[* 1]

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

PRESENT: COBB S Justice PART 6

JOHNSON RAE BECK

-v-

WILLIAM RODGERS, M.D.

INDEX NO. 107027/10

MOTION DATE 3/8/11

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-22
Answering Affidavits — Exhibits	23-24
Replying Affidavits	25-26

sur reply: 27-29

Cross-Motion: ☐ Yes ☑ No

FILED

MAR 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 3/16/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

JENNIFER RAE BECK,

Plaintiff,

Index No. 107027/10

-against-

Decision and Order

WILLIAM H. RODGERS, M.D., MARK A. WESTCOTT, M.D., STEPHEN C. SCHARF, M.D., LENOX HILL HOSPITAL,

Defendants.

----------X

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

Defendants Mark A. Westcott, M.D., and Stephen C. Scharf, M.D., move for an order awarding summary judgment in their favor and dismissing the case against them under C.P.L.R. Rule 3212. Plaintiff does not oppose the motion as to Dr. Westcott, but does oppose the motion as to Dr. Scharf.

This case sounding in medical malpractice. Plaintiff was first diagnosed with breast cancer in 2004 at the age of 33. At that time, she underwent a right modified radical mastectomy with right sentinel nodes dissection and the first stage of right breast reconstruction, together with chemotherapy. Between 2004 and 2006, she underwent further breast reconstructive procedures. She remained largely asymptomatic over the next few years.

In 2008, plaintiff discovered a mass in her upper right arm. Arthur Goldberg, M.D., plaintiff's oncologist, ordered a PET/CT scan which was performed on May 19, 2008 (the "May 2008 PET Scan"). Dr. Scharf, a radiologist, interpreted the study and his impression was that

plaintiff had multiple areas of metastatic disease in the mediastinal and bilateral hilar lymph nodes as well as the right internal mammary lymph nodes. He also noted possible soft tissue recurrence on the medial aspect of plaintiff's right breast prosthesis and additional metastatic disease in the liver and the soft tissue of the right arm.

On May 21, 2008, Dr. Goldberg and plaintiff discussed the results of the May 2008 PET Scan and the treatment plan. Dr. Goldberg ordered the placement of a chest port for the administration of chemotherapy and biopsies of plaintiff's liver and right arm. On May 27, Dr. Westcott placed the chest port and performed the biopsy of plaintiff's right arm. On May 28, Dr. Westcott performed the biopsy of plaintiff's liver. On May 29, defendant William H. Rodgers, M.D., reported the results of the biopsies to plaintiff's physicians. Dr. Rodgers interpreted the arm biopsy as negative for malignant cells but positive for a granulomatous process compatible with sarcoidosis. He interpreted the liver core biopsy as negative for malignant cells but positive for well formed granulomas similar to previous specimens, with histological and clinical features compatible with sarcoidosis. In light of the results of the biopsies, plaintiff's physicians determined that she did not, in fact, have cancer, and her chest port was removed on June 6, 2008.

On April 23, 2009, plaintiff presented for an appointment with Dr. Goldberg. She remained asymptomatic and was not taking any medication. She reported that she wanted to have a child. Dr. Goldberg noted that plaintiff was five years post breast cancer treatment, that she was still pre-menopausal, and that there was no indication for any further hormone treatment or that pregnancy would worsen her prognosis. He ordered a repeat PET scan in order to monitor the

sarcoidosis and determine whether there was any indication of worsening or increased activity, and indicated that plaintiff was to return to him in six months.

On June 8, 2009, plaintiff underwent a PET/CT scan (the "June 2009 PET Scan"). Dr. Scharf performed and interpreted the study and found extensive irregular activity in the liver with large areas of necrosis and multiple additional lesions. The abnormal areas were much more extensive in comparison to the May 2008 PET Scan. Dr. Scharf also noted that a previously identified lymphadenopathy in the mediastinum (i.e., the multiple areas of metastatic disease in the mediastinal and bilateral hilar lymph nodes noted in the May 2008 PET Scan) was no longer present, but the reason for the difference in distribution was "unclear" to him. Given that plaintiff was totally asymptomatic at that time, Dr. Scharf's impression was that it was unlikely that the findings were due to metastatic breast cancer, and more likely that the more extensive irregularities and disease seen on this study were due to sarcoidosis.

On July 1, 2009, Dr. Goldberg and plaintiff discussed her elevated tumor markers and abnormal scan studies in the context of the biopsies that she had a year earlier showing only granulomatous disease. Although distraught about the abnormal findings, plaintiff remained asymptomatic, with no palpable lymph nodes, a clear chest, and a soft nontender abdomen. Dr. Goldberg's plan was to perform a circulating tumor cell test to see if it suggested the presence of metastatic cancer, and if so, he would obtain another liver biopsy.

Plaintiff subsequently became pregnant and experienced a very complicated pregnancy marked by abnormal liver functioning, jaundice, and a dramatically enlarged liver. On

March 28, 2010, she delivered the baby at about 32 weeks gestation by emergency Cesarian section and went into acute liver failure. The baby remained at St. Barnabas Hospital for about a month; she was premature and underweight, but otherwise normal. Plaintiff remained at St. Barnabas for eight days. She had a liver biopsy performed at St. Barnabas on April 5, 2010, which was definitively positive for metastatic liver cancer. Dr. Goldberg immediately started plaintiff on a course of chemotherapy and hormone treatment. As of this motion, plaintiff has stage IV breast cancer, although the medical records reflect that she was responding well to treatment.

On May 4, 2010, Dr. Rodgers reviewed the biopsy slides from the May 2008 arm and liver biopsies and prepared an amended report. In addition to the granulomas reported on the initial review of the May 2008 biopsies, Dr. Rodgers found a small detached fragment of tumor (less than 5% of the tissue submitted) that he had not seen in his original review. The cytologically normal cells were intermingled with the tumor cells. He noted that the features of the tumor cells were compatible with metastatic breast carcinoma, although the immunophenotype was atypical (the tumor cells were nonreactive for CK7 and CK20 antigens, when breast carcinoma is usually CK7 positive). However, Dr. Rodgers' final impression was that the overall histologic and immunohistochemical profile was most compatible with metastatic breast carcinoma.

A defendant 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, 73 A.D.3d 204,

206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action 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, 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, 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, 73 A.D.3d at 207 (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 the defendant's prima facie showing. Id.

Plaintiff alleges that defendants failed to timely diagnose and treat her breast cancer from May 2008 through April 2010. In support of Dr. Scharf's argument that his treatment was in accordance with good and accepted standards of medical practice and did not cause or contribute to the metastasis of plaintiff's breast cancer in her liver, he submits an expert affirmation from Donna M. Scuderi, M.D., who affirms that she is a physician duly licensed to practice medicine in the State of New York and board certified in radiology. Dr. Scuderi sets forth that in preparing her affirmation she reviewed plaintiff's deposition testimony; the May 2008 PET Scan and the June 2009 PET Scan;

prior PET/CT scans; plaintiff's cytology and pathology reports; and the pleadings. She opines, to a reasonable degree of medical certainty, that Dr. Scharf's treatment was conducted within appropriate standards for radiology practice and that Dr. Scharf's care in no way caused or contributed to plaintiff's injuries or the misdiagnosis of metastasized breast cancer.

As to the May 2008 PET Scan, Dr. Scuderi agrees with Dr. Scharf's interpretation of the study showing showed multiple suspicious lymph nodes, suspicious lesions in the liver, and significant activity in the upper right arm correlating with a region of known soft tissue mass. Dr. Scharf noted the presence of a large liver lesion and observed a defect at the center of the lesion which reported as suggesting possible necrotic metastasis. His impression of metastatic disease on the report for the May 2008 PET Scan was based on the appearance of suspicious nodes, soft tissue lesion in the right arm, soft tissue recurrence on plaintiff's prosthesis, and the liver lesion. Dr. Scuderi affirms that Dr. Scharf's impression appropriately incorporated plaintiff's past medical history of breast cancer and current clinical findings.

As to the June 2009 PET Scan, Dr. Scuderi sets forth that it was within the context of a definitive negative liver biopsy and a clinically asymptomatic patient that Dr. Scharf read the June 2009 PET Scan. He found extensive necrosis in the liver, three additional separate areas activity in the liver, and much more extensive activity than in the May 2008 PET Scan. He noted that the past liver biopsy indicated sarcoidosis. Dr. Scuderi opines that as there was no clinical indication to the contrary, Dr. Scharf justifiably relied on the pathological findings and concluded that, given the extensive disease seen in the study in a patient who was totally asymptomatic, the

findings were attributable to sarcoidosis rather than metastatic breast cancer. Dr. Scuderi opines that it was not a deviation from accepted radiology standards of care for Dr. Scharf to identify the lesions on the June 2009 PET Scan in the context of plaintiff's clinical status and a definitive pathology report from a biopsy in 2008. Dr. Scuderi notes that plaintiff's own treating oncologist also accepted the findings of the prior biopsy in the context of plaintiff being clinically well and did not order a further biopsy.

In opposition, plaintiff maintains that triable issues of fact exist that are sufficient to defeat Dr. Scharf's motion for summary judgment. In support of her position that Dr. Scharf did depart from the standard of care and that his departures proximately caused her injuries, plaintiff submits an affirmation from a physician (name redacted) who sets forth that he/she is licensed to practice medicine in the State of New York and board certified in nuclear medicine and diagnostic radiology. In preparing the affirmation, the expert sets forth that he/she reviewed plaintiff's diagnostic films from 2008-2010; the May 2008 and June 2009 PET Scans; the 2008 biopsy report and the amended 2010 report; a pathology report from 2004; the liver biopsy performed at St. Barnabas in 2010; and Dr. Scuderi's affirmation in support of Dr. Scharf's motion.

Plaintiff's expert opines that Dr. Scharf failed to properly and accurately read the June 2009 PET Scan and that this failure contributed to a continuous failure to treat plaintiff's cancer. Plaintiff's expert sets forth that PET/CT scans are very sensitive, but not specific in terms of identifying what type of disease is present. A pattern of disease on a PET/CT scan may help distinguish the type of disease, but it is the standard of care to biopsy cells to arrive at a more

definitive diagnosis. In reviewing the June 2009 PET Scan, plaintiff's expert sees a marked increase in the size, number, and intensity of the liver lesions compared to the May 2008 PET Scan. The expert notes that the hypermetabolic liver lesions on the June 2009 PET Scan are more suggestive of cancer. The expert also notes that sarcoidosis typically shows up as mediastinal and fairly symmetric bilateral hilar disease, which is absent on the June 2009 PET Scan. In light of that, the expert concludes that plaintiff had cancer that was visible on the June 2009 PET Scan. The expert opines that it was a departure for Dr. Scharf to read the June 2009 PET Scan as anything other than suspicious for metastatic disease, and that it is below the standard of care not to recommend a biopsy. Plaintiff's expert believes that Dr. Scharf's conclusion that the unusual findings were unlikely due to metastatic breast cancer because plaintiff was asymptomatic was a departure from the standard of care because a patient's symptomatology has less clinical value than the evident lesions on the June 2009 PET Scan. The expert also sets forth that Dr. Scharf disregarded the likelihood of cancer in presuming that the abnormal results were due to sarcoidosis, even though the reason for the difference in the distribution was unclear to Dr. Scharf.

Plaintiff's expert states that it is a departure from the standard of care to rely on earlier negative pathology reports to rule out cancer one year later. The expert sets forth that it was incumbent upon Dr. Scharf to state that cancer was the most likely diagnosis in reviewing the June 2009 PET Scan because the multifocal hepatic masses on the June 2009 PET Scan are not a common presentation of sarcoidosis. The progression of the lesions should have caused Dr. Scharf to be concerned and he should have recommended that plaintiff's treating physicians evaluate her condition further. Plaintiff's expert opines that Dr. Scharf's failure to do so resulted in plaintiff continuing to be treated as a patient with sarcoidosis rather than cancer.

In reply, Dr. Scharf denounces as conclusory plaintiff's expert's contention that Dr. Scarf's failure to recommend further evaluation of plaintiff's condition upon reviewing the June 2009 PET Scan resulted in plaintiff being treated for sarcoidosis rather than cancer. Dr. Scharf further contends that Dr. Goldberg did refer plaintiff to a pulmonologist, Robert Kutnick, M.D., based on Dr. Scharf's interpretation of the June 2009 PET Scan, and that on June 23, 2009, Dr. Kutnick recommended that plaintiff undergo another liver biopsy. Dr. Scharf argues that recommendations were made based on Dr. Scharf's interpretation of the June 2009 PET Scan, but those recommendations were never acted on.

In sur-reply (with permission from the court), plaintiff maintains that just because another doctor made a recommendation based on Dr. Scharf's interpretation of the June 2009 PET Scan does not absolve Dr. Scharf of his duty to do so. Plaintiff further contends that every physician who relied on Dr. Scharf's report of the June 2009 PET scan was relying on Dr. Scharf's conviction that plaintiff had sarcoidosis, even Dr. Kutnick, who surmised that even though the progressive liver disease and involution of thoracic lymphadenopathy does give reason for caution, plaintiff probably had sarcoidosis.

Dr. Scharf has made a prima facie showing of entitlement to judgment as a matter of law by showing, with expert opinion testimony based on the medical records, that he was not negligent in interpreting the May 2008 and June 2009 PET Scans. Dr. Scharf's expert opines, in a nonconclusory manner, that the results of the May 2008 PET Scan were accurate, and that Dr. Scharf justifiably relied on the biopsy study performed in May 2008 and plaintiff's clinical symptomatology

in interpreting the June 2009 PET Scan. Plaintiff does not argue that Dr. Scharf failed to meet his burden in this respect, only that issues of fact preclude summary judgment in Dr. Scharf's favor. The court notes that plaintiff has not responded with any expert opinion evidence as to the allegation that Dr. Scharf improperly interpreted the May 2008 PET Scan; that branch of Dr. Scharf's motion as it relates to the May 2008 PET Scan is therefore granted. With respect to the June 2009 PET Scan, plaintiff has sufficiently rebutted Dr. Scharf's showing with expert opinion evidence that it was a departure for him to rely on a year-old biopsy report in the face of the dramatic changes from the May 2008 PET Scan to the June 2009 PET scan and the inconsistencies between the June 2009 PET Scan and the earlier diagnosis of sarcoidosis. Plaintiff's expert also rebuts Dr. Scharf's arguments about the importance of clinical symptomatology in arriving at his interpretation that the June 2009 PET Scan indicated sarcoidosis by submitting expert testimony that the clinical presentation is far less important than the lesions visible on the June 2009 PET Scan, and that the lesions indicated the presence cancer. Plaintiff's expert also opines that the departures related to the June 2009 PET Scan proximately caused injury to plaintiff in that they contributed to her physicians' ongoing failure to diagnose metastatic breast cancer in the liver. The conflicting expert affirmations raise material issues of fact as to plaintiff's claim that Dr. Scharf failed to properly interpret the June 2009 PET Scan (see, e.g., Florio v. Kosimar, 79 A.D.3d 625, 626 [1st Dep't 2010]; Frye v. Montefiore Med. Ctr., 70 A.D.3d 15 [1st Dep't 2009]) and whether such failure proximately caused the delay in diagnosing plaintiff's metastasized breast cancer.

Accordingly, it is hereby

ORDERED that the branch of defendants' summary judgment motion as to Mark A. Westcott, M.D., is granted, and the complaint as against Mark A. Westcott, M.D., is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendants' summary judgment motion as to Stephen C. Scharf, M.D., is partially granted, to the extent that the claim that Dr. Scharf failed to properly interpret the May 2008 PET Scan is dismissed, but the claim that Dr. Scharf failed to properly interpret the June 2009 PET Scan survives in accordance with the above decision; and it is further

ORDERED that the parties shall appear for their previously scheduled pretrial conference on April 5, 2011, at 10:00 a.m. The parties are reminded that their trial is scheduled for June 20, 2011.

Dated: March 16, 2011

JOAN B. LOBIS, J.S.C.