

Newhem v Millos

2022 NY Slip Op 33789(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. 005

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 005) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 167, 179, 180, 181, 182, 183, 184, 185, 186

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 Rosana T. Millos, M.D., and her practice, Hudson Valley Medical Associates, PLLC (the Millos 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 Millos 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 Millos, complaining of chest

and rib pain. An x-ray ordered by Millos, and taken on December 20, 2016, revealed a questionable nodular density in the patient's left lower lung, while a chest CT scan also ordered by Millos, and 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 the defendant pulmonologist Brijender Batra, M.D., to assess the nature and seriousness of the lung nodules appearing on the scans.

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.

Gorenstein saw the patient on January 17, 2017 and diagnosed him with lymphadenopathy secondary to the motor vehicle accident, concluding that the nodules were not cancerous and that no biopsies or additional testing was necessary to come to that conclusion. On February 21, 2017, the patient returned to see Millos for a follow-up visit in connection with his ribs, at which time he reported that, although the chest pain from the car

accident had abated, and he was not suffering from shortness of breath, he nonetheless was tired and remained unable to work due to the accident. Millos reported that, upon physical examination, the patient's lungs were clear, and concluded at that time that the patient did "not have any symptoms of lung disease or metastatic cancer" that were reflected in the examination. Millos's involvement with the patient terminated after this visit.

The patient again saw Gorenstein on March 21, 2017, at which time Gorenstein reiterated his diagnosis of lymphadenopathy. Despite Gorenstein's conclusion that there was no cancer, he purportedly instructed the patient at that visit 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.

For the same reasons set forth in this court's November 2, 2022 order awarding summary judgment to Batra and Pulmonology Consultants, P.C. (the Batra defendants), summary judgment must be awarded to the Millos defendants as well. Millos was merely a referring physician who, as described in her own affidavit, discharged her obligation to the patient by ordering a chest x-ray and CT scan and, due to her concerns about the nodules depicted in those scans, referring him to Batra, an appropriate specialist, for further consultation and testing. She relied on her own affidavit, as well as in the same affirmations of internist, oncologist, and hematologist Jeffrey G. Schneider, M.D., and thoracic surgeon Gary Kline, M.D., that had been submitted in connection with Gorenstein's summary judgment motion under Motion Sequence 003, to establish, prima facie, that she did not deviate from good and accepted practice in reading the December 2016 scans or in making the referral to Batra only

days after she obtained the results of those scans. In opposition to her showing, the plaintiff submitted experts' affirmations that did not identify any independent malpractice committed by Millos, but only faulted her for failing to satisfy her purported duty to the patient by following up in connection with the scans after she had referred the patient to Batra, and after Batra referred the patient to Gorenstein. As this court explained in its order awarding summary judgment to the Batra defendants, "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 [Sup Ct, N.Y. County, Mar. 18, 2011]). A mere referring physician does not owe a duty to follow up after a referral, and may only be held liable if he or she independently commits an act of malpractice, or involves himself or herself in the diagnoses and treatments of the physician to whom the patient has been referred (see *Datiz v Shoob*, 71 NY2d 867, 868 [1988]; *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]). Because Millos did neither of those things here, summary judgment must be awarded to the Millos defendants.

Accordingly, it is

ORDERED that the motion of the defendants Rosana T. Millos, M.D., and Hudson Valley Medical Associates, PLLC, for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Rosana T. Millos, M.D., and Hudson Valley Medical Associates, PLLC; and it is further,

ORDERED that the action is severed against the defendants Rosana T. Millos, M.D., and Hudson Valley Medical Associates, PLLC; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Rosana T. Millos, M.D., and Hudson Valley Medical Associates, PLLC.

This constitutes the Decision and Order of the court.

11/2/2022
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE