

**Kersul v Shih**

2010 NY Slip Op 31985(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 109892/08

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

BYDOKIA KORSUL  
- v -  
JULIE SHIH, M.D.

INDEX NO. 109892/08  
MOTION DATE 6/1/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	<u>1-18</u>
_____	<u>19</u>
_____	<u>20</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUL 13 2010

MOTION DECIDED IN ACCORDANCE WITH COUNTY CLERK'S OFFICE  
ACCOMPANYING DECISION AND ORDER NEW YORK

Dated: 7/7/10 \_\_\_\_\_  
J.S.C.

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

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

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

-----X  
EYDOKIA KERSUL,

Plaintiff,

- against -

Index No.: 109892/08

JULIE SHIH, M.D., DOWNTOWN WOMEN OBGYN  
ASSOCIATES, and NEW YORK UNIVERSITY  
MEDICAL CENTER,

**Decision and Order**

Defendants.

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

2010  
CLERK'S OFFICE  
JUL 20 10

In Motion Sequence Number 004, defendants Julie Shih, M.D., and Downtown Women OBGYN Associates (the "Practice") move, pursuant to C.P.L.R. Rule 3212, for summary judgment dismissal of the complaint against them.<sup>1</sup> The Practice is sued under the theory of *respondeat superior* for the acts of its employee, Dr. Shih. Plaintiff opposes the motion but, as will be addressed in the following decision, fails to put in an expert affidavit.

Plaintiff commenced this action by the filing of a summons and complaint on July 18, 2008. Issue was joined by Dr. Shih and the Practice by the service of their respective answers on or about August 11, 2008. There were three prior motions having to do with plaintiff's delinquent bills of particulars and failure to particularize. Plaintiff served three bills of particulars in total: one original bill of particulars, and two "amended supplemental" bills of particulars. Plaintiff filed the note of issue at the end of February 2010. This motion for summary judgment followed.

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<sup>1</sup> This action has previously been discontinued against NYU Medical Center.

This is an action sounding in medical malpractice in which plaintiff alleges that Dr. Shih misdiagnosed an abdominal cyst as being uterine fibroids and therefore failed to properly treat the cyst. She claims that Dr. Shih's course of treatment—prescribing Lupron, a hormone drug, to shrink the fibroids, and not telling plaintiff to stop breast-feeding her son—was a departure from the standard of care. Plaintiff alleges that Dr. Shih's treatment for the fibroids masked the cyst that was growing inside her, and that the cyst grew from approximately seven (7) pounds in January 2008 to twenty (20) pounds in February 2008. The growth of the cyst and the accompanying pain and discomfort necessitated an emergency admission to Hackensack University Medical Center ("HUMC") in New Jersey on March 18, 2008, and surgical removal of the abdominal cyst by Daniel Smith, M.D., on March 20, 2008. Plaintiff claims that Dr. Shih's malpractice caused the cyst growth and damaged her menstrual cycle, possibly permanently.

On May 1, 2007, plaintiff had her annual gynecological exam at the Practice and reported that she had missed her last menstrual cycle. It was determined that she was pregnant. She had blood work taken and was prescribed prenatal vitamins. She was instructed to return for a sonogram and meet with an obstetrician. On June 15, 2007, a sonogram revealed two myomas (also known as fibroids, or benign tumors), measuring 3.2 by 2.6 centimeters, and 2.9 by 2.1 centimeters, respectively. Plaintiff's doctors monitored the fibroids, which increased in size over the course of the pregnancy. On August 3, 2007 an ultrasound showed a fibroid or fibroids measuring approximately 4 by 4 centimeters. On September 27, 2007, a physical examination and ultrasound showed fibroids measuring approximately 8 by 10 centimeters. On October 24, 2007, an ultrasound and physical examination showed a large anterior fibroid measuring approximately 15 by 20 by 9 centimeters. Plaintiff delivered her child on November 13, 2007.

Plaintiff next saw Dr. Shih on December 26, 2007. She reported that she was breast-feeding. Dr. Shih noted that the uterine fibroids had become enlarged. Plaintiff was advised to schedule a sonogram and a surgical consult. The sonogram on January 18, 2008, indicated that the mass was 22 centimeters by then (up from two to three centimeters when first observed in June 2007). Dr. Shih saw plaintiff again on January 24, 2008; by this point, the tumor had grown so large that plaintiff's clothing did not fit properly. Plaintiff and Dr. Shih discussed a possible abdominal myomectomy to remove the fibroid or fibroids. Dr. Shih recommended Lupron injections to shrink the fibroids. She advised plaintiff that she could start the Lupron after she stopped breast-feeding. Plaintiff indicated that she wished to continue breast-feeding for a few more weeks. Dr. Shih also recommended that plaintiff have an MRI taken.

The MRI took place on January 30, 2008. The MRI report indicated that the mass could be a degenerating large pedunculated leiomyoma (a smooth uterine fibroid). Dr. Shih discussed the results with plaintiff on February 4, 2008. She advised plaintiff that the MRI revealed what appeared to be a major vein feeding the fibroid. Dr. Shih again recommended Lupron injections to shrink the fibroid.

Plaintiff was advised that she could start taking the course of Lupron one to two days after she stopped breast-feeding. She commenced the Lupron injections on February 13, 2008. The injections were scheduled to occur once a month. After the first injection, plaintiff grew concerned that the tumor appeared to grow in size. She presented once to the Practice to see Dr. Shih, and also spoke with Dr. Shih over the telephone, complaining of the enlargement. Dr. Shih advised plaintiff

that initial growth of the fibroid is not unusual. Dr. Shih recommended that plaintiff contact an oncologist to rule out cancer.

Plaintiff had her second injection on March 13, 2008. On March 18, she began experiencing abdominal pain. She called the Practice and she was advised to go to the emergency room. She went to the emergency room at HUMC and was admitted. The next day, Dr. Daniel Smith, a gynecological oncologist at HUMC, reviewed a CAT scan taken of the pelvic mass. At first he believed it to be a pedunculated fibroid or an ovarian mass. Dr. Smith operated on March 20, 2008, to remove the mass. The pathology report revealed that the abdominal mass was not fibroids, but was actually a desmoid (a rare, fibrous tissue that is estrogen sensitive and benign). Plaintiff was discharged on March 23, 2008. She became pregnant in December 2008 and delivered her third child on September 11, 2009.

In support of her motion for summary judgment, Dr. Shih provides an expert affirmation from Sheldon H. Cherry, M.D., a physician licensed in New York, who sets forth that he specializes in the field of obstetrics and gynecology and is certified by the American Board of Obstetrics and Gynecology. Dr. Cherry sets forth that in rendering his opinion, he reviewed plaintiff's medical records, the bills of particulars, and the deposition transcripts of plaintiff, her husband, Dr. Shih, and Nurse Nancy Kraus, who testified on behalf of the Practice. Dr. Cherry opines that it was within the standard of care for Dr. Shih to diagnose plaintiff as having a uterine fibroid. She appropriately relied on the findings and interpretations of several diagnostic studies, which were suspicious for uterine fibroids. Dr. Cherry states that there was never any indication or

suspicion that the mass might be malignant, so neither immediate surgical intervention nor referral to an oncologist were indicated or warranted. With the continued growth of the mass, Dr. Shih timely referred plaintiff to an oncologist on March 10, 2008, to rule out cancer. It was appropriate for Dr. Shih to suggest a course of Lupron to shrink the tumor for several reasons: plaintiff's history of thalassemia (anemia); plaintiff's desire for future children; and the size of the presumed fibroids. Dr. Cherry also states that, given the lack of indication for malignancy or immediate surgical intervention, Dr. Shih acted within good and accepted standards of practice by allowing plaintiff to continue nursing her son and delaying the Lupron treatment. Dr. Cherry also opines that, given her subsequent pregnancy and delivery of her third child in September 2008, there was no damage to plaintiff's menstrual cycle, as alleged.

Dr. Cherry further opines that even if there was any damage to plaintiff's cycle, Lupron was likely not the proximate cause of the damage. It is Dr. Cherry's opinion that Lupron likely "incidentally benefitted" plaintiff by decreasing the growth rate of the tumors. He states that the desmoids grew during the pregnancy because of the estrogen produced during pregnancy, and he maintains that desmoids commonly grow in pregnancy. Dr. Cherry opines that Dr. Shih correctly advised plaintiff that the first dose of Lupron could initially cause the mass to grow, and that it was appropriate to administer a second dose of Lupron to mitigate the growth or shrink the mass.

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 "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was

not the proximate cause of the injuries alleged.” Roques v. Nobel, 2010 N.Y. Slip Op. 3177, \*2, 73 A.D.3d 204 (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, however, 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.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, at 324 (1986) (citation omitted).

Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op., at \*3 (internal citations omitted). The plaintiff’s expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant’s prima facie showing. Id.

Defendants have demonstrated their prima facie entitlement to summary judgment, addressing the relevant issues in the bill of particulars and showing, with a detailed expert affirmation, that Dr. Shih did not depart from the standard of care or proximately cause plaintiff’s alleged injuries. In order to rebut this showing, plaintiff must produce admissible evidentiary proof demonstrating that material issues of fact exist that require a trial of the action. In medical malpractice cases, this evidentiary proof is generally in the form of an expert affirmation. Plaintiff

did not submit an expert affirmation in opposition to defendants' motion. Her attorney argues—in papers he titles a “Memorandum of Law in Opposition” to defendants' motion—that defendants did not make out a prima facie entitlement to summary judgment. He argues that there are issues of fact and contradictory evidence that preclude summary judgment. The attorney also questions why Dr. Cherry failed to explain in his affirmation why a myomectomy or uterine fibroid embolization could not have been performed to treat plaintiff's condition prior to February 13, 2008, and asks the court to “take judicial notice of the fact that myomectomy and/or uterine fibroid embolization are well recognized medical procedures utilized today to treat uterine fibroids.” Plaintiff's attorney maintains that Dr. Cherry failed to address why Dr. Shih could not have diagnosed plaintiff's abdominal mass prior to the February 2008 Lupron injection, or why she could not have performed laproscopic surgery like Dr. Smith performed in March. He states that Dr. Cherry's statements that Lupron shrinks fibroids and could not have caused plaintiff's injuries are conclusory and fail to consider material factual issues such as safe surgical alternatives.

Plaintiff has failed to rebut defendants' prima facie showing. The statements of plaintiff's attorney in opposition are inadmissible to establish that material facts exist to preclude summary judgment. The purported issues of fact that plaintiff's attorney raises about Dr. Shih's treatment of plaintiff are opinions that only a medical expert is qualified to render. The contradictory evidence he presents is based on the hearsay statements of Dr. Smith and his own opinion that Dr. Shih failed to explore a safe surgical alternative to the Lupron treatment. Further, the court did not find Dr. Cherry's affirmation to be conclusory; his opinion that Dr. Shih did not depart from the standard of care in treating plaintiff was amply supported by a comprehensive factual review and his


own expertise in the field of obstetrics and gynecology, and addressed the claims in the pleadings. Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Julie Shih, M.D., and Downtown Women OBGYN Associates (the "Practice") is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is direct to enter judgment accordingly.

Dated: July 7, 2010

ENTER:

  
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JOAN B. LOBIS, J.S.C.

**FILED**  
JUL 13 2010  
COUNTY CLERK'S OFFICE  
NEW YORK