

2009 WL 7237831 (N.Y.Sup.) (Trial Order)
Supreme Court of New York
Westchester County

Arlene STOLARSKI, as Administratrix of the Estate of Erin Stolarski, Deceased, and John Stolarski, Plaintiffs,

v.

Donald DESIMONE and Family Services of Westchester, Inc., Defendants;
Family Services of Westchester, Inc., Third-Party Plaintiff,

v.

Greenwich Hospital, Third-Party Defendant.

No. 3082/06.
December 31, 2009.

Decision & Order

Anthony J. Pirrotti, P.C., Attorney for Plaintiffs, 501 Ashford Avenue, Ardsley, New York 10502.

Meagher & Meagher, P.C., Attorneys for Defendant DeSimone, 175 Main Street, Suite 205, White Plains, New York 10601.

Lewis Brisbois Bisgaard & Smith LLP, Attorneys for Defendant/Third-party Plaintiff Family Services of Westchester, Inc.,
199 Water Street, 25th Floor, New York, New York 10038, Heidell, Pittoni Murphy & Bach, LLP.

Attorneys for Third-party Defendant Greenwich Hospital, 99 Park Avenue, New York, New York 10016.

Nicholas Colabella, Judge.

Motion Date 8/7/09

The following papers numbered 1- 32 were read on motion by defendant Family Services, Inc. for summary judgment.:

Notice of Motion, Affidavits, Exhibits.....	1-6
Answering Affidavit, Exhibits.....	7-19
Reply Affidavit, Exhibit.....	25-32

Motion by defendant Family Services of Westchester, Inc. is denied.

Plaintiffs claim that defendant Family Services Inc. was negligent in failing to refer the decedent to a psychiatrist for treatment. Defendant disputes the foregoing and claims that it did refer decedent to a psychiatrist. There is an issue of fact, however, as to whether decedent was referred to a psychiatrist. Although the social worker Chesneau testified that an appointment was scheduled with the psychiatrist Lago after the second appointment once plaintiff agreed to be seen by a psychiatrist, Lago testified he had no recollection of being contacted by Chesneau and that there was no appointment listed in his schedule of appointments. Chesneau's explanation for the absent entry, that Lago's schedule was full, is inconsistent with Lago's testimony that the appointment could have been added anyway. There is also no mention of an appointment being set up with Lago in Chesneau's notes prior to decedent's death.

In addition, defendant has failed to demonstrate, *prima facie*, that the failure to schedule an earlier appointment comported with accepted standards of care. While defendant attempts to make this demonstration with affidavits of experts, it is uncontroverted that defendant failed to identify the purported experts and their anticipated testimony in response to plaintiffs demand for expert disclosure until after the note of issue was filed, and defendant has offered no valid excuse for the failure to do so. Accordingly, the affidavits are untimely and may not be considered in determining summary judgment (*Yax v. Development Team, Inc.*, 67 AD3d 1003; *Gerardi v. Verizon New York*, 66 AD3d 960; *Wartski v. C.W. Post Campus of Long Island University*, 63 AD3d 916, 917; *King v. Gregross Mgmt. Corp.*, 57 AD3d 851; *Construction by Singletree, Inc. v. Lowe*, 55 AD3d 861, 863; *Colon v. Chelsea Piers Mgmt.*, 50 AD3d 616; but see, *Browne v. Smith*, 65 AD3d 996) .¹ As a result, the burden of proof did not shift to plaintiff to produce an affidavit from an expert to show that there was a departure from accepted standards of care.

The expert affidavits were also inadequate to establish entitlement to summary judgment, even if considered, in that they failed to eliminate all issues of fact as to whether there was a need for earlier intervention. Although Chesneau reported that decedent denied suicidal ideation when she met plaintiff, she was nonetheless being seen for treatment of depression with suicidal thought following a suicide attempt, she continued to express feelings of depression and hopelessness, and she stated that she felt she could not live without her boyfriend. The notes from decedent's in patient admission at Greenwich Hospital indicated that, at one point, plaintiff expressed a possibility that she might harm herself again, and Chesneau herself recorded a GAF score of 20 in her assessment of plaintiff which, according to Chesneau, was indicative of a need for hospitalization.²

There are other inconsistencies in the statements attributed to decedent that raise issues of fact as well. While Chesneau testified that decedent refused to see a psychiatrist, the social worker from Greenwich Hospital, Brown, testified that she had arranged for decedent to see a psychiatrist through defendant with decedent's knowledge and consent.

Moreover, there is an issue of fact as to whether, given decedent's history, another suicide attempt was reasonably foreseeable. That defendant could not have foreseen the specific manner of decedent's suicide is immaterial if it could have reasonably inferred that she was at risk for attempting suicide again without treatment. Defendant's contention, that there was nothing that could have been done to prevent decedent from committing suicide, is belied by the testimony of Lago that he could have treated her with medication and that no patient he had medicated had ever committed suicide.

Dated: December 31, 2009

White Plains, New York

<<signature>>

Nicholas Colabella

Supreme Court Justice

ANTHONY J. PIRROTTI, P.C.

Attorney for Plaintiffs

501 Ashford Avenue

Ardsey, New York 10502

MEAGHER & MEAGHER, P.C.

Attorneys for Defendant DeSimone

175 Main Street, Suite 205

White Plains, New York 10601

LEWIS BRISBOIS BISGAARD & SMITH LLP

Attorneys for Defendant/Third-party Plaintiff Family Services of Westchester, Inc.

199 Water Street, 25th Floor

New York, New York 10038

HEIDELL, PITTONI MURPHY & BACH, LLP

Attorneys for Third-party Defendant Greenwich Hospital

99 Park Avenue

New York, New York 10016

Footnotes

- 1 To the extent *Browne* is inconsistent with the other cited cases as to the rule on summary judgment, it appears to be aberrational. *Browne* made no mention of the other cases and subsequent cases have adhered to the rule stated in those cases without reference to *Browne*. Until the Second Department states otherwise, the undersigned will follow what appears to be the prevailing rule. The determination herein, however, is not intended as a determination with respect to the admissibility of expert testimony that may be offered at trial (see, *Ocampo v. Pagan*, 2009 WL 4984794 [Dec. 22, 2009]).
- 2 While Chesneau later testified that the low GAF score was a clerical error on her part, that explanation presents an issue of credibility for the fact finder.

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