

Sanchez. v New York & Presbyt. Hosp.
2021 NY Slip Op 30904(U)
March 18, 2021
Supreme Court, New York County
Docket Number: 805074/2017
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10**

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**RUTH SANCHEZ, as Administrator of the Estate
of NANCY SANCHEZ a/k/a NANCY K.
SANCHEZ**

Index №. 805074/2017

Plaintiff

-against-

**THE NEW YORK AND PRESBYTERIAN HOSPITAL,
THE NEW YORK & PRESBYTERIAN HOSPITALS,
INC., COLUMBIA UNIVERSITY COLLEGE OF
PHYSICIANS AND SURGEONS, TRUSTEES OF
COLUMBIA UNIVERSITY IN THE CITY OF NEW
YORK, NEW YORK PRESBYTERIAN HOSPITAL,
NEW YORK-PRESBYTERIAN THE UNIVERSITY
HOSPITAL OF COLUMBIA AND CORNELL, COLUMBIA
UNIVERSITY MEDICAL CENTER, MATKO KALAC,
M.D., ELIZABETH CLARICE VERNA, M.D., DONALD
ELMORE DIETZ, M.D., FOUAD OTAKI, M.D., LORNA
M. DOVE, M.D., BARBARA COONS, M.D., ANDREW
EISENBERGER, M.D., DR. "JANE DOE"...**

Defendants

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HON. GEORGE J. SILVER:

With the instant motion, defendants move for summary judgment (CPLR §3212) and an order dismissing the complaint of RUTH SANCHEZ ("plaintiff"), as administrator of the estate of NANCY SANCHEZ ("decedent"), as against them.

BACKGROUND AND ARGUMENTS

This case sounds in medical malpractice and concerns the alleged wrongful death of decedent, a 42-year old mother of four who died due to end stage liver failure precipitated by alcohol abuse. Decedent was admitted to New York Presbyterian Hospital on December 4, 2014 for treatment of end stage liver failure, evaluation of chronic anemia and evaluation as to whether she was a candidate to receive a liver transplant.

On December 11, 2014, a bone marrow biopsy was attempted by hematology fellow defendant Matko Kalac, M.D. ("Dr. Kalac"). The bone marrow biopsy was a medically indicated procedure to determine whether decedent's chronic anemia was due to an underlying hematologic malignancy and as part of the patient's workup to determine if she was eligible to receive a liver transplant.

Decedent's bone marrow biopsy was stopped before any blood or marrow was collected because decedent complained of pain. Decedent alleges this procedure was performed in a negligent manner and defendants failed to timely treat hematomas that formed at the right leg. More than a week after the procedure, CT imaging revealed that decedent had a hematoma at the right thigh and a hematoma of the abdomen. Hematomas are a known risk of bone marrow biopsies. The gluteal hematoma was monitored through serial imaging and eventually, interventional radiology and surgery attempted to evacuate this hematoma and others that formed spontaneously.

Throughout the period of alleged malpractice, decedent received medical treatment for end stage liver failure, acute and chronic kidney injury, hepatic encephalopathy, anasarca (swelling due to organ failure), impaired cardiac function and other serious comorbidities. Notwithstanding timely and appropriate medical care, decedent developed multi-organ failure and bleeding diathesis. She died on March 3, 2015 and her cause of death was alcoholic cirrhosis, end stage renal disease and hepatic encephalopathy.

At the time of the alleged malpractice, defendants Lorna Dove, M.D. ("Dr. Dove") and Elizabeth Verna, M.D. ("Dr. Verna") were liver transplant attendings. They were occasionally on-call during decedent's admission to the hospital and participated in managing treatment of decedent's liver failure. Defendant Donald Dietz, M.D. ("Dr. Dietz") was a first-year resident at the time of the alleged malpractice. He rotated on the liver service under the supervision and direction of attending physicians. Defendant Fouad Otaki, M.D. ("Dr. Otaki") was a gastroenterology fellow who also rotated through the liver transplant service. All these defendants, Dr. Verna, Dr. Dove, Dr. Dietz and Dr. Otaki had no involvement in the attempted bone marrow biopsy.

Dr. Kalac was a second-year hematology fellow at the time of the alleged malpractice. He examined decedent on December 10, 2014 under the supervision of attending hematologist, defendant Andrew Eisenberger, M.D. ("Dr. Eisenberger"). Dr. Kalac and Dr. Eisenberger were not involved in decedent's after the bone marrow biopsy performed on December 11, 2014.

In support of the instant application, defendants annex the expert affirmations of David Green, M.D. ("Dr. Green"), a board-certified hematologist and liver transplant specialist, and Francis Scott Nowakowski, M.D. ("Dr. Nowakowski"), a board certified interventional radiologist, who both opine to a reasonable degree of medical certainty that defendants met the standard of care in providing treatment to decedent. In particular, Drs. Green and Nowakowski emphasize that the bone marrow biopsy was a medically indicated procedure, performed in accordance within the applicable standard of care. Both experts state that earlier surgical intervention to evacuate decedent's hematomas would not have prevented her death. In addition, defendants state that decedent's death was due to her alcohol abuse and that appropriate care could not have reversed or prevented decedent's multi-organ failure.

In opposition, plaintiff argues that defendants' failure to discuss the excessive leakage requiring application of an ostomy bag to collect fluids should be fatal to defendants' application. Beyond that, plaintiff annexes the expert affirmations of a board-certified neurologist as well as a board-certified specialist in oncology and internal medicine. Both experts opine that the care and treatment rendered by defendants deviated from the standard of care. Specifically, plaintiff's

neurologist states that despite decedent's advanced liver disease, her complaints of pain before and after her liver biopsy were different, and notes that there were no obvious signs of anemia and bleeding in decedent prior to the biopsy. Additionally plaintiff's specialist in oncology and internal medicine notes that defendants interventions caused avoidable pain that contributed to decedent's ongoing anemia, and further complicated her already difficult condition by interfering with the possibility of a potentially life-saving liver transplant.

In reply, defendants highlight that affirmation of plaintiff's expert oncologist is inadmissible for plaintiff's failure to include a certificate of conformity. In addition, defendants state that plaintiff's opposition also contains records of Fort Tyron Rehabilitation that do not contain a necessary certification. Additionally, defendants highlight that plaintiff's experts do not lay a necessary foundation for espousing opinions outside their areas of specialty. As to the substance of plaintiff's expert's assertions, defendants underscore that plaintiff's neurology expert erroneously opines that the standard of care was breached as to the performance of the bone marrow biopsy even though such an observation falls outside the expert's knowledge in the field of neurology. Moreover, defendants highlight that plaintiff's medical oncology expert failed to lay a foundation for opinions espoused regarding the standard of care for the hepatology defendants in particular and in general as to the management and treatment of patients with end stage liver disease. Even if plaintiff's expert opinions were considered by this court in spite of their procedural deficiencies, defendants' state that both of plaintiff's expert affirmations are impermissibly vague and conclusory, and directly contradict or overlook the facts in the certified medical record. For instance, defendants state that plaintiff's experts do not cite to any record to support the theory that there was continuous drainage at the bone marrow biopsy site or that this remained an issue for decedent until her death.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v*

Sachs, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppl v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers*, 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

The lack of a certificate of conformity is not fatal to a court's consideration of a plaintiff's expert affirmation (*see Ortiz v. City of New York*, 129 AD3d 611, 612 [1st Dept 2015])[motion court properly considered out-of-state expert affirmation which was sworn to before a notary public]; *Matapos Technology Ltd. v. Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009][the absence of a certificate as required under CPLR 2309(c) "is a mere irregularity, and not a fatal defect"]; *Rivers v. Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012][trial court improvidently exercised its discretion in refusing to consider plaintiff's expert affidavit submitted in opposition to summary judgment motion where affidavit was notarized in Massachusetts but did not include a certificate of conformity as required by CPLR 2309(c)]; *Bey v. Neuman*, 100 AD3d 581, 582 [2d Dept 2012][finding that the affidavit of plaintiff's expert, which was notarized in Pennsylvania, may be considered by the court even though it lacked a certificate of conformity]; *but see Scott v. Westmore Fuel, Co., Inc.*, 96 AD3d 520, 521 [1st Dept. 2012][trial court properly rejected plaintiff's expert affidavit, which was notarized in New Jersey and lacked certificate of conformity, and where the expert was not disclosed until after the note of issue and certificate of readiness had been filed]).

But, while an expert need not be board certified in the same area as the defendant's physician, where a physician provides an opinion beyond his area of specialization, the expert must lay a foundation tending to support the reliability of the opinion rendered (*see Tsimbler v Fell*, 123 AD3d 1009 [2d Dept 2014]; *see also Sheckman v Wilson*, 68 AD3d 848 [2d Dept 2009]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839 [2d Dept 2009]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]).

Here, based on the evidence submitted, including medical records, deposition transcripts, and Drs. Green and Nowakowski's affirmations based upon the same, defendants have established a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Drs. Green and Nowakowski emphasize that the bone marrow biopsy was a medically indicated procedure and performed in accordance within the applicable standard of care. Both experts state that earlier surgical intervention to evacuate decedent's hematomas would not have prevented her death. In addition, defendants state that decedent's death was due to her alcohol abuse and that appropriate care could not have reversed or prevented decedent's multi-organ failure. Based on record, the court is satisfied that defendants have met their burden of producing evidentiary proof in admissible form sufficient to establish an entitlement to summary judgment (*Zuckerman v City of NY*, 49 NY2d 557 [1980].) As the court's function in deciding a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox*, 3 NY2d 395 [1957]), the burden now shifts to plaintiff to likewise submit proof in admissible form sufficient to create issues of fact to warrant a trial (*Kossonv Algaze*, 84 NY2d 1019 [1995]).

As a threshold issue, the court observes that plaintiff's failure to submit a certificate of conformity is not fatal to consideration of plaintiff's proffered evidence. However, where a physician provides an opinion beyond their area of specialization, the expert must lay a foundation tending to support the reliability of the opinion rendered (*see Tsimbler*, 123 AD3d 1009, *supra*). Here, plaintiff's expert neurologist generally states familiarity with "the diagnostic tests, both clinical, laboratory, and imaging available for the evaluation of a patient who complains of a pain and/or reduced function of a body part." Likewise, plaintiff's expert oncologist and internist states familiarity with "the performance of Bone Marrow Biopsies (BMBX) and the standards of care for the treatment of patients with hematologic and oncologic conditions." Glaringly, plaintiff's neurology expert erroneously opines that the standard of care was breached as to the performance of the bone marrow biopsy even though such an observation falls outside the ambit of expert's specialized knowledge in the field of neurology, and plaintiff's neurology expert does not profess knowledge of bone marrow biopsies. Even though plaintiff's expert oncologist and internist professes knowledge of bone marrow biopsies, the same expert failed to lay a foundation for opinions espoused regarding the standard of care for the hepatology defendants in particular and in general as to the management and treatment of patients with end stage liver disease.

Even if plaintiff's expert opinions were acceptable, the deviations cited by plaintiff's experts are impermissibly vague and conclusory, and directly contradict or overlook facts within the certified medical record. Additionally, the medical record furnished by plaintiff is devoid of a certification. As highlighted by defendants, plaintiff's attempt to argue that defendants failed to stop continuous drainage at the bone marrow biopsy site is unsupported by the medical record. In addition, plaintiff cannot support the inference that defendants' deviations were the proximate cause of decedent's death where there is ample evidence within the medical record to suggest that decedent would have succumbed to liver failure even if defendants had acted differently.

The court has considered plaintiff's remaining arguments and finds that they do not raise sufficient issues of fact to warrant a denial of summary judgment in defendants' favor. Accordingly, it is hereby

ORDERED that defendants' motion is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants and dismissing this matter in its entirety.

This constitutes the decision and order of this court.

Dated: March 18, 2021



GEORGE J. SILVER, J.S.C.