At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of April 2024.

PRESENT:

HON. GENINE D. EDWARDS,

Justice.

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MARIA HUDSON,

Plaintiff,

- against -

IRINA VAIZMAN, M.D., MARK GELFAND, M.D., MANHATTAN BEACH OB/GYN, STAR MEDICAL OFFICES, P.C., DMITRIY BRONFMAN, M.D., and REGINA KOGAN, P.A.,

Defendants.

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DECISION AND ORDER

Index No. 503601/17

Mot. Seq. # 7-8

The following e-filed papers read herein: NYSCEF Doc Nos.:

Notices of Motion, Affirmations/Affidavit, and Exhibits.....171-189; 190-207
Memo of Law in Opposition, Affirmation/Affidavits and Exhibits. 212-219
Reply Affirmation and Exhibit 220-221

In this action to recover damages for medical malpractice and lack of informed consent, Mark Gelfand, M.D., and Star Medical Offices, P.C., jointly, and Regina Kogan, P.A. ("defendant" or "PA Kogan"), individually, moved for summary judgment dismissing the amended complaint of Maria Hudson ("plaintiff") as against them. Plaintiff did not object to the dismissal of her amended complaint as against Mark Gelfand, M.D., and Star Medical Offices, P.C.[1] Further, plaintiff did not object (and thus effectively abandoned) her eighth cause of action for lack of informed consent as against PA Kogan. *See 114 Woodbury Realty,*

[1] *See* Plaintiff's Memorandum of Law and Affirmation in Opposition to Regina Kogan, P.A.'s Motion for Summary Judgment, dated August 29, 2023, at 1 n 1 ("Plaintiff is not opposing defendants, Mark Gelfand, M.D.[,] and Star Medical Offices, P.C.'s motion for summary judgment.").

LLC v. 10 Bethpage Rd., LLC, 178 A.D.3d 757, 114 N.Y.S.3d 100 (2d Dept. 2019). The remainder of this Decision and Order addresses plaintiff's claims sounding in medical malpractice as against PA Kogan.

Plaintiff commenced this action to recover damages for medical malpractice, alleging, inter alia, that defendant was negligent in failing to timely diagnose her with endometrial cancer. After discovery was completed and a note of issue was filed, defendant timely moved for summary judgment dismissing the amended complaint insofar as asserted against her.[2] On November 3, 2023, the Court reserved decision following oral argument.

"A defendant seeking summary judgment in a medical malpractice action must establish, prima facie, that he or she did not deviate from accepted standards of medical care or that his or her acts were not a proximate cause of any injury to the plaintiff." *Jacob v. Franklin Hosp. Med. Ctr.*, 188 A.D.3d 838, 135 N.Y.S.3d 430 (2d Dept. 2020), *affd* 36 N.Y.3d 1102, 144 N.Y.S.3d 412 (2021). To defeat summary judgment, the nonmoving party must demonstrate a triable issue of fact as to the elements that the movant proved. *Kielb v. Bascara*, 217 A.D.3d 756, 191 N.Y.S.3d 158 (2d Dept. 2023). There is no requirement that the plaintiff address the element of proximate cause since defendant failed to shoulder his prima facie burden as to that element. *Id.*

[2] Defendant also sought (albeit implicitly) dismissal of the cross-claim as against her by codefendant Manhattan Beach Ob/Gyn, P.C. (incorrectly sued herein as Manhattan Beach Ob/Gyn), in ¶ 33 of its Answer to Amended Complaint, dated October 6, 2019.

Here, defendant demonstrated, prima facie, by way of an expert affidavit,[3] that she did not deviate from accepted standards of medical care as a physician assistant. Specifically, the defense expert, a New York State-licensed physician assistant, opined (in ¶¶ 17-19 of her affidavit) that:

(1) "[t]he standard of care in 2014 for patient's [such as plaintiff's] complaining of post-menopausal bleeding [was] to either order and/or perform an endometrial biopsy or a D&C";

(2) defendant "properly evaluated . . . plaintiff, recommended all necessary consultations and tests, appreciated and interpreted the radiographic studies, appreciated . . . plaintiff's complaints and appropriately recommended a D&C [which, in defense expert's opinion, was an appropriate test in this case given plaintiff's clinical presentation] to determine the cause of her complaints, all within the standard of care";

(3) "an endometrial biopsy was not indicated here, and would have been inappropriate[,] because [plaintiff's] IUD could not be removed at the visit, and [its removal, if attempted or consummated,] could have been harmful by pressing on the IUD, which was possibly within the cervix"; and

(4) "a D&C would accomplish both removal of the IUD and obtaining the endometrial sample, and would be more definitive [diagnostically] than [an endometrial] biopsy alone."

[3] *See* Expert Affidavit of Rita Sachs, P.A., dated February 28, 2023.

As to proximate cause, however, defendant's expert did no more than opine (in ¶ 8 of her affidavit) that "[defendant] did not cause any harm to . . . plaintiff," and that "the alleged injuries are not the result of any alleged malpractice or negligence committed by [defendant]" (underlining in the original). Such bare, conclusory assertions were insufficient to make a prima facie showing that (regardless of defendant's showing of lack of departure) the departures that defendant allegedly committed did not proximately cause plaintiff's injuries. *See Lopresti v. Alzoobaee*, 217 A.D.3d 759, 191 N.Y.S.3d 171 (2d Dept. 2023).

In opposition to defendant's prima facie showing on the element of departure, plaintiff raised triable issues of fact. Specifically, plaintiff offered an expert affidavit from a New York State-licensed physician assistant[4] who opined (in ¶ 10 of his affidavit, with detailed explanations supplied throughout the remainder of his affidavit) that defendant: (1) "failed to appreciate ultrasound findings of [plaintiff's] thickened endometrium which were highly suggestive of endometrial malignancy; (2) "negligently attributed plaintiff's [persistent post-menopausal bleeding] to an embedded . . . IUD"; (3) "failed to perform an endometrial biopsy to rule out endometrial malignancy; (4) "failed to remove [the] IUD;" and (5) "failed to consult with a supervising gynecologist."

It is well established that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Those credibility issues

[4] *See* Expert Affidavit of Elijah A.J. Salzer, P.A., dated August 29, 2023.

must be resolved by a jury. *Khutoryanskaya v. Laser & Microsurgery, P.C.*, 222 A.D.3d 633, 201 N.Y.S.3d 177 (2d Dept. 2023).

Contrary to defendant's contention, plaintiff's alleged non-compliance with defendant's discharge instruction in failing to obtain a clearance for the D&C from her primary care physician – or to return to (or contact) defendant's office at Manhattan Beach Ob/Gyn, P.C. – did not constitute an intervening cause that, as a matter of law, severed the causal nexus between the missed early-stage endometrial cancer in December 2014 and the subsequently discovered advanced endometrial cancer in September 2015. "When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." *Hain v. Jamison*, 28 N.Y.3d 524, 46 N.Y.S.3d 502 (2016). Nothing in defendant's expert affidavit supported (much less established as a matter of law) that plaintiff's failure to follow up was "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from . . . defendant's conduct, that it may possibly break the causal nexus." *Romanelli v. Jones*, 179 A.D.3d 851, 117 N.Y.S.3d 90 (2d Dept. 2020).

The Court considered the parties' remaining contentions and found them either moot or without merit in light of its determination.[5] All relief not expressly granted is denied.

[5] The Court disregarded plaintiff's allegedly inadequate response to defendant's statement of material facts under 22 NYCRR 202.8-g because the deposition transcripts, medical records, and expert affidavits/affirmations were sufficient to provide the facts to the Court. *See Taveras v. Incorporated Vil. of Freeport*, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2024 N.Y. Slip Op. 01577 (2d Dept. 2024).

Based on the foregoing and after oral argument, it is

ORDERED that the joint motion of Mark Gelfand, M.D., and Star Medical Offices, P.C., for summary judgment is granted without opposition, and it is further

ORDERED that defendant PA Kogan's motion for summary judgment is granted to the extent that plaintiff's informed consent claim as against her is dismissed; and the remainder of her motion is denied, and it is further

ORDERED that plaintiff's amended complaint is dismissed in its entirety as against Mark Gelfand, M.D., and Star Medical Offices, P.C., without costs and disbursements in each instance, and it is further

ORDERED that to reflect the dismissal of Mark Gelfand, M.D., and Star Medical Offices, P.C., from this action, as well as to correct the name of defendant Manhattan Beach Ob/Gyn, P.C., the caption is amended to read in its entirety as follows:

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MARIA HUDSON,
Plaintiff,

- against -

IRINA VAIZMAN, M.D.,
MANHATTAN BEACH OB/GYN, P.C.,
DMITRIY BRONFMAN, M.D., and
REGINA KOGAN, P.A.,

Defendants.
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; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk, and it is further

ORDERED that the remaining parties are directed to appear virtually for an Alternative Dispute Resolution Conference on May 28, 2024, at 12PM.

This constitutes the Decision and Order of the Court.

ENTER,

Hon. Genine D. Edwards
J. S. C.