

L.W.

PART 29

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
 CINTRON, CARMEN

Index No. 0021705/2005

-against-

Hon. ROBERT E. TORRES

MONTEFIORE MEDICAL CENTER

Justice.

-----X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **April 09 2010** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
<u>Motion's</u> Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is granted in accordance with the attached decision

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

RECEIVED
 BRONX COUNTY CLERK'S OFFICE
 SEP 14 2010

Dated: 9/9/10

Hon. RET
ROBERT E. TORRES, J.S.C.
 JUDGE ROBERT E. TORRES

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX, PART 29
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

CARMEN CINTRON,

INDEX NUMBER: 21705/05

Plaintiff,

-against-

Present:
HON. **ROBERT E. TORRES**

MONTEFIORE MEDICAL CENTER,

Defendant.

Defendant MONTEFIORE MEDICAL CENTER moves this Court for an Order pursuant to C.P.L.R. § 3212 granting it summary judgment on the ground that there are no triable issues of fact. Plaintiff opposes the motion arguing that issues of fact exist warranting denial of the instant motion. For the reasons set forth herein, defendant's motion is granted.

In this present medical malpractice action, plaintiff alleges that defendant failed to obtain a medical history; failed to stop prescribing Vioxx; failed to stop prescribing prescription medications, when it became clear that plaintiff's renal function was deteriorating; continued to prescribe methotrexate; failed to provide appropriate warnings about the dangers of prescription drugs prescribed to plaintiff; failed to advise plaintiff of alternative prescriptive medications; improperly prescribed Vioxx in combination with other drugs; failed to prescribe a test dose of methotrexate; failed to give calcium folinate; failed to properly regulate, control, and monitor the quantity and dosage of the drugs defendant prescribed to plaintiff, including Vioxx, Celebrex, and methotrexate; failed to monitor the severity of plaintiff's condition; failed to provide appropriate medical treatment; failed to provide follow-up examinations; failed to provide appropriate treatment for hematuria; and

failed to properly diagnose plaintiff's medical condition. As a result of the alleged negligence, plaintiff alleges the following injuries: end stage renal disease; repeated hospitalization; possible kidney transplant; seizures; hypertension; and psychological and emotional injuries.

Defendants now move for summary judgment on the grounds that plaintiff failed to demonstrate that defendant departed from accepted standards of medical practice and that this departure was the proximate cause of plaintiff's injuries. In support of their motion, defendants submit the expert affirmations of nephrologist David Goldfarb, M.D. and rheumatologist Allan Gibofsky, M.D. Additionally, defendants submit the deposition testimony of Plaintiff CARMEN CINTRON.

Plaintiff opposes the motion arguing that defendant's experts' affirmations fail to establish the standards of medical care applicable to defendant's medical care and treatment of plaintiff in the years 2001-2003. In support of her position, plaintiff submits the expert affirmation of Richard Quigg, M.D.

On motions for summary judgment, the court's function is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957); Rose v. DaEcib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In order to establish a prima facie case of medical malpractice, plaintiff is required to show that defendant departed from accepted standards of care and that its departure was the proximate cause of the injuries. D.D. Hamilton Textile, Inc. v. Estate of Mate, 269 A.D.2d 214, 215 (1st Dept. 2000); Stanki v. Ezersky, 228 A.D.2d 311 (1st Dept. 1996). However, when reviewing a motion for summary judgment, the Court is not to determine credibility. Quinn v. Krumland, 179

A.D.2d 448 (1st Dept. 1992). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989).

Defendant's motion for summary judgment must be granted because plaintiff's affidavit is inconsistent with her deposition testimony. An affidavit which is contradictory to the affiant's prior deposition testimony must be rejected. Harty v. Lenci, 294 A.D.2d 296 (1st Dept. 2002). Self-serving affidavits submitted by plaintiff in opposition to a summary judgment motion which contradict plaintiff's own deposition testimony are insufficient to raise a triable issue of fact to defeat a motion for summary judgment. Phillips v. Bronx Lebanon Hosp., 268 A.D.2d 318 (1st Dept. 2000). Here, in plaintiff's affidavit in opposition to the instant motion, plaintiff states that no doctor ever told her that if she did not have a biopsy, she would need dialysis for the rest of her life and her life would be shortened. However, in plaintiff's deposition, plaintiff states that the doctor informed plaintiff several times that she needed a biopsy followed by a blood transfusion because her kidneys were failing and her kidneys would continue to deteriorate if she refused.

Additionally, Dr. Quigg's affidavit is based solely on plaintiff's affidavit in opposition to the instant motion and does not address plaintiff's contradictory deposition testimony. Specifically, plaintiff states in her deposition testimony that she experienced arthritis and pain in her hands and knees in 1991. However, Dr. Quigg based his opinion only on medical records from 2001 to 2003. As such, Dr. Quigg's opinions are unsupported by admissible evidence and are insufficient to defeat the instant motion. Where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and it is insufficient to withstand summary judgment. Diaz v. N.Y. Downtown Hosp., 99 N.Y.2d 542 (1st Dept. 2002).

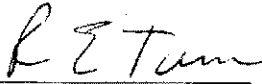
Notwithstanding, Dr. Quigg's affirmation is statutorily defective according to CPLR §

2309(c), which states that an oath or affirmation taken outside the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state if such deed had been acknowledged before the officer who administered the oath or affirmation. Here, Dr. Quigg's affidavit indicates that it was signed in the state of Illinois. Although the affidavit appears to be signed by a Notary Public, no certificate attesting to this individual's authority was attached.

Accordingly it is hereby ORDERED that the defendant's motion seeking summary judgment dismissing the action on the ground that there are no triable issues of fact is granted in all respects.

The defendant shall serve a copy of this order with Notice of Entry within thirty (30) days of entry of this Order.

Dated: September 7, 2010


Hon. Robert E. Torres

JUDGE ROBERT E. TORRES