| **Stark v Gopinathan** |
| --- |
| 2015 NY Slip Op 32100(U) |
| February 23, 2015 |
| Supreme Court, New York County |
| Docket Number: 701370/12 |
| Judge: Alice Schlesinger |
|  |
|  |

[* 1]

FEA 2/25/15 IE

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

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 115270/2005
STARK, RENEE
vs.
GOPINASTHAN, GOVINDAN, M.D.
SEQUENCE NUMBER : 001
DISMISS

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 with respect to defendants Alexandra Stern, M.D., Murray Hill Medical Group, P.C., and NYU Hospitals Center, and is otherwise denied in accordance with the accompanying memorandum decision

FILED
FEB 25 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
FEB 25 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: FEB 23 2015

ALICE SCHLESINGER J.S.C.

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

RENEE STARK, as the Executrix of the Estate of JACK STARK, and RENEE STARK, Individually

Plaintiff,

Index No. 701370/12
Motion Seq. No.001

-against-

GOVINDAN GOPINATHAN, M.D., CORA R. FREEDMAN, as Executrix of the Estate of MICHAEL FREEDMAN, M.D., ALEXANDRA STERN, M.D., MURRAY HILL MEDICAL GROUP, P.C., and NYU HOSPITALS CENTER,

Defendants.

----------X



SCHLESINGER, J.:

In this medical malpractice action, all of the defendants are moving for summary judgment. The various defendants are doctors who treated the decedent Jack Stark for a variety of complaints brought to each of them. Also included as defendants are two institutions, Murray Hill Medical Group and NYU Hospitals Center.

In the first instance, relevant to these doctors, Mr. Stark saw the first named defendant Dr. Govindan Gopinathan, a neurologist, on December 7, 1999. After that Mr. Stark saw defendant Dr. Alexandra Stern, a cardiologist, on August 23, 2000 during an admission to NYU Hospitals Center. At that time, Dr. Stern made a diagnosis of aortic stenosis with atrial flutter. After that Mr. Stark saw defendant Dr. Michael Freedman, a geriatrician, on June 4, 2002. To Dr. Freedman, Mr. Stark brought with him a panoply of complaints, summing up his condition at age 74 as not "what he used to be".

The papers here are extensive. The probable reason for this is the fact that the moving papers detail all of the visits that Mr. Stark made with each of these doctors beginning with Dr. Gopinathan in December 1999 up until Mr. Stark's death on November 27, 2007. In support of the moving papers, counsel for these defendants also submits various affidavits from experts attesting to the fact that each of these physicians provided medical care and treatment to the decedent in accordance with accepted standards of medicine.

In the case of Dr. Stern, Dr. Freedman and NYU, there is a 46 page affidavit by Dr. Monty Bodenheimer (Exhibit AA). Dr. Bodenheimer is a board certified internist and, like Dr. Stern, a cardiologist. With regard to Dr. Gopinathan, counsel submits an affidavit from Dr. Jeffrey Kessler (Exhibit BB), who is board certified in neurology and internal medicine. As to the issue of causation, or rather the alleged lack of causation, defendants submit an affidavit from Dr. Douglas Cohen (Exhibit CC), a physician board certified in neurosurgery.

In this decision I will briefly discuss many of the visits with the purpose of pointing out several of the symptoms that are central to the issues in this case. The primary issue has been defined in the opposition papers by way of an affirmation from an unidentified board certified internist (Exhibit A). That issue essentially is whether or not in 2002 Mr. Stark was suffering from Normal Pressure Hydrocephalus or NPH. It is the position of this physician and the plaintiff that in fact Mr. Stark was suffering from this condition and that, if a proper diagnosis had been made in June and July 2002, and if certain steps had been taken, specifically a lumbar puncture followed by the insertion of a VP shunt in his brain, Mr. Stark's symptoms would have been addressed and the

quality of his life would have been much improved. It should be noted here that in July of 2005, such a diagnosis was in fact made by a Dr. Kiral Kiprovski. After the diagnosis, there was a lumbar puncture procedure in September 2005. Finally, within a short time thereafter, a VP shunt was inserted by Dr. Robert Heros. However, Mr. Stark's condition in late 2005 had deteriorated to a large degree and continued to go down hill until his death in 2007.

Defense counsel points to this death as an indication that the lumbar puncture and shunt insertion were not the proper medical actions to take. This position is supported by the aforementioned Dr. Douglas Cohen. He opines that Mr. Stark's complaints were so mild that the risk of a lumbar puncture and shunt placement would have outweighed any benefits in the face of Mr. Stark's underlying conditions and co-morbidities. Dr. Cohen also points out that after Dr. Heros placed the right VP shunt on October 17, 2005, Mr. Stark's condition was complicated with a MRSA infection. Following that, on January 3, 2006 a pacemaker was placed, and the following month in February, Dr. Heros recorded his belief that Mr. Stark had regressed and was about the same as he was before the lumbar puncture.

In summary, Dr. Cohen states that the "tumultuous course following the placement of the VP shunt on December 6, 2005" is evidence that "the patient's outcome would have been the same due to his age, platelet deficit, extensive cardiac history, and eventual need for Coumadin, Plavix and aspirin." (¶37 and ¶42 of Cohen's affidavit). Finally, Dr. Cohen specifically says that if the lumbar puncture had been done as early as May 2003, he believes the risk of complications from the surgery would have been essentially the same as when it was done in late 2005. Further, in

anticipation of the position the plaintiff would take, Dr. Cohen opines that any alleged delays would not have changed anything (¶43).

Earlier in this decision I mentioned that, regarding the condition NPH, a significant dispute existed between the experts supporting the defendants' motion and the expert supporting the plaintiff's position. That dispute revolves around what symptoms a patient must display in order for a presumptive diagnosis of this condition to be made. Both experts for the moving defendants, Dr. Bodenheimer and Dr. Kessler, insist that there must be a triad of symptoms before such a diagnosis can be made. The triad of symptoms, according to the defense experts, include a gait disturbance, being the most important, together with urinary symptoms and cognitive dysfunction.

However, it is the plaintiff's expert position that a triad of these symptoms is not necessary. This physician opines that NPH can occur with variant combinations or degrees of symptomatology. He agrees that the gait disturbance is the most important sign of NPH but argues that only one of the additional factors is needed to adopt this diagnosis.

This doctor elaborates on this opinion and points out that the gait disturbance can be seen in many forms. It can be a slow gait or a shuffling or a wide-based form of walking or a magnetic gait. But the gait is characterized by disequilibrium. Similarly as to urinary symptoms, these can also take several presentations, such as frequency, urgency or incontinence. In summary, the plaintiff's expert believes, with a reasonable degree of medical certainty, that if a patient demonstrates gait dysfunction with either urinary or cognitive dysfunction, a diagnosis of NPH must be investigated. It is also this

physician's opinion, with the same degree of reasonable medical certainty, that Mr. Stark did display at least two of these symptoms when he saw the defendant doctors.

Finally, this expert believes that beginning in 2002 and continuing through 2005, both Dr. Freedman, the gerontologist, and Dr. Gopinathan, the neurologist, departed from good and accepted practice. Dr. Freedman allegedly departed by failing to diagnose NPH, failing to recognize the significance of an MRI finding of June 18, 2002, failing to refer plaintiff for a work up to rule in or out NPH, and improperly attributing Mr. Stark's symptoms in June 2002 to microvascular disease in the face of the impression listed on the June 18 MRI of hydrocephalus. Dr. Gopinathan allegedly departed from accepted standards of medical practice by similarly failing to consider NPH in his diagnosis, failing to do a proper physical examination, and failing to review the June 18, 2002 brain MRI and take appropriate action.

With regard to the issue of causation, it is this doctor's opinion that while the lumbar puncture followed by a shunt placement in 2002 would not have solved all of Mr. Stark's problems, it would have given him a much better quality of life between 2002 and 2005. In this regard this physician notes that NPH is one of the few causes of dementia that is treatable and reversible, but only if there is a timely diagnosis and a subsequent shunt placement. When NPH is not treated by draining excess cerebral spinal fluid from the brain, more damage is done to the parenchyma including an increase in brain atrophy. This expert also says that the earlier the VP shunt is placed, the less fluid needs to be drained, thereby reducing the risk of over drainage and a subdural hematoma, which did occur here.

Toward the beginning of this decision I stated that summary judgment motions such as this typically include support from the moving defendants in the form of expert affidavits to the effect that each defendant doctor gave proper care and treatment to Mr. Stark. That was the case here. Specifically, in Dr. Stern's case, as related by Dr. Bodenheimer, she first saw Mr. Stark in August 2000 as a consultant when he was a patient at NYU. Mr. Stark was then 72 years old. Dr. Stern ordered an echocardiogram, a repeat Doppler and a 24 hour Holter monitor. She then saw him again in September 2000, after which he had a series of EKG's at NYU in November 2000, January 2001 and March 2001. These all showed normal rhythm.

Dr. Stern next saw Mr. Stark on November 1, 2001 when he complained of shortness of breath. He had no symptoms of angina. The doctor ordered an EKG as well as a chest x-ray to exclude congestive heart failure. Mr. Stark's next visit with Dr. Stern occurred on May 9, 2002. On this date, the decedent made general complaints of depression, but all of his tests were negative. Mr. Stark said at that time that he wanted to see a gerontologist to take care of his general medical issues.

It was for this reason that Mr. Stark began seeing Dr. Michael Freedman in June 2002. Dr. Bodenheimer described the plaintiff's visits with him. Dr. Freedman first gave Mr. Stark a thorough examination which included a mini mental exam that was normal. Dr. Freedman also ordered an MRI of the brain and spine and started Mr. Stark on Zoloft for depression. Mr. Stark's laboratory results showed that his testosterone level was very low which, according to Dr. Freedman, can and did cause muscle weakness and depression. Further, more blood work led to a diagnosis of diabetes. Dr. Freedman next saw Mr. Stark on July 26, 2002. On this date he performed another

exam on the decedent and read the MRI of his brain, which he had ordered the month before. Although Dr. Freedman found that the MRI did display increased fluid, he did not make a diagnosis of NPH. The next time Dr. Freedman saw Mr. Stark was on August 22, 2002.

On October 8, 2002, Dr. Freedman referred Mr. Stark to an endocrinologist for his diabetes. His notes indicated that Mr. Stark was depressed. At that visit Dr. Freedman spent about an hour discussing a differential diagnosis for Mr. Stark's symptoms. His first listed diagnosis was microvascular disease. As a second possible diagnosis, he noted NPH. Then he listed the testosterone deficiency. However, as noted earlier, because Dr. Freedman did not find a triad of symptoms, he felt that there was a low possibility of Mr. Stark suffering from NPH.

When Dr. Stern next saw Mr. Stark on October 25, 2002, he reported feeling fatigued and depressed. However, Dr. Stern felt that his cardiovascular status was stable.

During the yearly winter months, Mr. and Mrs. Stark resided in Florida. They returned to New York in the warmer weather. During the period of late 2002 through the Spring of 2003 all seemed well until May 22, 2003 when Mrs. Stark called Dr. Stern to tell her that her husband was not speaking to her or shaving. She added that he was angry and unhappy, was shuffling, and had a personality change. All he did was watch television.

Dr. Stern saw Mr. Stark that day but was unable to get a clear history. She noted that he did not seem like his former self, smelled like urine and had a fever. She suspected that he had a urinary tract infection, and referred him to the emergency room

at NYU. There he was admitted and Dr. Freedman was called in to see him. Dr. Freedman noted his impression of mild dementia. Dr. Stern saw him the next day, May 23, and assessed his status as stable. She discharged him on that date. But on May 24, 2003, he returned to NYU. His complaints on that day in the Emergency Room were fever, urinary incontinence, lethargy and altered mental state. He was readmitted. He was also noted to have gait difficulty.

At this point Dr. Gopinathan was called in to see the patient for a consultation on May 25. He had not seen Mr. Stark since June 5, 2001 at his office. On this day, May 25, 2003, Dr. Gopinathan performed only a brief exam to rule out signs of a central nervous infection which was what he was concerned about. Therefore, he entered no orders and opined that Mr. Stark was ready to go home. But he did not.

Dr. Freedman then saw him on May 27, 2003. Dr. Stern saw him that same day. Finally, on May 28, 2003, he was seen again by Doctors Freedman and Gopinathan. It appears that on May 28, 2003, a CT scan without contrast had been ordered. It was to be followed by a lumbar puncture. However, the scan was cancelled and neither procedure was ever rescheduled. Plaintiff's expert opines that this was a further departure because this CT scan and puncture would have revealed the presence of NPH.

After his hospitalization, Mr. Stark continued to see Dr. Freedman and Dr. Stern in their respective offices. As Mr. Stark did the year before in November 2003, he and his wife moved to Florida for the winter months. There he would be treated by Florida doctors. However, during that time, Dr. Stern did speak to Dr. Jeffrey Sutton, a Florida cardiologist.

Mr. Stark next saw Dr. Stern on June 2, 2004, where he complained of shortness of breath, vague chest pains, fatigue and back pain. She ordered various tests, which included wearing a Holter monitor and undergoing a stress echocardiogram. The latter showed abnormalities consistent with coronary artery disease. Several days later, Mr. Stark saw Dr. Freedman who examined him, viewed test results and concluded that Mr. Stark had angina, diabetes, polyneuropathy, atrial fibrillation, aortic stenosis and depression.

The following month, on July 7, 2004, Dr. Stern met with Mr. Stark, his wife, and their son Lyle, who was a Physician's Assistant at St. Michael's Hospital in New Jersey. Dr. Stern discussed with them a cardiac catheterization, and it was decided that it should be done at St. Michael's. Soon thereafter, Mr. Stark did undergo an angiogram where he had two shunts implanted.

In August 2004 Dr. Stern met with Mr. Stark and discussed his having cramps that were altering his walking. She ordered a lower Doppler study, which disclosed mild to moderate vascular abnormalities but without severe blockages. August 20, 2004 was the last visit Mr. Stark had with Dr. Freedman. That doctor noted the same impressions that he had made on earlier occasions. Mr. Stark then saw Dr. Stern on September 2004, where she found that the patient's cardiac condition was stable. Again, the Starks went to Florida for the winter.

On June 30, 2005, Mr. Stark saw Dr. Stern for the last time. At that visit, he made complaints of cramps and dizziness. After testing him, Dr. Stern ruled out cardiac issues as a cause of his symptoms. Though this was Mr. Stark's last visit with Dr. Stern, the following month they talked about test results.

On July 18, 2005, Mr. Stark saw Dr. Kiprovski at the Hospital for Joint Diseases who believed that Mr. Stark was suffering from progressive gait difficulty. This same doctor, in September 2005, ordered a lumbar puncture, which led to an NPH evaluation in October by Dr. Heros, followed in December 2005 by the placement of a right VP shunt.

As discussed earlier, after this procedure Mr. Stark had a panoply of complications. In fact, on February 17, 2006, Dr. Heros diagnosed Mr. Stark with an altered mental state as well as NPH. Mr. Stark also suffered from two hematomas that had to be drained. It is clear that after the placement of the shunt in late 2005, Mr. Stark's condition worsened. In October 2006, a CT scan of his brain showed fluid collection, but the shunt, placed a year earlier, was still in place.

It is on these facts that Dr. Bodenheimer, advocating for Doctors Stern and Freedman, opines with a reasonable degree of medical certainty after reviewing all the records, the EBT's and Bills of Particulars that a diagnosis of NPH was unlikely because of the absence of the earlier-mentioned triad of symptoms that are associated with that condition. As stated before, that triad consisted of progressive dementia, urinary incontinence, and a magnetic gait.

Dr. Bodenheimer states that at all times during Dr. Stern's treatment of Mr. Stark, the doctor acted in accordance with good and accepted standards of cardiologic practice. He opines that there was no reason for Dr. Stern to suspect NPH because Mr. Stark had never presented with this triad of symptoms.

Dr. Bodenheimer similarly opines that Dr. Freedman acted in accordance with accepted medical practice. Why? Because from June 4, 2002 up until August 20,

2004, Mr. Stark again did not simultaneously exhibit the triad of symptoms necessary for NPH. Because of the failure to exhibit these symptoms, Dr. Bodenheimer opines that Dr. Freedman had no reason to refer Mr. Stark for a lumbar puncture and further that the risks associated with the puncture far outweighed the benefits. With regard to NYU, Dr. Bodenheimer opines that the staff acted properly in all respects. Further, he notes with regard to NYU's responsibility or lack thereof for Mr. Stark's treatment while he was hospitalized in May 2003, that at all times Mr. Stark had private physicians of his own choosing who were in charge of his care.

With regard to Dr. Gopinathan, I stated earlier that it was Dr. Jeffrey Kessler, a neurologist as is Dr. Gopinathan, who reviewed all the records, depositions and Bills of Particulars and provides opinions regarding Dr. Gopinathan's care with a reasonable degree of medical certainty. Not surprisingly, Dr. Kessler states that there was no reason to suspect NPH in December 1999 when the doctor and patient first met because there was no triad of symptoms. Dr. Kessler adds that Dr. Gopinathan's diagnosis of proximal myopathy and lumbar spondylosis, as confirmed by the MRI, was proper.

When Dr. Gopinathan tested Mr. Stark's memory in June 2001, he found no progressive dementia. He also found that the patient walked normally and made no complaints of urinary incontinence. Because of these symptoms or lack thereof, Dr. Gopinathan diagnosed Mr. Stark as having a mild axonal neuropathy. This is a disease of the peripheral nerves, whereas NPH is a disease of the brain.

In May 2003, while Mr. Stark was an inpatient at NYU, Dr. Gopinathan was called in as a consultant. At the time, he was concerned that his patient had an

infection of the brain, which he did not. But Dr. Gopinathan had no reason to consider NPH. Further, Dr. Kessler points out that Mr. Stark first complained of urinary problems in November 2006, long after his last visit with Dr. Gopinathan,[1] although as previously mentioned Stark complained of urinary incontinence at his May 2003 admission to NYU.

This decision has previously discussed the opinions on causation given by Dr. Cohen. There is no reason to repeat them. All in all, this Court concludes with regard to Dr. Gopinathan, Dr. Stern, Dr. Freedman and NYU that the defendants have presented a prima facie case as to summary judgment on each one's behalf. Therefore, the question arises whether the opinions given by plaintiff's expert internist are sufficient to create issues of fact with regard to any or all of these defendants.

I find that plaintiff's opposition is not sufficient as to Dr. Stern, NYU and Murray Hill Medical Group, the group with whom Dr. Stern was connected. But it is sufficient with regard to Doctors Gopinathan and Freedman.

This Court will not repeat the discussion previously provided with regard to the opinions concerning NPH. Not only did plaintiff's expert explain why less than a triad of symptoms should lead one to a diagnosis of NPH, but he also pointed to the various visits and the NYU May 2003 admissions in which Mr. Stark exhibited at least two of these symptoms. He also explains that because of the existence of these symptoms, Doctors Gopinathan and Freedman were obliged to consider NPH in their differential

---

[1]There is also an affidavit submitted by Mr. Michael Browdy, who is Director of Insurance at NYU Hospitals Center. He confirms that neither Dr. Gopinathan, Dr. Freedman, or Dr. Stern were employees of the hospital.

diagnoses and discuss that possibility with Mr. Stark. It was for Mr. Stark to decide whether or not the risks of a lumbar puncture and shunt placement outweighed the benefits.

According to plaintiff's expert, it was probable that the benefits in 2002 and 2003 far outweighed the risks. Again as noted, this expert opines that going down the path of the VP shunt placement would have given Mr. Stark an appreciably better life between 2002 and 2005 or between 2003 and 2005. He explains that in his opinion, Mr. Stark's symptoms would not have progressed as they did if the shunt had been placed. Instead, his weakness, walking and memory would have improved. In his affirmation, this expert also notes that Lyle Stark, the decedent's son and a certified Physician's Assistant, testified to his own observations that his father's symptoms were progressively worsening in 2002 and beyond.

In reply, counsel for the moving defendants argues that the expert's statement on behalf of the plaintiff should be disregarded. She urges that the statements and opinions are conclusory, speculative and delivered by someone without credentials. I disagree with all of those characterizations. The expert for the plaintiff is board certified in internal medicine. Further, the expert is on the staff of a major metropolitan hospital and has an active practice that includes the care, diagnosis and treatment of patients like Mr. Stark. He/she also is familiar with the issues in this case, which the statement then outlines. Finally, the expert is familiar with the medical literature relevant to these issues.

In the reply, counsel submits an additional affidavit from Dr. Cohen, who explains why the CT scan was cancelled in 2003. However, that statement will not be

considered because it is new material, not previously given and provides no opportunity for a response by the plaintiff.

Finally, I am granting the motion by Dr. Stern because no one opines on behalf of the plaintiff that she was negligent in any way in her care of Mr. Stark's cardiac condition or as to her failure to diagnose NPH. As to NYU, in light of the fact that during the decedent's hospitalizations at that institution, Mr. Stark was treated by doctors of his choosing who were not employees of NYU, there is no reason to keep the hospital in this action. As to Murray Hill, it is its association with Dr. Stern that led to its inclusion as a defendant. Therefore, since I am dismissing the action as against Dr. Stern, the action should be dismissed as against this facility should as well.

Accordingly, it is hereby

ORDERED that the motion of defendants Alexandra Stern, M.D., Murray Hill Medical Group, P.C., and NYU Hospitals Center for summary judgment dismissing the complaint against them is granted, and the complaint is dismissed in its entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion is denied with respect to the remaining defendants, and the action is severed and continued against the remaining defendants, who shall appear in room 222 on March 4, 2015 at 9:30 a.m. for a pre-trial conference to discuss settlement and select a trial date.

Dated: February 23, 2015

ALICE SCHLESINGER