

Rivera v Felix
2023 NY Slip Op 35045(U)
June 20, 2023
Supreme Court, Bronx County
Docket Number: Index No. 20991/17E
Judge: Joseph E. Capella
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23**

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ARLEEN RIVERA, as Administratrix of the Estate of SONIA
RIVERA, and ARLEEN RIVERA, individually,

Index No.: 20991/17E

Plaintiffs,

Decision/Order

-against-

DAVID FELIX, M.D.,

Defendant.

-----X	
PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed -----	1
Answering Affidavit and Exhibits -----	2
Replying Affidavits and Exhibits -----	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

The defendant, David Felix, M.D., moves for an order granting summary judgment (CPLR 3212) dismissal of the instant medical malpractice action, and dismissing all claims of malpractice prior to August 6, 2014, as time barred under CPLR 3211(a)(5). In sum and substance, plaintiffs allege that, between 2007 and 2014, Dr. Felix failed and/or delayed diagnosing decedent with acute myeloid leukemia (AML) resulting in decedent's death on October 7, 2014. At the outset, plaintiffs do not oppose dismissal of the claims for negligent hiring, lack of informed consent, and wrongful death; therefore, that branch of defendant's motion is granted and those claims are dismissed.

Defendant argues that all claims for negligent care and treatment prior to August 6, 2014, are time-barred and should be dismissed. In their complaint, plaintiffs allege that medical malpractice occurred between 2007 and October 7, 2014, and they commenced this action on February 6, 2017. Defendant argues that, as actions arising from medical

malpractice must be commenced within two and a half years of the alleged act (CPLR § 214-a), plaintiffs' claims arising between 2007 and August 5, 2014, are time-barred.

Defendant also argues that the continuous treatment doctrine does not apply to toll the statute of limitations as decedent was never in receipt of an actual course of treatment for AML. Defendant contends that decedent's alleged signs and symptoms of AML were first present in August 2014; therefore there was no course of treatment and the continuous treatment doctrine is inapplicable in this instance. In opposition, plaintiffs' two experts opine that Dr. Felix was continuously treating decedent for signs and symptoms of AML since at least February 2014, and thus there are issues of fact regarding the continuity of treatment which cannot be resolved via the instant motion to dismiss.

The First Department has held that the continuous treatment doctrine is applicable in cases involving a failure to diagnose cancer, and that the relevant issue in such a case is whether the ongoing treatment is related to the cancerous condition that gave rise to the action. (*Dookhie v Woo*, 180 AD3d 459 [2020].) Plaintiffs' experts raised an issue of fact as to whether Dr. Felix continuously treated decedent for signs and symptoms related to AML since at least February 2014, including weight loss, repeat infections, thoracic pain and bruising. Significantly, Dr. Felix even included a hematological malignancy in his differential diagnosis beginning in July 2014. Since questions of fact have been raised as to whether the treatment provided by Dr. Felix between February 2014 and August 2014 constituted continuous treatment for the purpose of tolling the statute, plaintiffs' claims related to treatment that occurred prior to February 2014 are dismissed as time barred (*Dellert v Kramer*, 280 AD2d 438 [1st Dept 2001]).

With regard to summary judgment, in support of the instant motion, Dr. Felix submits an expert affirmation by Dr. Reed Phillips, who is board certified in internal medicine, oncology, hematology, and hospice and palliative care. Dr. Reed describes in detail his opinion that Dr. Felix's treatment of decedent never deviated from the standard of care. Dr. Phillips explains that AML develops in weeks, not years, and as such, plaintiffs' allegations of a failure to diagnose same in early 2014 are impossible. Dr. Phillips opines that studies, films and exams done in early 2014 revealed nothing suggestive of AML. Blood test results from decedent's presentations at Columbia Presbyterian Hospital (Columbia Presbyterian) in March and April 2014 would have been markedly more abnormal if decedent had AML. And while the results admittedly demonstrated a hematological problem, they simply were not indicative of Leukemia. Additionally, Dr. Phillips notes that although it is not the standard of care for family physicians, such as defendant, to receive medical records from every hospitalization a patient undergoes, Dr. Felix did indeed request decedent's test results from Columbia Presbyterian; however he never received, nor was he privy to said records. Moreover, it is not the standard of care to force a patient to undergo blood tests or other exams. Dr. Phillips opines that Dr. Felix appropriately ordered routine blood tests for decedent in June and July 2014, for which decedent failed to appear. Dr. Phillips avers that there was no clinical indication of which Dr. Felix was aware or that is supported by decedent's medical record to indicate AML prior to the test Dr. Felix ordered on September 4, 2014.

Dr. Phillips opines that even if decedent had been diagnosed with AML months earlier, her course of treatment, prognosis and eventual death would not have changed. Dr.

Phillips clarifies that because of her age and overall health, decedent would not have been a candidate for any curative treatments as they carry an unavoidable risk of death due to their harshness. Therefore, Dr. Phillips opines that any alleged departure did not result in injury to or the death of decedent. Based on the aforementioned, the court is satisfied that defendant has established an entitlement to summary judgment (*Zuckerman v City of NY*, 49 NY2d 557 [1980]), thereby shifting the burden to plaintiffs to show, *inter alia*, that there was a departure from accepted standards of practice, and that such departure was a proximate cause of plaintiffs' damages (*Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]).

In opposition, plaintiffs submit expert affirmations from a board-certified oncologist and a board-certified expert in internal medicine. In their opinions, Dr. Felix deviated from the standard of care in failing to: recognize and workup decedent's symptoms of AML from February 2014 to August 2014, timely order and ensure performance of blood tests, refer decedent to hematologist/oncologist despite signs and symptoms of a blood malignancy, properly educate decedent on the importance of completing blood tests, and obtain records from decedent's 2014 hospitalizations at Columbia Presbyterian. Both experts state that Dr. Felix's deviations were the proximate cause of decedent's injuries, pain and suffering, loss of treatment options, loss of palliative care, and her premature death. They opine that her AML was present and diagnosable in March 2014, and that even a two-week delay in diagnosis and treatment of decedent's AML made a significant difference in her suffering and her chance of a cure.

As previously explained, to prevail on this claim plaintiffs must establish (1) a deviation or departure from accepted medical practice and (2) that such departure was a substantial factor in causing the injury or death. (*Frye v Montefiore*, 70 AD3d 15 [1st Dept 2009].) New theories of liability improperly raised for the first time in plaintiffs' opposition were insufficient to create issues of fact. (*Marti v Rana*, 173 AD3d 576 [1st Dept 2019].) Specifically, plaintiffs raised for the first time in opposition that Dr. Felix deviated from the standard of care when he failed to obtain records from decedent's hospitalization at Columbia Presbyterian in early 2014, notify decedent of the importance of obtaining timely blood tests, and appreciate blood test results from March and April 2014 to which he was never privy. Additionally, to establish an issue of fact sufficient to overcome summary judgment dismissal of the action, plaintiffs' experts needed to address the contentions of the defendant's expert. (*Stinson v Lueders*, 159 AD3d 652 [1st Dept 2018].) Plaintiffs failed to rebut in any manner defendant's argument that regardless of when AML was diagnosed, decedent's co-morbidities made her too weak for treatment and therefore her prognosis and death would not have changed. Accordingly, defendant's motion for summary judgment dismissal of the complaint is granted and the County Clerk is directed to dismiss the complaint in its entirety.

Defendant is directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. This constitutes the decision and order of this court.

June 20, 2023
Dated

Hon. 
Joseph E. Capella, J.S.C.