Connolly v Sanders
2021 NY Slip Op 33313(U)
January 4, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035444/2017
Judge: Sherri L. Eisenpress
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
THOMAS CONNOLLY, as Administrator of the Estate of
THOMAS J. CONNOLLY, deceased, and MARY J. CONNOLLY,

Plaintiff,

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

-against-

Index No.: 035444/2017

(Motion #3)

SCOTT SANDERS, M.D. SCOTT SNDERS M.D. PLLC and
SCOTT SANDERS DERMATOLOGY,

Defendants.
---X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 8, were reviewed in connection with the following motion seeking an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in favor of defendants, and dismissing Plaintiff's Amended Verified Complaint:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXPERT AFFIDAVIT OF PAUL L. HAUN, M.D./EXHIBITS A-N	1-3
AFFIRMATION IN OPPOSITION/REDACTED EXPERT AFFIDAVIT/REDACTED EXPERT AFFIDAVIT/EXHIBITS 1-12	4-6
AFFIRMATION IN REPLY/EXPERT AFFIDAVIT OF PAUL L. HAUN, M.D.	7-8

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant medical malpractice/wrongful death action was commenced on November 8, 2017, and arises out of allegations that Defendant Scott Sanders, M.D., was negligent with respect to an approximate six month delay in diagnosis (from August 2015, through February, 2016) of an extremely rare cancer called primary cutaneous Gamma Delta

T-Cell lymphoma (hereinafter "GDTCL"). Issue was joined with the service of an Answer on March 8, 2018. On October 22, 2018, Thomas Connolly passed away, thereby staying the lawsuit.

Thereafter, Plaintiff's motion to substitute an estate representative for Mr. Connolly was granted, and on August 7, 2019, Plaintiffs filed a Second Supplemental Summons and an Amended Verified Complaint adding a wrongful death cause of action. Issue was joined as to the Amended Complaint by service of an answer on September 20, 2019. Upon completion of discovery, a Note of Issue and Certificate of Readiness was filed on February 7, 2020. Given the COVID-19 emergency, Defendants' time to file a summary judgment motion was extended, thus making the instant application timely.

Factual Allegations

In July of 2015, Mr. Connolly presented to Dr. Bruce Levitt for an examination of a right upper thigh wound that had been present and raised for six (6) weeks. Dr. Levitt's assessment was cellulitis of the right thigh and an antibiotic ointment was prescribed. Mr. Connolly returned to Dr. Levitt on August 3, 2015 because the right lesion was not healing, at which time Dr. Levitt provided a dermatology referral for plaintiff to be seen by Defendant Dr. Sanders.

Mr. Connolly first presented to Dr. Sanders on August 4, 2015, with a red lesion on his right thigh that had been present for over six (6) weeks. Dr. Sanders performed an examination which was negative for fevers, fatigue, chills or weight loss. He performed two 4 mm punch biopsies into the nodule of the lesion and the tissue removed was solid. Dr. Sanders' impression of the lesion was an 8 cm infiltrated nodule without fluctuance and with focal erosion and crust distributed on right anterior proximal thigh. His differential diagnoses was neoplasm of uncertain behavior v. phlegmon, cyst, neoplasm and considered that the lesion could be consistent with a ruptured cyst; atypical mycobacteria; recurring bacterial

infection; or neoplasm of uncertain behavior which refers to a growth that could be benign or malignant. He directed Mr. Connolly to continue taking Bactrim.

Plaintiff returned to Dr. Sanders on August 8, 2015, for a follow-up visit. Upon examination, the skin lesion had shrunk and now measured 5 cm. Dr. Sanders reviewed the pathology slides from the August 4, 2015 biopsies and his diagnosis was ulcerated superficial and deep perivascular dermatitis with a granulomatous panniculitis. He noted that if the clinical nodule persists, an excision (biopsy) would be reasonable. Dr. Sanders prescribed two more weeks of Bactrim and his plan was to reassess in two weeks. If the lesion had not resolved by then, he would send a tissue specimen for further evaluation. On August 9, 2015, Dr. Sanders noted that plaintiff's lesion was doing much better and that he would reassess in two weeks. Plaintiff returned to Dr. Sanders on August 29, 2015 for a follow-up visit and plaintiff stated that the skin lesion was much improved, which was confirmed by Dr. Sanders. Dr. Sanders injected the right thigh lesion with lidocaine and lifted the crust, which once removed, had virtually nothing underneath it. Dr. Sanders determined that because the lesion had resolved, there was no tissue that he could excise. He told plaintiff he could return on an as-needed basis.

On January 30, 2016, Mr. Connolly returned to Dr. Sanders and complained of a two-day history of an erythematous papule on his right thigh similar to how his prior abscess had started. Mary Connolly, decedent's wife, noted that it had started as a small sized "blind pimple" which had grown "remarkably" in size in the matter of one day. Upon physical examination, Dr. Sanders noted that there was a new pink lesion on the right thigh which measured 6 mm and that the lesion was adjacent to a scar from the prior punch biopsies. A new punch biopsy was performed on the new lesion and the specimen was sent to Weill Cornell Medicine Dermatopathology lab for evaluation by Dr. Cynthia Magro. On February 4, 2016, pathologist Dr. Cynthia Magro diagnosed the new skin lesion as primary GDTCL, an extremely rare cancer.

The Plaintiff and his wife returned to Dr. Sanders on February 6, 2016 to discuss the diagnosis and poor prognosis, at which time Dr. Sanders apologized for not recognizing the prior skin lesion in August 2015, as a lymphoma. Mr. Connolly was referred for treatment with dermatologist Meena Kheterpal, M.D. and oncologist Alison Moskowitz at Memorial Sloan Kettering Cancer Center. Mr. Connolly continued to receive cancer treatment and therapies at Memorial Sloane Kettering until his death on October 22, 2018.

The Parties' Contentions

In support of Defendants' motion for summary judgment, the affidavit of Paul L, Haun, M.D., Board Certified Dermatologist with a subspecialty in Dermatopathology, is submitted. Dr. Haun avers that GDTCL is an extremely rare type of cancer. He states that studies show that GDTCL occurs in 0.40 person per 10 million persons and that there have been less than 100 reported cases of GDTCL in the United States in the past 20 years. There is no known cure for GDTCL and there is no known treatment-specific algorithm for attempting to treat the disease. The treatments for GDTCL are all anecdotal and include research protocols/studies and off-label non FDA-approved medication given the rarity of the disease. The medial survival rate for GDTCL is 15-18 months. Because GDTCL is so exceedingly rare, Dr. Haun states that all but a few dermatopathologists in the US possess the expertise to diagnose this type of T-cell lymphoma.

Dr. Haun opines that, with a reasonable degree of medical certainty, Dr. Sanders did not deviate from the standard of care in treating Mr. Connolly. Furthermore, he opines that the treatment provided by Dr. Sanders neither caused nor contributed to any of the injuries alleged in this action, including Mr. Connolly's death. More specifically, he avers that Dr. Sanders performed an appropriate comprehensive physical examination on August 4, 2015, and that no alternative or additional treatment or testing was indicated/necessary, including alternative or additional biopsies of the lesions as Plaintiff did not exhibit any clinical signs or symptoms that would suggest the possibility of T-cell lymphoma and the lesion

responded to the antibiotic. Dr. Haun further opines that Dr. Sanders did not depart or deviate from good and accepted medical practice in interpreting the pathology slides on August 8, 2015, because GDTCL is so exceedingly rare and he did not possess the expertise to suspect or diagnose this type of cancer.

Additionally, Dr. Haun opines that nothing that Dr. Sanders did or did not do caused any of plaintiff's alleged injuries or death. More specifically, the 6-month delay in diagnosing GDTCL had no bearing on plaintiff's clinical course, outcome, prognosis or treatment options, as there is no known cure or treatment-specific algorithm. Additionally, Mr. Connolly lived approximately 38 months following his initial visit with Dr. Sanders in August 2015, outliving the median life expectancy of 15-18 months for a patient diagnosed with GDTCL. Moreover, the claim that the delayed diagnosis denied plaintiff the opportunity for earlier successful treatment is without merit because Plaintiff's treatment would have been the same in August 2015, had he been diagnosed then.

In opposition to the motion, Plaintiffs present the redacted affidavit of a dermatopathologist who opines that Dr. Sanders was negligent in failing to make the diagnosis of the presence of a lymphoma when he did the microscopic evaluation of the biopsy in early August 2015. Plaintiffs' expert opines that there were clear indicators in the form of "atypia" which were visible to a trained dermatopathologist under the microscope, which should have triggered the realization by Dr. Sanders of the nature of the condition, prompting him to refer the biopsy for further study.

Plaintiffs also submit the redacted affidavit of an expert Board Certified in internal medicine, hematology and oncology. The expert opines that to a reasonable degree of medical probability that at the time Mr. Connolly was treated in August 2015, the GDTCL condition was only present in a single site within his right thigh and was a Stage I-A, which

by definition was less than 5 cm in size[1], as set forth in the AJCC Cancer Staging Manual, 8th Edition. He opines that the most effective treatment for this condition would have been the complete surgical excision of the lesion, with an option for radiation around the margins. He opines that accordingly to relevant medical literature, the chance of survival at that time with complete excision in that Stage would have been 96-100% chance of 5-year survival.

It is further the expert's opinion that when Plaintiff returned in February 2016, there was a second lesion on Mr. Connolly's buttock which the expert regards as a secondary site and spread of the original cancer and progression from early stage I-A to Stage II-B, which converted the condition from curable to incurable, due to the aggressive nature of this type of cancer. The expert states that in Stage II-B, the chance of survival is reduced to 40%, which is a significant reduction in life expectancy.

In reply, Defendants' submit a responsive affidavit from Dr. Haun. Dr. Haun notes that while Plaintiffs' expert correctly states that there is generally a correlation between early diagnosis and treatment of malignant cancer and therefore starting treatment earlier is generally better, this is not true for diagnosing and treating GDTCL because there is no prognostic staging, no cure, no treatment-specific algorithm for treating the disease and no known proven effective treatment. More specifically, Dr. Haun notes that there is no prognostic staging for GDTCL. The AJCC pages 970-971, upon which Plaintiff's expert specifically relies, refers solely to pediatric Non-Hodgkin's Lympohoma (NHL), an entirely different lymphoma which does have prognostic staging. Dr. Haun further notes that on page 980 of the AJCC, it specifically states "there is no prognostic staging for non-MF [mycosis fungoides] T-Cell lymphomas including GDTCL." Thus, Defendants contend that the Plaintiffs' expert's opinion on the issue of causation is without any medical basis since it is based entirely

[1] The Court notes that the medical records indicate that the lesion was 8 cm at that time, and as such, would not have qualified as Stage I-A.

on the prognostic staging of pediatric NHL, and not GDTCL, for which there is no prognostic staging. Dr. Haun further asserts that Plaintiffs' expert's assertion that the GDTCL was only in a single site in August 2015 is unfounded because it is impossible to make that determination without performing a full body PET scan.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the oppos ing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from accepted practice; and 2) evidence that such departure was a proximate cause of injury or damage. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006) Thus, in moving for summary judgment dismissing a complaint alleging medical malpractice, a defendant "must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries." Matthis v. Hall, 173 A.D.3d 1162, 1163, 104 N.Y.S.3d 680 (2d Dept. 2019). The

defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993).

"Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact." Wagner v. Parker 172 A.D.3d 954, 955, 100 N.Y.S.3d 280 (2d Dept. 2019). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record." Choida v. Schirripa, 188 A.D.3d 978, 2020 WL 6750857 (2d Dept. 2020). "An expert opinion that is contradicted by the record cannot defeat summary judgment." Wagner, 172 at 955.

As an initial matter, Plaintiffs assert that this Court must disregard Dr. Haun's affidavit because he is not an oncologist. While it is generally true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Behar v. Coren, 21 A.D.3d 1045, 1046-47, 803 N.Y.S.2d 629 (2d Dept. 2005), *appeal denied by* 6 N.Y.3d 705 (2006); Shectman v. Wilson, 68 A.D.3d 848, 849, 890 N.Y.S.2d 117 (2d Dept. 2009). In order to lay such foundation, the affidavit must state that the purported expert has had specific training or has expertise in a particular field, has familiarized his/her-self with relevant literature or has become familiar with the applicable standards of care in the specialized area of practice. Behar v. Coren, 21 A.D.3d at 1046; Mustello v. Berg, 44 A.D.3d 1018, 1019, 845 N.Y.S.2d 86 (2d Dept. 2007), *appeal denied by* 44 A.D.3d 1018 (2008).

Here, the Court finds that Dr. Haun is qualified to offer his opinion on this matter, as to both the standard of care and causation. Dr. Haun notes that he is one of only a handful of dermatopathologists and dermatologists in the United States who specializes in the study, research and treatment of GDTCL. Dr. Haun's affidavit lays the proper foundation that he is and continues to be familiar with the accepted standards of practice as it existed in the medical specialty of dermatology and dermatopathology, including the roles and responsibilities of dermatopathologists regarding the diagnosis and treatment of GDTCL during the period of time relevant to this matter. Dr. Haun notes that he treats GDTCL patients in his exclusive Cutaneous T-cell Lymphoma clinical practice; that oncologists throughout the US consult with him on the diagnosis and treatment of GDTCL; and that he is currently one of the only dermatologists/dermatopathologists in the US working on creating treatment to cure GDCTL.

In the instant matter, the Court finds that Defendants have met their burden upon summary judgment based upon the medical records and the expert affidavit of Dr. Haun, which specifically addresses each of the claims of negligence set forth in Plaintiffs' Verified Bill of Particulars. In opposition, thereto, Plaintiffs have failed to demonstrate a triable issue of fact as to proximate causation, and as such, their action must be dismissed in its entirety.

"To establish proximate cause, the plaintiff must demonstrate 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." Flaherty v. Fromberg, 46 A.D.3d 743, 745, 849 N.Y.S.2d 278 (2d Dept. 2007). "As to causation, the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury." Id.

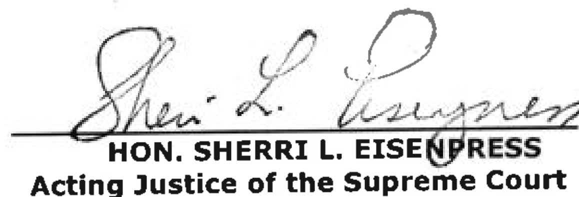
Here, Plaintiffs' expert affidavit failed to establish a triable issue of fact as to whether the approximate six month delay in diagnosis diminished Plaintiff's chance of a better outcome since GDTCL is an incurable disease with no treatment-specific algorithm for treating the disease and no known proven effective treatment. Moreover, Plaintiffs' expert affidavit as to causation is speculative, conclusory and not based upon scientific data, and as such, must be disregarded in its entirety. More specifically, Plaintiffs' expert's conclusion that Plaintiff's 5-year life expectancy was decreased from 95% to 40% is based upon data for an entirely different type of cancer which has prognosis stages, whereas there is no staging for GDTCL and no long-term chance of survival. Nor does the expert cite any evidence to support his contention that GDTCL could have been cured by the surgical removal of the lesion in 2015.

Accordingly, it is hereby

ORDERED that the Notice of Motion by Defendants **(Motion #3)** for summary judgment and dismissal of the Complaint as against them is hereby GRANTED in its entirety; and the action is dismissed in its entirely.

The foregoing constitutes the Decision and Order of this Court on Motion #3.

Dated: New City, New York
January 4, 2021



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing