

Lee v Kamdar

2013 NY Slip Op 31992(U)

August 19, 2013

Sup Ct, Suffolk County

Docket Number: 10-18413

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

CORRECTED ORDER

MOTION DATE 8-1-12
ADJ. DATE 9-13-12
Mot. Seq. # 001 - MG

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JO ANN LEE, by TAMMY IANNONE as
Executrix of her Estate,

Plaintiff,

SALENGER, SACK, KIMMEL & BAVARO
Attorney for Plaintiff
180 Froehlich Farm Boulevard
Woodbury, New York 11797

- against -

KRAL, CLERKIN, REDMOND, RYAN, PERRY
& VAN ETTEN, LLP
Attorney for Defendant Kamdar, M.D.
538 Broadhollow Road, Suite 200
Melville, New York 11747

ANTHONY P. VARDARO, P.C.
Attorney for Defendant Brookhaven
732 Smithtown Bypass, Suite 203
Smithtown, New York 11787

NITINKUMAR B. KAMDAR, M.D., ALMAS
ABBASI, M.D., and BROOKHAVEN
MEMORIAL HOSPITAL MEDICAL CENTER,

Defendants.

FUMUSO, KELLY, DEVERNA, SNYDER
SWART & FARRELL, LLP
Attorney for Defendant Abbasi, M.D.
110 Marcus Boulevard, Suite 500
Hauppauge, New York 11788

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Almas Abbasi, M.D., dated June 18, 2012, and supporting papers 1-16; (2) Affirmation in Opposition by the plaintiff Tammy Iannone as Executrix of the Estate of Joann Ann Lee, dated August 2, 2012, and supporting papers 17-18; and defendant Nitin B. Kamdar, M.D. dated August 17, 2012 and supporting papers 1921; (3) Reply Affirmation by the defendant Almas Abbasi, M.D. , dated August 31, 2012, and supporting papers 22-23; and by the defendant Almas Abbasi, M.D., dated August 20, 2012, and supporting papers 24-25; and the order of the undersigned, dated November 11, 2012; now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, and it having been determined that there was an inadvertent error on page 6 of the order of the undersigned, dated November 11, 2012, now pursuant to CPLR § 5019 (a), the court *sua sponte* substitutes the following sentence "Dr. Abassi's responsibility or duty to the plaintiff ended when the duty of care was transferred after her preliminary report was rendered" for the sentence that read "Dr.

Lee v Kamdar
Index No. 10-18413
Page No. 2

Kamdar's responsibility or duty to the plaintiff ended when the duty of care was transferred after her preliminary report was rendered". The corrected order shall read as follows.

ORDERED that motion (001) by defendant, Almas Abbasi, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint and any cross claims asserted against her are dismissed.

In this medical malpractice action, the plaintiff, Tammy Iannone as Executrix of the Estate of Jo Ann Lee, alleges that the defendants negligently departed from good and accepted standards of care and practice in failing to timely diagnose and treat the decedent's lung cancer. In addition to the first cause of action premised upon the defendants' negligence and the decedent's conscious pain and suffering, the plaintiff also asserts a cause of action against the defendants for the decedent's wrongful death on December 27, 2009, and a third cause of action against the defendant hospital for the negligent hiring and supervision of its staff and employees.

Almas Abbasi, M.D. seeks summary judgment dismissing the complaint on the bases that the decedent did not timely obtain the chest x-ray ordered by defendant Dr. Nitinkumar Kamdar on January 7, 2007; that a chest x-ray ordered on April 11, 2008 by Dr. Kamdar, and performed on April 18, 2008 at Brookhaven Memorial Hospital Medical Center, was interpreted by Dr. Vorwek as highly suspicious for primary lung carcinoma and that such finding was reported to Dr. Kamdar telephonically by the radiologist; that the CT scan of the decedent's chest performed on April 24, 2008, was correctly interpreted by Dr. Almas Abbasi, wherein further evaluation was recommended for the mass in the decedent's right lung previously identified by Dr. Vorwek; that the report by Dr. Abbasi was dictated, signed and electronically transmitted as per her obligation and duty when she properly entered the reading of the CT scan of the decedent's chest into the hospital reporting system for the result to be conveyed to Dr. Kamdar; that she had no duty to inform the patient of the CT findings; that her duty was to generate a report of the findings to Dr. Kamdar; and that there is no causal connection between Dr. Abbasi's treatment and the decedent's alleged 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 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 [2d Dept 1981]).

Lee v Kamdar
Index No. 10-18413
Page No. 3

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 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d 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 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In support of this application, the defendant Abbasi has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant Abbasi's answer, plaintiff's verified and supplemental verified bills of particulars; the expert affirmation of Benjamin Bashist, M.D. with curriculum vitae; uncertified copies of the medical records of defendants Kamdar, M.D. and Brookhaven Memorial Hospital; copies of the unsigned but certified transcripts of non-party witness Christopher Schneider dated September 21, 2011 which is not in admissible form and is not considered (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); and the signed transcripts of the examinations before trial of Nitinkumar Kamdar, M.D. dated July 20, 2011 and Almas Abbasi dated September 7, 2011.

Nitinkumar Kamdar, M.D. testified that he is a physician licensed to practice medicine in New York and is affiliated with Brookhaven Memorial Hospital as an attending physician. The fifty eight year old decedent was first seen in his office on August 2, 2006. Dr. Kamdar set forth the subsequent treatment provided. On April 14, 2007, Dr. Kamdar ordered a chest x-ray for the decedent. It was felt that the decedent had risk factors for lung cancer due to her smoking two packs of cigarettes a day for forty years, family history of lung cancer, and an intermittent cough. She did not have the x-ray ordered by Dr. Kamdar on April 14, 2007.

The decedent had subsequent visits with Dr. Kamdar, including a visit on April 11, 2008. Again, testified Dr. Kamdar, a PA and lateral chest x-ray was ordered and was subsequently performed at Brookhaven Hospital. Dr. Kamdar stated that his office customarily received radiology reports by mail from the hospital when radiologic studies were conducted. Dr. Kamdar testified that the decedent's record did not contain a copy of that x-ray report. The decedent returned to Dr. Kamdar on April 21, 2008, at which time the corresponding office note indicated that the chest x-ray, as reported to him telephonically from the hospital radiologist, revealed a questionable mass in decedent's lung. Dr. Kamdar's plan was for a CT with contrast of the chest as soon as possible, and a prescription for same was given to the decedent. Dr. Kamdar testified that the decedent was advised that the chest x-ray showed that she had a mass, a Pancoast tumor (lung cancer), in the apex of her left lung.¹ Dr. Kamdar

¹The chest x-ray revealed the tumor in the right lung.

Lee v Kamdar
Index No. 10-18413
Page No. 4

testified that it is his customary practice to tell the patient to follow-up one week after the test, or call the office after the test is completed and schedule an appointment. Dr. Kamdar further testified that he never saw the CT scan report and had not been made aware that the CT scan had been done. Had a telephonic report concerning the CT scan been received, it would have been recorded in the decedent's record. Dr. Kamdar testified that all outpatient radiology reports are received at the office by regular mail.

Dr. Almas Abbasi testified that she is licensed to practice medicine in New York and is board certified in radiology. From 2006 to 2008, she worked at Brookhaven Hospital as a staff radiologist. She was employed by S&D Radiology, which, she believed, had a contract with Brookhaven Hospital. She followed the guidelines of the American College of Radiologists for communication of diagnostic imaging findings in 2008, as well as the guidelines promulgated by Brookhaven Hospital. Dr. Abbasi testified from the records, marked as an exhibit, from the Department of Radiology at Brookhaven Hospital. She stated that the technician performed the CT scan on the decedent on April 24, 2008. She reviewed the CT films and the report generated by Dr. Patrice Vorwerk relative to the films of the chest x-ray previously performed at Brookhaven Hospital. Dr. Abbasi testified that Dr. Vorwerk indicated in her written report that there was a mass in the decedent's upper lobe of her right lung, which mass Dr. Abbasi testified she saw when she reviewed the chest x-ray films. There was no mass in the left lung. When Dr. Abbasi reviewed the CT scan, there was one mass in the right lung. She additionally testified that there was a 1.2 cm right hilar lymphadenopathy, which was a non-significant finding as it could just be a reactive lymph node, and that the upper abdomen demonstrated a 1.3 x 1.7 cm hypodense lesion in the spleen, which was possibly a cyst and non-significant. She set forth her findings and recommended further evaluation in the electronic report she dictated with Powerscribe. Her dictated report appeared on the screen, she signed it as it was accurate, and it was then electronically transmitted. She continued that when the report is signed off and electronically transmitted, it is transmitted to the ordering physician's office within a few seconds. She did not know if Dr. Kamdar signed off to receive electronic transmittals or faxes of the reports, but stated, that if the report does not transmit by those two methods, the report defaults and is then mailed out the following day on all cases. She does not receive a hard copy of the report. She did not call Dr. Kamdar with the results of the CT scan as the purpose of the CT scan was to confirm the previous finding that there was a mass. She was aware Dr. Kamdar knew of the mass because the mass was questioned on the prescription for the CT scan written by Dr. Kamdar.

Defendant Abbasi has submitted the affirmation of her radiology expert, Benjamin Bashist, M.D. who is licensed to practice medicine in New York and New Jersey and has been board certified in radiology since 1979, and is a Diplomate of the National Board of Medical Examiners. He set forth his education and experience in the field of radiology and offers opinions based upon a reasonable degree of medical certainty. It is Dr. Bashist's opinion that at all times, Dr. Abbasi rendered care and treatment in accordance with good and accepted standards of care, and that there is nothing that she did or did not do that caused the injuries to the decedent.

Dr. Bashist stated that the earliest relevant contact that the decedent had with Dr. Kamdar was on April 11, 2008 when she made complaints of numbness in her left arm. Dr. Kamdar wrote a prescription for a PA and lateral chest x-ray, and the decedent, who had a forty year history of smoking two to two and one half packs of cigarettes a day, was advised to stop smoking. The chest x-ray was performed on April 17, 2008 at Brookhaven Memorial Hospital Medical Center (Brookhaven Hospital). Dr. Patrice

Lee v Kamdar
Index No. 10-18413
Page No. 5

Vorwerk, a non-party radiologist, interpreted and reported the results of the chest x-ray on April 18, 2008, setting forth in her report her impression that the plaintiff's decedent had a spiculated mass in the right upper lobe of her lung measuring 3 x 2.2 x 2.5 cm. Dr. Vorwerk suggested a CT with contrast as the mass was highly suspicious for primary lung cancer. Dr. Vorwerk set forth in her radiology review that she discussed the findings on this x-ray with Dr. Nitinkumar B. Kamdar at 11:12 a.m. on April 18, 2008 with recommendation for follow-up chest CT and abdominal CT.

Upon reviewing the chest x-ray films of April 18, 2008, Dr. Bashist stated that it is his opinion that Dr. Vorwerk properly interpreted the x-rays and appropriately described the size of the mass, its location and its suspicious spiculated appearance. The report was dictated and transcribed by means of the Powerscribe program as the established method of dictating and communicating radiologic finds at Brookhaven Hospital. Dr. Kamdar's records, he stated, document the receipt of this information and that he informed the decedent that she needed to have a follow-up CT scan with contrast. Thereafter, the CT scan was performed and interpreted by Dr. Abbasi, whose report recommended further evaluation and described a 1.2 cm right hilar lymphadenopathy, a 2.5 x 1.9 cm mass with irregular borders in the right upper lung, and bilateral emphysematous changes. Dr. Bashist opined that Dr. Abbasi's interpretation of the CT scan was correct, and her report was appropriately detailed and comprehensive. He continued that the Powerscribe program was used to dictate and sign Dr. Abbasi's report. Dr. Bashist stated that Dr. Abbasi electronically signed her report at 2:32 p.m. on April 24, 2008, and the report was sent to Dr. Kamdar via the hospital's previously established channels of distribution. He continued that Brookhaven Hospital took those steps necessary to fulfill Dr. Kamdar's request for reports to be sent by regular mail.

The decedent thereafter received no further treatment, and no action was taken, until August 13, 2009 when the decedent presented to John T. Mather Memorial Hospital emergency room with complaints of difficulty breathing, a dry cough, shortness of breath, and labored breathing and wheezing. A chest x-ray revealed a dense infiltrate in the right lung, and a possible mass. The CT performed on August 14, 2009, revealed a large lobulated mass measuring 7 x 9.1 x 7 cm, at the mid-point of the right lung, later determined to be malignant.

Dr. Bashist stated that good and accepted medical practice mandates that the radiologist only has a duty to report his or her findings to the requesting or treating physician, and is not expected, or required, to report findings to the patient. It is the responsibility, and proper and accepted practice, for the ordering physician to follow-up on the results of studies they order, and where necessary, report those results to their patient. A radiologist, he continued, should communicate findings to the requesting physician through the usual channels established by the hospital where the diagnostic study was conducted, and is not expected to report findings to the ordering physician in any other manner, absent special circumstances which were not applicable to Dr. Abbasi's study or her report. Dr. Bashist stated that while Dr. Kamdar claims that he did not see either Dr. Vorwekk's or Dr. Abbasi's reports, he did receive a verbal report from Dr. Vorwek and thus knew the decedent had a mass in her lung, for which he ordered a CT of the lung.

Dr. Bashist stated that Dr. Abbasi's findings merely confirmed the findings that had been previously reported to the ordering physician (Dr. Kamdar) by Dr. Vorwek, whose report fully

documented that the findings were discussed with Dr. Kamdar. He further described circumstances that required a non-routine method of communication, and stated that there were no such circumstances applied to Dr. Abbasi's findings on April 24, 2008. Dr. Bashist opined that Dr. Abbasi did not depart from the standards of care and properly and correctly interpreted the CT scan and wrote an appropriate report regarding her accurate findings which were properly communicated by standard channels. By electronically signing the report of her findings, she satisfied her duty as recommended by good and accepted radiologic practice. He continued that Dr. Abbasi met her responsibility to communicate her findings to the requesting physician, under the generally accepted medical standard of care. The actual mailing or faxing of a report is a clerical function performed by Brookhaven in compliance with the ordering physician's request.

Based upon the foregoing, it is determined that Dr. Almas Abbasi demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against her on the bases that she did not depart from accepted standards of care in her timely and proper interpretation of the CT scan of April 24, 2008. He continued that she did not do, or fail to do, anything which proximately caused injury to the plaintiff's decedent. It is determined that Dr. Abbasi, as a radiologist, had the limited role of interpreting CT films and documenting the findings in a preliminary report, which findings were subsequently dictated, signed and electronically transmitted. Dr. Abbasi did not have a duty or responsibility to communicate the CT interpretation, or provide the copy of the report to Dr. Kamdar, and she was not the proximate cause of a delayed diagnosis or damages because Dr. Kamdar had been previously notified by Dr. Vorwerk about the mass found in the decedent's right lung. Dr. Abbasi's responsibility or duty to the plaintiff ended when the duty of care was transferred after her preliminary report was rendered (*see Parrilla v Buccellato*, 95 AD3d 1091; 944 NYS2d 604 [2d Dept 2012]; *Arias v Flushing Hospital Medical Center*, 300 AD2d 610, 753 NYS2d 518 [2d Dept 2002]; *Dombroski v Samaritan Hospital*, 47 AD3d 80, 846 NYS2d 430 [3d Dept 2007]). Additionally, Dr. Kamdar wrote on the prescription for the CT scan with contrast that a mass was being questioned, thus demonstrating his knowledge of same. It is further determined that Dr. Abbasi did not assume a general duty of care to schedule or urge further testing, or to further diagnose the plaintiff's decedent's medical condition. Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by a patient (*see, Mosezhnik v Berenstein*, 33 AD3d 895, 823 NYS2d 459 [2d Dept 2006]; *Chulla v DiStefano*, 242 AD2d 657, 662 NYS2d 570 [2d Dept 1997]). Here, Dr. Abbasi's duty was limited to properly and accurately interpreting the CT scan and dictating, signing and electronically transmitting the report.

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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Although the plaintiff opposes this motion on the bases that Dr. Abbasi's expert's opinions are conclusory, and that the medical records are not certified, it is noted that Dr. Kamdar and Dr. Abbasi testified from the records which were marked into evidence at their depositions. Their testimony has

Lee v Kamdar
Index No. 10-18413
Page No. 7

further established the necessary supporting proof, including Dr. Kamdar's admission that he received a telephonic communication from the radiologist interpreting the chest x-ray that the decedent had a mass in her lung. The plaintiff has not set forth that the records provided are incomplete or inaccurate. Notably, the plaintiff has not raised a triable issue of fact to preclude summary judgment. The plaintiff has submitted only an attorney's affirmation, and has not submitted an expert opinion setting forth that defendant Abbasi departed from the standard of care, that her departures proximately caused the injuries to the decedent, and the basis for such opinions. Thus, the plaintiff has failed to raise a triable issue of fact to preclude summary judgment from being granted to the moving defendant Abbasi.

Defendant Kamdar has opposed defendant Abbasi's motion as well. However, such opposition is supported with only an attorney's affirmation. No supporting expert affirmation setting forth an opinion that raises a factual issue to preclude summary judgment has been provided. Although counsel states that the additional findings on the CT scan were significant and should have been reported to Dr. Kamdar by Dr. Abbasi, counsel's opinion is not an expert opinion and does not raise a factual issue to preclude summary judgment. Dr. Abbasi testified that the findings were not significant. Defendant Kamdar's exhibit (Appendix 3) is an unauthenticated and partially redacted copy of an employment agreement between S&D Medical, LLP and Dr. Abbasi. It sets forth the new findings on radiologic studies which require immediate intervention/treatment. However, the findings which counsel claims required Dr. Abbasi to have called Dr. Kamdar, are not listed in the appendix. Moreover, such conditions or findings which counsel for Kamdar asserts should have been reported to Kamdar are not alleged in the complaint or the bill of particulars and thus are not the subject of this action.

Accordingly, motion (001) is granted and the complaint and any cross claims asserted against defendant Abbasi are dismissed.

Dated: 8/19/13



PETER H. MAYER, J.S.C.