

Ukponmwan v Shah

2014 NY Slip Op 32442(U)

September 2, 2014

Sup Ct, Bronx County

Docket Number: 302365/09

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

IA-6

SEP - 8 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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ESTHER UKPONMWAN and
ALEXANDER UKPONMWAN,
Plaintiff(s),

INDEX No.: 302365/09

-against-

AJAY K. SHAH, M.D., F.A.C.S., BRONX
LEBANON HOSPITAL, MURUGA RAJ, M.D.,
ANDRESITO B. PACIS, M.D., and
MOSHOLU PARK RADIOLOGY, P.C.,

Present:
HON. STANLEY GREEN
J.S.C.

Defendant.

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The following papers numbered 1 to 3 read on this motion
No. on the Calendar of April 4, 2014

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	2
Replying Affidavit and Exhibits.....	3
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: September 2, 2014



STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: IA-6

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 ESTHER UKPONMWAN and
 ALEXANDER UKPONMWAN,
 Plaintiff(s),

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 LEBANON HOSPITAL, MURUGA RAJ, M.D.,
 ANDRESITO B. PACIS, M.D., and
 MOSHOLU PARK RADIOLOGY, P.C.,
 Defendant(s):

DECISION

-----X
HON. STANLEY GREEN:

The motion by Muruga Raj, M.D. for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of defendants' failure to timely diagnose and treat her left breast cancer.

On or about September 2006, plaintiff palpated a lump in her left breast which she described as the size of a "corn seed." On October 7, 2006, she went to the office of Dr. Raj, her gynecologist, complaining of a lump in her left breast. Dr. Raj examined her, noted a finding of left breast tenderness and referred her for a bilateral mammogram and an ultrasound.

On October 17, 2006, plaintiff presented to Mosholu Park Radiology for a bilateral screening mammogram and an ultrasound. The mammogram was interpreted by Dr. Pacis as showing "dense heterogeneous fibroglandular breast parenchyma" and a "vague nodule in the inner inferior quadrant" in the left breast. He recommended a targeted sonogram of the left

breast to complete his evaluation. Dr. Pacis performed the targeted sonogram that day and interpreted it as showing a “.8cm x .7 cm predominantly fluid filled mass between the 8 and 9 o'clock axis. There appears to be some internal echoes within this cystic mass. Aspiration of the cystic mass under sonographic guidance was recommended. Both reports were sent to Dr. Raj, as plaintiff's referring physician.

Plaintiff returned to Dr. Raj on October 27, 2006 for a follow-up visit. Plaintiff testified that Dr. Raj reviewed the radiology reports and told her she needed to see a doctor who specializes in breast cancer because he did not specialize in this area. He told his secretary to make an appointment for plaintiff to see Dr. Shah, a “breast specialist.”

On November 17, plaintiff went to Dr. Shah's office for evaluation of her left breast. Dr. Shah performed a breast exam and palpated a lump in the left breast. Dr. Shah testified that because he was able to feel the mass in the same location as indicated on the sonogram report, he decided to do a fine needle aspiration of the mass without sonographic guidance. Dr. Shah performed a fine needle aspiration of the left breast. According to plaintiff, he told her the lump looked like a cyst and recommended that she avoid chocolate and caffeine and not wear underwire bras.

The cytology report of the fine needle aspiration performed by Dr. Shah on November 17, 2006 indicated that “30 cc of slightly bloody fluid was received (fixed) and the diagnosis was “scant atypical duct cells.” Dr. Niazi, the cytopathologist who analyzed the specimen at Bronx Lebanon Hospital, issued a report which recommended a biopsy for complete evaluation.

Shortly thereafter, plaintiff received a telephone call from Dr. Shah who indicated that the results of the fine needle aspiration were negative. No recommendation for a biopsy was made.

On January 5, 2007, plaintiff saw Dr. Shah for follow-up visit. He documented "glandular breasts, cyst left on sono" and noted "left breast: glandular - no definite palpable mass" following a breast examination. He noted that he had a discussion with plaintiff regarding the physical examination, x-ray, sonogram and cytology findings, that she understood and agreed with a plan for a follow up visit with bilateral mammogram and left sonogram in September, 2007 and that she did not want any surgery. He also noted that plaintiff understood that the findings appeared benign, but malignancy could not be ruled out. Dr. Shah did not give plaintiff a referral for a biopsy, as recommended in the November 22, 2007 cytopathology report.

On March 12, 2007, plaintiff presented to Dr. Raj's office for her annual gynecologic exam. He performed a breast exam and documented that it was a negative examination. Plaintiff gave Dr. Raj a copy of the cytopathology report from the November 17, 2006 fine needle aspiration, which had a note at the bottom dated and signed by Dr. Shah on January 5, 2007, containing Dr. Shah's recommendation for a bilateral mammogram and left breast sonogram in September 2007. Dr. Raj did not know if plaintiff had undergone a biopsy as recommended by the cytopathology report and did not ask plaintiff if she had any treatment with regard to her left breast since November 2006, when he last saw her.

In August 2007, plaintiff contacted Dr. Shah to request a follow up appointment because she felt the lump in her left breast was not a cyst and she "needed him to follow up and do more tests". Dr. Shah told her it was almost time for her mammogram and that she should schedule it.

On September 24, 2007, Dr. Raj saw plaintiff for a complaint of no menses. He did not perform a breast exam on that visit nor did he ask whether plaintiff had undergone a left breast biopsy after the November 17, 2006 fine needle aspiration or had undergone any other treatment.

On October 23, 2007, plaintiff underwent a bilateral mammogram and a left breast ultrasound. The mammogram report indicated there was a “suggestion of a new ovoid density which was not well margined in the inferior mid-parenchyma of the left breast corresponding to 2 BB’s with no associated micro calcification or architectural distortion.” The sonogram report was faxed to Dr. Shah and indicated multiple lesions in the left breast in the 7 o’clock position, for which an ultrasound guided biopsy was suggested. Dr. Shah examined plaintiff’s breast and found a palpable mass in a little higher location than the mass in November 2006, at approximately 9 o’clock. Dr. Shah performed a fine needle aspiration of the mass on October 26, 2007 which found atypical cells and a biopsy was recommended. He then referred plaintiff for a sonographic guided biopsy, which was performed on December 27, 2007 and revealed mammary duct carcinoma.

On March 6, 2008, plaintiff underwent a left breast mastectomy, followed by chemotherapy and radiation. In December 2012, plaintiff suffered a recurrence of the left breast cancer and underwent surgery on January 2, 2013. The pathology report revealed moderately differentiated recurrent infiltrating duct carcinoma.

Plaintiff claims that Dr. Raj was negligent in that he (1) failed to d to conduct a proper and thorough investigation into the cause of a “persistent palpable mass” in plaintiff’s left breast in October 2006; (2) failed to recommend or refer plaintiff for excisional biopsies to be performed of the “areas” in question; (3) failed to discuss biopsy results with Dr. Shah; (5) failed to schedule a short follow up appointment for repeat breast examination; and (6) failed to warn plaintiff that she “probably had breast cancer,” causing spread of the cancer beyond its primary site into lymph nodes, reducing her chance of cure and/or recovery and increasing the stage of the

cancer.

Dr. Raj seeks dismissal of the complaint against him on the ground that the medical and gynecological care and treatment he provided to plaintiff was at all times within accepted standards of practice and not a proximate cause of injury or damages to plaintiff. In support of the motion, Dr. Raj submits the affirmation of Dr. Stuart Bednoff, who is Board Certified in Obstetrics and Gynecology.

Dr. Bednoff opines that the care and treatment Dr. Raj rendered to plaintiff was at all times within accepted standard of practice and that his care and treatment of plaintiff was not a proximate cause of injury to her. He opines that Dr. Raj adhered to the accepted standards of care expected of a gynecologist in his treatment of plaintiff, which obligated him to perform a timely and proper breast examination in response to a complaint of a breast lump, pain and tenderness, to timely recognize the possible significance of her complaints and promptly refer her to appropriate specialists in Radiology and General Surgery for definitive investigation, evaluation and management. He opines that Dr. Raj fully complied with these standards and that upon referral to Dr. Shah on October 27, 2006, Dr. Raj fulfilled his responsibility to plaintiff with respect to the care and treatment of her left breast complaints. Dr. Bednoff notes that both Dr. Shah and Dr. Raj found no definitive palpable mass in the left breast at the time they examined her in January and March 2007, respectively. He also notes that plaintiff did not discuss her breast issues with Dr. Raj after his referral to Dr. Shah and that her visits to Dr. Raj in March and September 2007 were for primary gynecologic care and ostensibly unrelated to the left breast.

Plaintiff contends that the motion must be denied because multiple issues of fact exist that must be determined by a jury. In opposition to the motion, plaintiff submits the affidavit of a

physician who is licensed to practice medicine in New Jersey and is Board Certified in the field of Obstetrics and Gynecology. This expert opines that the care and treatment rendered by Dr. Raj departed from good and accepted medical practice and that the departures were substantial factors resulting in harm to plaintiff which delayed her diagnosis of left breast cancer.

Plaintiff's expert opines that as plaintiff's treating gynecologist and the referring physician, Dr. Raj had a duty and obligation to independently make proper clinical recommendations, specifically, give plaintiff a referral for a biopsy based on the cytopathology report indicating a findings of "scant atypical duct cells" because these findings are abnormal and raise the suspicion of breast cancer, which must be immediately ruled out. The expert opines that Dr. Raj could not "wash his hands" of plaintiff's condition simply because he referred her to a specialist and that he had an obligation to follow up with her and Dr. Shah to ensure that his patient underwent a left breast biopsy. He opines that "Dr. Raj's failure to ensure that plaintiff underwent a biopsy of the palpable abnormality in her left breast following receipt of the November 22, 2006 cytopathology report was a departure from good and accepted medical practice and a substantial factor resulting in harm to Ms. Ukponmwan. Had the biopsy been performed in March 2007, an earlier diagnosis of breast cancer would have been made."

In a medical malpractice action, a defendant physician establishes prima facie entitlement to summary judgment when he establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (Roques v. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to rebut the prima facie showing by demonstrating: (1) the existence of a duty from the defendant physician to the plaintiff patient; (2) a breach of

that duty and (3) an injury to the plaintiff proximately caused by that breach (Alvarez v. Prospect Hospital, 68 NY2d 320); Kane v. City of New York, 137 AD2d 658).

Whether a defendant doctor owes a plaintiff a duty of care is a question of law for the court (Markley v. Albany Med. Ctr., 163 AD2d 639). 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 upon by the patient (Id). The dispositive factor in ascertaining duty is not a physician's status as a primary care physician, but the extent to which the physician advised and the plaintiff relied on advice about the subject condition (Burtman v. Brown, 97 AD3d 156).

Here, the testimony and records show that after promptly investigating plaintiff's initial left breast complaints, Dr. Raj informed her that she needed to see a "breast specialist" and referred her to Dr. Shah. There is no evidence that Dr. Raj was involved in the decisions regarding plaintiff's diagnosis and treatment after he referred plaintiff to Dr. Shah and no evidence that plaintiff questioned Dr. Raj about her condition or treatment.

While plaintiff's expert opines that Dr. Raj had "a duty and obligation to independently make proper clinical recommendations," Dr. Raj was entitled to rely on the treatment rendered to plaintiff by Dr. Shah, who was better equipped than he to handle plaintiff's condition (Perez v. Edwards, M.D., et al. 107 AD3d 565). Furthermore, in August 2007, when she was concerned about the lump persisting, plaintiff contacted Dr. Shah to request further testing of her left breast, which led to her diagnosis of breast cancer. Clearly, she did not seek or rely on advice from Dr. Raj regarding her left breast after she began seeing Dr. Shah.

Even assuming, arguendo, that Dr. Raj departed from the standard of care with regard to the treatment of plaintiff's left breast, plaintiff's expert does not indicate that he possesses any

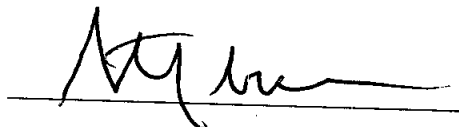


credential, relevant knowledge or experience with regard to the effects of a delay in diagnosis of breast cancer, nor does he provide any factual support for his opinion that the delay for the relevant period of time allegedly contributed to by Dr. Raj, was a substantial factor in altering plaintiff's outcome. Accordingly, Dr. Raj is entitled to summary judgment dismissing the complaint.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: September 2, 2014

A handwritten signature in black ink, appearing to read 'Stanley Green', is written over a horizontal line.

STANLEY GREEN, J.S.C.