

Ferrara v Perkins

2007 NY Slip Op 31826(U)

June 19, 2007

Supreme Court, Suffolk County

Docket Number: 0015408/2003

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 2-2-07
ADJ. DATE 4-11-07
Mot. Seq. # 001 - MotD

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CYNTHIA FERRARA and SCOTT FERRARA,
:
:
Plaintiffs, :
:
- against - :
:
ALEXANDRA B. PERKINS, M.D., "JOHN/JANE
DOE, M.D.", the first and last name being fictitious,
RADIOLOGICAL HEALTH SERVICES, P.C.,
PROFESSIONAL RADIOLOGY, P.C., PORT
JEFFERSON IMAGING ASSOCIATES, P.C.,
PORT RADIOLOGY SERVICES, P.C., THEODORE
GOLDBERG, M.D., JEFFERSON OBSTETRICS
AND GYNECOLOGY, P.C., NORTH HARBOR
OBSTETRICS AND GYNECOLOGY, P.C.,
RANDALL E. SCHRAGER, M.D., GENERAL
SURGERY ASSOCIATES, L.L.C. and JOHN T.
MATHER MEMORIAL HOSPITAL OF PORT
JEFFERSON, NEW YORK, INC.,
Defendants. :
-----X

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Upon the following papers numbered 1 to 42 read on this motion for summary judgment and to preclude; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27 - 35; Replying Affidavits and supporting papers 36 - 40; Other 41 - 42 (sur-reply); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Alexandra B. Perkins, M.D., Joseph M. Carrucciu, M.D. s/h/a John/Jane Doe, M.D., Radiological Health Services, P.C., Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., Port Radiology Services, P.C., and John T. Mather Memorial Hospital of Port Jefferson, New York, Inc. for summary judgment and for preclusion of evidence at trial is determined herein.

This is a medical malpractice action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Cynthia Ferrara as a result of the negligence of defendants in failing to timely diagnose and treat plaintiff's breast cancer of the right breast between December 1, 1999 through

June 30, 2002. Plaintiff underwent bilateral mammograms on December 27, 1999 and April 18, 2000 at non-party Brookhaven Women's Imaging Services, P.C., the second of which was ordered by plaintiff's gynecologist, defendant Theodore Goldberg, M.D. (Dr. Goldberg). Then, on June 27, 2000, plaintiff was admitted to John T. Mather Memorial Hospital of Port Jefferson, New York, Inc. (Mather Hospital) by defendant Randall Schrager, M.D. (Dr. Schrager), an attending surgeon, for excision of a left breast mass. Defendant Alexandra B. Perkins, M.D. (Dr. Perkins), a radiologist and employee of defendant Radiological Health Services, P.C., first saw plaintiff on June 27, 2000 and performed a needle aspiration and ultrasound of the left breast as ordered by Dr. Schrager. Dr. Schrager excised the left breast mass, discharged plaintiff and subsequently saw plaintiff at his office.

On January 8, 2001 Dr. Perkins interpreted a bilateral mammogram that had been ordered by Dr. Goldberg and performed on said date at Mather Hospital on an outpatient basis. Dr. Perkins compared this bilateral mammogram with the films dated December 27, 1999. Then, on February 7, 2002, plaintiff underwent another bilateral mammogram at Mather Hospital on an outpatient basis which was interpreted by defendant Joseph M. Carrucciu, M.D. s/h/a John/Jane Doe, M.D. (Dr. Carrucciu), a radiologist and employee of Radiological Health Services, P.C. Dr. Perkins and Dr. Carrucciu interpreted the respective bilateral mammograms as negative.

Plaintiff subsequently underwent mammograms on June 28, 2002 which were interpreted as showing a solid mass in plaintiff's right breast. Thereafter, plaintiff had a right breast mastectomy. Plaintiffs commenced the instant action on July 3, 2003. The Court's computer records indicate that the note of issue in this action was filed on September 5, 2006.

By their complaint, plaintiffs allege a first cause of action for medical malpractice based on negligence in failing to properly and timely diagnose plaintiff's breast cancer; failing to timely and properly examine plaintiff and recognize plaintiff's symptoms and complaints; failing to order and perform appropriate diagnostic studies, including radiological studies and biopsies of the breast; and failing to properly and timely interpret the diagnostic studies that were performed. In addition, plaintiffs allege a second cause of action for medical malpractice based on lack of informed consent to the treatment and procedures that were performed and a third, derivative, cause of action on behalf of plaintiff Scott Ferrara for loss of services. Plaintiffs' last, fourth, cause of action is solely against defendant Mather Hospital for negligence in failing to investigate the qualifications of the defendants prior to granting and renewing privileges or employment.

Defendants Dr. Perkins, Dr. Carrucciu, Radiological Health Services, P.C., Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., Port Radiology Services, P.C., and Mather Hospital now move for summary judgment and preclusion. They seek summary judgment dismissing plaintiffs' claims as against Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., and Port Radiology Services, P.C. on the grounds that said entities did not provide any medical services to plaintiff. In addition, they seek summary judgment dismissing plaintiffs' second cause of action alleging medical malpractice based on lack of informed consent as inappropriate as against them given plaintiffs' claims of failure to properly diagnose and treat. They also seek partial summary judgment on the grounds that claims relating to treatment prior to January 8, 2001 for Dr. Perkins, Radiological Health Services, P.C., and Mather Hospital and claims relating to treatment prior to February 7, 2002 for Dr. Carrucciu are time barred pursuant to CPLR 214-a.

Finally, said defendants request an order precluding any evidence from being introduced at trial related to any claims with respect to Dr. Perkins, Dr. Carrucciu, Radiological Health Services, P.C. and Mather Hospital concerning the failure to order additional testing and any other activity unrelated to the interpretation and analysis of mammography studies performed and interpreted by the defendants. Regarding this portion of their motion, the defendants rely on the Appellate Division, Second Department decision, *Mosezhnik v Berenstein*, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006). In support of their motion, the defendants submit the summons and complaint; their answers; plaintiffs' bills of particulars and supplemental and amended bills of particulars; the deposition transcripts of plaintiffs, Dr. Perkins, Dr. Carrucciu and Dr. Schrage; the affidavit dated December 27, 2006 of Edward H. Glenn, M.D., president of Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., Port Radiology Services, P.C.; and plaintiff's medical and Mather Hospital records.

In opposition to the motion, plaintiffs contend that the moving defendants have failed to submit an expert affidavit demonstrating their lack of negligence in their interpretation of the bilateral mammogram films performed on January 8, 2001 and February 7, 2002, which claims are timely, to obtain summary judgment dismissing said claims or an expert affidavit to establish that no additional study was warranted to support their request for preclusion. Plaintiffs contend that contrary to the moving defendants' assertions, the Second Department has not adopted a blanket rule to the effect that radiologists have no duty of care to schedule or to urge further testing and plaintiffs submit a redacted physician's affirmation to demonstrate that the standard of care did require additional study¹.

In addition, plaintiffs contend that the moving defendants have failed to sufficiently explain the limited involvement of Professional Radiology, P.C. as solely billing for radiographic services or studies performed at Mather Hospital and have not indicated whether the corporation was paid for services rendered by Dr. Perkins and/or Dr. Carrucciu so as to be liable under the doctrine of respondeat superior. Plaintiffs add that they do not oppose the portion of the motion seeking summary judgment dismissing the second cause of action as against the moving defendants for medical malpractice based on the lack of informed consent.

With respect to defendants' request for dismissal of the claims against Dr. Perkins prior to January 8, 2001 as untimely under CPLR 214-a, plaintiffs do not dispute that the discovery and medical records provided by defendants to date show that Dr. Perkins' care at issue in this case involved her interpretation of the January 8, 2001 mammogram. Plaintiffs similarly state that they do not dispute that the discovery and medical records provided by defendants to date show that Dr. Carrucciu's care at issue in this case involved his interpretation of the February 7, 2002 mammogram. In support of their opposition, plaintiffs submit portions of the deposition transcripts of Drs. Carrucciu and Perkins; the bilateral mammography reports of Drs. Perkins and Carrucciu; their redacted radiology expert affirmation; and motion papers, orders and decisions related to the case relied on by defendants, *Mosezhnik v Berenstein*, 33 AD3d 895,

¹Plaintiffs may submit an unidentified expert's affirmation provided that the Court may require submission of an unredacted copy for in camera inspection (see, *Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]). An unredacted expert affirmation has been provided to the Court for an *in camera* review. The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name and location. The Court has returned the unredacted affirmation to plaintiffs' counsel by ordinary mail.

823 NYS2d 459 (2d Dept 2006).

By their reply, the moving defendants reiterate that respondeat superior does not apply to the three radiology corporations and contend that plaintiffs are attempting to raise baseless issues of fact with respect to said matter. In addition, the defendants repeat their assertions regarding the dismissal of certain claims as time-barred as against Drs. Perkins and Carrucciu. The moving defendants also emphasize that they are not moving for summary judgment on the claims against Dr. Perkins, Dr. Carrucciu, Radiological Health Services, P.C. and Mather Hospital concerning the failure to order additional testing and any other activity unrelated to the interpretation and analysis of mammography studies performed and interpreted by the defendants but that instead, they are seeking the preclusion of evidence with respect to these claims at the time of trial. The moving defendants criticize the redacted affirmation submitted by plaintiffs in opposition to this portion of defendants' motion for its speculative nature and insufficiencies. In support of their request for preclusion, the moving defendants submit the affirmation of their expert radiologist and records referred to therein.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Here, initially, the Court grants that portion of defendants' motion for summary judgment dismissing plaintiffs' second cause of action for medical malpractice based on lack of informed consent inasmuch as there is no allegation that plaintiff's injuries resulted from an affirmative violation of her physical integrity in the absence of informed consent (*see, Pedone v Thippeswamy*, 309 AD2d 792, 765 NYS2d 532 [2d Dept 2003]). Plaintiffs in their affirmation in opposition to the instant motion indicate that they do not oppose this portion of the motion.

In his affidavit, Edward H. Glenn, M.D. (Dr. Glenn) attests as president of Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., Port Radiology Services, P.C. that these three corporations had no involvement in plaintiff's care and treatment or in the interpretation of two mammograms that were performed at Mather Hospital. Dr. Glenn explains that Professional Radiology, P.C. does not own any mammography or sonography equipment located at Mather Hospital nor does it employ the radiologists or technicians that interpret or perform breast imaging studies at Mather Hospital. He states that Professional Radiology, P.C. only bills for radiographic services or studies performed at Mather Hospital. Dr. Glenn adds that Port Jefferson Imaging Associates, P.C. is only involved in the performance of MRI studies done outside Mather Hospital and that Port Radiology Services, P.C. is only involved with radiological studies performed at St. Charles Hospital. Dr. Perkins testified at her deposition that she was a shareholder of Under the doctrine of respondeat superior, a professional service corporation is liable, like any other corporation, for the torts of its officers or employees when acting in those capacities (*Connell v Hayden*, 83 AD2d 30, 46, 50, 443 NYS2d 383 [2d Dept 1981]). Defendants have sufficiently demonstrated that these three corporate entities were not involved in the care or treatment of plaintiff and that Dr. Perkins and Dr. Carrucciu were not employees or officers of said entities such that they are entitled to summary judgment dismissing the complaint as against them. Plaintiffs' opposition to the

dismissal of the action as against Professional Radiology, P.C., on the grounds that the moving defendants' explanation of its limited involvement is insufficient, fails to raise a triable issue of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*see, Zuckerman v City of New York, supra*).

A medical malpractice action must be commenced within two years and six months of the act, omission, or failure complained of (*see, CPLR 214-a*), but may be tolled until the end of treatment if the plaintiff establishes that the defendant provided continuous treatment, which is defined as "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Borgia v City of New York*, 12 NY2d 151, 155, 237 NYS2d 319 [1962], *aff'd* 15 NY2d 665, 255 NYS2d 878 [1964]; *see also, Cooper v Kaplan*, 78 NY2d 1103, 578 NYS2d 124 [1991]). In general, where a diagnostician, such as a radiologist, performs a "discrete and complete" service, this will not be considered continuous treatment, unless the diagnostician "has a continuing or other relevant relationship with the patient," or "act[s] as an agent for the doctor or otherwise act[s] in relevant association with the physician" (*Elkin v Goodman*, 24 AD3d 717, 808 NYS2d 405, 407 [2d Dept 2005], quoting *McDermott v Torre*, 56 NY2d 399, 408, 411, 452 NYS2d 351 [1982]; *see also, Davis v City of New York*, 38 NY2d 257, 379 NYS2d 721 [1975]).

With respect to Dr. Perkins, the defendants assert that Dr. Perkins did not perform any invasive treatment of plaintiff's right breast at any time including during the June 27, 2000 admission to Mather Hospital and that her last involvement with plaintiff was the interpretation of the January 8, 2001 mammogram to the outside films dated December 27, 1999. Inasmuch as the instant action was commenced on July 3, 2003, any claims as against Dr. Perkins and Radiological Health Services, P.C. and Mather Hospital with respect to Dr. Perkins' performance of a needle aspiration and ultrasound of the left breast on June 27, 2000 are dismissed as time barred (*see, CPLR 214-a*). Plaintiffs, in their opposition papers, indicate that the focus of this case involves Dr. Perkins' interpretation of the January 8, 2001 bilateral mammogram, not on her care prior thereto.

Regarding Dr. Carrucciu, the defendants point to the attached report of the bilateral mammogram that was performed on February 7, 2002 to demonstrate that Dr. Carrucciu's first and only contact with plaintiff occurred on said date and that any claims relating to him prior to said date should be dismissed. Since the instant action was commenced on July 3, 2003, and Dr. Carrucciu's first and only involvement with plaintiff occurred on February 7, 2002, any claims as against Dr. Carrucciu relating to dates prior to February 7, 2002 are dismissed as time barred (*see, CPLR 214-a*). Just as with Dr. Perkins, plaintiffs indicate in their opposition papers that this action relates to Dr. Carrucciu's interpretation of the February 7, 2002 bilateral mammogram.

However, that portion of the motion for order precluding any evidence from being introduced at trial related to any claims with respect to Dr. Perkins, Dr. Carrucciu, Radiological Health Services, P.C. and Mather Hospital concerning the failure to order additional testing and any other activity unrelated to the interpretation and analysis of mammography studies performed and interpreted by the defendants is denied as premature at this juncture. The Court respectfully refers determination of this matter to the trial justice.

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Accordingly, the motion is granted solely to the extent that the second cause of action is dismissed as against the moving defendants; the complaint is dismissed as against defendants Professional Radiology, P.C., Port Jefferson Imaging Associates, P.C., and Port Radiology Services, P.C.; any claims as against Dr. Perkins, Radiological Health Services, P.C., and Mather Hospital with respect to Dr. Perkins' performance of a needle aspiration and ultrasound of the left breast on June 27, 2000 are dismissed as time barred; and any claims as against Dr. Carruciu relating to dates prior to February 7, 2002 are dismissed as time barred.

Dated: 6/19/07

Emily Pines
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION