

<b>Goldberg v Ouzounian</b>
2013 NY Slip Op 31018(U)
April 23, 2013
Supreme Court, Suffolk County
Docket Number: 10-22969
Judge: Joseph C. Pastorella
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

**COPY**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

Mot. Seq. # 006 - MD

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- against -

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STEVEN P. OUZOUNIAN, M.D., ANTHONY F.  
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SOUTHAMPTON HOSPITAL, TWIN FORKS  
SURGICAL ASSOCIATES, P.C. and MEETING  
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Defendants.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 17; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers 18 - 20; Replying Affidavits and supporting papers 21 - 27; Other \_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that motion (006) by the defendant, Patricia O. Shea, N.P., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against her is denied.

In this medical malpractice action, the plaintiff, Gregory Goldberg, thirty years of age, asserts that the defendants departed from accepted standards of medical care and treatment, on or about October 20, 1995 and continuing, in their failure to timely and appropriately diagnose malignant neoplasm of the testicles, and in failing to recognize or consider that his hernia was incidental to the testicular cancer. Causes of action for negligence and lack of informed consent have been pleaded. As a result of the alleged departures by the defendants in failing to diagnose, test, and timely treat the testicular cancer, the plaintiff alleges that he has been caused to suffer injury including radical left and right orchiectomies; complete and total inability to naturally produce offspring; metastasis of the cancer to the lungs; unnecessary surgical left hernia repair; retroperitoneal adenopathy close to the left kidney; increased size of the cancerous tumors in the testicles; decreased chances for survival, diminished life expectancy; increased risk for metastasis, recurrence, and death; the need for extensive chemotherapy; severe testicular pain and swelling; scarring and deformity of the testicles.

The moving nurse practitioner, Patricia Shea, an employee of defendant Meeting House Lane Medical Practice, seeks summary judgment dismissing the complaint as asserted against her on the bases that she initially saw the plaintiff in her capacity as a nurse practitioner in September 2009 for pre-operative clearance for inguinal hernia repair surgery; that the plaintiff was seen by defendant internist Dr. Knott prior thereto; that she discussed the patient's condition with Dr. Knott after issuing medical clearance; that Dr. Knott had advised her that the plaintiff had an inguinal hernia and was referred to Dr. Ouzounian for surgical evaluation; that she saw and examined the plaintiff pre and post-operatively but the plaintiff did not permit her to examine the testicles; that she did not depart from accepted standards of care and treatment; and she did not cause or contribute to the decedent'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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [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 [1980]). The opposing party 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 [1981]).

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 [1998], *app denied* 92 NY2d 818). 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 Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674 [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 [1998], *app denied* 92 NY2d 814; *Bloom v City of New York*, 202 AD2d 465 [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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282 [2d Dept 1997]). "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 [2d Dept 2007]).

The medical records submitted in support of a motion for summary judgment must be certified to be in admissible form as required by CPLR 3212. Expert testimony is limited to facts in evidence (*see also Allen v Uh*, 82 AD3d 1025 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273 [Sup Ct, Tomkins County 2002]), and uncertified medical records are inadmissible.

In support of this motion (006), the moving defendant Shea has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, co-defendants' answers, without cross claims, the plaintiff's verified bill of particulars as to defendant Shea; uncertified copies of the plaintiff's medical records which are not in admissible form; the affirmation of the defendant's expert Ivan K. Rothman, M.D.; and the transcripts of the examinations before trial of Gregory Goldberg which is unsigned but certified and is considered pursuant *Zalot v Zieba*, 81 AD3d 935[2d Dept 2011]), and the signed and certified transcript of Patrician O'Shea. It is also noted that the defendant's reply papers also contained additional uncertified records and reports which were not provided with the moving papers, thus, the plaintiff lacked the opportunity to respond to defendant's further arguments.

It is determined that even if the moving papers comported with CPLR 3212, that the moving defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint. The court notes that the defendants' expert, Ivan Rothman, M.D., failed to set forth his education and training and work experience, or submit a copy of his curriculum vitae, to qualify as an expert in this matter, although he stated that he is licensed in New York and is board certified in internal medicine, oncology and hematology. Dr. Rothman set forth the materials and records which he reviewed and opined that the care and treatment rendered by nurse practitioner Shea was in accordance with the accepted standards of medical practice and was not the cause of the plaintiff's injuries claimed herein.

Dr. Rothman opined that when defendant Shea saw the plaintiff on September 14, 2009, to provide medical clearance for the plaintiff's planned inguinal hernia surgery, the plaintiff had been seen by Dr. Knott and Dr. Ouzounian who diagnosed the plaintiff as having a right inguinal hernia. He continued that therefore, there was no need for defendant Shea to have conducted any additional, separate in-depth physical examination, and that it was justifiable for her to rely upon, and defer to the

working diagnosis of inguinal hernia made by Dr. Ouzounian, and to have referred the plaintiff back to him after the medical clearance. While Dr. Rothman opined that defendant Shea's clearance note was appropriate in all respects, he does not set forth the standard of care for providing said clearance by a nurse practitioner, or whether her examination of the plaintiff was complete and appropriate. Dr. Rothman continued that when the plaintiff presented to defendant Shea on November 4, 2009 for complaints of testicular pain, he then reported that he had incisional pain, and declined examination by Shea. Rothman opined that defendant Shea appropriately recommended that the plaintiff follow up with Dr. Ouzounian for further evaluation. Thus, concludes Dr. Rothman, the actions of defendant Shea during this post-operative period were appropriate in all respects in that the plaintiff's refusal for a physical examination prevented Shea, for all practical purposes, from adequately investigating his complaints.

Dr. Rothman stated that defendant Shea next saw the plaintiff on November 16, 2009 due to complaints of severe upper left quadrant pain and inability to take deep breaths, for which Shea referred the plaintiff back to Dr. Ouzounian. However, Dr. Rothman does not opine as to the medical standard of care for a nurse practitioner when a patient presents with severe upper left quadrant pain and inability to take deep breaths, tenderness, despite there being no wheezing, and merely stated in a conclusory opinion that defendant Shea's actions were appropriate. On November 18, 2009, Dr. Ouzounian ordered a testicular ultrasound which revealed left testicular cancer. On December 10, 2009, a left radical orchiectomy was performed at Stony Brook University Hospital. Dr. Rothman opined that the delay in diagnosing the plaintiff's condition did not proximately cause and/or contribute to any delay in the diagnosis of the underlying testicular cancer. He continued that the delay until December 8, 2009 in confirming the testicular cancer did not "materially effect" the plaintiff's subsequent medical care and treatment, and even if the condition had been diagnosed earlier, the care and treatment rendered would have been the same. Dr. Rothman does not comment, however, on the normal chest x-ray in September 2009, and the metastasis to the lungs as noted in the December 2009 chest x-ray, thus raising further factual issues with regard to proximate cause.

Based upon the foregoing, defendant Shea has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against her.

The plaintiff's expert, a nurse practitioner, set forth that she is licensed in New York State, but, likewise, has not set forth her work experience as an expert. She set forth the materials and records which she reviewed and opined with a reasonable degree of medical certainty that defendant nurse practitioner Shea was in a position to prevent the delay in the diagnosis that occurred, and had a duty to perform physical examinations that would have led to earlier diagnosis. The failure to do so was a departure from the standard of care for a nurse practitioner. She supported this opinion by setting forth that on September 11, 2009, the plaintiff's chest x-ray was normal, and that three months later, the plaintiff was diagnosed with involvement of the lungs. On December 10, 2009, the plaintiff was ultimately diagnosed with testicular cancer by Dr. Munkelwitz when the hard, enlarged, and firm left testicle was investigated. Thus, concluded the plaintiff's expert, the delay in diagnosing the plaintiff's condition permitted the cancer to progress and metastasize to the lungs. During the plaintiff's visit with Shea on September 14, 2009, Shea did not examine the plaintiff's inguinal region and forfeited the opportunity to recognize the existence of a testicular mass. She continued that the purpose of a medical consult in anticipation of surgery is to identify and evaluate the patient's current medical status, provide a clinical risk profile prior to surgery, and to optimize the patient's medical condition in an attempt to

Goldberg v Ouzounian  
 Index No. 10-22969  
 Page No. 5

reduce the risk of complications, or the potential benefit of finding a new diagnosis. The plaintiff's expert noted that the plaintiff's testicular pain arose spontaneously several days prior to his presentation, and that the defendants were erroneous in reporting that the injury occurred due to the plaintiff lifting a heavy fish at work, when that incident occurred on August 30, 2003, six years prior to the onset of the plaintiff's testicular pain.

The plaintiff's expert continued that the initial evaluation should have included an evaluation of the inguinal region and testicle, even if an annual examination was not part of the reason for the visit. At that first visit, the plaintiff asked for pain medication for his back, and defendant Shea did not evaluate this condition. She continued that back pain can be referred from diseased organs in other parts of the body, including the retroperitoneum, and that as a nurse practitioner, Shea should not have merely prescribed pain medication without also assuring that there was no remote reason for the back pain, which could have been caused by kidney stones or other conditions. The coexistence of an inguinal hernia and testicular cancer is possible, and the occurrence of one does not preclude the occurrence of the other. Thus, she stated, it was a departure from the standard of care for defendant Shea not to have performed a thorough examination of the plaintiff on the first visit for medical clearance, even though the plaintiff reported to the front desk receptionist that he was experiencing testicular pain. The plaintiff's expert stated that defendant Shea testified that the plaintiff refused to be examined for his testicular pain, and therefore, she did not examine the plaintiff's testicle. The plaintiff's expert continued that this excuse is disingenuous because of the ability to the nurse practitioner to communicate the necessity for the examination, and the ability of the examiner to explain that surgery cannot be completed without the cooperation of the patient.

Based upon the foregoing, even if the defendant's moving papers were properly supported with evidence in admissible form, and even if this court considered the experts' opinions despite their respective failures to set forth their qualifications as experts in this matter, there are factual issues raised by the plaintiff which preclude summary judgment from being granted. In view of the foregoing, it is determined that even if the defendants' application had comported with CPLR 3212 and 2101, and all the defendants' answers were provided in support of the motion, the plaintiff has raised sufficient factual issues to preclude summary judgment from being granted to the moving defendants.

Accordingly, motion (006) by defendant Patricia O'Shea, N.P. for summary judgment dismissing the complaint is denied.

Dated: April 23, 2013

  
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 HON. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION