

Kravitz v Wajsbroten-Kandel

2011 NY Slip Op 31142(U)

April 26, 2011

Supreme Court, Suffolk County

Docket Number: 08-120

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-6-11
ADJ. DATE 3-3-11
Mot. Seq. # 001 - MotD

-----X
 LAURA KRAVITZ AND SCOTT KRAVITZ, :
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 :
 Plaintiffs, :
 :
 :
 - against - :
 :
 BARBARA WAJSBROT-KANDEL, M.D., :
 EKTA GUPTA, M.D., :
 STEVEN J. GOLDMAN, M.D., :
 JOHN J. LOPES, M.D., and, :
 OAKDALE OB/GYN, P.C., :
 Defendants, :
 -----X

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Upon the following papers numbered 1 to 32 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-26; 27-29; Replying Affidavits and supporting papers 30-31; Other 32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants Steven J. Goldman, M.D., John J. Lopes, M.D. and Oakdale Ob/Gyn for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the plaintiffs' complaint is granted with prejudice as to John J. Lopes, M.D. and is denied as to Steven J. Goldman, M.D. and Oakdale Ob/Gyn .

This medical malpractice action is premised upon the alleged negligence of the defendants in their care and treatment of the plaintiff, Laura Kravitz, lack of informed consent, and a derivative claim asserted on behalf of her spouse, Scott Kravitz. It is claimed that Laura Kravitz came under the care and treatment of the defendants in or about 2005 and that the defendants negligently failed to timely biopsy, diagnose, remove, and treat Laura Kravitz for a cancerous tumor/mass in her right breast.

It is noted that this action was discontinued by stipulation as against the co-defendant resident physician, Ekta Gupta, M.D., on or about May 14, 2009.

The moving defendants, Steven J. Goldman, M.D., John J. Lopes, M.D. and Oakdale OB/GYN, P.C. seek summary judgment dismissing the complaint as asserted against each of them on the bases they each did not depart from the appropriate standards of care and did not proximately cause the plaintiff's claimed injuries.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

In support of motion (001) the moving defendants have submitted, inter alia, an attorney's affirmation; the expert affirmation of Howard G. Nathanson, M.D.; copies of the summons and complaint, answers served by the moving defendants, and the plaintiffs' verified and amended verified bills of particulars; uncertified copies

of the plaintiff's medical records which are not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212; and unsigned copies of the transcripts of the examinations before trial of Laura Lee Kravitz dated September 10, 2008, Scott Kravitz dated December 12, 2008, Barbara Wajsbrot-Kandel, M.D. dated February 4, 2009, Steven Goldman, M.D. dated June 19, 2009, and John Lopes, M.D. dated August 12, 2009, which unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

Howard G. Nathanson, M.D. avers in his duly notarized expert affidavit that he is a physician licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. He has set forth the materials he reviewed and offers his opinion within a reasonable degree of medical certainty that the care and treatment provided to Laura Kravitz from December 2005 through December 2006 by the defendants, Steven J. Goldman, M.D., John J. Lopes, M.D., and Oakdale Ob/Gyn, P.C., was within the standard of care that existed at that time and did not proximately cause the injuries claimed by the plaintiffs.

Dr. Nathanson continues that Laura Kravitz began treating with the aforementioned defendants in 1993 at Oakdale Ob/Gyn, PC. She saw Dr. Lopes on several occasions, including on February 27, 2002, at which time a breast examination was conducted and found to be within normal limits. A mammography was ordered, performed and reviewed on July 16, 2002, and the report revealed that the findings were within normal limits. However, she was thereafter sent for a bilateral sonogram on August 15, 2002. Dr. Nathanson states that Dr. Lopes received and reviewed the findings which were within normal limits. Thereafter, Dr. Lopes did not see the plaintiff nor review any reports through February 2007.

Dr. Nathanson continues that on December 1, 2005, Dr. Goldman conducted a breast examination on Ms. Kravitz and that his findings were within normal limits; however, Dr. Goldman recommended that she obtain a mammogram which was performed on April 11, 2006. Dr. Nathanson states that the Suffolk Medical Imaging report concerning that mammogram recommended "additional mammographic views of the right breast and bilateral breast ultrasound." After Ms. Kravitz was informed of the results of that report, further examination was performed by Suffolk Medical Imaging on May 11, 2006. The report generated with regard to that further examination indicated that "the right breast has suspicious abnormality and biopsy should be considered." Dr. Nathanson states that Dr. Goldman read and signed off on the May 12, 2006 report. He then sent Ms. Kravitz to the Carol M. Baldwin Breast Center at Stony Brook University Hospital with a copy of the report of the May 12, 2006 mammogram, and an order for a right breast mammogram. He further recommended that she be evaluated and that a biopsy be performed if deemed necessary by the Breast Care Center.

Dr. Nathanson continues that Ms. Kravitz was seen at the Breast Care Center on June 2, 2006. Dr. Barbara Wajsbrot-Kandel, a radiologist/breast imager at Stony Brook University Hospital in 2006, issued a report setting forth that she compared the June 2, 2006 films from the Breast Care Center with the study from Suffolk Medical Imaging and visualized no abnormality in the right breast. He continues that Dr. Wajsbrot-Kandel recommended follow up in six months and did not agree with a recommendation for stereotactic biopsy for Ms. Kravitz, as she did not believe the density referred to in the prior mammogram was abnormal. Thereafter, on December 7, 2006, the follow up mammogram revealed a larger density with more angular borders in the right breast. The subsequent biopsy revealed breast cancer.

Dr. Nathanson states that it is his opinion within a reasonable degree of medical certainty that Dr. Lopes and Dr. Goldman did not render care and treatment during the period of time following the June 2, 2006 consultation at the Carol M. Baldwin Breast Care Center and, thus, did not depart from good and accepted medical practice. He states that Dr. Lopes was not involved in Ms. Kravitz's care from December 2005 through December 2006. Dr. Nathanson continues that the care and treatment rendered by Dr. Goldman from December 2005 through December 2006 was within the standard of care in that Ms. Kravitz did not present with any complaints and she had normal breast examinations. He continues that she was referred to the Baldwin Breast Care Center at Stony Brook following receipt of the May 12, 2006 mammogram report from Suffolk Imaging, and that it was not necessary to refer her for an additional third opinion as obtaining a biopsy was not even a conclusive first opinion. He further states that Dr. Goldman relied upon the definitive opinion given by the Breast Care Center that the June 2, 2006 mammography was normal. Dr. Nathanson continues that a breast biopsy could not have been performed based upon the testimony of Dr. Wajsbrot-Kandel wherein she stated that there was no abnormality seen which could be biopsied.

The plaintiffs have submitted the affirmation of their expert physician wherein the expert affirms to being licensed to practice medicine in the State of New York and to being board certified in obstetrics and gynecology. It is the plaintiffs' expert's opinion, set forth within a reasonable degree of medical certainty, that Dr. Goldman and Oakdale Ob/Gyn departed from accepted standards of medical care and practice from December 2005 through December 2006, and that those departures were substantial contributing factors of the injuries claimed by Ms. Kravitz. The plaintiffs' expert continues that these defendants failed to place Laura Kravitz in a proper scheme of care such that her breast cancer would be timely diagnosed and treated, and that they failed to have a proper plan of management to come to a conclusion about the conflicting mammogram reports. The expert states that had the tumor been properly diagnosed and treated in June 2006, the tumor would have been smaller, the staging would have been lower, and she would not have had to face such a substantial decrease in life expectancy.

Specifically, the plaintiffs' expert states that Dr. Goldman and Oakdale Ob/Gyn departed from good and accepted medical care and practice in failing to properly act as the coordinator of the plaintiff's care; in failing to appreciate that this patient had a family history of breast cancer in her maternal grandmother; and in failing to appreciate and rectify the fact that there was a discrepancy with regard to the findings of the mammographies of May 11, 2006 and June 2, 2006, obligating the defendants to send the patient back to the original radiologist, Suffolk Medical Imaging, to obtain another opinion due to the seriousness of the potential diagnosis of breast cancer. The plaintiffs' expert continues that there were further departures by Dr. Goldman and Oakdale Ob/Gyn in their failing to contact both Dr. Wajsbrot-Kandel and the radiologists at Suffolk Medical Imaging to further evaluate the discrepancy and to devise an appropriate plan to determine the true nature of the suspected breast abnormality; in failing to recommend and obtain a breast MRI, surgical consult and breast biopsy; in failing to place Ms. Kravitz in an appropriate scheme of care and manage her care to more timely diagnose the breast cancer; and in inappropriately selecting the "do nothing approach" by accepting one consulting radiologist's opinion over another consulting radiologist's opinion concerning what the abnormality represented.

The plaintiffs' expert disagrees with the defendants' expert's opinion that Dr. Goldman did not depart from accepted standards of medical care and practice in relying on the negative opinion of Dr. Wajsbrot-Kandel as she did not rule out a diagnosis of breast cancer, and that Dr. Goldman and Oakdale Ob/Gyn should not have assumed that the first radiologist was wrong.

The plaintiffs' expert states that Dr. Nathanson does not mention that Ms. Kravitz' maternal grandmother had breast cancer which requires mandating an appropriate plan of treatment for Ms. Kravitz. When the May 12, 2006 mammogram showed a "questionable area of architectural distortion in the posterior central right breast," and specialized mammographic views revealed "a persistent focal area of asymmetric density in the posterior central right breast," a stereotactic biopsy was recommended. However, when Dr. Goldman referred Ms. Kravitz to Stony Brook, and a biopsy was not performed, Dr. Goldman, as coordinator of Ms. Kravitz' care, had an obligation to affirmatively act on her behalf. The plaintiffs' expert states that, instead of obtaining a breast biopsy, Dr. Goldman relied upon Dr. Wajsbrot-Kandel's opinion that the mammogram study was "probably" benign. However, opines the plaintiffs' expert, Ms. Kravitz' breast cancer was present at the time of the April, May and June 2006 mammograms, and an MRI would have revealed the right breast abnormality. Instead, the December 7, 2006 mammography, as interpreted by Dr. Wajsbrot-Kandel, showed focal asymmetric density in the right breast which increased in size. A sonogram taken on December 13, 2006 was interpreted by Dr. Sherry Ford as being "suspicious for malignancy" and a stereotactic breast biopsy was recommended. Once performed, the stereotactic biopsy of the right breast revealed malignant ductal carcinoma in situ, comedo type, invasive ductal carcinoma, and invasive lobular carcinoma.

The plaintiffs have also submitted the affirmation of a physician licensed to practice medicine in the State of New York who is board certified in internal medicine with subcertifications in medical oncology and hematology. After setting forth the sequence of the plaintiff's medical care and treatment relative to the cancer in her right breast, this expert opines within a reasonable degree of medical certainty that there are multiple departures by Dr. Goldman and Oakdale Ob/Gyn which caused injury to Ms. Kravitz. It is the plaintiffs' medical expert's opinion that it was incumbent upon Dr. Goldman and Oakdale Ob/Gyn not to merely accept the conflicting radiology reports, of May 12 and June 2, 2006, but to rectify this discrepancy to protect the patient's health and well-being. The medical expert continues that Dr. Goldman also departed from the standard of care by failing to order an MRI, which was an appropriate plan of management. The failure to rectify the discrepancy between the mammogram reports and the failure to order an MRI caused a delay of over six months in the diagnosis and treatment of the plaintiff's breast cancer, causing and permitting the breast cancer to grow and spread, undetected, undiagnosed, and untreated. These departures, opines plaintiffs' medical expert, caused the increase in tumor size, lymph node metastasis, the need for more invasive and extensive surgery and oncological treatment, as well as increased pain and suffering, and a decrease in life expectancy.

The plaintiffs' medical expert further opines that because the cancer was at Stage 2B at the time of diagnosis, the breast cancer mass was present in June 2006 when she presented to the Carol Baldwin Breast Center, and that the size of the breast cancer increased through December 2006 when Dr. Wajsbrot-Kandel reported an increase of growth of the cancer based upon her interpretation of the December 2006 mammogram. Had the diagnosis of cancer been made in June 2006, the tumor would have been smaller, it would not have spread to the lymph nodes, and the patient would have had a greater chance of survival and cure. Only a lumpectomy would have been needed with sentinel node biopsy instead of a partial mastectomy with lymph node dissection. She would not have had metastasis to the lymph nodes, her cancer would have been staged lower, and she would have had less disfigurement. He continues that the growth of the cancer and its spread to the lymph nodes had an impact on the required oncological treatment, and a grave impact on the plaintiff's survivability from this cancer, depriving her of a substantial opportunity for a cure.

It is determined based upon the affidavits and affirmations submitted by the parties, that prima facie entitlement to summary judgment dismissing the complaint has been established with regard to Dr. Lopes. The

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plaintiffs have asserted, and the plaintiffs' experts have opined, that there were departures from the standard of care by Dr. Goldman and Oakdale Ob/Gyn from on or about June 2006 through December 2006. However, the submissions establish that Dr. Lopes last saw and treated the plaintiff on August 15, 2002, prior to the departures from care that allegedly commenced in June of 2006.

Accordingly, that part of motion (001) which seeks summary judgment dismissing the complaint as asserted against Dr. Lopes is granted with prejudice.

Turning to the application of Dr. Steven Goldman and Oakdale Ob/Gyn for dismissal of the complaint as asserted against them, the defendants' and the plaintiffs' experts have submitted conflicting opinions with regard to whether they departed from good and accepted standards of care by delaying and failing to timely diagnose and treat Ms. Kravitz for breast cancer. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]). In the instant action, summary judgment is precluded as to Dr. Steven Goldman and Oakdale Ob/Gyn based upon the conflicting medical opinions submitted by the parties' experts.

Accordingly, that part of motion (001) which seeks dismissal of the complaint as asserted against Dr. Goldman and Oakdale Ob/Gyn is denied.

Dated: April 26, 2011



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION