

Tirado v Greater Staten Is. Med. Group, P.C.
2012 NY Slip Op 30501(U)
March 1, 2012
Supreme Court, Richmond County
Docket Number: 101982/09
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 101982/09
Motion No.: 001, 002**

ROSE TIRADO,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**GREATER STATEN ISLAND MEDICAL GROUP, P.C.,
STATEN ISLAND PHYSICIAN PRACTICE, P.C.,
DUK KYOON CHOI, M.D.,
LANCE JUNG, M.D.,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Motion and Affidavits Annexed	2
Memorandum of Law in Support of Motion	3
Answering Affidavits	4
Replying Affidavits	5, 6
Memorandum of Law in Reply	7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Staten Island Physicians Practice, P.C. (“SIPP”), Lance Jung, M.D., and Duk Kyoon Choi, M.D. move by their attorneys for summary judgment dismissing the plaintiff’s complaint. The motions are denied.

Facts

The plaintiff was an employee of the defendant SIPP from July, 2000 until August, 2008. During that time she treated with Dr. Zhang; who was also employed by SIPP, as her primary care physician. During a physical examination of the plaintiff in February 2008, Dr. Zhang noted the presence of a mass on plaintiff’s right breast. Dr. Zhang ordered a mammogram, spot

compression and a breast sonogram. Records indicate that the defendant Dr. Choi, a radiologist, interpreted the mammogram and called for a breast sonogram. Christina Dorsey administered the sonogram which was also interpreted by Dr. Choi. Dr. Choi found that the mass was a cyst and not a tumor, but recommended that the plaintiff *follow up in one year*.

Dr. Zhang also referred the plaintiff for a surgical consult with Dr. Jung. The plaintiff contends that she was not referred to Dr. Jung, but instead sought him out on her own. The plaintiff testified during her examination before trial as follows:

Q. So you saw Dr. Jung out of your own volition?

A. Just as protocol, you have a mammo done and you have a lump, working there, I know that's what you do, you see the surgeon.

According to Dr. Jung, he conducted a physical examination of the plaintiff and viewed Dr. Choi's report. It was also noted that Dr. Jung wrote, "needle aspiration versus observation with *three month follow-up*." During Dr. Jung's examination before trial, he testified that he repeatedly requested that the plaintiff undergo the needle aspiration, but she failed to do so. The plaintiff denies that Dr. Jung ever directed her to have the mass aspirated.

After several months the plaintiff testified that she felt the mass had grown in size. Once again Dr. Jung states that he requested that the plaintiff allow him to aspirate the mass, but the plaintiff was hesitant to allow him to conduct the aspiration. Once again the plaintiff denies that Dr. Jung ever approached her about aspirating the mass. However, the plaintiff underwent a second sonogram on July 15, 2008. According to the submitted medical records two solid masses were found; one was 2 centimeters, and a second was .6 centimeters.

On July 24, 2008 Dr. Jung performed a right breast biopsy. The pathology report revealed infiltrating duct cell carcinoma. On August 4, 2008 the plaintiff underwent a bone scan which could not rule out metastases. The next month, on September 17, 2008 the plaintiff

underwent a right breast revision of the biopsy cavity and sentinel lymph node. The pathology report on the sentinal node was negative for cancer and further noted that immunohistochemistry stains of the node for pan-cytokeratin show no metastatic carinoma. Moreover, the breast tissue from the lumpectomy showed ductal carcinoma that is an in situ–solid and cribriform types with intermediate nuclear grade, and minimal necrosis as well as the presence of calcifications. On October 31, 2008 the plaintiff underwent a total right mastectomy. She had breast reconstruction on February 2, 2010. The operative report dated October 31, 2008 from Charushella Andaz, M.D. states that “she has very small breast and attempt at conservation is not feasible without disfiguring her breasts.”

The plaintiff then commenced this action alleging medical malpractice. The plaintiff alleges that due to the failure of both Dr. Choi and Dr. Jung to properly diagnose her breast cancer the mass grew from 1.4 centimeters in February of 2008 to 2.4 centimeters in July of 2008.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

In a medical malpractice action, “. . . a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . 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 . . .”⁶

Lance Jung, M.D. and Staten Island Physicians Practice

Here, Dr. Jung submits the expert affirmation of Dana Monaco, M.D., a board certified general surgeon who regularly treats breast cancer patients. Dr. Monaco concludes that Dr. Jung’s care of the plaintiff was in accord with good and accepted medical practice. In particular after reviewing Dr. Jung’s records concerning the plaintiffs, as well as reading the examination before trial transcripts, Dr. Monaco determined that Dr. Jung conducted thorough physical examinations of the plaintiff. In addition, Dr. Monaco found that the patient history taken by Dr. Jung was more than adequate in this case. While Dr. Monaco determined that Dr. Jung requested

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

that the plaintiff permit him to conduct a fine needle aspiration of the mass, a fact currently disputed by the plaintiff, she concluded that the failure to conduct that procedure was not a proximate cause of the plaintiff's injuries. Dr. Monaco's reasoning is as follows:

. . . even if the plaintiff underwent a needle aspiration sooner (i.e. on February 29, 2008 when Dr. Jung recommended that she undergo this when he first saw her as a patient) than when she did on July 16, 2008, that this would not have made any difference in the plaintiff's outcome and prognosis. When the plaintiff underwent a right total mastectomy on October 31, 2008, the plaintiff underwent this because clear margins were not obtained from the September 17, 2008 right breast revision procedure. Further, the record note from this procedure that plaintiff had a ductal carcinoma in situ that was mixed with a poorly differentiated cancer as well. Due to this type of cancer and the plaintiff's young age, it is my opinion, within a reasonable degree of medical certainty, that the plaintiff would still have decided to undergo chemotherapy as well as surgical intervention even if she underwent a fine needle aspiration sooner (i.e. such as undergoing the fine needle aspiration on February 29, 2008 when Dr. Jung told plaintiff his preference of her undergoing this) than she did on July 16, 2008.

Dr. Monaco's expert affidavit, argues that Dr. Jung and SIPP did not depart from good and accepted medical practice, and that even assuming that the Dr. Jung and SIPP did depart from good and accepted medical practice, the plaintiff was not injured by that departure.

Dr. Choi

Dr. Choi submits two expert affirmations. The first comes from Maria A. Abadi, M.D., who is board certified in anatomic pathology and cytopathology. The second expert affirmation is produced by Mark A. Fialk, M.D. who is board certified in internal medicine, medical oncology, hematology and hospice and palliative medicine. Both experts conclude that Dr. Choi is entitled to summary judgment dismissing the plaintiff's complaint.

Dr. Abadi reviewed all four radiology reports of the plaintiff, in addition Dr. Abadi traveled to the Department of Pathology at Richmond University Medical Center to look at the slides of the specimen removed from the plaintiff. Upon examining the specimen Dr. Abadi concluded that the plaintiff's cancer was a T1 on July 24, 2008.

In addition, Dr. Fialk concluded that any action or inaction on the part of Dr. Choi was not the proximate cause of the plaintiff's injuries. Dr. Fialk reasoned that:

. . . the tumor by ultrasound was 1.4 cm in greatest dimension on February 28, 2008. In situ and invasive cancer cannot be distinguished by mammogram or ultrasound. We will assume that what Dr. Choi reported as a cyst was in fact a cancerous precursor to the cancer removed September 17. We thus cannot know the greatest dimension of the invasive cancer on February 28. However, it is as close to impossible as anything in medicine ever gets that the invasive portion of the cancer was less than .1 cm on February 28. Thus the patient's cancer was T1 NO M0 on that date. This is stage I cancer.

We know from Dr. Abadi's examination of the slides from the specimen removed July 24, 2008 that the greatest dimension of the cancer at that point was 1.8 cm. Thus this cancer was T1 NO M0 and Stage I on that date.

Therefore, based on the expert affirmations of Drs. Abadi and Fialk, it has been established that Dr. Choi's reading of the mass as a cyst on February 28, 2008 did not cause the plaintiff's injuries.

Plaintiff's Opposition

The defendants having met their burdens on summary judgment, the burden now shifts to the plaintiff to demonstrate by an expert affidavit that an issue of fact exists concerning whether the defendants departed from good an accepted medical practice, or was the proximate cause of the plaintiff's injuries.

In opposition to the defendants motions for summary judgment the plaintiff submits the expert affirmation of an undisclosed expert licensed to practice medicine in Florida who is board certified in internal medicine and oncology. An un-redacted copy of the undisclosed expert's report was submitted directly to chambers for an in camera inspection. The plaintiff's expert finds that the cancer grew to a Stage II tumor at the time of its removal from the plaintiff. In so finding the plaintiff's expert reasoned in pertinent part that:

Oncologists use a staging system to stage the nature and extent of a cancerous tumor. This determines the subsequent treatment. Staging is based on size, node involvement and metastese. A 1.4 cm tumor is a Stage 1 tumor. . . Staging in terms of the size component is based on the overall dimensions of the tumor. Oncologists and pathologists do not in everyday medical practice, for the purpose of staging breast cancer, break down the internal components of the tumor. Breast tumors always contain different types of cancer cells. Invasive cancer is seen alongside ductal carcinoma in situ. They are seen in varying ratios to each other. But whatever the ratio is has absolutely no bearing upon what the staging is. A 1.4 cm tumor is a Stage 1 tumor regardless of the ratio, and the choice of treatment and prognostic outcome are based upon that stage number, among other factors. It would be indisputable departure from accepted oncology standards of care to reduce the staging of a tumor (and its ultimate treatment options) on the basis of the invasive-to-in situ ratio. Notably, the physicians involved in this patient's care did not utilize such reduction. . . when the cancer was finally diagnosed as such following the July, 2008 sonogram, it was then 2.4 cm in size and was a Stage 2 tumor. This significant increase in size had serious consequences for the patient.

Therefore, the plaintiff's expert opines that the actions by the defendants were the proximate cause of the plaintiff's injuries. On the issue of liability, the plaintiff's expert accepts the plaintiff's testimony that Dr. Jung never mentioned the necessity of a fine needle aspiration during her initial visit. Plaintiff's expert opines that Dr. Jung's failure to discuss a fine needle aspiration of the mass in the plaintiff's right breast constituted a departure from good and accepted medical practice.

In reply to the plaintiff's expert report the defendant resubmits the operative report of Dr. Andaz produced after the October 31, 2008 surgery. Contained in that report is a statement that "[plaintiff] has very small breast and attempt at conservation is not feasible without disfiguring her breasts." While this statement may be proven true, it does not address the issue of whether the plaintiff would have needed a mastectomy had the mass been removed when it was 1.4 cm.

The defendants argument that the plaintiff's expert report should not be considered is unavailing. The cases cited by the defendants are inapposite to the matter before this court. In the *Behar v. Cohen* case, the plaintiff sought to oppose expert affirmations submitted in the fields of surgical and gastroenterological treatment, with an affirmation from a pathologist.⁷ In this matter, the plaintiff's expert is board certified in oncology and internal medicine. Furthermore, in the *Mustello v. Berg* case, the plaintiff opposed the defendant's gastroenterological expert with an affirmation from a general surgeon.⁸ Here, the plaintiff's expert is a board certified oncologist opining on matters concerning breast cancer.

Conclusion

The motions for summary judgment dismissing the plaintiff's complaint made by Dr. Jung, Dr. Choi and Staten Island Physicians Practice are denied. There are issues of fact that require resolution at trial.

Accordingly, it is hereby:

ORDERED, that the motions for summary judgment made by the defendants Lance Jung, M.D., Staten Island Physicians Practice, and Duk Kyoon Choi, M.D. are denied; and it is further

⁷ *Behar v. Coren*, 21 AD3d 1045, [2d Dept 2005].

⁸ *Mustello v. Berg*, 44 AD3d 1018, [2d Dept 2007].

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, March 26, 2012 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: March 1, 2012

Joseph J. Maltese
Justice of the Supreme Court