. Smith’s elevated CEA level. One week after Ms. Smith’s March visit, Dr. Ciobanu reported the 5.5 result to Dr. Enecilla, recommending that Dr. Enecilla repeat Ms. Smith’s colonoscopy or chest CT scan.

On May 7, 2010, Ms. Smith again saw Dr. Ciobanu. Her CEA level was still elevated, at 4.0. Dr. Ciobanu further noted Ms. Smith’s “mild anemia,” which he indicated was “due to sickle cell trait.”

By the summer, Ms. Smith began to lose weight again. At her September 16 visit she weighed 159 pounds, a three-pound decrease from her July visit, and her CEA level had increased to 4.8. At her visit on October 29, she had lost two additional pounds. She last saw Dr. Ciobanu on December 23, 2010. Her insurer had hired its own hematologists and indicated that Ms. Smith’s anemia would be handled by those providers, instead. At this visit, Ms. Smith’s weight had decreased by six pounds to 151 pounds, an eleven-pound weight loss since July. Dr. Ciobanu recommended that her providers carefully watch her weight loss. He also recommended a thyroid or ENT evaluation and continuing the iron and folic acid supplements. Ms. Smith died six weeks later.

Mr. Henderson was appointed administrator of his mother’s estate on March 23, 2011. He sues on behalf of her estate, claiming that the Defendants’ treatment and care was medical malpractice. In a second cause of action for wrongful death, he sues for loss of guidance and support

for himself and his siblings, who include Anthony, Donald, Alphonso, and Debra Smith. Dr. Ciobanu joined issue. Plaintiff's bill of particulars contends that earlier detection of Ms. Smith's cancer would have allowed surgical resection of the tumor, chemotherapy, and other treatment. Following the filing of the note of issue in this case, Dr. Ciobanu moves for summary judgment, claiming that he provided care within accepted standards of practice and there are no genuine issues of material fact regarding that care.

In support of his motion for summary judgment, Dr. Ciobanu provides the expert opinion of Ivan Rothman, M.D. Dr. Rothman is a New York-licensed physician, who is board-certified in hematology, oncology and internal medicine. Dr. Rothman opines that Plaintiff's allegations are "completely without merit." Rather, Dr. Ciobanu properly evaluated and managed Ms. Smith's condition, evidenced by the frequency of her visits, the physical examinations and laboratory tests performed. Dr. Rothman opines that beginning in October 2009, during the last fourteen-month interval in which Dr. Ciobanu regularly cared for Ms. Smith, Dr. Ciobanu appropriately recommended additional diagnostic testing, including recommending in March 2010 that Ms. Smith have a repeat colonoscopy.

Dr. Rothman opines that Ms. Smith "did not demonstrate signs or symptoms of her disease at any time during Dr. Ciobanu's care." Defendant's expert contends that Ms. Smith had been stable throughout her treatment with Dr. Ciobanu, within normal degrees of variation. He claims Ms. Smith had no progressive weight loss, disease-related physical complaints or worsening anemia indicative of malignancy.

[8]

In the closing paragraphs of the opinion, Dr. Rothman does mention Ms. Smith's "possible weight loss," but contends that had "nothing to do with, and was not an indication of, the later development of cancer." Rather, he contends that the aggressive nature of Ms. Smith's cancer and its rate of growth made it medically impossible for the cancer to have been the cause of any signs or symptoms during Dr. Ciobanu's care. None of Dr. Ciobanu's care and treatment in any way caused Ms. Smith's injuries, Dr. Rothman opines. At most, based on the aggressiveness of Ms. Smith's malignancy, the cancer could only have produced findings "within days or weeks of development."

Plaintiff Henderson opposes Defendant Ciobanu's motion. In support, he offers the opinion of an expert whose identity has been redacted pursuant to Section 3101(d)(1)(i) of the Civil Practice Law and Rules. Plaintiff's expert is a New-York licensed physician, who is board-certified in internal medicine, medical oncology and hematology. The expert contends that Dr. Ciobanu departed from proper standards of care and those departures were substantial factors in causing Ms. Smith's death. The expert notes that Ms. Smith treated with Dr. Ciobanu for twenty-four visits between February 8, 2006, and December 23, 2010. Over the course of that treatment, Dr. Ciobanu noted significant findings of anemia, elevated CEA levels and weight loss, which he treated with folic acid, later supplemented by vitamin C.

Plaintiff's expert contends, citing Dr. Ciobanu's deposition testimony, that Dr. Ciobanu mistook Ms. Smith's sickle cell trait as a source for her anemia. The expert points out that the sickle cell trait creates no greater risk for developing anemia. Dr. Ciobanu's erroneous assumption, the expert contends, contributed to his failure to pursue other sources for Ms. Smith's

anemia, such as cancer.

Plaintiff's expert disagrees with Dr. Rothman's opinion that Ms. Smith's cancer was late developing and metastasizing aggressively. The expert contends, rather, that the belated discovery was simply made at a critical juncture in the cancer's progression. Based on the size of Ms. Smith's cancerous mass that was discovered fewer than three weeks after she ended treatment with Dr. Ciobanu, Plaintiff's expert estimates that the cancer would have been detectable at approximately one centimeter in size by the time of her May 2009 colonoscopy, at which time it would have been at an early stage of the cancer process, stage I or II. The expert contends that Ms. Smith's type of cancer, an adenocarcinoma of moderately to poorly differentiated cell structure, would produce a metastatic spread that could take months to years to occur, not days to weeks as Dr. Rothman claimed. The expert contends that Dr. Ciobanu departed in accepting Ms. Smith's negative 2009 colonoscopy results, which were inconsistent with Ms. Smith's persistent anemia, fatigue and weight loss. Had the cancer been detected earlier - the expert opines that a CT or PET scan would have disclosed the lesion - Ms. Smith's life expectancy would have been longer.

In reply, Defendant Ciobanu contends that he appropriately followed Ms. Smith and closely monitored her clinical status. When he noted changes in her condition, he recommended further evaluation, including recommending a colonoscopy in March 2010. Lastly Ms. Smith's anemia was multifactorial.

In considering a motion for summary judgment, this Court reviews the record in the

light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that the physician did not depart from accepted standards of practice or that, even if the physician did, the departure did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman

v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court is not persuaded that the Defendant has established a prima facie case of entitlement to summary judgment. Dr. Rothman states conclusorily that Dr. Ciobanu's treatment was appropriate and within the standard of care from October 22, 2009, to December 23, 2010. His opinion is not supported by the record, however. Dr. Rothman's claim that Ms. Smith "did not demonstrate signs or symptoms of her disease" is undermined by his own reference to "possible weight loss." See Roques, 73 A.D.3d at 195. Ms. Smith resumed treatment with Dr. Ciobanu in the fall of 2009, following a twenty-pound unintended weight loss documented in the medical records of the decedent's other providers immediately preceding that return. Dr. Ciobanu's records themselves record an eleven-pound weight loss, which he began tracking because of her prior unintended weight loss. Moreover, this symptom and others in the record were manifest even within the timetable that Dr. Rothman sets for attribution to her cancer: Dr. Ciobanu last treated Ms. Smith less than three weeks before her cancer diagnosis.

At the same time, this Court finds that Plaintiff has presented genuine issues of material fact. Her expert, in a lengthy and detailed opinion, disputes Dr. Rothman's findings and highlights the material issues of facts that remain for the jury, including the failure to diagnose the

malignancy, notwithstanding anemia, elevated CEA levels, and weight loss. Plaintiff's expert has also challenged Dr. Ciobanu's reliance on Ms. Smith's sickle cell trait as a substantial factor for her anemia, and the deposition testimony contains numerous references to that assumption. Dr. Rothman does not explain why he never followed up on her May 2009 colonoscopy results or the supposed colonoscopy performed in the fall of 2009 that was actually an EGD. See Ocasio-Gary, 69 A.D.3d at 404. Accordingly, it is


ORDERED that the motion is denied; and it is further

ORDERED that the parties appear for a pretrial conference on April 1, 2014, at 9:30 am.

Dated: Feb. 26, 2014

FILED
FEB 28 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



JOAN B. LOBIS, J.S.C.