

**Griffin v Messina**

2009 NY Slip Op 31297(U)

June 11, 2009

Supreme Court, New York County

Docket Number: 112116/06

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey  
Justice

PART 29

MARIA GRIFFIN and CRAIG MATHERS,

INDEX NO.: 112116/06

Plaintiffs,

Motion Sequence No. 13

-v-

ALBERT MESSINA, M.D., FRANKLIN H.  
JULIE, as Executor of the Estate of  
ARIE L. LIEBESKIND, M.D., a/k/a/  
ARIE LIEBESKIND, Deceased,  
PARK AVENUE RADIOLOGISTS, P.C.,  
KRISTINE CHU, M.D., NEW YORK  
GYNECOLOGICAL & OBSTETRICAL  
ASSOCIATES, P.C., FRANCIS J. MURDACO,  
M.D. and FRANCIS J. MURDACO,  
M.D., P.C.,

Defendants.

The following papers, 1- 73, were read on this motion by defendants New York Gynecological & Obstetrical Associates, P.C. and Kristine Chu, M.D. for summary judgment, dismissing the complaint, as asserted against them; a separate motion by defendants Francis J. Murdaco, M.D. and Francis J. Murdaco, M.D., P.C. for summary judgment, dismissing the complaint, as asserted against them; and a separate motion by defendants Franklin H. Julie, as Executor of the Estate of Arie L. Liebskind, M.D., a/k/a Arie L. Liebskind, Deceased and Park Avenue Radiologists, P.C. for summary judgment, dismissing the complaint, as asserted against them.

Motion Sequence No. 1

Notice of Motion - Affidavits - Exhibits  
Affirmation in Opposition - Affidavits - Exhibits  
Replying Affirmation -

Papers Numbered

1-15  
16-32  
33-41

Motion Sequence No. 2

Notice of Motion - Affidavits - Exhibits  
Affirmation in Opposition - Affidavits - Exhibits  
Replying Affirmation -

Papers Numbered

42-63  
\_\_\_\_\_  
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Motion Sequence No. 3

Notice of Motion - Affidavits - Exhibits  
 Affirmation in Opposition - Affidavits - Exhibits  
 Replying Affirmation -

Papers Numbered64-72(16-32)73

Cross-Motion:  Yes  No

Plaintiffs, Maria Griffin and Craig Mathers, commenced a medical malpractice action against the above captioned defendants<sup>1</sup> with the filing of a summons and complaint on or about August 30, 2006. Plaintiffs allege that defendants were negligent in failing to timely diagnose plaintiff Maria Griffin's breast cancer. The complaint also contains causes of action for lack of informed consent, and a loss of services cause of action asserted by Maria Griffin's husband, Craig Mathers. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants New York Gynecological & Obstetrical Associates, P.C. and Kristine Chu, M.D. presently move for summary judgment, dismissing the complaint, as asserted against them. Defendants Francis J. Murdaco, M.D. and Francis J. Murdaco, M.D., P.C. similarly move, by separate motion, for summary judgment, dismissing the complaint, as asserted against them. Defendants Franklin H. Julle, as Executor of the Estate of Arle L. Liebskind, M.D., a/k/a Arle L. Liebskind, Deceased and Park Avenue Radiologists, P.C. also, by separate motion, seek summary judgment, dismissing the complaint, as asserted against them.

On or about May 23, 2002, injured plaintiff turned 40 years of age and began yearly mammograms. Plaintiffs contend that she was at increased risk for breast cancer because she had a family history of breast cancer in that she had an aunt that suffered from breast cancer, and died from the disease. Additionally, injured plaintiff had a history of fibrocystic disease. At that time, injured plaintiff was being treated by gynecologist Dr. Michelle Li for her routine gynecological care. Dr. Li had performed a breast exam on May 1, 2001, and had previously performed one about a year earlier. Both of these breast exams were negative for masses. Dr. Li referred injured plaintiff to Lenox Hill Radiology for her first screening mammogram on May 23, 2002. The report generated from this mammogram noted regional calcification distribution that was interpreted as a benign finding.

Injured plaintiff began treating with defendant Dr. Francis Murdaco on January 17, 2003, when she presented for a pre-operative medical evaluation for podiatric surgery. Dr. Murdaco performed an examination for preoperative medical clearance on that date, which did not include a breast examination. Injured plaintiff returned to Dr. Murdaco on November 7, 2003, presenting with low back and neck pain, and sought a referral to a chiropractor. Again, no breast examination was performed by Dr. Murdaco during this visit. Dr. Murdaco performed a full physical evaluation of injured plaintiff, including a breast exam, on February 13, 2004, when she presented with resolving viral gastroenteritis. This breast exam was positive for fibrocystic

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<sup>1</sup> Defendant Arie L. Liebskind, M.D. passed away following the commencement of this action, and the caption was amended to reflect this, naming Franklin H. Julle, as Executor of the Estate of Arie L. Liebskind, M.D., a/k/a Arie L. Liebskind, Deceased, as a defendant.

breasts, bilaterally. Dr. Murdaco noted that he did not feel any masses, but ordered a mammogram.

Injured plaintiff presented to defendant Park Avenue Radiologists, P.C. on May 4, 2004, for her bilateral mammogram. This study was interpreted by defendant Dr. Albert Messina. In his report dated May 6, 2004, Dr. Messina notes that injured plaintiff's breasts were dense and glandular with diffuse lobular changes. Moreover, a 4 cm. noncalcified mass was noted in the upper outer quadrant of Injured plaintiff's right breast, and, as a result, a right breast sonogram was ordered. Plaintiffs contend that the bilateral mammogram also revealed a 1cm. lesion on the left breast that Dr. Messina failed to recognize. The follow-up sonogram of the right breast was performed on May 26, 2004. This study was interpreted by defendant Dr. Ariel Liebskind. In a report dated June 1, 2005, Dr. Liebskind noted the presence of multiple scattered cysts throughout the right breast and a cystic structure in the upper outer quadrant that appeared to be benign. It does not appear that Dr. Liebskind reviewed the mammogram films of May 4, 2004, prior to his interpretation of the sonogram.

In August of 2004, Dr. LI stopped accepting Injured plaintiff's medical insurance and referred her to defendant Dr. Kristine Chu, who was an employee of defendant New York Gynecological & Obstetrical Associates, P.C.. On August 19, 2004, Injured plaintiff presented to Dr. Chu for an examination. Dr. Chu performed a gynecological exam, including a breast exam. With respect to the breast exam, Dr. Chu noted fibrocystic changes bilaterally and expressly set forth that "we will schedule a mammogram." According to Dr. Chu's deposition testimony, the mammogram was to be scheduled by Injured plaintiff herself prior to getting pregnant in the near future, as she had expressed a desire to have a baby. Dr. Chu did not schedule a mammogram for injured plaintiff, nor did Dr. Chu follow up with her regarding same.

Thereafter, on December 30, 2004, injured plaintiff presented to Dr. Murdaco with a productive cough. Dr. Murdaco's diagnosis was an upper respiratory infection or bronchitis, and he prescribed antibiotics. No breast exam was performed during this visit. Injured plaintiff next treated with Dr. Murdaco on May 20, 2005, at which time he performed a breast exam. Dr. Murdaco felt a fullness on the left breast that he did not feel during the prior exam, and also found the area to be firmer, and the mobility decreased from the prior exam. Dr. Murdaco referred Injured plaintiff for a further mammogram. When Dr. Murdaco learned that a mammography appointment was not immediately available at Park Avenue Radiologists, P.C., he made arrangements with breast surgeon Dr. Leslie Strong to perform an expedited mammogram. Injured plaintiff saw Dr. Strong on June 16, 2005, at which time he observed a left breast deformity, retraction of the skin and a left palpable node. Dr. Strong performed a mammogram and a fine needle aspiration, leading to a diagnosis of ductal carcinoma on June 17, 2005. On July 20, 2005, Injured plaintiff underwent a left total radical mastectomy, a left sentinel node biopsy, left axillary node dissection, bone marrow aspiration, and, immediately thereafter, underwent a TRAM flap reconstruction. The 4 cm. tumor in Injured plaintiff's left breast was staged as IIIa. Following the aforementioned surgery, injured plaintiff underwent chemotherapy and radiation. Plaintiffs' contend that the defendants herein failed to timely diagnose her left breast cancer, resulting in the spread and advancement of the cancer.

### Legal Analysis

“[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court.” Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, “the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

### New York Gynecological & Obstetrical Associates, P.C. and Kristine Chu, M.D.

Defendants New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu presently move for summary judgment, arguing that they did not depart from good and accepted medical practice in connection with the treatment rendered to injured plaintiff, nor did they contribute to any delay in the diagnosis of her breast cancer. In support of their motion, New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu rely upon, *inter alia*, the expert affidavit of a physician who is board certified in obstetrics and gynecology. At the outset, New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's expert sets forth that the care rendered to injured plaintiff by these defendants was within accepted standards of medical care in all respects, and that such care did not cause or contribute to a delay in diagnosing her breast cancer or worsen her prognosis for survival in any respect.

According to the expert, Dr. Chu properly treated and cared for injured plaintiff during her examination of August 19, 2004. The expert sets forth that Dr. Chu took a proper history, and determined that injured plaintiff did not present with an elevated risk of developing breast cancer in her left breast. The expert notes that injured plaintiff did not have a significant history of breast cancer in her family and that the recently performed mammograms of May 4, 2004, were interpreted as benign and did not reveal any abnormalities in her left breast. The expert adds that although a mass was noted in her right breast, the follow up sonogram was benign and only revealed scattered cysts. The expert states that Dr. Chu had no reason to place injured plaintiff on heightened surveillance for breast cancer, and, thus, there was no indication to order another mammogram or any other evaluation on August 19, 2004. New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's expert explains that Dr. Chu performed a thorough examination of injured plaintiff and correctly diagnosed her with bilateral fibrocystic breasts, which, according to the expert, is common and a benign finding that does not elevate the likelihood that a woman will develop breast cancer. The expert finds that Dr. Chu's diagnosis

of bilateral fibrocystic breasts was consistent with the radiological studies of May 2004, as well as injured plaintiff's prior history.

New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's expert also addresses the fact that Dr. Chu, despite the fact that she observed no abnormalities, recommended a mammogram during the examination of August 19, 2004. According to the expert, this mammogram was recommended solely in the context of the injured plaintiff possibly getting pregnant in the near future. As the expert explains, injured plaintiff wanted a child and Dr. Chu "understood that an updated screening mammogram is a component of fertility treatment because radiologists are often reluctant to perform a mammogram during pregnancy or when a new mother is breast feeding." The expert states that any claim that Dr. Chu recommended this mammogram secondary to suspicious breast abnormalities is not supported by the record. The expert further states that as this mammogram was not secondary to suspicious breast abnormalities it was not a departure on the part of Dr. Chu in not following up with injured plaintiff with respect to such mammogram.

In opposition to defendants New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's motion, plaintiffs rely upon, *inter alia*, the expert affidavit of a physician, who is board certified in obstetrics and gynecology. Plaintiffs' expert first opines that injured plaintiff presented to Dr. Chu with an appreciably elevated risk for breast cancer based upon a family history of breast cancer, fibrocystic breast disease, and suspicious findings on a mammogram three months prior to the examination of August 19, 2004. According to the expert, Dr. Chu failed to appreciate injured plaintiff's elevated risk for breast cancer. The expert sets forth that not only did Dr. Chu fail to accurately note and/or assess injured plaintiff's medical history, including her family history of breast cancer, she also failed to independently review injured plaintiff's medical records, including the most recent breast studies. Plaintiffs' expert states that such failures on the part of Dr. Chu were departures from good and accepted medical practice. The expert further opines that such a failure on the part of Dr. Chu was a substantial factor in causing injured plaintiff's cancer cells to increase, reducing her life-expectancy, reducing her chance of a cure, worsening her prognosis, and increasing her likelihood of recurrence.

Moreover, plaintiffs' expert sets forth that based upon the fact that when diagnosed on June 17, 2005, the left breast mass was found to be 4 cm. in size, the left breast mass was present and palpable during Dr. Chu's examination of August 19, 2004. Therefore, the left breast mass should have been identified upon a properly performed clinical breast examination. According to the expert, her failure to palpate and identify the mass indicates that her examination of injured plaintiff was not properly performed, and a failure to properly perform such examination, and to palpate and identify this mass, was a departure from good and accepted medical practice. Plaintiffs' expert states that "[t]he standard of good and accepted medical practice for breast examinations, particularly by a gynecologist, dictated that Dr. Chu be able to palpate a breast mass in August 19, 2004, which was 4 cm. when excised in July 2005." The expert further states that if Dr. Chu palpated and identified the left breast mass, she would have ordered additional testing that would have led to the cancer being diagnosed shortly thereafter. The expert adds that with respect to the mammogram that Dr. Chu allegedly recommended in the context of the injured plaintiff possibly getting pregnant in the near future, it was a departure from good and accepted medical practice for Dr. Chu not to order, schedule and arrange for the mammogram performed, regardless of the reasoning behind the performance of the studies. The expert opines that if injured plaintiff had additional studies

immediately following her August 19, 2004, examination by Dr. Chu, either prompted by the identification of the mass following a properly performed breast exam, or prompted by Dr. Chu's recommendation to have such studies done because Injured plaintiff sought to have a child, such studies would have revealed a mass in her left breast and led to the diagnosis of breast cancer. Plaintiffs expert ultimately opines that:

"my opinion to a reasonable degree of medical certainty, that Dr. Chu's failure to appreciate Mrs. Griffin's elevated risk of breast cancer, her failure to timely and properly palpate Mrs. Griffin's left breast mass, her failure to schedule and follow-up with a bilateral mammogram of Mrs. Griffin and her failure to timely diagnose Mrs. Griffin's breast cancer in August 2004, were substantial factors in causing Mrs. Griffin's cancer to advance and spread, and substantially contributed to a significantly worsening of her prognosis, and her decreased life expectancy, and substantially reduced her chances of a successful cure."

Based upon the conflicting expert affidavits submitted, this Court finds that issues of fact and credibility exist in connection with whether Dr. Chu departed from good and accepted medical practice in her care and treatment of Injured plaintiff, and whether such departure or departures were a proximate cause of her injuries. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). Despite New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's contention to the contrary, the Court finds the affidavit of plaintiffs' expert to be sufficiently detailed, specific and factual in nature and does not merely set forth opinions in a conclusory manner. Accordingly, New York Gynecological & Obstetrical Associates, P.C. and Dr. Chu's motion is denied.

Francis J. Murdaco, M.D. and Francis J. Murdaco, M.D., P.C.

Defendants Dr. Murdaco and Francis J. Murdaco, M.D., P.C. presently move for summary judgment, arguing that Dr. Murdaco did not depart from good and accepted medical practice in connection with the treatment he rendered to Injured plaintiff. In support of their motion, Dr. Murdaco and Francis J. Murdaco, M.D., P.C. rely upon, *inter alia*, the expert affidavit of a physician who is board certified in general internal medicine. The expert opines that all treatment rendered to plaintiff by Dr. Murdaco was in accordance with good and accepted medical practice. Dr. Murdaco's expert first sets forth that Dr. Murdaco first treated Injured plaintiff on January 17, 2003 for a pre-operative medical evaluation for podiatric surgery, and that the examination performed by Dr. Murdaco on that date was within accepted standards of medical care. According to the expert, plaintiff presented for a focused examination for preoperative medical clearance, as opposed to a comprehensive physical examination, and, thus, the standard of care did not require Dr. Murdaco to perform a breast examination. The expert then sets forth that on November 7, 2003, injured plaintiff presented to Dr. Murdaco with low back and neck pain, and sought a referral to a chiropractor. The expert again states that Injured plaintiff's visit was for a limited purpose that did not require the performance of a full examination. Therefore, in the expert's opinion, Dr. Murdaco's treatment on November 7, 2003, was within the standard of care.

Dr. Murdaco's expert next addresses his examination of Injured plaintiff on February 13, 2004. Injured plaintiff presented with resolving viral gastroenteritis, prompting Dr. Murdaco to

perform a full physical evaluation, including a breast exam. Dr. Murdaco's expert sets forth that the breast exam was positive for fibrocystic breasts, bilaterally, but that Dr. Murdaco noted that he did not feel any masses. The expert opines that Dr. Murdaco met the standard of care by ordering a mammogram and referring injured plaintiff to a gynecologist. The expert further opines that Dr. Murdaco was under no obligation upon receipt of the mammogram and sonogram results, which revealed no areas of concern, to refer injured plaintiff to a breast surgeon or to recommend a repeat mammogram, or any other study, in less than a year.

Dr. Murdaco's expert sets forth that when injured plaintiff next visited Dr. Murdaco on December 30, 2004, she presented with a productive cough. Dr. Murdaco's diagnosis was an upper respiratory infection or bronchitis, and he prescribed antibiotics. Dr. Murdaco's expert states that Dr. Murdaco did not perform a breast exam during this visit, and that such an exam was not indicated since the visit related to a specific symptom that was entirely unrelated to any breast condition. Lastly, with respect to injured plaintiff's visit to Dr. Murdaco on May 20, 2005, Dr. Murdaco's expert states that she presented feeling generally well, but had some moles on her body. Dr. Murdaco performed a breast exam and, according to Dr. Murdaco's expert, Dr. Murdaco felt a fullness on the left breast that he did not feel during the prior exam, and also found the area to be firmer and the mobility decreased from the prior exam. Dr. Murdaco had a level of concern and referred plaintiff for a further mammography. The expert notes that when a mammography appointment was not immediately available at Park Avenue Radiologists, P.C., Dr. Murdaco made arrangements with Dr. Leslie Strong to perform a "fasttracked" mammogram. According to Dr. Murdaco's expert, Dr. Murdaco did not only act within the standard of care, his persistence led to the diagnosis of left breast cancer.

This expert affidavit is detailed, specific and factual in nature and does not merely assert in simple conclusory form that Dr. Murdaco acted within the accepted standards of medical care in connection with the treatment of injured plaintiff herein. This affidavit is sufficient to make a *prima facie* showing of entitlement to judgment as a matter of law, demonstrating the absence of any material issues of fact with respect to the adequacy of the medical treatment provided by Mount Sinai (see Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998]; see also Alvarez v. Prospect Hospital, *supra*). The burden, therefore, shifts to plaintiffs to come forward with evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*). However, plaintiffs have not submitted any opposition to the instant motion, and have not provided any medical expert affidavit alleging that Dr. Murdaco departed from good and accepted medical practice in his treatment of injured plaintiff. Without such competent medical evidence, plaintiffs are unable to raise a triable issue of fact, and defeat the summary judgment of Dr. Murdaco and Francis J. Murdaco, M.D., P.C. (see Suib v. Keller, *supra*; Juba v. Bachman, *supra*; Frimmerman v. Bernstein, 107 AD2d 795 [2d Dept. 1985]; Fileccia v. Massapequa General Hospital, 99 AD2d 796 [1984]). Accordingly, Dr. Murdaco and Francis J. Murdaco, M.D., P.C.'s motion is granted.

Franklin H. Julie, as Executor of the Estate of Arie L. Liebskind, M.D., a/k/a Arie L. Liebskind, Deceased and Park Avenue Radiologists, P.C.

Defendants Dr. Liebskind and Park Avenue Radiologists, P.C. presently move for summary judgment, arguing that Dr. Liebskind did not depart from good and accepted medical practice in connection with his interpretation of injured plaintiff's May 26, 2004, right breast

sonogram. These defendants further argue that any alleged malpractice as to Dr. Liebskind that are sought to be imputed to Park Avenue Radiologists, P.C. must also be dismissed. In support of their motion, Dr. Liebskind and Park Avenue Radiologists, P.C. rely upon, *inter alia*, the expert affidavit of a physician who is board certified in diagnostic radiology. Dr. Liebskind and Park Avenue Radiologists, P.C.'s expert sets forth that injured plaintiff had a bilateral mammogram performed at Park Avenue Radiologists, P.C. on May 4, 2004. This study, which was interpreted by Dr. Messina, revealed a 4 cm noncalcified mass in the upper outer quadrant of injured plaintiff's right breast, and, as a result, a right breast sonogram was ordered. The sonogram was performed on May 26, 2004. This study was interpreted by Dr. Liebskind. As the expert states, Dr. Liebskind noted the presence of multiple scattered cysts throughout the right breast and a cystic structure in the upper outer quadrant that appeared to be benign. The expert notes that there is no indication that Dr. Liebskind reviewed the mammogram films of May 4, 2004.

Based upon a review of the sonogram films of May 26, 2004, Dr. Liebskind and Park Avenue Radiologists, P.C.'s expert opines that Dr. Liebskind interpreted the films correctly. The expert further opines that it was appropriate for Dr. Liebskind to limit his interpretation to only the images of the right breast sonogram, and that he was not obligated by the standard of care to review the mammogram films and report, or to perform a breast examination. Lastly, the expert notes that injured plaintiff was not subsequently diagnosed with right breast cancer.

In opposition to defendants Dr. Liebskind and Park Avenue Radiologists, P.C. motion, plaintiffs rely upon, *inter alia*, the expert affidavit of a physician, who is board certified in radiology and focuses on the interpretation of mammograms and treating females with breast cancer. Plaintiffs' expert first sets forth that good and accepted practice in 2004 required that when a radiologist reviewed a sonogram of a suspicious area of a breast, the radiologist must first review the most recently performed mammograms of both breasts to get a complete picture of the condition of the breasts so that an accurate assessment of the sonogram can be made. Therefore, according to plaintiffs' expert, prior to reviewing the sonogram of May 26, 2004, Dr. Liebskind was required under the standards of good and accepted radiologic practice to review the bilateral mammograms of May 4, 2004. The expert states that a failure to do so by Liebskind was a departure from good and accepted medical practice. In this expert's opinion, if Dr. Liebskind had reviewed injured plaintiff's May 4, 2004 mammograms, and had done so properly, he would have noted the presence of a mass in her left breast, which was missed by Dr. Messina. The expert adds that this would have led to further testing, and the diagnosis of injured plaintiff's breast cancer more than one year earlier than it was eventually identified. Therefore, plaintiffs' expert opines that Dr. Liebskind's failure to properly review the bilateral mammograms of May 4, 2004, prior to reading the right sonogram, was a substantial contributing factor in the spread and advancement of injured plaintiff's breast cancer for more than a year.

Furthermore, according to plaintiffs' expert, Dr. Liebskind departed from good and accepted medical practice by failing to order bilateral sonograms. The expert sets forth that injured plaintiff was a high risk patient for breast cancer based upon the finding of scattered cysts in her right breast, which required increased monitoring of both breasts. Moreover, Dr. Liebskind had a duty to order bilateral sonograms for the purpose of performing a comparative analysis. Plaintiffs' expert opines that the departure on the part of Dr. Liebskind in failing to order bilateral sonograms was a substantial contributing factor in causing the delay in diagnosis of injured plaintiff's breast cancer, resulting in the advancement of the disease, a reduction of her life expectancy, worsening of her prognosis, and a diminution of her chance for a cure.

Based upon the conflicting expert affidavits submitted, this Court finds that issues of fact and credibility exist in connection with whether Dr. Liebskind departed from good and accepted medical practice (i) in failing to review the bilateral mammograms of May 4, 2004, prior to reviewing the sonogram of May 26, 2004; or (ii) failing to order bilateral sonograms. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, supra; Morris v Lenox Hill Hosp., supra). Accordingly, Dr. Liebskind and Park Avenue Radiologists, P.C.'s motion is denied.

Based on the foregoing, it is hereby

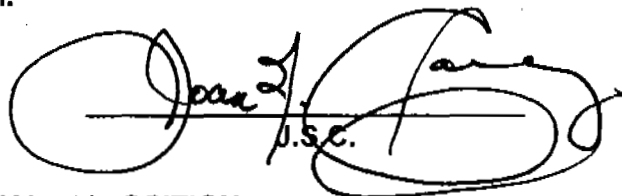
ORDERED that the motion by defendant New York Gynecological & Obstetrical Associates, P.C. and Kristine Chu, M.D. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by defendant Francis J. Murdaco, M.D. and Francis J. Murdaco, M.D., P.C. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross-motion by defendants Franklin H. Julle, as Executor of the Estate of Arie L. Liebskind, M.D., a/k/a Arie L. Liebskind, Deceased and Park Avenue Radiologists, P.C. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on June 15, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a trial.

Dated: 6/11/2009



Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
JUN 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK