

**Murphy v Aram**

2014 NY Slip Op 33160(U)

September 30, 2014

Supreme Court, Richmond County

Docket Number: 100077/2012

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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ROSEMARY MURPHY,

Plaintiff,

-against-

NADUBEETHI JAYARAM, M.D., SYED  
HUSSAINI, M.D., STEVEN M. GREEN, M.D.,  
C. STEPHEN KWON, M.D., PANNA DESAI, M.D.,  
HIDEKO KAMINO, M.D., STATEN ISLAND  
PHYSICIAN PRACTICE, P.C., RICHMOND  
UNIVERSITY MEDICAL CENTER, NYU HOSPITAL  
FOR JOINT DISEASES, NYU LANGONE MEDICAL  
CENTER, MARTIN A. POSNER, M.D., and STEVEN  
M. GREEN, M.D., P.C.,

Defendants.

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DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 100077/2012

Motion Nos.: 4373-002

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In this medical malpractice action, the motions of defendants NADUBEETHI JAYARAM, M.D., SYED Z. HUSSAINI, M.D., C. STEPHAN KWON, M.D., STATEN ISLAND PHYSICIAN PRACTICE, P.C.<sup>1</sup>, PANNA DESAI, M.D., NYU HOSPITALS CENTER<sup>2</sup> (s/h/a NYU HOSPITAL FOR JOINT DISEASES and NYU LANGONE MEDICAL CENTER), RICHMOND UNIVERSITY MEDICAL CENTER<sup>3</sup>, STEVEN M. GREEN, M.D. and MARTIN A. POSNER, M.D. and STEVEN M. GREEN, P.C.<sup>4</sup> for summary judgment, pursuant to CPLR §3212, are denied.

Plaintiff ROSEMARY MURPHY's ("MURPHY") primary contention is that defendants were negligent in their failure to timely diagnose and treat squamous cell carcinoma in her right hand causing her to undergo numerous surgeries including the amputation of her right hand.

MURPHY, who had a prior history of skin cancer lesions which had been removed from various locations on her body, was 76 years old when she initially presented to defendant SYED HUSSAINI, M.D. ("HUSSAINI") of defendant STATEN ISLAND PHYSICIAN PRACTICE,

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<sup>1</sup> Pursuant to the Order of this Court, dated July 24, 2014, the motion by defendant STATEN ISLAND PHYSICIANS PRACTICE to dismiss all claims of direct liability was granted. However, all claims of vicarious liability were preserved for trial.

<sup>2</sup> Pursuant to the Order of this Court, dated July 24, 2014, the motion for summary judgment of defendants PANNA DESAI, M.D. and NYU HOSPITALS CENTER was granted as to the claims of plaintiff ROSEMARY MURPHY of lack of informed consent.

<sup>3</sup> Pursuant to the Order of this Court, dated July 24, 2014, the motion by defendant RICHMOND UNIVERSITY MEDICAL CENTER to dismiss all direct claims of liability was granted. However, all claims of vicarious liability were preserved for trial.

<sup>4</sup> Pursuant to the Order of this Court, dated July 24, 2014, the motions for summary judgment of defendants STEVEN M. GREEN, M.D. and STEVEN M. GREEN, M.D. and MARTIN A. POSNER, M.D., P.C. to dismiss plaintiff ROSEMARY MURPHY's claims of lack of informed consent were granted with prejudice.

PRACTICE, P.C. (“SIPP”) on January 5, 2009 complaining of a painful lump on her right hand. On July 16, 2009, HUSSAINI drained a 4-centimeter abscess on MURPHY’s right hand and, finding no evidence of an infection, diagnosed cellulitis. MURPHY was seen by HUSSAINI seven times between July 16, 2009 and April 30, 2010 during which he examined her right hand, drained fluid from the lesion and provided other treatment. As a result of his inability to reach a diagnosis, HUSSAINI referred MURPHY to defendant NADUBEETHI JAYARAM, M.D. (“JAYARAM”), an orthopedic surgeon.

JAYARAM ordered an MRI of MURPHY’s right hand and the report, dated April 8, 2010, indicated that there was a 3.5 x 3.0 x 2.5 cm lobulated multiseptated mass abutting and enveloping the second metatarsal. In addition, the radiologist indicated that “these are worrisome for a malignant soft tissue mass or an infectious process”. On May 11, 2010, JAYARAM admitted MURPHY to defendant RICHMOND UNIVERSITY MEDICAL CENTER (“RUMC”) and performed a curettage of a bone cyst at the base of the right second metacarpal as well as an excision biopsy of possible granuloma in the cyst.

Defendant C. STEPHEN KWON, M.D. (“KWON”), a pathologist employed by RUMC, reviewed the surgical pathology and found, among other things, decalcified bone cystic contents and clinically inflamed fibrous tissues consistent with an inflamed epidermoid cyst of MURPHY’s second metacarpal bone of her right hand. KWON did not observe any necrotizing or tuberculoid granulomata and, of significance, he found no indications of cancerous or malignant growth.

MURPHY returned to JAYARAM for post-surgery visits on May 19, 2010 and May 16,

2010 and her incision was found to be healing with full range of motion. She visited with JAYARAM on three occasions in June, 2010 and during the last visit she complained of pain at the base of her right second metacarpal. Pursuant to JAYARAM's directive, an MRI was performed on July 7, 2010 which revealed a recurrent, solid and cystic mass at the base of MURPHY's second metacarpal which demonstrated invasion into the bone and appeared aggressive. Upon receipt of the MRI report, JAYARAM referred MURPHY to defendant STEVEN M. GREEN ("GREEN"), an orthopedic surgeon, of MARTIN A. POSNER, M.D. and STEVEN M. GREEN, P.C..

GREEN examined MURPHY on August 9, 2010 and he performed a repeat surgical excision on September 1, 2010 at defendant NYU HOSPITAL FOR JOINT DISEASES ("NYU"). The pathology report, prepared by defendant PANNA DESAI, M.D. ("DESAI") of NYU, provided, in part, as follows:

1. MASS, RIGHT HAND: RUPTURED EPIDERMAL INCLUSION CYST WALL WITH EXTENSIVE ACUTE AND CHRONIC INFLAMMATION AND OCCASIONAL GIANT CELL REACTION. FOCI OF LYMPHOPLASMACYTIC INFILTRATION ARE NOTED AROUND CLUSTERS OF SQUAMOUS CELLS WITHIN THE FIBROUS WALL.
2. MASS, RIGHT HAND: RUPTURED EPIDERMAL INCLUSION CYST WALL WITH EXTENSIVE ACUTE AND CHRONIC INFLAMMATION AND OCCASIONAL GIANT CELL REACTION. FOCI OF LYMPHOPLASMACYTIC INFILTRATION ARE NOTED AROUND CLUSTERS OF SQUAMOUS CELLS WITHIN THE FIBROUS WALL.
3. MASS, RIGHT HAND: PARTLY REACTIVE FOCALLY NECROTIC BONE SPICULES ADMIXED WITH CHRONICALLY INFLAMED FIBROUS TISSUE CONTAINING KERATINOCYTES.
4. MASS, RIGHT HAND: SMALL FRAGMENTS OF BONE SPICULES ADMIXED WITH FIBROUS TISSUES.

NOTE: Two smears from the yellow ?pus were given to me by Dr. Green. Upon H & E stain the smears mainly showed keratinocytes. There was no neutrophils. Overall, histology is that of an irritated, ruptured epidermal inclusion cyst. Most probably arising in soft tissue of hand and eroding the carpal bone.

DESAI's report fails to mention any evidence of abnormal cell nuclei or atypia which may have been indicative of cancerous or malignant growth.

GREEN continued to treat MURPHY post-operatively and, as a result of continued swelling and drainage at the incisional area, he prescribed Keflex for his diagnosis of post-operative cellulitis. On December 15, 2010, he performed an incision and drainage of MURPHY's right hand and, because of her continued complaints of pain, on March 2, 2011, he performed a neurectomy of MURPHY's radial sensory nerve. The pathology specimens of the March 2, 2011 surgery were reviewed by defendant HIDEKO KAMINO, M.D. ("KAMINO") of defendant NYU LANGONE MEDICALCENTER<sup>5</sup>. (As discussed below, KAMINO also reviewed the slides from RUMC and the slides from MURPHY's prior surgery at NYU on September 10, 2010). KAMINO diagnosed MURPHY with an infiltrating moderately to well differentiated squamous cell carcinoma which appeared to have evolved in a pre-existing cyst. This finding was confirmed by DESAI in his pathology report dated April 14, 2011.

On June 22, 2011, GREEN performed a ray resection of the index and middle fingers of MURPHY's right hand. However, her pain persisted and, on December 8, 2011, MURPHY underwent a right-hand amputation which was performed by non-party Dr. Alfred Culliford at Staten Island University Hospital.

In *Contreras v. Adeyemi*, 102 AD3d 720 [2014], the Appellate Division, Second Department

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<sup>5</sup> Plaintiff ROSEMARY MURPHY has discontinued her claims against defendant HIDEKO KAMINO, M.D.

sets forth as follows:

To establish liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*Stukas v. Streiter*, 83 AD3d 18 [2011]; *see also Gillespie v. New York Hosp. Queens*, 96 AD3d 901 [2012]; *Swanson v. Raju*, 95 AD3d 1105 [2012]; *Heller v. Weinberg*, 77 AD3d 622 [2010]). A defendant physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Stukas v. Streiter*, 83 AD3d at 24; *see also Gillespie v. New York Hosp. Queens*, 96 AD3d at 902; *Swanson v. Raju*, 95 AD3d at 1106; *Heller v. Weinberg*, 77 AD3d at 622-623). Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see Stukas v. Streiter*, 83 AD3d at 24; *see also Gillespie v. New York Hosp. Queens*, 96 AD3d at 902; *Heller v. Weinberg*, 77 AD3d at 623). In order to defeat a defendant's motion for summary judgment, a plaintiff must only rebut the defendant's prima facie showing (*see Stukas v. Streiter*, 83 AD3d at 30; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324). Summary judgment is not appropriate where the parties adduce conflicting medical expert opinions, as issues of credibility can only be resolved by a jury (*see Hayden v. Gordon*, 91 AD3d 819, 821 [2012]; *Bengston v. Wang*, 41 AD3d 625, 626 [2007]; *Feinberg v. Feit*, 23 AD3d 517, 519 [2005]).  
Accord, *Iulo v. Staten Island Univ. Hosp.*, 106 AD3d 696 [2013].

Defendants HUSSAINI, JAYARAM, and KWON contend that they are entitled to summary judgment on the ground that MURPHY did not have squamous cell carcinoma at the time they were involved in her care and treatment. This contention is supported by the affirmation of a pathologist who opines that KWON accurately read the slides from MURPHY's initial surgery when he found no evidence of squamous cell carcinoma. In addition, these defendants provide the affirmation of an oncologist/hematologist who indicates that MURPHY suffered from an "exceptionally rare clinical problem, i.e. a malignant transformation of an epidermal inclusion cyst into squamous cell carcinoma" and that MURPHY's prognosis and treatment would have been the same even if,

assuming arguendo, that there was a delay in diagnosis.

In opposition to HUSSAINI's motion for summary judgment, MURPHY proffers the affidavit of an physician who opines that HUSSAINI departed from accepted standards of medical practice by failing to adequately and appropriately document the condition and progress of the lesion on MURPHY's hand; by failing to develop or document a diagnosis and plan of treatment based on test results, physical examination and clinical presentation; by not altering his diagnosis to fit the results of the available data; by delaying in referring MURPHY to a specialist; and by not considering that a malignant or premalignant condition as being the cause of the reoccurrence of the lesion.

With respect to JAYARAM's motion for summary judgment, MURPHY submits the affirmation of an expert who opines, among other things, that JAYARAM's working diagnosis of an infectious process or unicameral cyst was without any scientific basis and was contradicted by the MRI studies; that he failed to timely refer MURPHY to an appropriate specialist; and that the five month delay in his referral substantially contributed to the delay in diagnosis of the malignant condition which eventually led to the amputation of MURPHY's hand.

MURPHY disputes KWON's contention that he accurately read the specimen(s) from MURPHY's initial surgery. In support of this assertion, MURPHY provides an affidavit of a pathologist who opines, that based on KAMINO's diagnosis of the same slides, KWON's failure to report the keratinocytic atypia (especially in light of MURPHY's prior medical history) was a departure from accepted standards of medical practice. The pathologist sets forth that a finding of keratinocytic atypia may represent a well differentiated cancer that was evolving in the cyst.

Plaintiff MURPHY, through her submission of the affidavits of her medical experts which conflict with the opinions of defendants' experts, has raised a triable issue of fact as to whether

HUSSINI, JAYARAM and/or KWON have committed acts of negligence and, as a result, summary judgment is not appropriate (*see Hayden v. Gordon, supra.*).

DESAI supports his motion for summary judgment with the submission of an affirmation of a physician who reviewed the slides associated with MURPHY's surgery at RUMC and two pathology specimens from MURPHY's two surgeries at NYU. The physician concluded that none of the pathology specimens from MURPHY's surgery that took place at NYU on September 1, 2010 or the slides from MURPHY's surgery at RUMC revealed any evidence of squamous cell carcinoma. However, plaintiff's expert pathologist concludes that, based on his review of the medical history and reports contained in the records (particularly, the pathology report prepared by KAMINO), that DESAI departed from standards of accepted standards of medical practice by not reporting findings of cytologic atypia. Although the pathologist did not personally review the slides, he maintains that the finding of cytologic atypia by KAMINO in the slides may have represented a well differentiated cancer in MURPHY's hand from the beginning of her treatment.

In opposition to GREEN's motion for summary judgment, MURPHY submits the affirmation of a physician who concludes that GREEN departed from accepted standards of medical practice on multiple occasions including that the initial surgery performed by GREEN was inappropriate. Specifically, MURPHY's expert opines that the resection was inadequate ("piecemeal") and that an "en bloc" resection should have been conducted to ensure the complete removal of the lesion which would have provided tissue margins which could have been evaluated for malignancy. In addition, the physician alleges, among other things, that GREEN should have considered malignancy or premalignant conditions in his differential diagnosis; the oncologic resection by GREEN in June, 2011 was inadequate; and he should have referred MURPHY to an oncologist immediately when

MURPHY's cancer was confirmed.

GREEN contends that he did, in fact, consider that the mass in MURPHY's right hand could have been malignant and that was the primary reason why he had the slides from RUMC re-reviewed by DESAI. As a result of DESAI's findings which ruled out malignancy, GREEN performed the initial surgery when the mass was completely excised rather than done in a "piecemeal" fashion. GREEN alleges that there is no basis in medical facts to support plaintiff's contention that GREEN should have performed an amputation of MURPHY's index and second fingers of her right hand - particularly in light of the finding by DESAI that there was no malignancy.

As with her opposition to the summary judgment motions of HUSSINI, JAYARAM and KWON, plaintiff has submitted affidavits of medical experts which sufficiently conflict with the opinions of defendants' experts. The contentions of these experts raise triable issues of fact as to whether DESAI and GREEN have committed acts of negligence and, as a result, summary judgment is not appropriate (*see Hayden v. Gordon, supra.*).

Accordingly, it is

ORDERED, that the motions of defendants NADUBEETHI JAYARAM, M.D., SYED Z. HUSSAINI, M.D., C. STEPHAN KWON, M.D., STATEN ISLAND PHYSICIAN PRACTICE, P.C. and RICHMOND UNIVERSITY MEDICAL CENTER for summary judgment, pursuant to CPLR §3212, is denied; and it is further

ORDERED, that the motions of defendants PANNA DESAI, M.D., NYU HOSPITALS CENTER, STEVEN M. GREEN, M.D. and MARTIN A. POSNER, M.D. and STEVEN M. GREEN,

P.C. for summary judgment, pursuant to CPLR §3212, is denied.

This shall constitute the decision and order of the Court.

Dated: September 30, 2014

E N T E R,

/s/ Philip G. Minardo  
HON. PHILIP G. MINARDO