Davi v Garjian
2021 NY Slip Op 31952(U)
April 15, 2021
Supreme Court, Richmond County
Docket Number: 150888-2015
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
____x **IAS PART 6**

TONI ANN DAVI, as Administrator of the Estate of ANTHONY DAVI, Deceased,

Plaintiffs,

- against –

PEGGY ANN GARJIAN, M.D. and PEGGY ANN GARJIAN, M.D., P.C.

Defendants.
____x

ORDER

Index Number: 150888-2015

Hon. Justice Judith N. McMahon

Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against the Defendants, Peggy Ann Garjian, M.D. and Peggy Ann Garjian, M.D., P.C., is denied as detailed herein.

This action involves allegations of negligence related to the prescription and administration of Humira. Plaintiff claims that Dr. Garjian was negligent in failing to treat and monitor Decedent, Anthony Davi, for infection in relation to the administration of Humira injections between September 18, 2013 and October 21, 2013, resulting in a fungal spine infection to occur at the site of the injection, reactivation of plaintiff's Hepatitis C with worsening of liver function, paraspinal abscess, septic arthritis of the left knee and an inability to walk.

Defendants now move for summary judgment to dismiss Plaintiff's case as against them.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Jason Faller. S*ee Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants' motion, Dr. Faller opined "that Dr. Garjian's evaluation and diagnosis during this first visit with Mr. Davi was in accordance with good and accepted medical practice. Based on the history and physical, it was appropriate for her to consider Humira injections for Mr. Davi's reported complaints."

As to Plaintiff's allegations, Dr. Faller stated that "Although plaintiff's counsel contends that Dr. Garjian supplied Mr. Davi with a sample of Humira, there is absolutely no evidence that he took Humira after his initial consultation with Dr. Garjian."

Dr. Faller further opined "that Mr. Davi's condition on October 10, 2013 was not related to an administration of Humira. There is absolutely no evidence that Mr. Davi took Humira prior to this October 10, 2013 MRI and one dose of Humira could not possibly cause an infection or gout."

Dr. Faller concluded that, "Although Mr. Davi received approval for Humira, there is no documentation offered by plaintiff, or anyone supporting the contention that Mr. Davi received the Humira, paid partial or full payment for the Humira…It is my opinion within a reasonable degree of medical certainty that there is no documented proof that Mr. Davi received or took the Humira. Assuming, however, that Mr. Davi received one dose of Humira injection to the left knee, it would not cause sharp and aching left knee pain/pressure approximately three weeks later as alleged by Ms. Davi and plaintiff's counsel."

"Once this showing has been made [by Defendants], 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. Soults*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd 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 Plaintiffs "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*., 68 N.Y.2d 320, 501 N.E.2d 572 (1986). 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. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff submitted an Affirmation from Dr. Richard Roseff in Opposition to Defendants' motion.

Dr. Roseff opined that "defendants departed from good and accepted medical practice in their care and treatment of the plaintiff's decedent ANTHONY DAVI, from September 18, 2013, until October of 2013, when they prescribed and administered two immunosuppressive medications such as Humira and Methotrexate that substantially increased the chance of an opportunistic infection. It is also my opinion that these departures proximately caused Mr. Davi's serious injuries, including, but not limited to septic arthritis in Mr. Davi's left knee, and a fungal infection in his spine."

Dr. Roseff further opined, "that Dr. Garjian departed from the standard of care when she failed to order a Quantiferon Gold, or at least a PPD skin test to rule out occult (latent) tuberculosis. It is also my opinion that Dr. Garjian departed from good and accepted medical practice when she failed to properly screen Mr. Davi for Humira therapy, and failed to discuss with him all major risks and benefits of the therapy while actively pursuing two (2) Humira applications."

Dr. Roseff stated that, "Based on the approval letters dated October 28, 2013, Mr. Davi was approved for a free Humira, and had to be contacted by the program for a delivery arrangement. Contrary to defendants' contentions, the approval letters contain no information to support defendants' unfounded position that Mr. Davi had to pay any portion of the Humira cost, and it is my opinion that these approval letters show that the medication was delivered to Mr. Davi's residence in or around the end of October of 2013 or the beginning of November of 2013. It is also my opinion that Dr. Garjian departed from good and accepted medical practice when she failed to reach out to Mr. Davi and failed to advise him not to take Humira pending receipt of all appropriate blood work and consultation that she ordered over a month earlier."

Finally, Dr. Roseff concluded, "that Dr. Garijian departed from good and accepted medical practice when she initiated Methotrexate therapy and failed to refer Mr. Davi to a hepatologist and/or gastroenterologist for a consult prior to initiating Humira and Methotrexate therapy because the therapy requires close monitoring of viral loads in patients such as Mr. Davi with chronic Hepatitis C infection."

"In opposition, 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 Defendant 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. 2nd Dept. 2017).

There are questions of fact created by Dr. Roseff including, but not limited to, whether or not Mr. Davi received Humira, from whom, and whether/how many doses were administered.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020).

ORDERED Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against the Defendants, Peggy Ann Garjian, M.D. and Peggy Ann Garjian, M.D., P.C. is denied; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on June 21, 2021, at 11:30 AM; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: April 15, 2021

So Ordered.

ENTER:

J.S.C

Hon. Judith N. McMahon