

Cross v Radiologix, Inc.
2009 NY Slip Op 30446(U)
February 26, 2009
Supreme Court, New York County
Docket Number: 108372/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOBU
Justice

PART 6

Index Number: 108372/2007

CROSS, BARBARA
vs.
RADIOLOGIX

SEQUENCE NUMBER: 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/20/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED:

1-22
23-28; 30
29

Notice of Motion/Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED

MAR - 3 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/26/09

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
BARBARA CROSS and CHARLES CROSS,

Plaintiffs,

Index No. 108372/07

-against-

Decision and Order

RADIOLOGIX, INC.; HUDSON VALLEY RADIOLOGY ASSOCIATES PLLC, individually and d/b/a MID ROCKLAND IMAGING; MID ROCKLAND IMAGING; MID ROCKLAND IMAGING PARTNERS, INC. d/b/a MID ROCKLAND IMAGING; NANCY DEROBERTIS; ELLIOT HANDLER, M.D.; LOUIS EISEN, M.D.; NEW YORK UNIVERSITY MEDICAL CENTER; NYU UROLOGY ASSOCIATES; and MICHAEL D. STIFELMAN, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Defendants NYU Hospitals Center, s/h/a New York University Medical Center

-----X
("NYU"), and Michael D. Stifelman, M.D., move, pursuant to C.P.L.R. Rule 3212, for an order granting them summary judgment, on the grounds that plaintiffs' claims against Dr. Stifelman are without merit, and that there are no triable issues of fact. The claims asserted against NYU are premised on vicarious liability for the alleged acts of Dr. Stifelman.

Plaintiffs' medical malpractice claims arise out of the unnecessary removal of plaintiff Barbara Cross' healthy left kidney, due to the mistaken belief that her left kidney had a cancerous growth. On or about November 9, 2006, Ms. Cross began experiencing pain in her stomach accompanied by chills and nausea, lasting for about twelve hours. On Saturday, November 11, Ms. Cross saw a nurse practitioner, Catherine Burke, at her primary care physician's office.

Nurse Burke instructed Ms. Cross to have a CT scan of her abdomen/pelvis in order to ascertain the cause of her pain. Ms. Cross underwent a CT scan on November 13 at Mid Rockland Imaging. The abdominal/pelvic scan revealed a “moderate sized left renal mass, most suspicious for a primary renal neoplasm.” (Emphasis in original.) On November 14, Nurse Burke informed Ms. Cross that the results of the scan showed a mass on her left kidney that was approximately seven to eight centimeters in diameter, and advised Ms. Cross to see a urologist, John Giella, M.D. When Ms. Cross consulted with Dr. Giella the next day, he informed her that because of the size of the mass, she would need a radical nephrectomy, or the removal of her entire left kidney. Dr. Giella provided her with a list of urologists who could perform the surgery, and also referred Ms. Cross for a chest CT scan and a bone scan to determine whether the suspected kidney cancer had metastasized. She underwent these tests on November 16 and November 21, respectively; the results for both tests were negative for metastatic disease.

On November 22, 2006, plaintiff consulted with defendant, Dr. Stifelman, one of the surgeons recommended by Dr. Giella. Ms. Cross provided Dr. Stifelman with all of the imaging studies. Dr. Stifelman reviewed the abdominal/pelvic CT scan, and also reviewed the reports of the chest CT and bone scans. He agreed that Ms. Cross should have a radical nephrectomy because the lesion was larger than four centimeters; there was no absolute indication for a partial nephrectomy; her initial renal function was within normal limits; she only had one co-morbid factor, which was hypertension; and, the films depicted the tumor as extending all the way into the renal sinus, or the middle aspect of her kidney.

Dr. Stifelman performed Ms. Cross' laparoscopic left radical nephrectomy on December 12, 2006, at NYU. He removed the left kidney by cutting around the fat surrounding the kidney, in order to avoid spreading the cancer cells. Once the kidney was removed and the incisions were sewn, Dr. Stifelman palpated the preserved kidney. He did not feel any abnormalities upon palpation, so he made an incision in the kidney, but again, he did not find evidence of a mass. Dr. Stifelman re-examined Ms. Cross' abdominal/pelvic CT scan to ensure that he had, in fact, removed the correct kidney, which he had, according to the scan. He took Ms. Cross' kidney to the pathology lab where it was evaluated by both the pathologist and Dr. Stifelman; no sign of malignancy was present. At this time, with Ms. Cross still on the operating table, Dr. Stifelman re-opened Ms. Cross' incisions in order to ensure that he had not missed anything; he made the incisions larger so that he could introduce his hand to the laproscopic environment to assist in palpation. Dr. Stifelman visualized and palpated the left upper and lower quadrants, but no masses were felt or seen. Ms. Cross' incisions were re-sewn and she was awakened. A CT scan was performed to confirm that there was nothing wrong with Ms. Cross' right kidney, and this was confirmed.

Plaintiffs and her physicians later learned that a technician at Mid Rockland Imaging, Nancy DeRobertis, had mislabeled another patient's abdominal CT scan as belonging to Ms. Cross. Ms. DeRobertis caught this mistake on November 13, 2006, but when she took steps to correct the mistake, she inadvertently again mislabeled another individual's films as belonging to Ms. Cross. The abdominal/pelvic films that Ms. Cross obtained originally—and on which her physicians based their decisions—were of another individual with a mass on her kidney. Ms. Cross' true abdominal/pelvic films were later discovered and reviewed. The images of Ms. Cross' own anatomy

[* 5]

showed a three millimeter right middle lobe lung nodule, a gallbladder stone that was unchanged, and a small cyst in the left kidney; no mass suspicious for primary renal neoplasm was present in the left kidney.

Plaintiffs' pleadings allege that Dr. Stifelman departed from the standard of care by failing to review the actual films from the chest CT scan that Ms. Cross had taken to rule out metastasis. Dr. Stifelman reviewed the report—rather than the actual film—of the chest CT scan. The report of the chest scan was prepared by Louis Eisen, M.D., a board certified radiologist. The report indicates that the purpose of the chest CT scan was to evaluate for metastatic disease; Dr. Eisen's impression, as written in the report, was that there was no evidence of metastatic disease in Ms. Cross' chest.

Dr. Stifelman argues that he properly performed the laparoscopic radical nephrectomy; that he properly relied upon the films from the abdominal/pelvic CT scan; and, that he properly relied upon Dr. Eisen's report from the chest CT scan. In support of his motion is an affirmation by J. Stuart Wolf, Jr., M.D., a physician duly licensed to practice medicine in the State of Michigan and board certified in urology.¹ Dr. Wolf states that his opinions are based upon his review of Ms. Cross' medical records, the deposition testimony in the case, and plaintiff's verified

¹ Pursuant to C.P.L.R. Rule 2106, only a physician who is licensed to practice in New York is authorized to sign an affirmation; an out-of-state physician must make his or her statement by affidavit. Dr. Wolf is licensed in the State of Michigan, and as such, his affirmation is technically defective under Rule 2106. However, the deficiency is deemed waived because no party raised the issue in opposition. Scudera v. Mahbubur, 299 A.D.2d 535 (2d Dep't 2002); see also Shinn v. Catanzaro, 1 A.D.3d 195, 198 (1st Dep't 2003), citing Scudera, *supra*.

bills of particulars; his opinions are also based on his own training in and experience with urology, and his knowledge of the standards of good and accepted urological practice in 2006. Dr. Wolf sets forth that Dr. Stifelman acted in accordance with accepted standards of medical care, and that Dr. Stifelman's removal of Ms. Cross' kidney was not due to any departures from good and accepted practice. Dr. Wolf opines that it was appropriate for Dr. Stifelman to rely on what he believed to be Ms. Cross' abdominal/pelvic CT scans, which showed a 7 cm mass on her left kidney: the images were of excellent quality; all further work-up had been performed by Ms. Cross' urologist, Dr. Giella; and, the abdominal/pelvic images were from a woman with a "similar body habitus" as Ms. Cross. Further, Dr. Wolf opines that it was appropriate for Dr. Stifelman to rely on the radiologist's reports—rather than the actual films—from Ms. Cross' chest and bone scans, which showed no metastasis, because Dr. Stifelman is a urologist trained in reviewing imaging studies of the kidneys. Finally, since Dr. Stifelman believed that cancer cells were present, Dr. Wolf sets forth that it was proper for Dr. Stifelman to remove Ms. Cross' kidney by laparoscopic radical nephrectomy, and that it would have been inappropriate for him to manipulate the kidney during the operation, because manipulation can result in the spread of cancer cells to other parts of the body.

Plaintiffs' affirmation by counsel in opposition to Dr. Stifelman's motion for summary judgment admits that plaintiffs do not have an expert to opine that Dr. Stifelman departed from good and accepted practice by not reading the actual films from Ms. Cross' chest CT scan. However, plaintiffs did not discontinue against Dr. Stifelman because plaintiffs' counsel was advised that co-defendants Radiologix, Inc., and Mid Rockland Imaging Partners, Inc. s/h/a "Mid Rockland Imaging Partners, Inc. d/b/a Mid Rockland Imaging" (collectively, "Radiologix"), have an expert

affidavit opposing Dr. Stifelman's motion; plaintiffs ask the court to deny Dr. Stifelman's motion on the basis of Radiologix' opposition.

Radiologix argues that issues of fact exist precluding summary judgment. Counsel for Radiologix questions why Dr. Stifelman did "not simply read all the studies that were available to him rather than simply focus of [sic] the abdominal scans?" Radiologix points out that the chest scan did show Ms. Cross' right kidney, and avers that had Dr. Stifelman "only inserted the disc [containing the chest CT film] into his computer after reading the abdominal scan disc, he would have seen the right kidney and seen that there was a discrepancy." Radiologix claims that Dr. Stifelman had the "last clear chance" to prevent Ms. Cross' unnecessary surgery.

In support of its opposition, Radiologix annexes an expert affirmation from Jonathan S. Bromberg, M.D., who sets forth that he is a physician duly licensed to practice medicine in the State of New York and board certified in general surgery. He bases his opinions on a review of Ms. Cross' medical records; deposition transcripts from the case; plaintiffs' bills of particulars; and, Dr. Wolf's affirmation in support of Dr. Stifelman's motion. His opinions are further informed by his training and education in the field of surgery, and more particularly, surgery of the kidneys and pancreas, and abdominal organ transplants. He opines that Dr. Stifleman deviated from the standards of care by failing to review Ms. Cross' chest CT scan when he reviewed her abdominal CT scan. Dr. Bromberg sets forth that he agrees with Dr. Wolf that it was within the standard of care for Dr. Stifelman to rely on Ms. Cross' abdominal CT scan and not to order further tests. But, Dr. Bromberg states that it was also the standard of care to review the chest CT scan, and that Dr. Stifelman

inappropriately relied on the report when he also had the scans. He opines that had Dr. Stifelman reviewed the chest CT scans, which were available to him, he would have seen that the scans were not of the same patient, given certain anatomical differences. Dr. Bromberg avers that the standard of care required Dr. Stifelman to review all of the scans he had available to him. In Dr. Bromberg's opinion, Dr. Stifelman's failure to review Ms. Cross' chest CT scan and "catch the discrepancy" contributed to the unnecessary removal of Ms. Cross' kidney.

Dr. Stifleman's reply—by attorney's affirmation—reiterates that Dr. Stifleman acted appropriately in treating Ms. Cross. Dr. Stifelman's counsel points out that the doctrine of "last clear chance" is inapplicable to medical malpractice and unsupported by case law. Additionally, defendant argues that nowhere does Radiologix' expert, Dr. Bromberg, argue that there was any prospective medical reason for Dr. Stifelman to have looked at the chest CT images to render the treatment that he was asked to provide to Ms. Cross. Counsel argues that the chest CT scan was performed to search for metastasis, and that the report concludes that no evidence of metastasis was found. The chest CT report does not mention the kidneys at all. Dr. Stifelman's attorney claims that chest CT scans are not used to plan for nephrectomies and that, regardless, only the top of Ms. Cross' kidney is seen on the chest CT scan, while the abdominal/pelvic CT scan showed that tumor was in the lower pole of her kidney. Defendant argues that Dr. Stifelman's duty is to provide the care he undertakes properly, not to review studies taken for other purposes in order to "ferret[] out" Radiologix' admitted negligence.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Id. (citation omitted). Specifically, this requires, in a medical malpractice action, that a party opposing a physician's summary judgment motion

must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

Dr. Stifelman has demonstrated that he is entitled to summary judgment. He has supported his motion with an affidavit by an expert qualified in the field of urology. His expert, Dr. Wolf, sets forth that it was within the standard of care for Dr. Stifelman to rely on the abdominal/pelvic CT scan. The expert concluded, after reviewing all relevant documents, that Dr. Stifelman did not depart from the standard of care by not reviewing the actual films from Ms. Cross' chest CT scan, as the abdominal scans were of excellent quality, the radiologist's report of the chest CT scan demonstrated no metastasis, and Dr. Stifelman is trained in reviewing imaging studies of the kidneys, not the chest.

Having established a *prima facie* showing of entitlement to summary judgment, the burden shifts the party opposing summary judgment to assert a genuine issue of material fact. The issue of fact Radiologix attempts to raise is that the top of the right kidney is discernable on the chest CT scan and as such, Dr. Stifelman, who claims to be trained in reviewing kidney scans, should have reviewed the chest scan. But, it is highly speculative for Radiologix' expert to opine that had Dr. Stifelman reviewed all of the scans, he would have seen that there was no lesion on the kidney, prompting further investigation and discovery that surgery was not required. The tumor on the scan that was mistakenly labeled as belonging to Ms. Cross was in the lower lobe of the left kidney, not the top of the right kidney, which was the area of the kidney allegedly visible on Ms. Cross' chest scan. Dr. Bromberg never elaborates on precisely what anatomical differences or discrepancies would have led Dr. Stifelman to question whether the chest scan and the abdominal scan were both of Ms. Cross' anatomy. Dr. Bromberg does not explain what would have prompted Dr. Stifelman to examine the actual films from chest CT scan, when it is not debated that it was proper for Dr. Stifelman to rely on Ms. Cross' abdominal scans and "completely appropriate" for him not to order further tests. Dr. Bromberg simply states that it is the standard of care to review all scans available in order to avoid the "unfortunate result of a patient undergoing an unnecessary removal of an organ." Dr. Bromberg's statements are speculative, conclusory, and based on a position of hindsight; as such, Radiologix fails to raise a triable issue of fact that Dr. Stifelman departed from good and accepted practice by not reading the actual films from Ms. Cross' chest CT scan, which was taken only to check for metastasis, and on which no metastasis was found.

The motion for summary judgment is granted. Accordingly, it is hereby

ORDERED that the complaint is severed and dismissed as against defendants NYU Hospitals Center, s/h/a New York University Medical Center, and Michael D. Stifelman, M.D., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties are directed to appear for a pre-trial conference on April 7, 2009, at 10:00 a.m.

This constitutes the decision and order of the court.

Date: February 26 , 2009



JOAN B. LOBIS, J.S.C.

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MAR - 3 2009
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NEW YORK