

Wolterstorff v North Shore Univ. Hosp.

2011 NY Slip Op 31651(U)

June 10, 2011

Supreme Court, Nassau County

Docket Number: 11538/07

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

LYNN WOLTERSTORFF a/k/a CASAMASSIMA and
WILLIAM WOLTERSTORFF,

Plaintiff(s),

MOTION DATE: 5/12/11
INDEX NO.: 11538/07

-against-

SEQ. NOS. 3 & 4

NORTH SHORE UNIVERSITY HOSPITAL, MICHAEL]
L. NIMAROFF, ROBERT J. DRING, GLEN KAUFMAN
and ERIC GANDRAS,

Defendant(s)

The motion of the defendants' North Shore University Hospital and Eric Gandras, M.D. (Motion No. 3) and the defendants Michael L. Nimaroff, M.D., and Robert J. Dring, M.D., (Motion No. 4), pursuant to CPLR 3212, for summary judgment are determined as hereinafter provided.

On January 20, 2005 the defendant Michael L. Nimaroff, M.D., an obstetrician and gynecologist, performed a laparoscopic myomectomy on the plaintiff Lynn Wolterstorff at the defendant North Shore University Hospital in order to remove a 5.5 cm uterine fibroid. Her subsequent follow-up (i.e., 1/28/05 and 2/9/05) and regular (i.e., 6/30/05 and 7/12/06) visits were routine. However, on July 25, 2006 she returned complaining of pelvic pain and an ultrasound examination and CT scan revealed an abscess within the mesentery. On July 26, 2006 a physician associated with Dr. Nimaroff, the defendant Glen Kaufman, M.D., therefore recommend that Ms. Wolterstorff consult with a surgeon.

Following a July 26, 2006 examination, the defendant Robert J. Dring, M.D., a general surgeon, reviewed her CT scans with the defendant Eric Gandras, M.D., an interventional radiologist, to determine whether the abscess was amendable to percutaneous aspiration and drainage or whether a laparoscopy or other surgery was required. On July 31, 2006 Dr. Gandras removed approximately 50 cc of liquid and sent a sample to the lab for analysis. A follow-up CT scan in approximately two to three weeks was also recommended, however, Ms. Wolterstorff did not do so. The laboratory results were

negative.

On October 3, 2006 she returned to Dr. Dring complaining of recurrent abdominal pain in the same general location. An October 5, 2006 CT scan confirmed the existence of an approximately 4.6 cm mass. Ultimately, on October 11, 2006 Dr. Dring performed an exploratory laparotomy and removed the mass from the mesentry of Ms. Wolterstorff's distal ileum.

On or about June 22, 2007 the plaintiffs filed this medical malpractice action. Upon joinder of issue and the completion of disclosure, the case was certified for trial on August 5, 2010 and on October 22, 2010 a note of issue was filed. Finally, pursuant to a January 11, 2010 so-ordered stipulation (see defendant Gandras' Exhibit O), the defendants' time in which to seek summary judgment was extended until February 21, 2011. The February 17, 2011 (defendants Nimaroff and Dring) and February 18, 2011 (defendants North Shore University Hospital and Gandras) motions are therefore timely (see CPLR 3212[a]).

"To establish a prima facie case in a medical malpractice, a plaintiff must prove that the defendant deviated from accepted standards of medical practice and that such deviation proximately caused [her] injuries" (Semel v Guzman, ___ AD3d ___ [2nd Dept; 5/17/11]). "On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (Heller v Weinberg, 77 AD3d at 622-623). In opposition, a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact (see Stukas v Streiter, 83 AD3d 18). 'General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (Salvia v St. Catherine of Sienna medical Center, ___ AD3d ___ [2nd Dept; 5/17/11] quoting Heller v Weinberg, 77 AD3d 622,623).

David Sperling, M.D., a board certified radiologist and a practicing interventional radiologist, avers, within a reasonable degree of medical certainty, in a February 17, 2011 affirmation (see defendant Gandras' Exhibit N) that it was good and accepted medical practice to proceed with the CT-guided percutaneous aspiration and drainage of fluid on July 31, 2006 instead of an exploratory

laparoscopy. Moreover, he opines that it was properly performed and, even if the subsequent mass was present then, that it was not visible on the July 25, 2006 and July 31, 2006 CT films and therefore incapable of being diagnosed by Dr. Gandras. It was also good medical practice to recommend a follow-up CT scan, although Ms. Wolterstorff did not undergo one. In addition, the fluid was properly sent to the laboratory for an analysis which, fortunately, was negative. He therefore concludes that the mass depicted on the October 5, 2006 CT scan developed after, and is unrelated to, Dr. Gandras' July 31, 2006 treatment.

Similarly, Pedro Degarra, M.D., a board certified obstetrician and gynecologist, avers in a February 11, 2011 affirmation on behalf of Dr. Nimaroff (see defendants' Nimaroff and Dring's Exhibit A) that he properly performed the January 20, 2005 laparoscopic myomectomy. Further, he denounces the plaintiffs' speculative assertion that the mass removed on October 11, 2006 was a remnant of the earlier fibroid since the first one was consistent in size with the mass identified on an November, 2004 sonogram and in a different location than the July 31, 2006 drainage and second fibroid.

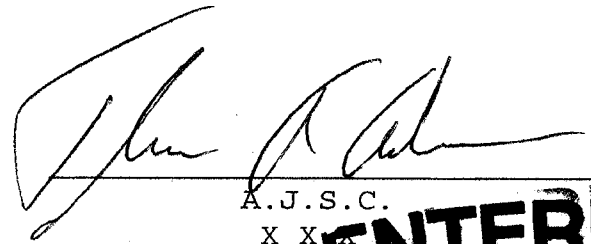
The February 14, 2011 affirmation of Dr. Dring's expert, Michael Persico, M.D., a board certified general surgeon (see defendants Nimaroff and Dring's Exhibit B), likewise avers, inter alia, that the referral to Dr. Gandras for the less invasive percutaneous drainage procedure was entirely appropriate. Conversely, based upon a review of the October 5, 2006 CT scan, the October 11, 2006 laparotomy was allegedly both indicated and appropriately performed. The movants have therefore established their respective prima facie entitlement to summary judgment dismissing the plaintiffs' complaint as against them.

In opposition, the plaintiffs rely upon a single April 6, 2011 affirmation of a board certified obstetrician and gynecologist (see plaintiffs' Exhibit A), who opines, in sum, that Dr. Nimaroff left a "[s]ignificant residual tumor" behind on January 20, 2005 (para.14) and that Drs. Dring and Gandras negligently failed to order cytology tests of the aspirated fluid which would, allegedly, have revealed the presence of endometrial cells "and led to the proper diagnosis of an endometrioma and endometriosis" (para.16). Moreover, contrary to the record, it is alleged that a follow-up CT scan was not recommended.

Preliminarily, Drs. Dring and Gandras dismiss the affirmation of the plaintiffs' expert because he is neither a surgeon or an interventional radiologist. "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practice in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (Schectman v Wilson, 68 AD3d 848,850 quoting Postlewhaite v United Health Services Hospital, 5 AD3d 892,895). However, even if the plaintiffs' expert surpasses that threshold, his speculative conclusions are inadequate to create a triable issue of fact (see Salvia supra). Indeed, the belated theory concerning the failure to order cytology tests is not alleged within the plaintiffs' bill of particulars (see Dolan v Halperin, 73 AD3d 1117,1119). In any event, Dr. Gandras' expert, Dr. Sperling, further asserts that the applicable standard of care only requires a cytology study when, unlike here, a diagnosis of cancer is suspected (see defendant Gandras' reply affirmation, Exhibit C). Moreover, Dr. Nimaroff's expert, Dr. Segarra, contends that "[a] diagnosis of endometriosis requires the performance of a biopsy" and there was nothing to biopsy since only fluid was drained (see defendant Nimaroff and Dring's reply affirmation, Exhibit A).

Accordingly, the defendants North Shore University Hospital and Eric Gandras (Motion No. 3) and the defendants Michael L. Nimaroff and Robert J. Dring's (Motion No. 4) respective motions, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint as against them are granted. Upon searching the record (see CPLR 3212[b]), the Court, sua sponte, also dismisses the action as against the defendant Glen Kaufman as well.

Dated: JUN 10 2011



A.J.S.C.
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ENTERED

JUN 14 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**