

**Newhem v Millos**

2022 NY Slip Op 33788(U)

November 2, 2022

Supreme Court, New York County

Docket Number: Index No. 805203/2019

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

*Justice*

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IAN BLAKE NEWHEM, as Executor of the Estate of  
STEPHEN J. NEWMAN, Deceased, and IAN BLAKE  
NEWHEM, as Executor of the Estate of MARIS B.  
NEWMAN, Deceased,

**INDEX NO.** 805203/2019

**MOTION DATE** 08/01/2022

**MOTION SEQ. NO.** 004

Plaintiff,

- v -

ROSANA T. MILLOS, M.D., HUDSON VALLEY MEDICAL  
ASSOCIATES, PLLC, BRIJENDER BATRA, M.D.,  
PULMONARY CONSULTANTS, P.C., LYALL A.  
GORENSTEIN, M.D., and ROCKLAND THORACIC &  
VASCULAR ASSOCIATES, P.C.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 165, 173, 174, 175, 176, 177, 178, 192, 196

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action, inter alia, to recover damages for medical malpractice based upon departures from good and accept medical practice and lack of informed consent, and to recover for wrongful death, the defendants Brijender Batra, M.D., and his practice, Pulmonary Consultants, P.C. (the Batra defendants), together move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against the Batra defendants.

The facts of this dispute are set forth in detail in this court's October 26, 2022 order disposing of Motion Sequence 003. As relevant here, on December 16, 2016, Stephen J. Newman (the patient) was involved in a motor vehicle accident in which he injured his ribs and, on December 20, 2016, he presented to his internist, the defendant Rosana T. Millos, M.D.,

complaining of chest and rib pain. An x-ray taken on December 20, 2016 revealed a questionable nodular density in the patient's left lower lung, while a chest CT scan taken on December 23, 2016 revealed a 5-millimeter (mm) nodule in the right upper lobe of the patient's lungs, five limited nodules within the left upper lobe, a 7-mm nodule along the left major fissure, an 11-mm nodule within the left lower lobe, and a 3-mm nodule within the left lower lobe.

Millos referred the patient to pulmonologist Batra. On December 30, 2016, Batra reviewed the December 23, 2016 CT scan and, upon examination, diagnosed the patient with multiple lung nodules and instructed him to undergo blood work and a PET/CT scan. A January 9, 2017 PET/CT scan revealed a dominant 8-mm left lower lobe lung nodule described as "nonmetabolic," along with additional scattered tiny lung nodules that were also described as "nonmetabolic," as well as multiple small hypermetabolic mediastinal and bilateral hilar lymph nodes that measured less than 1 mm to 4 mm that were "suspicious for foci of metastatic disease," the presence of hypermetabolic skeletal lesions involving the left second rib and sternum that were "suspicious for skeletal metastases," and a small lytic lesion involving the anterior aspect of the left second rib and a 2.1-centimeter (cm) mildly metabolic right adrenal nodule. The patient again saw Batra on January 10, 2017 to review the PET/CT scan, after which Batra referred him to the defendant cardiothoracic vascular surgeon Lyall A. Gorenstein, M.D., to determine whether he needed surgery to secure samples of the nodules for the purpose of biopsy and a determination as to whether the nodules were malignant.

Batra's involvement ended at that point. Gorenstein saw the patient from January 17, 2017 through March 21, 2017 and diagnosed him with lymphadenopathy secondary to the motor vehicle accident. Despite Gorenstein's conclusion that there was no cancer, he purportedly instructed the patient in March 2017 to obtain a follow-up CT scan in October 2017 and scheduled the patient for a follow-up cardiothoracic surgical consult for some time during October 2017. According to the plaintiff, Gorenstein never communicated those instructions to the patient. In fact, by January 17, 2017, the patient already had metastatic lung cancer that

was not properly diagnosed until September 19, 2018, when a routine dental appointment revealed a mass in the patient's gumline, the mass was biopsied, and the patient underwent a whole-body PET/CT scan on September 27, 2018. The patient died on October 15, 2018.

The legal standards applicable to summary judgment motions and medical malpractice claims were described and analyzed in detail in this court's October 26, 2022 order denying, in part, Gorenstein's summary judgment motion under Motion Sequence 003. In addition, as relevant to the instant motion, "[i]t is generally true that the mere referral of a patient by one physician to another, without more, does not render the referring doctor vicariously liable for the negligence of the treating physician" (*Datiz v Shoob*, 71 NY2d 867, 868 [1988]; see *Harrington v Neurological Inst. of Columbia Presbyterian Med. Ctr.*, 254 AD2d 129, 131 [1st Dept 1998]; *Arshansky v Royal Concourse Co.*, 28 AD2d 986, 987 [1st Dept 1967] [a physician's referral, in and of itself, does not render that physician liable for malpractice committed by the physician to whom the patient was referred, unless referring physician participated in the diagnosis]; *Graddy v New York Med. Coll.*, 19 AD2d 426, 429 [1st Dept 1963] ["a referral of a patient by one physician to another competent physician, absent partnership, employment, or agency, upon abundant authority, does not impose a liability on the referring physician"]; *Blatt v Mount Sinai Hosp. Med. Ctr.*, 2011 NY Slip Op 50684[U], \*3, 31 Misc 3d 1215[A], 2011 NY Misc LEXIS 1768, \*6 [Sup Ct, N.Y. County, Mar. 18, 2011] ["a referring physician generally owes no duty to his or her patient once the patient comes under the care of the other doctor"]; *Jing Xu v Karpov*, 2008 NY Slip Op 52107[U], \*3-4, 21 Misc 3d 1120[A], 2008 NY Misc LEXIS 6155, \*10-11 [Sup Ct, N.Y. County, Oct. 6, 2008]; cf. *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 351 [1st Dept 1995] [informed consent obtained by a treating physician may cure the failure of the referring physician to obtain consent]).

The Batra defendants established their prima facie entitlement to judgment as a matter of law by relying on the same expert affirmation of internist, oncologist, and hematologist Jeffrey G. Schneider, M.D., upon which Gorenstein relied in connection with his summary judgment

motion. In that affirmation, Dr. Schneider opined that none of the physicians reviewing the December 2016 and January 2017 radiology scans could have known at that juncture that the patient was suffering from cancer at that time. Rather, he concluded that the fact that the patient was then metastatic could only be appreciated in hindsight. As such, Dr. Schneider concluded that none of the physicians examining or treating the patient during that time frame caused or contributed to the spread of the patient's cancer. The Batra defendants further rely on the parties' deposition testimony, which established that they properly expressed their suspicions and concerns that that scans may have revealed hypermetabolic and/or metastatic growths, properly referred the patient to a specialist who was better suited to undertake procedures to assess whether those growths were indeed cancerous, and did not further involve themselves in the patient's treatment, relying instead on Gorenstein's expertise.

Although the plaintiff opposed the Batra defendants' motion with the affirmations of three experts---an internist/pulmonologist, an oncologist, and a thoracic surgeon---none of them opined that the Batra defendants deviated from good and accepted practice by misreading the scans or misdiagnosing the patient's condition. In other words, they did not allege that the Batra defendants independently committed acts of malpractice. Rather, the crux of these experts' opinions was that the Batra defendants departed from good and accepted practice "by failing to address the importance of the Decedent's lung nodules and possible metastatic disease and to confirm that the Decedent received appropriate followup care for such issues referred after the referral was made to defendant GORENSTEIN." Initially, such an opinion does not have support in the medical records, as the records clearly indicated that the Batra defendants did indeed address the importance of the lung nodules by expressing their concern for the presence hypermetabolic and potentially metastatic growth, and immediately referring the patient to Gorenstein for a further, more complete assessment and evaluation. Moreover, although the plaintiff's experts concluded that the Batra defendants had a duty to see to it that Gorenstein properly followed up with appropriate examinations, "whether the defendant doctor owed the

plaintiff a duty of care . . . is a question for the court, and generally not an appropriate subject for expert opinion” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]; *Blatt v Mount Sinai Hosp. Med. Ctr.*, 2011 NY Slip Op 50684[U], \*3, 31 Misc 3d 1215[A], 2011 NY Misc LEXIS 1768, \*6). Inasmuch as the Batra defendants’ involvement with the patient terminated when they referred him to Gorenstein, and they did not assume a further obligation to the patient by participating in his further evaluation and assessment, they did not owe the patient any further duty once he began treating with Gorenstein.

Accordingly, it is

ORDERED that the motion of the defendants Brijender Batra, M.D., and Pulmonary Consultants, P.C., for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Brijender Batra, M.D., and Pulmonary Consultants, P.C.; and it is further,

ORDERED that the action is severed against the defendants Brijender Batra, M.D., and Pulmonary Consultants, P.C.; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendants Brijender Batra, M.D., and Pulmonary Consultants, P.C.

This constitutes the Decision and Order of the court.

11/2/2022

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE