

S.S. v Ciatello

2021 NY Slip Op 34186(U)

March 31, 2021

Supreme Court, Queens County

Docket Number: Index No. 711944/18

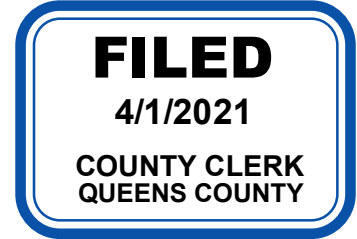
Judge: Peter J. O'Donoghue

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This opinion is uncorrected and not selected for official publication.

New YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **PETER J. O'DONOGHUE** IAS PART MD
Justice



-----,

S.S., an infant under the age of 14 years
by his mother and natural guardian,
FABIANA BERG,

Plaintiff,
-against-

Index No.: 711944/18

Motion Date: 11/18/20 and
12/16/20

DIANE CICATELLO, M.D et.

Motion Seq.: 2, 3, & 4

Defendants.

Motions bearing sequence numbers 2 of 11/18/20 and 3 and 4 of 12/16/20 are hereby consolidated for disposition. The following papers numbered as set forth below read on these motions by defendants (a) DIANE CICATELLO, M.D., JACK J. SOBRIN, D.O. and MID HUDSON MEDICAL GROUP, P.C (seq 2) for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the above-captioned action in its entirety; (b) RICHARD JIAO, M.D. (seq 3) pursuant to CPLR §3212 granting summary judgment in his favor and dismissing the Complaint; and (c) Benjamin Hentel, M.D., DRA Imaging, P.C., Jon Lewis, M.D. and Joseph Antonio, M.D. (Seq 4) for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint and any potential cross-claims and deleting their names from the caption.

	<u>PAPERS NUMBERED</u>
<u>Seq. No. 2</u>	
N.M.-Affidavits-Exhibits.....	32-50
Opposition Papers-Affidavits-Exhibits.....	114-115
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Seq. No. 4

N.M.-Affidavits-Exhibits..... 72-108

Opposition Papers-Affidavits-Exhibits..... 112-113

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Upon the foregoing papers it is ordered that the branch of the within motion by defendant JACK J. SOBRIN, (seq 2) for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the action against him is denied as moot since plaintiff executed and filed a stipulation of discontinuance of the action as asserted against JACK J. SOBRIN.

The branch of the within motion by defendant DIANE CICATELLO, M.D., (seq 2) for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the action as asserted against her is granted. Movant established *prima facie* entitlement to an award of summary judgment through the submission of the expert affirmation of JAMES SANDERS, M.D.. Dr. Sanders opines that there was no delay in the diagnosis of osteogenesis imperfecta (hereinafter "OI") which is known in lay terms as brittle bone disease which is a collection of genetic disorders caused by gene mutation and that "Dr. Cicatello properly raised the impression of OI on April 19, 2012 at the time she ordered the skeletal x-ray assessment." He further opines that "there are no cures for any type of OI" and "once diagnosed, the treatment plan for OI, including OI Type V, is management and is patient specific based upon fractures and deformities with greatly varied results." In opposition, plaintiff submits the expert affidavit of EILEEN COSTELLO, M.D.. Dr. Costello opines, in a conclusory fashion, that "upon review of the records there were tell-tale signs that this child had bone disease which were not noted by Dr. Cicatello." Dr. Costello fails to identify what the "tell-tale signs" were, or what was known or should have been known to Dr. Cicatello. Furthermore, Dr. Costello fails to opine on the issue of proximate cause. Dr. Costello does not refute Dr. Sander's assertion that there are no cures for any type of OI; nor does she attribute any fractures or substantively caused harm to the purported delay in diagnosing osteogenesis imperfecta to Dr. Cicatello.

The branch of the within motion by defendant MID HUDSON MEDICAL GROUP, P.C (seq 2) for summary judgement is granted with respect to the allegations premised on vicarious liability for Dr. Sorbin's and Dr. Cicatello's care and treatment.

The motion by defendant Richard Jiao, M.D. (Seq 3) for an Order pursuant to CPLR §3212 granting summary judgment in his favor, and dismissing the Complaint as to said defendant is denied. Questions of fact exist, including but not limited to, whether Richard Jiao, M.D.

departed from the accepted standard of care by improperly interpreting the September 26, 2011 x-ray of the infant's right leg by failing to diagnose a fracture to the right leg and/or failing to appreciate the presence of a bowing deformity; and if so, whether such departure(s) was(were) a substantial factor(s) in causing plaintiff's injuries to wit: an undiagnosed and untreated hairline fracture which progressed into that of a transverse and spiral fracture and the delayed diagnosis, and therefore delayed commencement of treatment, of the genetic bone disease known as osteogenesis imperfecta, which may require resolution at trial.

The motion by defendants Benjamin Hentel, M.D., DRA Imaging, P.C., Jon Lewis, M.D. and Joseph Antonio, M.D. (Seq 4) for an Order pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the complaint and any potential cross-claims as to these defendants and deleting their names from the caption is decided as follows:

The branches of the motion by defendants Jon Lewis, M.D. and Joseph Antonio, M.D. are granted. Plaintiff's expert MARC FREDERIC GLICKSTEIN, M.D., FACR, fails to raise a question of fact sufficient to defeat summary judgment as he concedes in his expert affidavit that "I find no fault with their care."

The branch of the motion by defendant Benjamin Hentel, M.D. for an Order pursuant to CPLR §3212 granting summary judgment in his favor, and dismissing the Complaint as to said defendant is denied. Questions of fact exist, including but not limited to, whether Benjamin Hentel, M.D. departed from the accepted standard of care by improperly interpreting the February 5, 2012 abdominal pelvic CT scan by failing to diagnose posterior fractures of the 9th, 10th and 11th ribs on the right and the 12th rib on the left; and if so, whether such departure(s) was(were) a substantial factor(s) in causing plaintiff's injuries to wit: delayed diagnosis, and therefore delayed commencement of treatment, of the genetic bone disease known as osteogenesis imperfecta, which may require resolution at trial.

The branch of the motion by defendant DRA Imaging, P.C. for summary judgement with respect to the allegations premised on vicarious liability for Benjamin Hentel's care is denied.

The claim for loss of services on behalf of the mother is dismissed without opposition.

The case is dismissed as to defendants DIANE CICATELLO, M.D., Jon Lewis, M.D., Joseph Antonio, M.D.; and discontinued as to defendant JACK J. SOBRIN.

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----x Index No.: 711944-2018

S.S., an infant under the age of 14 years
by his mother and natural guardian, FABIANA
BERG,

Plaintiff

- against -

BENJAMIN HENTEL, M.D., DRA IMAGING, P.C.,
and RICHARD JIAO, M.D.,

Defendants.

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The Clerk of the Court shall enter judgment accordingly

Dated: March 31, 2021

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Hon. Peter J. O'Donoghue, J.S.C.

