

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

DEENA SILVERMAN, as Executrix of the Estate of
JESSE SILVERMAN, Deceased, and DEENA
SILVERMAN, individually,

ORIGINAL RETURN DATE: 11/19/07
SUBMISSION DATE: 01/10/08
INDEX NO. 010535/06

Plaintiff,

MOTION SEQUENCE # 1

-against-

RICHARD MATANO, M.D. and
APEX LABORATORY, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Affirmation in Partial Opposition.....	3
Reply Affirmation.....	4

Motion by defendant, APEX LABORATORY, INC. ("Apex"), seeking an order pursuant to CPLR 3212 awarding it summary judgment dismissing plaintiff's complaint as asserted against Apex is granted.

Plaintiff commenced the within personal injury action sounding in medical malpractice on or about June 30, 2006. Issue was thereafter joined upon the interposition of verified answers from each defendant in or about August 2006.

Plaintiff, Deena Silverman, testified that her husband, the decedent, Jesse Silverman, had open-heart surgery in October 1989 and some time thereafter had carotid artery surgery. Coumadin was one of the medications prescribed for him. Beginning in January 2005, Mr. Silverman began having his blood tested at home weekly by Apex, generally on Monday mornings. Mrs. Silverman testified that she would receive a telephone call on Monday evening with instructions as to the dosage of the Coumadin as it would vary depending upon the results of the blood test. Any change would commence the following morning.

On the morning of May 9, 2005, John Widecki, a phlebotomy technician employed by Apex, drew Mr. Silverman's blood and then placed the vial into an insulated cooler. The specimen was delivered and logged into Apex's computer tracking system at 3:32 p.m. for testing (Atwell Aff. ¶5). Two copies of the test results were faxed to Dr. Matano's office at 3:49 p.m. and 3:53 p.m., respectively (Contino Aff. ¶10, Exs. F and G). Because of the "panic high" result, a Panic Alert Report was generated, and Apex also telephoned Dr. Matano's office and verbally notified Isabel of the results (Atwell Aff. ¶¶ 7 and 9). Mrs. Silverman testified that she received a telephone call from Debbie of Dr. Matano's office at approximately 4:30, 5 o'clock, advising that the results were good" (Contino Aff. Ex. Q, p. 48). On Tuesday morning at breakfast Mr. Silverman took his normal dosage of Coumadin. Thereafter, Mrs. Silverman received another telephone call from Debbie at approximately 9:30 a.m., this time advising that "the lab made a very big mistake, get Jesse right off the Coumadin for two days" (Id. p. 49).

Mrs. Silverman testified that on May 11 her husband fell and that he began complaining of back pain the following evening. On the morning of May 14, Mr. Silverman went to the emergency room at St. Francis Hospital. A doctor took blood and "it shot all the way up" as the count was very high (Id. p. 73). According to Mrs. Silverman's testimony the doctor said, "wow, your blood must be very thin" (Id.). While at the hospital, Mr. Silverman became paralyzed and could not speak. He was thereafter transferred to North Shore University Hospital where he was admitted and stayed for twenty-six days. Mrs. Silverman testified that the doctors at North Shore told her that "there was massive bleeding on his spinal area" (Id. p. 88) and that he suffered a heart attack (Id. p. 98). Mr. Silverman died on June 9, 2005.

As amplified in plaintiffs' verified bill of particulars, plaintiffs allege the following with respect to Apex: Apex was negligent (1) in failing, neglecting and refusing to care properly for said patient; (2) in providing inaccurate and inappropriate test results; (3) in failing to warn plaintiff of test results; in treating said patient in a careless, negligent and unprofessional manner; (4) in failing to diagnose adequately the conditions and ailments from which patient was then suffering; (5) in failing to use reasonable skill, care and diligence in the exercise of professional knowledge to accomplish the purpose for which said defendant was retained; (6) in failing to take any or effective and adequate means or measures to prevent further harm and injury to said patient; and (7) in failing and omitting to take proper and suitable precautions for the safety of said patient (Contino Aff. Ex. D ¶4). Plaintiffs further allege that the laboratory test results were incorrectly recorded and reported to Dr. Matano (Contino Aff. Ex. D ¶16).

It is submitted that plaintiffs' claims against Apex are without merit. In support of its application, Apex provides the affidavits of John Widecki, a house call phlebotomy technician employed by Apex; Thomas Atwell, Apex's President; and Mike Papez, a clinical laboratory consultant employed by Medical Laboratory Consulting Services.

Mr. Atwell avers that he is certified as a Laboratory Supervisor and as a Medical Technologist. He states that Apex was to "conduct Prothrombin Time ("PT") Testing and calculate an International Normalized Ratio ("INR") on Mrs. Silverman's blood once per week for six months" (Atwell Aff.

¶4). It is submitted by Mr. Atwell that in May 2005 the generally accepted device to appropriately and accurately ascertain the PT and INR was an Electra 1600C, which was utilized by Apex to analyze Mr. Silverman's blood specimens. Mr. Atwell avers that quality control tests were conducted daily on the Electra 1600C and were in acceptable range on May 9, 2005, and that blind sample testing conducted by the New York State Department of Health in February 2005 yielded a 100% accuracy rate. It is further asserted by Mr. Atwell that on May 9, 2005, Mr. Silverman's PT and INR results were at "panic high" levels (as published in literature such as trade journals) generating a Panic Alert Report, causing "Apex to call Dr. Matano's office that day and verbally notify 'Isabel'" and thereafter to fax results at 3:48 and 3:53 p.m. (Id. ¶9). Mr. Atwell avers that "Apex does not report test results directly to patients, as New York State Health Department regulations prohibit same unless specific written authorization is given by the prescribing physician," which was not the case in this matter (Id. ¶10). Mr. Atwell concludes that "the accessioning of blood, its testing to the reporting of the PT and INR results via fax and telephone to Dr. Matano's office clearly establish that Apex acted properly and in accordance with Apex's policies and procedures as well as generally accepted laboratory practices" (Id. ¶11).

Dr. Matano testified that it is office procedure after receiving a verbal communication from the laboratory that the results are within range to wait until a fax copy is received. If, however, the results were abnormal, the staff would contact the doctor (Contino Aff., Ex. R, p. 122). Thus, even if Apex had verbally reported an incorrect result, the fax report would have been and was received prior to Dr. Matano's office communicating with plaintiff. Debra Camilo, who was employed by Dr. Matano at the time, testified that "[t]here is always a fax" (Id., Ex. S, p. 27) and that, even if there was a time lag between the receipt of the verbal communication and the fax, they would still wait for the fax. Ms. Camilo also testified that the laboratory would call when the level was abnormal. With regard to the monitoring of the Coumadin levels, Ms. Camilo testified that it was Dr. Matano who gave instructions as to what to do after reviewing the results (Id. p. 76) and that those instructions were given to the patient the same day. Mr. Camilo further testified that she had no recollection of ever having a conversation with Ms. Silverman wherein she related that the lab had made a mistake

Within the particular context of a medical malpractice action, a plaintiff opposing a defendant's motion for summary judgment is required to proffer evidentiary facts sufficient to rebut the defendant's *prima facie* showing that he or she [or it] was not negligent in order to show the existence of a triable issue of fact (*Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept. 1994]). Allegations of a general and conclusory nature which are not supported by competent and admissible evidence and which do not demonstrate the essential elements of a medical malpractice action are not sufficient to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The essential elements of a medical malpractice action are comprised of the following: (1) a deviation or departure from accepted practice and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358 [2d Dept. 1998]).

Apex has submitted competent evidence that it did not depart from good and accepted practice

when it conducted blood tests for Mr. Silverman. In the matter *sub judice*, based upon the heretofore referenced deposition testimony coupled with the affidavits submitted and the averments therein contained, Apex has demonstrated its *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to plaintiffs to submit competent evidence showing a departure from accepted practice and a nexus between the alleged negligence and plaintiff's injury (*Alvarez v Prospect Hosp., supra*).

In opposition to Apex's application, plaintiffs only submit the affirmation of counsel. Counsel submits that the only issue is whether Apex performed the tests accurately and whether the results were properly transmitted to Dr. Matano. Plaintiffs only rely on the testimony of Mrs. Silverman relating to her alleged conversation with Debra Camilo, which testimony is hearsay and not corroborated by Debra Camilo. It is well settled that unsubstantiated hearsay is insufficient to raise a triable issue of fact (*Garcia v Prado*, 15 AD3d 347 [2d Dept. 2005]; *Ventriglio v Staten Island University Hosp.*, 6 AD3d 525 [2d Dept. 2004]).

Viewing the evidence in a light most favorable to plaintiff as is required when deciding a motion for summary judgment, the court concludes that the evidence proffered by plaintiff has failed to raise a triable issue of fact.

Defendant, Apex, is accordingly awarded summary judgment dismissing plaintiffs' claims against it.

Plaintiffs' complaint is dismissed as against Apex. Dismissal is without costs.

This decision constitutes the order of the court.

Dated: February 13, 2008

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

FEB 15 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

RE: SILVERMAN v. MATANO

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