

Soboloff v Flores
2018 NY Slip Op 32100(U)
August 27, 2018
Supreme Court, New York County
Docket Number: 805362/14
Judge: Martin Shulman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X
SUZANNE SOBOLOFF, as Administrator of the Estate
of MARTIN THEODORES,

Index No.: 805362/14

Plaintiff,

Decision & Order

-against-

RAJA M. FLORES, M.D., THE MOUNT SINAI MEDICAL
CENTER A/K/A THE MOUNT SINAI HOSPITAL and
MOUNT SINAI DOCTORS FACULTY PRACTICE,

Defendants.
-----X

In this action alleging medical malpractice and wrongful death, plaintiff Suzanne Soboloff, as Administrator of the Estate of Martin Theodore ("Soboloff" or "plaintiff"), moves pursuant to CPLR 2221(e) for renewal of this court's decision and order dated December 15, 2017 and filed December 20, 2017 (the "decision"), which dismissed this case and granted summary judgment in favor of Defendants Raja M. Flores, M.D. ("Dr. Flores"), Mount Sinai Doctors Faculty Practice and The Mount Sinai Hospital s/h/a The Mount Sinai Medical Center a/k/a The Mount Sinai Hospital ("Mt. Sinai") (collectively referred to as "defendants"). Defendants oppose the motion to renew.

History

This is a medical malpractice and wrongful death action arising from the medical care and treatment defendants rendered to plaintiff's decedent, Martin Theodore ("Mr. Theodore" or "decedent"). Soboloff's complaint alleged that defendants failed to diagnose a malignant liver mass, failed to inform plaintiff's decedent of the mass and potential treatment options and failed to refer Mr. Theodore to a specialist. As a result thereof, plaintiff alleged that Mr. Theodore was denied the opportunity to undergo

potentially lifesaving treatment and experienced significant and unnecessary pain and suffering prior to his death. Reference is made to the decision, which sets forth an extensive factual history and summarizes the parties' arguments on the underlying motion, which will not be repeated herein.

The decision granted defendants' motion for summary judgment, finding that defendants made a prima facie showing of entitlement thereto, which plaintiff failed to rebut. Specifically, the decision found that plaintiff's expert's opinion in opposition was not supported with any "medical research, clinical studies or statistics" and was conjectural and speculative. This court stated that plaintiff offered no specifics of the "body of literature" her expert, Aymen Elfiky, M.D. ("Dr. Elfiky"), referenced in his affidavit, in which he opined *inter alia* that defendants' treatment deprived Mr. Theodores of opportunities for life prolonging and/or curative interventions. As a result, this court found there were no issues of fact as to whether defendants departed from accepted medical practice or whether any alleged departure proximately caused the decedent's injuries.

Plaintiff now seeks to renew the underlying motion and in support of her application submits another affidavit from Dr. Elfiky "intended to clarify" his prior affidavit by now including various medical literature supporting his opinions. See Motion at Exh. M, ¶ 6 ("Elfiky Aff."); and Exhs. N through Q. Dr. Elfiky opines, "with a reasonable degree of medical certainty, that the Defendants departed from accepted medical practice, and that these departures deprived Mr. Theodores of the opportunity to undergo potentially life-extending treatment, and were a significant factor in causing

unnecessary and significant pain and suffering to Martin Theodores." Elfiky Aff., ¶ 25.

More specifically:

- decedent's lung cancer which had metastasized to his liver was treatable;
- had Mr. Theodores been timely diagnosed and treated, it is probable that his life expectancy would have been enlarged as potentially curative treatment was available;
- Mr. Theodores was a candidate for aggressive radiotherapy (RT) ablation, hypofractionated image-guided radiotherapy (HIGRT), stereotactic ablative radiotherapy (SABR), stereotactic body radiotherapy (SBRT) and/or embolization (collectively, the "potential treatments"); and
- medical literature supports these opinions, such as the National Comprehensive Cancer Network ("NCCN") Clinical Cancer Guidelines in Oncology (Motion at Exh. N) and various medical articles and research studies (*id.* at Exhs. O through Q).

Plaintiff's Arguments in Support of Renewal

In support of renewal, plaintiff's counsel focuses on submitting allegedly "new evidence" not included in the prior papers, specifically regarding oligometastatic¹ non-small cell lung cancer ("NSCLC"), in order to establish that Dr. Elfiky's opinion is based on accepted medical research and studies. Plaintiff does not seek reargument of the many disputed "questions of fact".

Plaintiff contends that CPLR 2221(e)(2) does not require that new evidence, which was not offered on the prior motion, be newly discovered. Here, plaintiff's new

¹ Oligometastatic disease is a type of metastasis in which cancer cells from the original primary tumor travel through the body and form a small number of new tumors in one or two other parts of the body. Although imaging revealed that the decedent had only one liver tumor which potentially could have been oligometastatic, defendants' expert, Mark A. Fialk, M.D. ("Dr. Fialk"), concludes that it is not possible for Dr. Elfiky to determine with certainty, in retrospect, that Mr. Theodores' NSCLC was oligometastatic because the appearance of only one metastatic site on imaging does not exclude other distant micrometastatic disease.

evidence includes the NCCN Guidelines (*id.* at Exh. N) and medical articles and research studies regarding treatment of oligometastatic (Stage IV) NSCLC (*id.* at Exhs. O through Q). Through this literature, plaintiff attempts to demonstrate that Dr. Elfiky's conclusions are medically supported and foundationally strong, rather than conjectural and speculative. Soboloff also contends that this literature regarding treatment of Stage IV lung cancer is accepted medical care and found reliable by the relevant scientific community.

Plaintiff's counsel explains that she did not submit the guidelines and medical literature previously because she "naively and incorrectly assumed that the sworn Affidavit of Dr. Elfiky, an oncologist at Dana Farber Cancer Institute, one of the leading cancer research and treatment institutions in the world, would be sufficient" to rebut defendants' expert, based on his education and training, his experience, his knowledge of the literature, and the NCCN Guidelines (Dennehy Aff. in Supp. of Motion, ¶17). Plaintiff's counsel also notes, "In retrospect, I should have submitted some of the ample and well accepted medical literature that supported this medical opinion" (*id.*).

Defendants' Arguments in Opposition to Renewal

Defendants oppose the motion to renew and contend it should be denied and the decision stand on the grounds that plaintiff's counsel has neither factually nor legally demonstrated entitlement to *any* type of CPLR 2221(e) relief. Defendants contend that "the law is clear that a motion to renew should be based on 'new' facts" and Soboloff's "new" evidence consists of articles, published between 2012 and 2016, which summarize medical studies based on clinical data and were available to plaintiff and Dr.

Elfiky at the time plaintiff opposed the motion for summary judgment. Weinberger Opp. Aff., ¶11.

Defendants also dispute that Soboloff has provided a reasonable justification for her failure to submit the “new” supporting evidence on the prior motion, and urge this court to decline to exercise its discretion in the interest of justice and/or substantive fairness to overlook this oversight. They also note that the renewal motion addresses only the issue of proximate cause without addressing whether defendants departed from the applicable standard of care. Lastly, defendants contend that renewal is unwarranted because Dr. Elfiky's current affidavit fails to causally connect the defendants' alleged malpractice and plaintiff's decedent's death in a non-conclusory manner (*id.* at ¶6).

Discussion

Motions to renew are governed by CPLR 2221(e), which establishes three requirements that the moving party must satisfy, stating as follows:

A motion for leave to renew

(1) shall be identified as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

Motions for leave to renew are “intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention.” *Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 (1st Dept 2007), citing *Garner v Latimer*, 306 AD2d 209, 209 (1st Dept 2003). “Renewal should be denied where the

party fails to offer a valid excuse for not submitting the additional facts upon the original application." *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979). It "is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation (citation omitted)." *Chelsea Piers Mgmt. v Forest Elec. Corp.*, 281 AD2d 252, 252 (1st Dept 2001).

However, In applying CPLR 2221(e)(3), the First Department has, on occasion, taken a flexible approach in allowing for the "discretion to relax this requirement and to grant a motion [for leave to renew] in the interest of justice (citations omitted)." *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003) (renewal granted in the interest of justice despite moving party's failure to offer an excuse for failing to offer new evidence in support of the initial motion) (bracketed matter added). See also *Poag v Atkins*, 3 Misc3d 1109(A) (Sup Ct, NY County 2004) ("courts retained broad discretion to grant renewal, in the interest of justice, upon facts known to the moving party at the time of the prior motion").

Here, plaintiff concedes that the guidelines, journal articles and medical studies she now proffers, which date from 2012 through 2015, were available at the time of the original summary judgment motion and were known to her expert. Soboloff's counsel's justification for not including same, to wit, that she "naively and incorrectly assumed" that Dr. Elfiky's affidavit would be sufficient, expressly admits a failure to exercise the due diligence required for renewal.

Nevertheless, this court is empowered to exercise its discretion to grant renewal in the interest of justice and substantive fairness. See *Mejia, supra*; *Poag, supra*; *Rancho Santa Fe Assn., supra*; *Garner v Latimer*, 306 AD2d at 209-210. In this case,

plaintiff's motion for renewal must be denied as the circumstances do not warrant the court's exercise of such discretion.

Putting aside the weak excuse for not submitting the evidence in question during the first round of motion practice, plaintiff's expert's affidavit in support of renewal remains insufficient to establish that issues of fact exist warranting denial of summary judgment in defendants' favor. Accordingly, granting renewal would not serve the interest of justice or defeat substantive fairness.

Defendants contend that plaintiff's renewal motion focuses only on the issue of proximate cause without addressing whether or not they deviated from the applicable standard of care. This is incorrect, as plaintiff's expert does in fact aver that the NCCN Guidelines set forth the standard of care for oligometastatic NSCLC. See Elfiky Aff., ¶23. Dr. Elfiky opines that defendants departed from this standard of care by not offering Mr. Theodores the potential treatments discussed therein, as well as in other articles attached to the moving papers. Dr. Elfiky merely states that it was "probable" that the potential treatments would have prolonged the decedent's life or possibly cured him.

However, while Dr. Elfiky concludes that the standard of care required pursuit of these potential treatments, he offers only speculative support for this opinion in his present affidavit and reply affidavit. As painstakingly discussed in Dr. Fialk's affidavit submitted in opposition to the renewal motion, the materials plaintiff now proffers to support Dr. Elfiky's conclusions do not substantiate his claims. See Weinberger Opp. Aff. at Exh. A ("Fialk Aff."); Motion at Exhs. N through Q. The NCCN Guidelines and cited articles all conclude that further studies are needed to assess the efficacy and

safety of the various potential treatments. Dr. Fialk states, and Dr. Elfiky does not refute, that a method of treatment does not become accepted in the medical community until it is proven to be effective and safe, at a minimum, in a randomized Phase III clinical study. Fialk Aff., ¶19. The studies Dr. Elfiky relies upon evaluate only Phase I and Phase II clinical trial data regarding the potential treatments.

For example, contrary to Dr. Elfiky's claims, the 2012 NCCN Guidelines² indicate that patients with metastatic NSCLC such as the decedent "are not candidates for aggressive treatment". See Weinberger Opp. Aff., Ex. G, p 1255. Rather, the 2012 NCCN Guidelines state the following with respect to the standard of care:

Systemic therapy (consisting of chemotherapy, targeted therapy, or a combination), clinical trials, and/or palliative treatment are commonly used to treat patients with metastatic NSCLC.

Id. at pp 1254-1255.

The 2012 NCCN Guidelines do not suggest that a patient having NSCLC with liver metastasis is a candidate for SABR/SBRT or any type of RT to treat liver metastasis. At most, these guidelines note that studies "suggest that SABR can be used for bone, liver, and brain metastases." *Id.* at p 1258.

As a further example, plaintiff's expert relies upon a 2015 article entitled *The Biology and Treatment of Oligometastatic Cancer*³ (Motion at Exh. O), which is

² Soboloff's motion submits portions of the 2018 NCCN Guidelines (Motion, Ex. N), which are irrelevant to determining the standard of care during the decedent's treatment, to wit, 2011-2013. Defendants' opposition includes the entire 2012 version of the NCCN Guidelines (Weinberger Opp. Aff., Ex. G).

³ Reyes, Diane K., Pienta, Kenneth J., *Oncotarget*, Vol. 6, No. 11 (2015): www.impactjournals.com/oncotarget.

inapplicable to evaluate the treatment rendered to Mr. Theodores between 2011 and 2013. Further, this article discusses oligometastasis, yet Dr. Elfiky does not address Dr. Fialk's conclusion that it is impossible to determine if the decedent's cancer was oligometastatic. This, combined with the article's conclusion that further studies are required, calls into question the article's applicability.

Dr. Elfiky opines that if Mr. Theodores had been diagnosed with liver metastasis in December 2011 he would have received SBRT/SART/HIGRT through a clinical trial. However, whether an earlier diagnosis would result in acceptance to and participation in a clinical trial is entirely conjectural. Indeed, there is no indication that any clinical trial was available to the decedent at the time. This opinion also rests upon the assumption that Mr. Theodores would choose to participate in a trial and that the trial would result in a durable response. See *Miller v Ford*, 2018 WL 1087814, 2018 NY Slip Op 30370[U] (Sup Ct, NY County) (Shulman, J.) (plaintiff's theory that alternate treatments existed which the decedent could have obtained through emerging clinical trials is too conjectural to raise any triable issue of fact).

For the foregoing reasons, Dr. Elfiky does not establish with any certainty that Mr. Theodores would have had a positive response to any of the potential treatments and/or clinical trials. Nor does he establish that the standard of care required defendants to offer the decedent potential treatments that were still the subject of research to determine their efficacy and safety. On renewal, plaintiff fails to offer sufficient proof to change this court's prior determination that no questions of fact exist and summary judgment in defendants' favor is warranted.

NYSCEF DOC. NO. 167

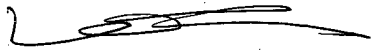
RECEIVED NYSCEF: 08/27/2018

Accordingly, it is

ORDERED that plaintiff's motion for renewal is denied.

This constitutes the decision and order of the court.

Dated: August 27, 2018



Hon. Martin Shulman, J.S.C.