

Chillious v Edouard
2020 NY Slip Op 32144(U)
July 2, 2020
Supreme Court, Kings County
Docket Number: 522699/17
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 July 2020

PRESENT: HON. ELLEN M. SPODEK, Justice
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OVEDA CHILLIOUS as Administrator of the Estate
Of TIFFANY CHILLIOUS,
Plaintiffs,

Index # 522699/17

-against-

KATHLEEN EDOUARD, M.D., EVA RUBIN, M.D.,
ADVANTAGECAREPHYSICIANS, P.C., and
KIMESHA CLARK, N.P.,
Defendants.

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Defendant Kathleen Edouard, M.D. moves for an order pursuant to CPLR §3212 for summary judgment dismissing Plaintiff’s complaint against her in its entirety and with prejudice. In the alternative, Defendant Edouard asks for partial summary judgment as to any Defendant and any theory of liability that the Plaintiff has failed to raise an issue of fact. Co-Defendant Kimesha Clark, N.P. cross-moves for an order pursuant to CPLR §3212 for summary judgment dismissing the complaint against her on the grounds

that no triable issue of fact exists and that there is no basis for the claims made by the Plaintiff. Plaintiff opposes both motions.

Plaintiff claims that Defendant Dr. Edouard failed to diagnose thrombophlebitis during a course of treatment from June 27, 2013 thru August 31, 2015, allegedly causing the Decedent's December 9, 2015 death from cardiac arrest secondary to a pulmonary embolism. In addition, Plaintiff claims that NP Clarke failed to investigate, diagnose and treat Decedent for deep vein thrombosis when she presented to her on December 2, 2015.

Decedent Tiffany Chillious was a patient of Defendant Dr. Edouard. On June 27, 2013, then thirty-one years old, she presented to ADVANTAGECAREPHYSICIANS, P.C. and was seen by Dr. Edouard for complaints of intermittent dull pain in the right knee without any precipitating injury. Ms. Chillious was considered morbidly obese (5 feet 6 inches tall and weighed 285 pounds) and she reported to Dr. Edouard that the dull right knee pain was aggravated by walking and had been present for two months. At the time of the visit, Ms. Chillious had a heart rate of 63 beats per minute, her blood pressure was 126/86 and her pulse oximetry at rest was 100%. Decedent allegedly made no complaints of leg swelling or tenderness. Dr. Edouard counseled the Decedent on obesity and weight reduction, ordered an x-ray of the right knee and recommended over-the-counter pain medications as necessary.

On August 29, 2014, Decedent returned to Dr. Edouard for her yearly physical exam. During this appointment her weight was recorded at 290 pounds, her blood pressure was noted as 132/76, her pulse rate 75 and with 99% oxygen saturation at rest. Dr. Edouard reviewed and updated the Decedent's history and performed a physical examination for morbid obesity and tenderness of the left ear. A review of the pulmonary system was negative for shortness of breath and an examination of the lower extremities

(musculoskeletal) was negative for any tenderness, swelling, or discoloration. Dr. Edouard's impression was that of a left ear infection. She prescribed antibiotic drops for treatment.

On August 31, 2015, Decedent returned for her yearly physical and was seen by Dr. Edouard. During this visit, the Decedent reported a six-month history of shortness of breath upon exertion and climbing stairs. She relayed to Dr. Edouard that she had been to the emergency room four times with respect to these complaints. The Decedent explained that the chest x-rays and EKG studies performed during those four emergency presentations were normal, and that the hospital had treated her for asthma with a nebulizer and inhaler treatments that provided relief of her shortness of breath. Dr. Edouard reviewed and updated the Decedent's medical history and performed a physical examination that was negative for complaints of leg swelling, tenderness, or discoloration. At this visit, Decedent weighed 297 pounds and the oxygen saturation was 98% on room air, her heart rate was within the normal limits and tachycardic. Dr. Edouard counseled Decedent on losing weight and potential bariatric surgery, which the Decedent declined. Dr. Edouard referred the Decedent for a pulmonary consult to ascertain the sitology underlying her complaints of shortness of breath. This was the last time the Decedent saw Dr. Edouard. The pulmonary consult was scheduled for October 9, 2015; this appointment was cancelled prior to that date.

On November 24, 2015, Decedent returned to ADVANTAGECARE for the pulmonology function testing. At that time the spirometry testing revealed a lung capacity of 75% and band diffusing capacity of 56%. The Decedent was to return on December 4, 2015.

On December 2, 2015, the Decedent presented to Co-defendant Kimesha Clarke, N.P. with complaints of a one-week history of shortness of breath and an episode of painful coughing on November 30, 2015. Nurse Clarke documented an absence of lower extremity swelling or pain/tenderness and measurement of oxygen saturation revealed a reading of 99% and the absence of tachycardia. She also documented the absence of known risk factors for DVT/PE (deep vein thrombosis/ pulmonary embolism). These conditions were ruled out.

On December 4, 2015, Ms. Chillious returned to ADVANTAGECARE to discuss the result of the November 24, 2015 pulmonary function testing. She presented to Dr. Rubin who noted the referral from Dr. Edouard. Dr. Rubin noted that Decedent experienced shortness of breath on exertion, excessive snoring and morbid obesity. Dr. Rubin noted that she experienced relief of the shortness of breath upon resting. Decedent admitted to excessive snoring for three years and excessive daytime sleepiness for which Dr. Rubin recommended an evaluation for sleep apnea. The physical examination showed coarse breathing sounds bilaterally, productive cough and Dr. Rubin diagnosed acute bronchitis. Dr. Rubin prescribed Albuterol for nebulization and a seven-day course of amoxicillin. Additionally, she was referred to Sleep Medicine Service for further evaluation.

On December 9, 2015, the Decedent was transported to Brookdale University Hospital Medical Center by EMS after having trouble breathing at home. She arrived in the Emergency Department at 9:00am in cardiac arrest. The Decedent's past medical history was significant for asthma and obesity. Dr. Jane Wu noted that Plaintiff Oveda Chillious reported that the Decedent complained of shortness of breath and cough for one-week prior and had denied any chest pain or leg swelling. At the deposition, Plaintiff

confirmed that Decedent made no complaints of shortness of breath or of any chest pain. Despite resuscitative measures, the Decedent's heart rhythm remained asystolic and was pronounced dead at 9:40am.

The Decedent's autopsy was conducted by Dr. Aglae of the Office of the Chief Medical Examiner of the City of New York on December 10, 2015. The Medical Examiner's Report listed the cause of death as "lower extremity phlebothrombosis with pulmonary thromboembolism due to obesity" and confirmed that the pulmonary embolism was a "recent" event.

Defendant Dr. Edouard submitted the affidavit of Dr. Brian Feingold, a board-certified doctor in internal medicine. He opines that all the care and treatment rendered to the Decedent by Dr. Edouard was at all times in conformance with standards of medical care as they existed during 2015. He also opined that there were no negligent acts or omissions on the part of Dr. Edouard, and that none of the alleged deviations proximately caused the injuries claimed by Plaintiff. At the June 27, 2013 presentation to Dr. Edouard, Decedent's vitals were within normal limits and upon a physical examination, there were no complaints of leg swelling or tenderness. He further states that the right knee aching pain was unrelated to the claims in this action from a temporal standpoint, as the condition of lower extremity thrombophlebitis is not chronic such that it would persist for a period of years before an acute event. Therefore, Dr. Feingold asserts that the treatment rendered by Dr. Edouard on the June 27, 2013 presentation was within accepted standards of medical care.

At the August 29, 2014 presentation to Dr. Edouard, the physical examination of the pulmonary system was negative for shortness of breath and examination of the lower extremities (musculoskeletal) was negative for any tenderness, swelling or discoloration.

He opines that the Decedent's presenting complaints were not indicative of lower extremity thrombophlebitis given the Decedent's lack of lower extremity swelling, pain and discoloration. Additionally, the patient's near perfect oxygen levels and the lack of shortness of breath were not indicative of pulmonary thromboembolic disease. Dr. Feingold opines that Dr. Edouard appropriately prescribed antibiotic eardrops for the Decedent's complaints of left ear pain.

The Decedent then presented to Dr. Edouard on August 31, 2015 with a five-month history of shortness of breath upon exertion. Based on the physical examination and the documentation, Dr. Feingold opines that the presentation was not indicative of, nor should it have caused suspicion of a thromboembolic process. Further, lower extremity thrombophlebitis is not a condition that would present chronically over five months, and the relief Decedent experienced with administration of asthma medication militates away from a diagnosis or suspicion of lower extremity thrombophlebitis with associated pulmonary embolism. Dr. Feingold states that Dr. Edouard adhered to the standard of care and committed no acts or omissions that could have caused or contributed to the injuries claimed herein. Dr. Feingold states that Dr. Edouard properly suspected a pulmonary etiology underlying the Decedent's complaints and immediately referred her for a further work up by a pulmonologist.

Dr. Feingold also addresses the intervening appointment with Co-Defendant Kimesha Clark, N.P. on December 2, 2015. Decedent presented to NP Clarke with complaints of shortness of breath upon exertion with an onset of November 25, 2015. It is his opinion that this episode is distinguishable from the earlier episodes during the five months preceding the August 31, 2015 appointment from the now current complaints beginning November 25, 2015. Additionally, NP Clarke noted that upon exam, there was

an absence of lower extremity swelling or pain/tenderness, and measurement of oxygen saturation was at 99%. Dr. Feingold opines that there was no lower extremity thrombophlebitis/pulmonary embolism present as of the December 2, 2015 office visit.

In conclusion, Dr. Feingold opines that the report of the autopsy further confirms that the pulmonary embolism was a “recent” acute event and could not have been detected during the final presentation to ADVANTAGECARE on December 4, 2015, much less at the time of the Decedent’s last appointment with Dr. Edouard on August 31, 2015. At all times Dr. Edouard acted within accepted standards of medical care and that none of the alleged acts or omissions set forth in the Plaintiff’s legal papers could have caused any of the injuries claimed therein. Dr. Feingold opines that Plaintiff’s claims for medical malpractice are without merit.

Co-Defendant Kimesha Clarke, NP submitted the affidavit of both Dr. Feingold and Dr. Preston L. Winters. Dr. Preston L. Winters is board certified in internal medicine. When NP Clarke saw the Decedent on December 2, 2015, she had complaints of shortness of breath upon exertion with an onset on November 25, 2015, only “one-week” prior. NP Clarke noted that the patient had been seen by a pulmonologist a week prior and was “awaiting test results”. The patient had received a bronchodilator pump, Albuterol but had not been using it. Her blood pressure at that visit was 116/80 with a pulse of 77. Her oxygen saturation was at 99%. The examination of her heart and lungs showed normal rate and regular rhythm with normal effort and breath sounds. There was no respiratory distress, no wheezing, no rales and no tenderness. NP Clarke also noted that patient “has no known risk factors for DVT/PE”. NP Clarke advised for the patient to follow up with her pulmonologist. Based on the Decedent’s clinical presentation to NP Clarke on December 2, 2015, Dr. Winters opines that NP Clarke appropriately

worked up this patient in the face of her clinical presentation, which did not include any complaints, signs, or symptoms that would have been suggestive of DVT/PE on December 2, 2015. He further opines that NP Clarke acted within accepted standards of good and accepted care and that all claims against her are without merit.

Plaintiff opposed both motions and submitted an expert affidavit from a board-certified internist and pulmonologist. Plaintiff's expert opined that the Decedent's respiratory issues presented during the last eight plus months of her life were investigated and not properly diagnosed. The expert states that although there were no abnormalities in the Decedent's vital signs, a focused examination of the Decedent's calves should have been performed to evaluate her for deep vein thrombosis. In their opinion this was a departure from accepted standards of practice. Plaintiff's expert agrees that the pulmonary embolus was probably not present as of August 31, 2015, but there were signs that a prudent medical practitioner should have taken notice of for preventative measures.

As it pertains to NP Clarke, the expert opines that the same history was present except that the duration of the complaints of shortness of breath was now three months longer¹. The expert opines that Decedent had two significant risk factors for the development of deep vein thrombosis in addition to presentation of signs and symptoms. She had probable sleep apnea and she had recently traveled to Barbados², coupled with her obesity. In conclusion, Plaintiff's expert opines that both Dr. Edouard and NP Clarke departed from good and accepted medical practice by failing to investigate, diagnose and treat the cause(s) of the presenting complaint of shortness of breath that Decedent

¹ Based on deposition testimony, decedent only advised NP Clarke that her shortness of breath started a week prior on November 25, 2015.

² It is not clear that Decedent advised NP Clarke of her recent trip to Barbados at the time of presentation.

presented with, allowing the deep vein thrombosis that was present to continue and expand untreated and to progress to the point where an occlusive embolus arose and lodged in her lungs which resulted in excessive clot formation/burden and caused her death. As such, the motions for summary judgment should be denied in their entirety.

In response to Plaintiff's expert's opinion, Defendants and their expert argue that the affidavit is insufficient to raise a triable issue of fact, because it ignores facts in the record and reaches unsupported conclusions purely based on speculation. Dr. Feingold argues that there is no definitive proximate causal link between the purported autopsy findings and the conclusions reached by the Plaintiff's expert. Moreover, on August 31, 2015, when Decedent presented to Dr. Edouard, she had no signs or symptoms of DVT/PE. The standard of care would not require a D-Dimer test at that time. As a further note, Dr. Feingold states that, "more likely than not" does not equate to a reasonable degree of medical certainty.

On a motion for summary judgment to dismiss a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp.*, 120 A.D.3d 1287 (2d Dep't 2014); *Stukas v. Streiter*, 83 A.D.3d 18, 24-26 (2d Dep't. 2011). Once the Defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the Defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 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. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff's injury. *Contreras v. Adeyemi*, 102 A.D. 3d 720, 721 (2d Dept. 2013); *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012); *Semel v. Guzman*, 84 A.D.3d 1054, 1055-56 (2d Dept. 2011). 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 Katherine Edouard, M.D. and Co-Defendant Kimesha Clarke, N.P. have sustained their burden of showing that they did not depart from good and accepted medical standards. The burden then shifted to Plaintiff to provide evidence to the Court that the Defendants did in fact 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 Dr. Edouard or NP Clarke. Plaintiff's expert opinion was completely speculative and never specifically clarified the alleged departures from accepted standards of medical practice as it relates to the Decedent's presentation to Dr. Edouard and NP Clarke. Plaintiff expert's affidavit begins by stating that, "It is in my opinion that her respiratory issues present during the last eight plus months of her life were not appreciated, not investigated and not properly diagnosed." However, Decedent presented to Dr. Edouard on June 27, 2013 and August 14, 2014 without respiratory issues. On August 31, 2015, she indicated that she had shortness of breath upon exertion and climbing stairs. She explained that she had been to

the ER on four separate occasions and that all her stats were normal. She further stated that she had been treated for asthma and that the nebulizer and inhaler treatments provided relief of her shortness of breath. Plaintiff's expert never addresses this aspect of the record. Plaintiff's expert proffers that Dr. Edouard should have given Decedent a D-Dimer test, but this assumes that the diffusing capacity result of 56% on November 24, 2015 was the same nearly three months earlier on August 31, 2015. This is mere speculation. He continues as to what would have been acceptable standards of practice for the decedent, but only by selectively pinpointing issues of error and ignoring key factors, examination reports, omissions and testimony from the record. Plaintiff expert affidavits, which fail "to respond to relevant issues raised by the defendants' experts", are insufficient to defeat summary judgment. *Ahmed v. Pannone*, 116 A.D.802, 806 (2d Dept. 2014).

As it pertains to NP Clarke, Plaintiff's expert completely ignores the fact that Decedent presented to NP Clarke on December 2, 2015 stating that her breathing issues had started only one week prior. He expands the duration of Decedent's respiratory complaints for the entire eight months completely negating Decedent's indicating that it started on November 25, 2015. His opinion on NP Clarke's departure is rooted in her failing to investigate, diagnose and treat the presenting complaint of shortness of breath. Plaintiff's expert fails to address Decedent's failure to use the bronchodilator pump, albuterol. There is a reference to travel being a factor for DV/PE, but he does not specifically identify if NP Clarke was aware of said travel or if the time frame/travel time

of such travel was sufficient.³ Moreover, Plaintiff's expert did not delve into all of the factors of DV/PE (how many of the factors he finds were present for the Decedent on December 2, 2015) and indicate why NP Clarke failed to diagnose or treat properly. Plaintiff's expert did not pinpoint the departure from good and accepted medical practice as it pertains to NP Clarke. In fact, Plaintiff in her opposition merely states that all arguments put forth by Dr. Edouard are applicable to Kimesha Clarke as well with some added arguments regarding the pulmonary function tests and NP Clarke's testimony that travel is a factor. Mere "conclusions, expressions of hope or unsubstantiated allegations or assertions" are insufficient to defeat summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

To defeat a Defendant's motion for summary judgment, the plaintiff must adduce proof of the standard of care, as well as both a deviation from accepted medical care and that treatment rendered by the moving defendant was a proximate cause of Plaintiff's injuries. See *Nicholas v. Stamer*, 49 A.D.3d 832, 854 N.Y.S.2d 220 (2d Dept. 2008) "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 N.Y.2d. 542 (2002). The Court finds that plaintiff's expert testimony is purely speculative and is insufficient to defeat summary judgment in this case.

The motions by Defendant Dr. Kathleen Edouard and Co-Defendant NP Kimesha Clarke are granted and Plaintiff's complaint is severed and dismissed as against Dr.

³ Based on testimony of Oveda Chillious, Decedent traveled to Barbados for a week returning on or about November 11, 2015. There was no indication of flight time. However, a direct flight from JFK to Barbados is approximately four and a half hours.

Kathleen Edouard and NP Kimesha Clarke, and the Clerk of the Court is directed to enter Judgment accordingly.

This constitutes the opinion, decision of this Court.

ENTER,



JSC