

**Mella v Center for Alternative Sentencing & Empl.  
Servs.**

2021 NY Slip Op 31246(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 805225/2014

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. JUDITH REEVES MCMAHON      **PART**      **IAS MOTION 30**

*Justice*

-----X

RAMON MELLA,

Plaintiff,

- v -

CENTER FOR ALTERNATIVE SENTENCING AND  
EMPLOYMENT SERVICES, CHRISTIAN COLON,  
JONATHAN HERTZ, MICHELLE LOVE, ST. LUKE'S  
HOSPITAL,

Defendant.

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**INDEX NO.**      805225/2014

**MOTION DATE**      04/07/2021

**MOTION SEQ. NO.**      015

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 015) 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 319, 320, 321, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents,

Defendant Jonathan Hertz, M.D.'s motion, seeking an order granting Jonathan Hertz, M.D. summary judgment against Plaintiff Ramon Rafael Mella, as Administrator of the Estate of Newton Mejia Mella, also known as Newton Mella Mejia, is granted in part and denied in part as detailed herein.

Defendants Center for Alternative Sentencing and Employment Services and Christian Colon's cross-motion seeking summary judgment and dismissing Plaintiff's pleading in its entirety as against Center for Alternative Sentencing and Employment Services and Christian Colon is withdrawn without prejudice.

This is an action sounding in medical malpractice for personal injuries and wrongful death of a 34-year-old male, Newton Mella, also known as Newton Mella Mejia, who committed suicide on July 3, 2013, by jumping from the 10th floor of his family's apartment. The Complaint

and the Bill of Particulars allege negligence and medical malpractice from January 1, 2013, through July 3, 2013. During that time, Mr. Mella had been under the care of Defendant Center for Alternative Sentencing and Employment Services (“CASES”) an Assertive Community Treatment (“ACT”) organization whose mission it was to treat patients with mental health disorders while they lived in the community, either in homes or in shelters. Defendant Dr. Jonathan Hertz was a psychiatrist employed by this organization, working three days a week.

Mr. Mella had a long history of mental illness and had been diagnosed years before with schizoaffective disorder, a mental illness wherein the patient suffers from symptoms of psychosis as well as symptoms of mood disorder, requiring treatment for both. The role of Dr. Hertz was to engage in medication management for the patient, Newton Mella, which entails seeing the patient periodically, evaluating his condition, adjusting his medications and their dosages as the circumstances indicated, advising the patient with regard to those medications, documenting the results of his visit, and making other decisions that, in his judgment, were appropriate.

Two days before his death, on July 1, 2013, Newton Mella reached out to Dr. Hertz by telephone, to report that he had begun to hear voices. Mr. Mella left a message and, according to Dr. Hertz, received a return phone call during which Mr. Mella downplayed the severity of the voices. There is some dispute between the parties as to the substance of that conversation and the conclusion of the call.

What is not in dispute is that the next day was a day that Dr. Hertz was not scheduled to work for CASES. Dr. Hertz had notified CASES personnel about the call with Mr. Mella and Mr. Mella was visited and evaluated by Defendant Christian Colon, a CASES case manager, who is not a psychiatrist. Mr. Colon reported that Mr. Mella displayed a sad and very tired affect and he did not appear well.

Mr. Colon's notes from the visit and testimony reflect that despite his concern that the severity of Mr. Mella's condition might require hospitalization and a more thorough evaluation, during the time Mr. Colon attempted to contact someone at CASES to authorize him to call 911 to bring Mr. Mella to the hospital despite his objections, Mr. Colon was convinced by Mr. Mella and his family that Mr. Mella did not need to go to the hospital for further evaluation.

Mr. Mella committed suicide the day after Mr. Colon's visit.

Defendants herein move for Summary Judgment, arguing there are no triable issues of fact.

At oral argument on the motion and cross-motion, conducted via Microsoft Teams, the Court was informed that Defendants CASES and Mr. Colon had tentatively settled the case with Plaintiff, but were awaiting a final decision from the Surrogate's Court. Therefore, Defendants CASES and Mr. Colon withdrew their summary judgment cross-motion without prejudice.

The summary judgment motion of Defendant Dr. Hertz remains before the Court.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage." *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2<sup>nd</sup> Dept. 2010). "To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima

facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries.” *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2<sup>nd</sup> Dept. 2018).

Defendant Dr. Hertz submitted an Affirmation from Psychiatrist Dr. Robert H. Levy, which demonstrated their prima facie entitlement to judgment as a matter of law.

In support of Defendant’s motion, as to Plaintiff’s allegations against Dr. Hertz for treatment prior to July 1, 2013, Dr. Levy opined that, “In my opinion, these medications [prescribed to Mr. Mella by Dr. Hertz] were appropriate and conformed to the standard of practice of treating a patient with the diagnosis of schizoaffective disorder with a past history of alcohol abuse, and the dosages were appropriate to treat his symptoms both of psychosis and of mood instability. The proof of that is that thereafter, when the patient was adherent to the medication regimen as prescribed, the medications controlled many of the symptoms with which the patient was afflicted.”

As to the allegations related to the phone call on July 1, 2013, Dr. Levy opined, “that Dr. Hertz properly evaluated the patient in that telephone call...Dr. Hertz conformed to good and accepted medical and psychiatric practice in taking steps to have a different member of the team see the patient the following day...As in this case, hearing voices that are mild and not command-type can be present, and the patient is still able to adapt and live in the community without danger to themselves or others.”

As to whether Dr. Hertz was obligated to visit Mr. Mella himself after the July 1, 2013 phone call, Dr. Levy opined that, “under the circumstances, it is appropriate for a psychiatrist like Dr. Hertz to work part-time rather than full-time, and if he's working three days a week and not there on Tuesdays, he has no responsibility to be available on the days that he's not working.”

Finally, Dr. Levy concluded, “that with respect to 7/1/13, Dr. Hertz conformed to good and accepted medical and psychiatric practice; and, further, what he said on the telephone and the plan that he instituted of having another team member see the patient the following day conformed to good and accepted medical and psychiatric practice; and there was no departure from such standards that in any way was a competent producing cause of the patient committing suicide on 7/3/13. Beyond that, there was no responsibility of Dr. Hertz to be available on 7/2/13 since he was not working that day and was working in his private practice.”

“Once this showing has been made [by Defendant], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2<sup>nd</sup> Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp., supra*. In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2<sup>nd</sup> Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1<sup>st</sup> Dept. 2009).

In opposition to Defendant’s motion, Plaintiff submitted an Affirmation from Psychiatrist Dr. Jeremy H. Colley.

In opposition to the motion, Dr. Colley opined, “that the defendant Jonathan Hertz M.D. violated the standard of care by failing to take appropriate measures to provide decedent with timely access to a psychiatric evaluation, either by himself or another psychiatrist. Specifically, there is no evidence in the voluminous records and deposition transcripts that Dr. Hertz established a date and time for an appointment with Newton, in response to Newton's telephone call to Dr. Hertz on July 1, 2013. Indeed, in response to plaintiff's phone call, in which he reported hearing voices, Dr. Hertz arranged for (or allowed) the member of plaintiff's CASES ACT team with the least amount of experience and training in dealing with mentally ill patients, case manager Christian Colon, to visit decedent the next day.”

Dr. Colley elaborated that, “As a psychiatrist, Dr. Hertz departed from the standard of care when he failed to provide plaintiff with access to an appropriate psychiatric evaluation after plaintiff reached out to him regarding hearing voices on July 1, 2013...Dr. Hertz deviated from the standard of care when he did not arrange for a psychiatric evaluation the next day. As a physician, Dr. Hertz owed a duty to decedent Newton Mella that did not end at the end of his CASES workday...While no doctor is available twenty-four hours a day, every day, it is well recognized in the psychiatric community that a psychiatrist is under a duty to arrange coverage for their patients by another physician or organization. This is because when the doctor himself is

not available, their responsibility extends to making sure that their patients have timely access to psychiatric evaluation.”

Dr. Colley stated that, “Mr. Colon's visit to decedent in no way absolved Dr. Hertz or CASES of their duty to Newton to provide him with timely access to psychiatric care. Substituting the judgment of a case manager with little professional education for the professional medical judgment of a psychiatrist was woefully insufficient and resulted in the suicide of plaintiff's decedent, Newton Mella. It is my opinion that Defendants' failure to follow proper procedures caused, allowed and contributed to Mr. Mella's suicide.”

Finally, Dr. Colley concluded, “that decedent's death would have been avoided had he received a timely psychiatric evaluation on July 1, 2013 or July 2, 2013. It is my further opinion that both Dr. Hertz and CASES each failed to meet the standard of care for an ACT team and psychiatrist, respectively, when they failed to arrange for this psychiatric evaluation of decedent and that their departures led to decedent's death. Had Newton received a timely psychiatric evaluation, it is my opinion, to a reasonable degree of medical certainty, that his suicide could have been prevented. Based on the foregoing, it is my opinion with a reasonable degree of medical certainty that Dr. Hertz departed from the standard of care by failing to ensure that his CASES patients would have timely access to psychiatric evaluation when he was unavailable, such as on his days off. Finally, it is my opinion that the defendants' respective violations of the standard of care was a proximate cause of Newton Mella's death by suicide on July 3, 2013.”

“Of particular relevance in this case, which involves the vagaries of psychiatric diagnosis and treatment, is the rule that liability may not be imposed for honest errors in medical judgment but can and should ensue if that judgment was not based upon intelligent reasoning or upon

adequate examination so that there has been a failure to exercise any professional judgment.”

*Tkacheff v. Roberts*, 147 A.D.3d 1271, 47 N.Y.S.3d 782, 784 (N.Y.A.D. 3<sup>rd</sup> Dept. 2017).

“A psychiatrist may not be held liable for a mere error in professional judgment. Rather, for a psychiatrist to be held liable for malpractice based upon a decision made in connection with a patient's treatment or a decision to discharge a patient from a hospital, it must be shown that the treatment decisions represented something less than a professional medical determination ... or that the psychiatrist's decisions were not the product of a careful evaluation.” *Ballek v. Aldana-Bernier*, 100 A.D.3d 811, 957 N.Y.S.2d 108 (N.Y.A.D. 2<sup>nd</sup> Dept. 2012). “This rule is particularly relevant to cases involving mental health treatment, given that psychiatry is not an exact science and, therefore, decisions related to mental health treatment and discharge often involve a measure of calculated risk.” *Gallagher v. Cayuga Med. Ctr.*, 151 A.D.3d 1349, 57 N.Y.S.3d 544 (N.Y.A.D. 3<sup>rd</sup> Dept. 2017).

“It is well settled that a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective. Liability is imposed only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care...A decision will not be insulated by the medical judgment rule if it is not based upon a careful examination.” *Park v. Kovachevich*, 116 A.D.3d 182, 982 N.Y.S.2d 75 (N.Y.A.D. 1<sup>st</sup> Dept. 2014).

In opposition to the motion, Dr. Colley's opinions create a question of fact as to whether or not Dr. Hertz's actions on July 1, 2013 are a departure from the standard of care. Dr. Colley opined that in response to Mr. Mella's phone call, it was a departure to have failed to conduct or ensure that another qualified medical professional conduct a careful evaluation to arrive at a professional medical determination of Mr. Mella's condition.

“In opposition, the Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that the defendants departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2<sup>nd</sup> Dept. 2017).

However, Dr. Colley did not opine as to any departures by Dr. Hertz prior to July 1, 2013, and so Plaintiff’s allegations related to treatment prior to that date must be dismissed as Defendant met their prima facie burden on those allegations based on the opinions of Dr. Levy.

Accordingly, it is

ORDERED that Defendant Jonathan Hertz, M.D.’s motion, seeking an order granting Jonathan Hertz, M.D. summary judgment against Plaintiff Ramon Rafael Mella, as Administrator of the Estate of Newton Mejia Mella, also known as Newton Mella Mejia, is granted as to Plaintiff’s allegations related to treatment prior to July 1, 2013, and it is further

ORDERED that Plaintiff’s allegations against Defendant Dr. Jonathan Hertz, M.D. for treatment prior to July 1, 2013, are severed and dismissed; and it is further

ORDERED that the remainder of Defendant Jonathan Hertz, M.D.’s motion, seeking an order granting Jonathan Hertz, M.D. summary judgment against Plaintiff Ramon Rafael Mella, as Administrator of the Estate of Newton Mejia Mella, also known as Newton Mella Mejia is denied; and it is further

ORDERED that Defendants Center for Alternative Sentencing and Employment Services and Christian Colon’s cross-motion seeking summary judgment is withdrawn without prejudice; and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly; and it is further  
 ORDERED that all parties remaining in the case shall appear for a conference, to be  
 conducted remotely via Microsoft Teams, on June 28, 2021, at 12:00 PM.

THIS IS THE DECISION AND ORDER OF THE COURT.



<u>4/9/2021</u>			<u>JUDITH REEVES MCMAHON, J.S.C.</u>	
<b>DATE</b>				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE