

<b>Fiszer v Gliwa</b>
2019 NY Slip Op 33007(U)
October 2, 2019
Supreme Court, Kings County
Docket Number: 510656/2015
Judge: Ellen M. Spodek
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At an IAS Term, Part 63 Of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of October 2019.

PRESENT:

HON. ELLEN M. SPODEK, Justice

-----X  
WIESLAWA FISZER, as the administrator of the estate of MARIUSZ FISZER, deceased, and WIESLAWA FISZER, individually,

Plaintiffs,

-against-

AGNIESZKA GLIWA, M.D., SHUJA QADIR, M.D., MANHANTAN AVENUE MEDICAL PRACTICE, PLLC., and MANHATTAN MEDICAL,

Defendants.  
-----X

**DECISION AND ORDER**

Index No.: 510656/2015

*MS#2*

**Papers**

**Numbered**

Notice of Motion.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>

Defendant Shuja Qadir, M.D., moves for an order pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes the motion.

Mariusz Fiszer was a 52-year-old male at the time of his death on February 21, 2014. This medical malpractice suit is brought by his wife, Plaintiff, Wieslawa Fiszer. Mr. Fiszer was a patient of Dr. Agnieszka Gliwa's, a general practitioner and board-certified internist, since April 23, 2009. Both Dr. Gliwa and defendant Dr. Qadir practiced at 934 Manhattan Avenue, Brooklyn, New York. Mr. Fiszer was seen regularly by Dr. Gliwa between the first office visit in April 2009 and

his last visit on February 5, 2014. Most of Mr. Fiszser's visits with Dr. Gliwa were related to issues such as depression, GERD, and low vitamin counts. Throughout Dr. Gliwa's care, Mr. Fiszser's HDL cholesterol was sometimes low, however, his lipid profile was normal. Dr. Gliwa testified that in her view, Mr. Fiszser did not have any risk factors for cardiac disease as he was not obese, not a smoker, and had satisfactory lipid levels. EKG's were performed throughout Dr. Gliwa's care, which she interpreted as normal.

On January 31, 2014, Mr. Fiszser arrived via ambulance to Wyckoff Hospital with complaints of shortness of breath and chest pain. His blood pressure was 165/100 and he was complaining of 8/10 pain in his chest. Blood work and an EKG were performed, however, he left the hospital against medical advice. Mr. Fiszser went to see Dr. Gliwa on February 5, 2014, complaining of shortness of breath and left arm numbness. An EKG was done at that time and Mr. Fiszser was referred to defendant Dr. Qadir, a board-certified cardiologist. Defendant Dr. Qadir saw Mr. Fiszser later that day, when Mr. Fiszser told defendant Dr. Qadir he had complaints of chest pain a week prior when he visited Wyckoff Hospital Medical Center. Mr. Fiszser told defendant Dr. Qadir that he was treated and discharged with a diagnosis of the flu. Defendant questioned Mr. Fiszser whether he had any cardiac history. He denied having cardiac issues. Mr. Fiszser offered the histories of his father, who died from alcohol abuse, his mother who died from natural causes, and his son who died from Marfan syndrome. Mr. Fiszser presented as having no current complaints and defendant Dr. Qadir concluded that the patient's chest pains were nonconforming to coronary disease. Defendant Dr. Qadir ordered tests to be done, however they were not expedited. An EKG, was done on February 19, 2014 and was found to be normal. A stress test was scheduled for March 5, 2014, however Mr. Fiszser passed away on February 21<sup>st</sup>, before the stress test could be done.

Plaintiff testified at her deposition that her husband had a history of cardiac issues, including his father who passed away from a heart attack.

Defendant argues that the summary judgment motion should be granted because the plaintiff's expert based his opinion on hearsay evidence, namely the plaintiff's deposition testimony regarding her husband's cardiac family history. This cardiac family history was not in her husband's medical records, and was not information that the defendant would have any reason to know. Defendant argues that he was told by plaintiff's husband that there was no history of cardiac disease. Defendant contends that plaintiff cannot sustain her burden opposing summary judgment with an opinion of an expert which is based on hearsay evidence.

Plaintiff opposes the motion and submits an affidavit from a doctor, Americo A. Simonini, licensed to practice in the State of New York and California. Dr. Simonini is board certified in cardiovascular disease and internal medicine. Dr. Simonini stated that he is familiar with the standards of care in the areas of cardiology and cardiovascular medicine, and for the evaluation, detection, and treatment of coronary artery disease, including acute coronary syndrome, congestive heart failure, and cardiovascular disease. Dr. Simonini opined that "Dr. Qadir's departures from good and accepted medical practice were a substantial factor, in causing the pre-mature and unnecessary death of Mariusz Fiszer, due to a cardiac arrest—ventricular tachycardia and fibrillation—following an otherwise preventable acute myocardial infarction as a result of severe coronary artery stenosis which was not diagnosed or treated by Dr. Qadir." Aff. In Opp., Exh. A, p. 4.

In order to succeed on a motion for summary judgment, a defendant must establish the absence of any departure from good and accepted practice, or if there was a departure, that the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care*

*Corp.*, 120 A.D.3d 1287 (2<sup>nd</sup> Dept. 2014); *Stukas v. Streiter*, 83 A.D.3d 18, 24-26 (2d Dept. 2011). Following the defendant making such a showing, the burden shifts to the plaintiff to submit evidentiary materials to rebut the prima facie showing made by the defendant, in order to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.* 68 NY2d 320, 324 (1986); *Brinkley v. Nassau Health Care Corp.*, *supra*; *Fritz v. Burman*, 107 A.D.3d 936, 940 (2d Dept. 2013); *Lingfei Sun v. City of New York*, 99 A.D.3d 673, 675 (2d Dept. 2012); *Bezerman v. Bailine*, 95 A.D.3d 1153, 1154 (2d Dept. 2012); *Stukas v. Streiter*, at 24. The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas*, at 24.

After oral argument and a review of the papers, the Court finds that defendant has sustained his burden of showing that he did not depart from good and accepted medical standards. The burden then shifted to plaintiff to offer evidence to the court that the defendant did deviate from the accepted standards of medical care, raising a triable issue of fact. The Court finds that plaintiff has not sustained her burden as to defendant.

Plaintiff's expert states that defendant departed from good and accepted practice by failing to diagnose the patient with an elevated risk for coronary artery disease and major adverse cardiac events. The defendant was never made aware of any family history of cardiac disease of Mr. Fiszer. Defendant testified that he asked Mr. Fiszer whether there was any cardiac disease in his family and the patient denied having a history of cardiac disease. Plaintiff's expert relied on a family history that is not supported by any documentation or medical record, only the self-serving testimony of the decedent's wife, which is hearsay. Plaintiff's expert offers contradictory opinions when he states that the defendant departed from good and accepted practice by failing to take a proper and complete medical history, but then stating that the defendant departed from good and

accepted practice by failing to diagnose cardiovascular disease while having knowledge of the patient's increased risk due to his family history. Plaintiff's expert is assuming that the decedent's wife was truthful at her deposition and the decedent was not truthful when giving his family history to the defendant. Such an assumption cannot be the basis to deny summary judgment.

Plaintiff's expert fails to offer a standard of care for the alleged departure for failing to obtain the patient's hospital records. The defendant relied on the facts that were given to him by his patient and he had no reason to believe that the patient was not being truthful. Further, plaintiff's expert concludes that because of obvious risk factors, an EKG, stress test, and other diagnostic tests should have been expedited. As stated above, there were no obvious risk factors for cardiac issues and therefore, the tests were scheduled within the standard time.

Plaintiff's expert relies on information that was not available to defendant and any reliance on an alleged family history of cardiac issues is speculative. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." *Diaz v. New York Downtown Hosp.*, 99 NY2d 542 (2002). Here, Plaintiff's expert affidavit is purely speculative, inconsistent with the evidence, and insufficient to defeat summary judgment in this case. Without an expert's affidavit, plaintiff cannot sustain her burden to show that there are issues of fact sufficient to defeat summary judgment.

The motion by defendant is granted in its entirety, and plaintiff's complaint is severed and dismissed as to Dr. Shuja Qadir, and the Clerk of the Court is directed to enter Judgment accordingly.

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JSC  
NOW FILED  
2019 OCT -7 AM 8:10  
KINGS COUNTY CLERK  
FILED  
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