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SCANNED ON 4/12/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten Justice PART 6

Index Number : 100488/2003

ROSEN, CARYN

VS

MOSS, RICHARD M.D.

Sequence Number : 3

SUMMARY JUDGMENT

INDEX NO. 100488/03

MOTION DATE 3/22/05

MOTION SEQ. NO. 03

MOTION CAL. NO. 10

The following papers, numbered 1 to 4 were read on ..... motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2 3
Replying Affidavits	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

FILED

APR 12 2005

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-6-05

EILEEN BRANSTEN J.S.C.

J.S.C

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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CARYN ROSEN,

Plaintiff,

-against-

Index No. 100488/03
Motion Date: 3/22/05
Motion Seq. No: 003

RICHARD D. MOSS, M.D.,
GILA LEITER, M.D.,
PARK AVENUE WOMEN'S CENTER, and
HERBERT JAFFIN, M.D., RICHARD D.
MOSS, M.D., SHELDON H. CHERRY, M.D., P.C.,

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3211, defendant Richard D. Moss, M.D. ("Dr. Moss") moves for summary judgment dismissal of the action commenced by plaintiff Caryn Rosen ("Ms. Rosen"). Defendants Park Avenue Women's Center ("Women's Center") and Herbert Jaffin, M.D., Richard D. Moss, M.D. and Sheldon H. Cherry, M.D., P.C. ("Corp.") cross-move for summary judgment dismissal of plaintiff's action. Ms. Rosen opposes defendants' motions.

Background

On September 27, 1999, Ms. Rosen – then twenty-six years old – first presented to Dr. Moss with concerns about a diagnosis of human papilloma virus (HPV). Defendants'

Affirmation in Support of Motion ("Aff."), at ¶ 8. Dr. Moss attempted to examine Ms. Rosen's vulva where a wart had just been removed, but was limited due to Ms. Rosen's discomfort. *Id.* Dr. Moss noted that Ms. Rosen took Nordette for birth control, her last menstrual period was September 19, 1999, and that she weighed 138.5 pounds. *Id.* He did not, however, perform a papilloma, blood or urine test. Plaintiff's Affirmation in Opposition ("Opp."), at ¶ 6.

On February 14, 2000, Ms. Rosen returned to Dr. Moss complaining of missed periods, sore breasts and cramping. Aff., at ¶ 9. She reported that her last period was January 11, 2000 and that she weighed 140.5 pounds. *Id.* Dr. Moss diagnosed Ms. Rosen with "silent menses" due to birth control pills and switched Ms. Rosen to a different form of birth control, Ortho Tri-cyclen. Aff., at ¶ 10. A few months later, however, Ms. Rosen switched back to Nordette, which she preferred over Ortho Tri-cyclen because it made her periods last only three to four days. *Id.*

On August 28, 2000, Ms. Rosen again saw Dr. Moss, this time complaining of severe abdominal pain. Aff., at ¶ 11. Ms. Rosen told Dr. Moss that her period had commenced on August 26, 2000, and that she may have left a tampon inside her. *Id.* At the time, Ms. Rosen weighed 142 pounds. Aff., at ¶ 12. Dr. Moss performed pelvic and abdominal examinations, both of which were normal. *Id.* He then diagnosed Ms. Rosen with irritable

bowel associated with upper respiratory infection. *Id.* Dr. Moss did not perform blood or urine tests or an ultrasound. Opp., at ¶ 10.

Ms. Rosen had her next appointment with Dr. Moss seven months later, on March 29, 2001. Aff., at ¶ 13. At that time, Ms. Rosen reported that her last period was on February 20, 2001, and that she weighed 142 pounds. *Id.* Dr. Moss performed another pelvic examination, which was normal. *Id.* He also performed a urine test and HIV test, both of which came back normal. Opp., at ¶ 11.

On December 6, 2001, Ms. Rosen saw Dr. Moss for the last time. Aff., at ¶ 14. At the time, Ms. Rosen weighed 147.5 pounds and reported that her last menstrual period was November 20, 2001. *Id.* She also reported "looking kind of fat" and that her periods had not been consistent. Aff., at ¶ 15. Again, Dr. Moss performed a pelvic examination, which was normal. Aff., at ¶ 14.

On April 13, 2002, Ms. Rosen began experiencing cramps, pain and a poking feeling in her abdomen. Aff., at ¶ 16. On April 15, 2002, she developed heavy bleeding and presented to Dr. Moss's office, where she saw Gila Leiter, M.D. ("Dr. Leiter") in Dr. Moss's absence. *Id.* Dr. Leiter felt a mass during Ms. Rosen's pelvic examination, and on that basis, ordered blood and urine tests and sonograph and radiology studies. Aff., at ¶ 17. Dr. Leiter also scheduled Ms. Rosen for surgery later that day at Mount Sinai Hospital, although Ms. Rosen chose to undergo the surgery at Jamaica Hospital instead. *Id.*

On April 18, 2002, Dr. Wayne Cohen, M.D. ("Dr. Cohen") and Sharon Lojun, M.D. ("Dr. Lojun") performed a laparotomy on Ms. Rosen at Jamaica Hospital. Aff., at ¶ 18. They found multiple cysts and referred Ms. Rosen to a reproductive endocrinologist, who ultimately diagnosed her with a pituitary tumor. *Id.*

In this medical malpractice action, commenced on January 14, 2003, Ms. Rosen claims that defendants failed to diagnose and treat her amenorrhea, bloating and weight gain, and as a result of these failures, she developed ovarian cysts and a pituitary tumor. Aff., at ¶ 5.

Dr. Moss and Corp. now move for summary judgment dismissal of plaintiff's action, arguing that Dr. Moss did not depart from accepted standards of medical care in treating Ms. Rosen. Aff., at ¶ 2. In support of their motions, defendants submit the affirmation of Brian Cohen, M.D. ("Dr. Cohen"), a physician board-certified in obstetrics and gynecology. Aff., Ex. N, at ¶ 1. Dr. Cohen opines to a reasonable degree of medical certainty, after review of all the testimony and records in this case, that Dr. Moss did not depart from accepted standards of medical care in treating Ms. Rosen. Aff., Ex. N, at ¶ 15. To begin, Dr. Cohen points out that the diagnosis of pituitary tumors is difficult to make and that Ms. Rosen did not exhibit signs of such a tumor because she had no visual disturbances or headaches. Aff., Ex. N, at ¶ 3. Furthermore, Dr. Cohen concludes based on the size of Ms. Rosen's cysts that Ms. Rosen did not have any cysts when she saw Dr. Moss. Aff., Ex. N, at ¶¶ 6,7. Dr. Cohen

also alleges that amenorrhea in women on birth control pills is not remarkable because birth control pills often cause women to skip periods. Aff., Ex. N, at ¶¶ 8,10. Additionally, he opines that Ms. Rosen's weight gain of nine pounds over two years was insignificant and did not warrant concern or merit a work-up. Aff., Ex. N, at ¶ 9. Finally, Dr. Cohen concludes that Dr. Moss did not depart from accepted standards of care in treating Ms. Rosen because all of her pelvic examinations were normal. Aff., Ex. N, at ¶ 12.

Plaintiff opposes these motions, relying on the affirmation of a physician board-certified in obstetrics and gynecology. Opp., Ex. A, at ¶ 1. The doctor opines, after a review of all of the testimony and records in this case, that Dr. Moss departed from accepted standards of medical care in treating Ms. Rosen. Opp., Ex. A, at ¶ 2. Specifically, the doctor concludes that Ms. Rosen's tumor could have been treated with Bromocriptine. *Id.* Additionally, the doctor opines that Dr. Moss should have performed blood tests on Ms. Rosen to determine whether her follicular stimulating hormones and prolactin were at normal levels, and that his failure to do so proximately cause him to miss diagnosing Ms. Rosen's ovarian cysts. Opp., Ex. A, at ¶ 12. The doctor, moreover, concludes, based on the size and nature of Ms. Rosen's tumors, that the tumors were present when she saw Dr. Moss in February of 2000. Opp., Ex. A, at ¶ 13.

Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep't 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324.

In a medical malpractice action, the opponent of summary judgment must present evidence that defendant physician departed from good and accepted medical practice, *Lyons*

v. McCauley, 252 A.D.2d 516 (2d Dep't 1998), and that defendant's wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dep't 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dep't 2003). This evidence must generally be made through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dep't 2003).

If the nonmovant submits an admissible affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dep't 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dep't 2000).

Here, both parties have submitted evidence sufficient to support their respective positions. The parties' submissions make clear that there are material issues of fact to be tried, namely, whether defendants negligently failed to diagnose Ms. Rosen's ovarian cysts and pituitary tumor and whether these failures proximately caused Ms. Rosen's injuries. Dr. Cohen insists that there were no departures that proximately caused Ms. Rosen's injuries, and plaintiff's expert urges that there were. The issue of which expert is correct is for the jury to decide after a trial. *Santiago v. Brandeis*, 309 A.D.2d 621 (1st Dep't 2003). This

Court cannot hold as a matter of law that defendants' motions definitively establish that there was no malpractice.

Additionally, defendants are incorrect in asserting that plaintiff's expert affidavit is conclusory and insufficient to defeat their motions for summary judgment. The doctor makes specific reference to each of Ms. Rosen's visits to Dr. Moss in explaining precisely when and how Dr. Moss failed to diagnose Ms. Rosen's pituitary tumor. *Burt v. Lenox Hill Hosp.*, 141 A.D.2d 378, 380 (1st Dep't 1988). The doctor also establishes proximate cause by stating, "[w]hen the patient continued with complaints of severe abdominal pain and distention, a pelvic ultrasounds [*sic*] should have been performed. This would have diagnosed the ovarian cyst." Opp., Ex. A, at ¶ 12.

In the end, defendants have not demonstrated that there is no issue of fact that warrants trial and their summary judgment motions must be denied.

Accordingly, it is

ORDERED that Dr. Moss's motion for summary judgment is denied; and it is further

ORDERED that Corp.'s cross-motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 6, 2005

ENTER

Hon. Eileen Bransten

NOTICE OF APPEARANCE

April 6, 2005

Case Name: *Rosen v. Moss*

Index Number: 100488/03

Nature of Appearances: Settlement Conference **June 14 at 9:30 a.m.**

Date & Time: If it has not already been done, plaintiff is to immediately (within 10 days) make a demand for settlement purposes. Defendants are to consider the demand. Adequate time has been afforded to enable defendant to investigate settlement of the case. The parties are to appear prepared for substantive, serious settlement discussions and if the case does not settle should be prepared for a September 12, 2005 trial date. The parties and witnesses should clear their calendars for the September 12, 2005 trial. If the September 12, 2005 date does not work for anyone, an alternative September 2005 date should be discussed by counsel as soon as possible and counsel is to inform the Court of the lack of feasibility of the scheduled date and propose an alternate trial date within 14 days of this Notice.

Unless an earlier trial date is assigned, the September 12, 2005 date should be used for purposes of CPLR 3101(d) expert exchange. Pursuant to the Preliminary Conference Order plaintiff should exchange expert information no later than 45 days before September 12, 2005 and defendants no later than 30 days before the 12th.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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C Aryn Rosen

Index No. 100488/03

Date 3/22/05

Plaintiff(s),

- against -

Richard D Moss, M.D, Gila Leiter, M.D, Park Ave Women's Center, and Herbert Jaffin, M.D, Richard D Moss, M.D, Sheldon Berg, M.D, P/C

Defendant(s)

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PRE-TRIAL STIPULATION AND ORDER

Brief Description of nature of alleged malpractice: Failure to dx pituitary adenoma

THE ATTORNEYS HEREBY STIPULATE AND AGREE AS FOLLOWS:

Trial Date

1. The trial date assigned for this action is September 12, 2005 ("Trial Date"). All trial attorneys, parties and witnesses (including experts) MUST be notified of the Trial Date within seven days of this Stipulation and Order both by phone and by mail. If anyone will not be available on the Trial Date counsel must promptly confer with all other attorneys and establish the closest available date to the Trial Date that is workable for everyone.

2. Within two weeks of this Stipulation and Order, any party or parties seeking an adjournment of the trial date must make a written request to the Court. The adjournment request must be accompanied by a stipulation signed by the parties indicating the closest date to the Trial Date that the parties, their witnesses and attorneys are available for trial. The stipulation should state that the parties are aware that the adjourned date, if acceptable to the Court, is a final date and that barring unforseen emergency circumstances (which do not include a prior engagement), the parties will select a jury and proceed to trial on the adjourned date.

   If the closest available date proposed is satisfactory to the Court, you will be notified of the adjournment. If the date is unworkable or if the Court has questions about the proposed date, the Court may require an in-court or telephonic conference.

Name: Rose O Index No. 100458/03

Date: 3/22/05 Page 2 of __

Trial Preparation

3. The parties anticipate that trial of this action will last approximately 21 days.

4. All records are to be timely subpoenaed (anticipate delays). If the medical records include records concerning drug use; alcohol use; psychiatric and psychologist interviews and reports, the subpoena must be made on notice to the other attorneys in the case. (HIPAA requirements.)

Disclosure

5. The parties understand that CPLR 3101(d) exchange must take place pursuant to the following guidelines: plaintiff is to exchange no later than 45 days before trial and the defendant is to exchange no later than 30 days before trial.

6. Outstanding medical examinations, if any, are to be complete by _____. Examining doctors' reports are to be exchanged by _____.

7. *In limine* motions may be made on the Trial Date before this Judge or the Judge assigned to try the case. The subject of any *in limine* motions must be disclosed to all counsel no later than one week before the Trial Date or the Court-approved adjourned date.

Experts

8. **If any expert appears at trial without his/her *FULL SET OF RECORDS AND ANY AND ALL COMPUTER, HANDWRITTEN OR TYPEWRITTEN NOTES RELATED TO THE ACTION AND TO THE EXPERT'S REVIEW OF THE RECORDS,* the expert's testimony WILL be stricken.**

Next conference date: 6/14/05

Additional Directives

- _____
- _____

Name: Rosen

Index No. 100488/03

Date: 3/22/05

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The signatories to this Stipulation understand that failure to comply with this Order may result in imposition of appropriate costs and sanctions.

Entz & Fritz

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Trial Atty: same
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Schiavetti, Corgan, et al

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Dated: New York, New York
4-6-, 2005

FILED

APR 12 2005

COUNTY CLERK'S OFFICE NEW YORK

SO ORDERED

Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN