

Donnelly v Parikh

2014 NY Slip Op 32279(U)

August 19, 2014

Supreme Court, Suffolk County

Docket Number: 09-27177

Judge: Jeffrey Arlen Spinner

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Upon the following papers numbered 1 to 63 read on these motions for summary judgment; and this cross motion to discontinue action; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-19; (003) 20-33; Notice of Cross Motion and supporting papers (004) 34-36; Answering Affidavits and supporting papers 37-52; Replying Affidavits and supporting papers 53-56; 57-59; Other 60-62; 63; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (002) by defendants, John S. Saugy, M.D. and Suffolk Orthopedic Associates, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that motion (003) by defendants, Albert Zilkha, M.D., Long Island Medical Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted as to Albert Zilkha, M.D., Long Island Medical Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. as to any vicarious liability they may have for Albert Zilkha, M.D.; and it is further

ORDERED that motion (004) by defendant, Suryakant Parikh, M.D. and Prakashchandra Parikh Physicians, P.C., pursuant to CPLR 3217 so ordering the stipulation of discontinuance dated September 9, 2013 in their favor, is granted with prejudice to the remaining parties.

In this medical malpractice action, Jaye Donnelly seeks damages for personal injuries allegedly sustained due to the defendants alleged negligent departures from the good and accepted standards of medical care and treatment in failing to diagnose a Pancoast tumor in plaintiff's left lung while she was being treated by defendants for rotator cuff syndrome in her left shoulder. Causes of action sounding in negligence and lack of informed consent have been asserted.

In motion (004), defendants Suryakant Parikh and Prakashchandra Parikh Physicians, PC, pursuant to CPLR 3217 (b), seek to have a stipulation of discontinuance so ordered by this court. The stipulation of discontinuance was signed by counsel for the plaintiff and counsel for these moving defendants on September 9, 2013, but has not been signed by the co-defendants.

CPLR 3217 (a)(2) provides in pertinent part that "[a]ny party asserting a claim may discontinue it without an order...by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties..." CPLR 3217(b) provides "[e]xcept as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." Subsection (d) provides that "[a]ll notices, stipulations, or certificates pursuant to this rule shall be filed with the county clerk by the defendant."

Upon reviewing the evidentiary submissions provided with motions (002) and (003), it is determined that no co-defendant has submitted an expert affirmation which asserts any liability as against Suryakant Parikh, M.D. and Prakashchandra Parikh Physicians, P.C., and no co-defendant pleaded a cross claim against them.

Accordingly, motion (004) is granted and the stipulation is deemed so-ordered, with prejudice to the remaining co-defendants, and Suryakant Parikh, M.D. and Prakashchandra Parikh Physicians, P.C. are directed to file a copy of the stipulation of discontinuance with the Clerk of the County of Suffolk

forthwith.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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]).

In support of motion (002), defendants John S. Saugy, M.D. and Suffolk Orthopedic Associates, P.C. submitted, inter alia, an attorney’s affirmation; affirmation of Richard D’Agostino, M.D.; copies of the summons and complaints with a copy of the order dated November 5, 2010 consolidating two actions, defendants’ answers, plaintiff’s verified bills of particulars, amended bills of particulars; the signed transcripts of the examinations before trial of Jaye Donnelly dated August 3, 2010, and Suryakant Parikh, M.D., John Saugy, M.D. dated January 15, 2013; the unsigned and uncertified transcript of the examination before trial of Albert Zilkha dated July 12, 2012, and Joel D. Ritter dated December 12, 2012, and the unsigned and uncertified transcript of the examination before trial of nonparty witness Joan Stagg dated May 10, 2013, which are not in admissible form (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]); an improperly certified copy of the medical record of non-party Suffolk Orthopedic Associates which is not in admissible form pursuant to CPLR 3212 and 4518; and an uncertified medical report and record of Long Island Magnetic Resonance Imaging, P.C. which fails to comport with CPLR 3212 and 4518 (see *Friends of Animals v Associated Fur Mfrs., supra*).

In support of motion (003), Albert Zilkha, M.D., Long Island Medical Imaging P.C., and Long Island Magnetic Resonance Imaging, P.C., submitted, inter alia, an attorney’s affirmation; affirmation of Jonathan Luchs, M.D.; copies of the summons and complaint, answer and demand served by each of these moving defendants; plaintiffs’s verified bills of particulars and amended verified bills of particulars; unsigned and uncertified transcript of the examination before trial of Albert Zilkha, M.D. which is considered as adopted as accurate by him (see *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); a CD of the MRI which is not in admissible form pursuant to CPLR 3212 and 4518; and the signed copy of the transcript of the examination before trial of Suryakant Parikh, M.D.

Expert testimony is limited to facts in evidence (see *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County

2002]). Uncertified medical records and inadmissible evidentiary submissions are not in evidence.

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]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

MOTION (002)

In motion (002), John S. Saugy, M.D. and Suffolk Orthopaedic Associates, P.C. submitted the affirmation of Richard D'Agostino, M.D. who affirmed he is licensed to practice medicine in New York State and is board certified in orthopaedic surgery. He set forth his education and training, and indicated the materials and records he reviewed. It is Dr. D'Agostino's opinion within a reasonable degree of medical certainty, based upon plaintiff's symptoms and the results of the clinical examinations, tests and radiologic studies available to Dr. Saugy when he treated the plaintiff, Jaye Donnelly at Suffolk Orthopaedic Associates, P.C. from September 14, 2007 through December 31, 2007, that Dr. Saugy properly diagnosed plaintiff with left rotator cuff disorder and treated the left rotator cuff disorder in accordance with the standards of medical care and treatment. He continued that there was no indication when plaintiff treated with Dr. Saugy that plaintiff's left shoulder pain was caused by a Pancoast tumor to plaintiff's left lung as opposed to left rotator cuff syndrome. He stated that the x-rays performed on plaintiff's left shoulder at Suffolk Orthopaedic Associates were properly interpreted and there was no evidence of a lung tumor on those x-rays. Dr. D'Agostino further opined that the care and treatment by Dr. Saugy and Suffolk Orthopaedic Associates, P.C. did not cause or contribute to the plaintiff's injuries.

Dr. D'Agostino stated that the plaintiff was referred by Dr. Devendra Gil, M.D. for an orthopaedic evaluation at Suffolk Orthopaedic Associates for pain in her right ankle after she twisted it. She presented on September 14, 2007 and was seen by P.A. Michael Polidoro. She provided a history of right breast cancer and stroke, as well as right ankle pain. P.A. Polidoro conducted an examination of her right ankle. X-rays were positive for a non-displaced fracture at the lateral malleolus for which she was treated with an air cast and instructed to engage in partial weight bearing on that extremity, and to use a walker, for which

she was given a prescription. Other instructions were given as well. Dr. Saugy testified that he would have performed his own examination of the plaintiff and reviewed the x-rays himself. The plaintiff followed up at the office for care concerning her right ankle on September 28, 2007 and October 15, 2007.

Dr. D'Agostino stated that at the October 15, 2007 visit, the plaintiff was seen by Dr. Saugy. She had been referred to see Dr. Saugy by Dr. Parikh because she was experiencing pain in her left shoulder, and was having difficulty with overhead activities and internal rotation since April 2007. She presented to Dr. Saugy with a copy of the MRI report of her left shoulder, dated August 8, 2007, as reported by Albert Zilkha, M.D. from Long Island Magnetic Resonance Imaging, PC. Dr. Zilkha's report indicated a partial thickness tear of the infraspinatus tendon, subacromial-subdeltoid-subcoracoid bursitis, joint effusion with fluid extending to the biceps tendon sheath, hypertrophic acromioclavicular joint, and muscle atrophy. Dr. Saugy examined the plaintiff's left shoulder, and noted his findings of active elevation to 70 degrees, significant decreased internal rotation, significant positive impingement sign, and passive abduction at 70 degrees. The x-rays obtained by Dr. Saugy revealed a significant decrease in the acromioclavicular (AC) joint space. Dr. Saugy's impression was severe left shoulder impingement syndrome with AC joint arthritis, for which he prescribed physical therapy and a return visit in two weeks.

Dr. D'Agostino continued that Dr. Saugy saw the plaintiff on November 19, 2007 for re-evaluation. Upon examination, Dr. Saugy found, among other things, that her left shoulder showed active elevation to 90 degrees, internal rotation to 1.5, and positive impingement sign, which he felt had improved with physical therapy. Physical therapy was to be continued, and she was to return in six weeks. On December 31, 2007, the plaintiff advised Dr. Saugy that her right ankle felt much better, but her shoulder was still painful. Upon examination, Dr. Saugy's impression was left shoulder impingement syndrome, so he injected her shoulder with DepoMedrol (corticosteroid), and Marcaine. She was instructed to continue physical therapy and to return in two weeks. However, the plaintiff did not return to Suffolk Orthopaedic Associates thereafter.

Dr. D'Agostino stated that the plaintiff did not complain of pain in her left shoulder at the visits of September 14, 2007 or September 28, 2007 at Suffolk Orthopaedic Associates. The first time she presented with complaints concerning her left shoulder was on October 15, 2007, when she was seen by Dr. Saugy, after having been referred by Dr. Parikh for an orthopedic evaluation of that shoulder. Dr. D'Agostino stated that Dr. Saugy properly appreciated the plaintiff's new complaints relating to her left shoulder, including her advising him that she had been experiencing this pain since April 2007. He continued that Dr. Saugy properly examined her, and that the exam was positive for shoulder impingement. Dr. D'Agostino stated that Dr. Saugy properly reviewed the MRI report of August 8, 2007 from Dr. Zilkha, given to him by the plaintiff, and he noted that the findings set forth in the report. Dr. D'Agostino continued that Dr. Saugy, as an orthopedist, appropriately relied upon the interpretation of the MRI study by Dr. Zilkha, a radiologist, and that it was unnecessary for him to order and review the MRI image. Dr. D'Agostino stated that Dr. Saugy appropriately ordered x-rays of the plaintiff's left shoulder, with a limited focus not intended to identify lung pathology, but instead, intended to optimize the bones of the shoulder to properly examine the shoulder itself, which is reasonable and within the standard of care. Dr. D'Agostino stated the x-ray optimized the bone of the shoulder, however, the area where the lung would appear on the films is blackened, and thus, a physician would not be able to properly examine a lung on the x-ray. Dr. D'Agostino stated, that upon a review of the shoulder x-ray, there is no evidence whatsoever of a lung tumor.

Dr. D'Agostino stated that the symptoms presented by the plaintiff, the physical examination, and the positive findings of the x-ray and shoulder MRI are all consistent with Dr. Saugy's impression of shoulder impingement syndrome. The proper treatment for impingement syndrome or rotator cuff conditions is physical therapy, which Dr. Saugy appropriately prescribed. No other radiological or diagnostic tests were indicated. Thus, opined Dr. D'Agostino, Dr. Saugy timely and appropriately examined and re-evaluated the plaintiff's shoulder pain on November 19, 2007 and December 31, 2007, without indication the plaintiff was suffering from lung cancer. Physical therapy and DepoMedrol injection into the shoulder were appropriate. Dr. D'Agostino stated that Dr. Saugy appropriately instructed the plaintiff to return for re-evaluation after the December 31, 2007 visit. Dr. D'Agostino concluded that the plaintiff's claimed injuries are not the result of anything which Dr. Saugy did or failed to do.

Based upon the foregoing, it is determined that Dr. Saugy and Suffolk Orthopedic Associates have demonstrated prima facie entitlement to summary judgment on the bases that the treatment provided to the plaintiff comported with the applicable standards of care and treatment, and did not cause or contribute to plaintiff's claimed injuries.

MOTION (003)

In motion (003), Albert Zilkha, M.D., Long Island Medical Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. submitted the affirmation of Jonathan S. Luchs, M.D., a physician licensed to practice medicine in New York State who is board certified in diagnostic radiology. He identified the records and materials which he reviewed. He opined within a reasonable degree of medical certainty that, based upon the testimony, medical records, and his education and training, Dr. Albert Zilkha, Long Island Medical Imaging PC and Long Island Magnetic Resonance Imaging, PC, did not depart from the accepted standards of medical practice with regard to the care and treatment of the plaintiff, and they did not cause the plaintiff any injury.

Dr. Luchs continued that on August 4, 2007, the plaintiff presented to her primary care physician, Dr. Suryakant Parikh, with complaints of pain in her left upper extremity. Dr. Parikh referred plaintiff for a left shoulder MRI as it was his impression that the plaintiff had a frozen left shoulder. Three days later, on August 7, 2007, the plaintiff presented to Long Island Magnetic Resonance Imaging, P.C. for an MRI of her left shoulder. The study was interpreted by Dr. Zilkha as revealing a partial thickness tear of the infraspinatus tendon; subacromial-subdeltoid-subcoracoid bursitis; joint effusion with fluid extending to the biceps tendon sheath; a hypertrophic acromioclavicular joint, and muscle atrophy. Dr. Luchs stated that the interpretation and report are within the standards of care in the medical community at the time, and is a reasonable competent procuring cause for plaintiff's reported shoulder pain. There was no indication within the records for Dr. Zilkha to perform additional studies or examination to rule out lung cancer. He was asked by the referring physician to perform an MRI of the shoulder, which he did.

Dr. Luchs continued that Dr. Zilkha had no further responsibility to independently diagnose the plaintiff's lung cancer as the plaintiff did not present to Dr. Zilkha for a diagnostic or screening MRI to rule out lung cancer. The record clearly indicated the study was for a left shoulder MRI, and Dr. Zilkha's role was to interpret the MRI study, document his findings, and report the same to Dr. Parikh. As a radiologist, Dr. Zilkha did not assume a general duty of care to independently diagnose the plaintiff's medical conditions. Additionally, stated Dr. Luchs, Dr. Zilkha's interpretation of the MRI study and his report of

his findings were not a significant cause of plaintiff's alleged injuries.

Dr. Luchs stated that it has not been contested that Ms. Donnelly's cancer was not timely diagnosed, was successfully treated, and remains in complete remission resulting in what amounts to a cure of her cancer. He stated that Dr. Zilkha did not commence treatment for any ongoing or continuous condition, and never met the plaintiff in person. She did not return to Dr. Zilkha's facility following that August 2007 MRI. He continued that Dr. Zilkha did not depart from the standard of medical practice and met the standards of care necessary for a physician interpreting and reporting his findings with regard to plaintiff's MRI of her left shoulder, and he did not cause the plaintiff any injury.

Based upon the foregoing, it is determined that Dr. Zilkha, Long Island Medical Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. have demonstrated prima facie entitlement to summary judgment and dismissal of the complaint as asserted against each.

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]).

In opposing motions (002) and (003), the plaintiff has submitted the redacted affirmations of her expert radiology and hematology/oncology physicians, however, she has not provided unredacted originals of the affirmations to this court as required (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). A redacted version of an expert affidavit lacks evidentiary value (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection" (*Marano v Mercy Hospital*, *supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for *in camera* inspection, plaintiff has opposed the motion with evidence in admissible form (*Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). The original unredacted affirmations with the experts' names and signatures have not been submitted to this court under separate cover as required. Accordingly, plaintiff's experts' affirmations are not in admissible form and are insufficient to raise a triable issue of fact as to the defendants' alleged malpractice (*Rose v Horton Medical Center*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]). Counsel for the plaintiff has set forth in the attorney's affirmation that an unredacted copy of each expert's affirmation is available at the court's request. It is not the responsibility of the court to request what is to be provided with the moving papers. Providing only unredacted expert affirmations does not preserve the plaintiff's obligation of opposing defendant's motion by submitting the original, unredacted affirmation for the court's *in camera* inspection.

It is noted that even if plaintiff's radiology expert's affirmation were in admissible form, a review of such affirmation establishes that such radiologist has not set forth his education and training and the bases

for his expertise in radiology, or provided a copy of his curriculum vitae to qualify as an expert in the field of radiology. It is further determined that even if plaintiff's radiology expert's affirmation were in admissible form, his opinion that Dr. Zilkha failed to correctly interpret the MRI study of August 7, 2007 is conclusory and unsupported. Plaintiff's radiology expert's opinion is broad and unspecific, as he does not identify which images or views of the MRI of plaintiff's shoulder demonstrates a mass in the plaintiff's upper left lung, and he does not describe what is seen, or differentiate that purported mass from normal findings or other possibilities. Defendant Zilkha submitted a reply affidavit in rebuttal, and it is not until the sur-reply that the plaintiff's expert identified what he failed to provide in his initial affirmation submitted in opposition to the motion. Again, plaintiff has not submitted an unredacted original affirmation in the sur-reply, and it is therefore not in evidentiary form. It is further noted that Dr. Zilkha did not conduct a physical examination of the plaintiff, and his only contact was to read diagnostic studies taken of the plaintiff by others, and he did not assume a general duty of care (*Anderson v Lamaute*, 306 AD2d 232, 761 NYS2d 87 [2d Dept 2003]). Thus, plaintiff has not established that Dr. Zilkha negligently read or interpreted the MRI study, nor has plaintiff rebutted the moving doctors' showing of entitlement to summary judgment as a matter of law as to Dr. Zilkha and Long Island Medical Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. (*Feleccia v Massapequa Gen. Hosp.*, 63 NY2d 639, 479 NYS2d 520 [1984]).

With regard to Dr. Saugy, plaintiff's radiology expert does not identify how many views of plaintiff's shoulder were taken during the x-ray study, and which view demonstrated what he considers to be a mass, the location of the purported mass, and the basis for his determination that it is a mass. Plaintiff's radiology expert's opinion is vague and conclusory and unsupported by evidentiary proof. Plaintiff's radiology expert has not set forth his qualifications to opine with regard to the standard of care of an orthopedist. It has not been demonstrated by plaintiff's radiology expert that Dr. Saugy departed from the standard of care in treating the plaintiff for her complaints of shoulder pain.

It is further determined that even if plaintiff's hematology/oncology expert's affirmation were in admissible form, that said expert did not set forth his education and training and bases to qualify as an expert in this area, or submit a curriculum vitae. It is noted that plaintiff's hematology/oncology expert relied upon the opinions proffered by plaintiff's radiology expert that there was a left lung mass present on the August 7, 2007 MRI, and on the subsequent shoulder x-ray performed by Dr. Saugy. He does not indicate that he independently reviewed the MRI study and visualized the purported mass, and plaintiff's radiology expert failed to raise a factual issue in this regard. The plaintiff's hematology/oncology expert stated that in October 2008, the plaintiff's tumor was significantly larger than it was on the August 7, 2007 MRI, according to the plaintiff's radiology expert. However, plaintiff's radiology expert never described the purported mass or its dimensions for plaintiff's hematology/oncology expert to base an opinion concerning how much, if at all, the tumor grew from August 7, 2007 through its diagnosis in October 2008.

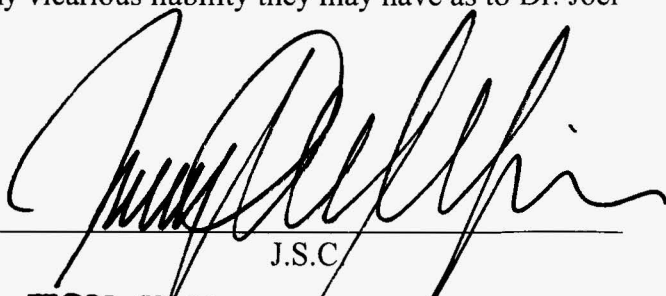
It is determined that plaintiff's radiology expert and hematology/oncology expert have failed to raise a triable issue of fact with regard to departures from the standard of care and treatment and proximate cause of the plaintiff's claimed injury to preclude summary judgment from being granted to the moving defendants, John A. Saugy, M.D., Suffolk Orthopaedic Associates, P.C., Albert Zilkha, M.D., and to Long Island Medical Diagnostic Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. for any claims of vicarious liability relating to Albert Zilkha, M.D., even if the opposing experts' affirmations were in admissible form.

It is noted in the deposition transcripts of Dr. Joel Reiter, that Dr. Reiter testified that in 2007, he was an employee of defendant Long Island Medical Imaging P.C. and Long Island Magnetic Resonance Imaging, P.C. He interpreted a shoulder x-ray dated June 19, 2007, ordered by Dr. Parikh, for plaintiff's complaints of pain, numbness, and limitation of movement in her left arm. Dr. Reiter testified that when he interpreted that x-ray, he compared it to two chest x-rays of January 10, 2006 and June 24, 2006. Upon reviewing the January 10, 2006 chest films, he noted surgical clips in the right hemithorax and right axilla indicating her prior breast surgery, and he also noted slight hazy density in the left lung apex indicating scarring. When he reviewed the June 24, 2006 chest film, he noticed the same findings. He testified that he attributed that hazy density to scarring of the lining of the lung or right beneath the lining of the lung, due to chronic inflammatory disease, usually secondary to smoking or recurring lung infection, old TB, old fungal disease, radiation, fibrosis, or necrotizing pneumonia actinomycosis. Upon his review of the left shoulder x-ray of June 19, 2007, he noted a portion of the left apex of the lung was visible, and that there was a hazy density in the lateral portion of the superior sulcus in the left lung apex, or apical scarring, in about the area of the second rib, which had not changed in any way from the time of the plaintiff's prior chest x-ray of June 24, 2006.

It is further noted in motion (003) that Dr. Reiter has not moved for summary judgment in his favor, and Dr. Luchs does not comment upon Dr. Reiter's care and treatment of the plaintiff relating to his interpretation of the June 19, 2007 shoulder x-ray. Plaintiff's radiology expert indicates that he has been advised that Dr. Joel Reiter is not the subject of the motion. He does not comment upon Dr. Reiter's interpretations of plaintiff's x-rays. In that Dr. Reiter, who has not moved for summary judgment, was an employee of Long Island Medical Imaging PC and Long Island Magnetic Resonance Imaging, P.C. at the time, summary judgment is not granted to Dr. Reiter or to Long Island Medical Imaging P.C. and Long Island Magnetic Resonance Imaging, P.C. for any vicarious liability they may have as to Dr. Joel Reiter.

Accordingly, motions (002) and (003) are granted and the complaint is dismissed as asserted against defendants John A. Saugy, M.D., Suffolk Orthopaedic Associates, P.C., and as asserted against Albert Zilkha, M.D., and Long Island Medical Diagnostic Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. for any vicarious liability they may have as to Albert Zilkha, M.D. This action is therefore continued as against Dr. Joel Reiter and Long Island Medical Diagnostic Imaging, P.C., and Long Island Magnetic Resonance Imaging, P.C. to the extent of any vicarious liability they may have as to Dr. Joel Reiter.

Dated: AUG 19 2014



J.S.C.
HON. JEFFREY ARLEN SPINNER

FINAL DISPOSITION

 X
NON-FINAL DISPOSITION