| **Matter of Rodino v Yacovone** |
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| 2016 NY Slip Op 31142(U) |
| June 16, 2016 |
| Supreme Court, New York County |
| Docket Number: 805038/14 |
| Judge: Alice Schlesinger |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of

RACHEL RODINO,

Plaintiff,

-against-

JOSEPH YACOVONE, M.D., SUSAN BEATTY, M.D., and CHELSEA DIAGNOSTIC RADIOLOGY, P.C.,

Defendants.

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Index No. 805038/14

Mot. Seq. 002 and 003

Rachel Rodino, the plaintiff in this medical malpractice action, was concerned about breast cancer at the age of forty-one due to a strong family history of premenopausal breast cancer in her mother and her aunt. She went to Chelsea Diagnostic Radiology, P.C. on August 5, 2011 to get a screening mammogram and bilateral breast ultrasound. Joseph Yacovone, M.D., one of the defendants in this action, interpreted the breast imaging studies as benign and recommended routine follow-up mammography. *See* defendants' attorney affirmations, ¶¶ 9-11, exh. "I."

A year later, plaintiff returned to Chelsea for more breast imaging studies. Dr. Susan Beatty, another defendant in this action, performed another screening mammogram and bilateral breast ultrasound. She compared them to the studies interpreted by Dr. Yacovone one year prior and found benign bilateral calcifications and cysts, and a four-millimeter nodule in plaintiff's right breast. She recommended a short follow-up in six months to target that area. *See id.* at ¶ 12, exh. "J."

About one year later, on September 23, 2013, plaintiff returned to Chelsea complaining of a palpable lump in her left breast. Dr. Beatty performed a diagnostic

mammogram and found indeterminate calcifications in the upper outer quadrant of her left breast that were new since the last exam. She recommended a biopsy. *Id.* at ¶¶ 15-18.

A core needle biopsy was attempted on September 27, 2013 but could not be completed because plaintiff experienced vaso-vagal reactions. *Id.* at ¶ 17, exh. "L."

On October 21, 2013, a stereotactic guided core biopsy of plaintiff's left breast was performed by Dr. Beatty after plaintiff took valium. After seven samples were taken, plaintiff experienced another vaso-vagel reaction, so Dr. Beatty stopped. After plaintiff recovered, a surgical clip was placed into the biopsy canal. The histology showed "ductal carcinoma in situ [("DCIS")], high-grade with associated microcalcifications." The diagnosis of DCIS was confirmed by NYU Pathology Associates. *Id.* at exh. "M."

Dr. Beatty suggested another stereotactic sampling and an MRI. On November 26, 2013, a core biopsy of plaintiff's left breast mass was performed and the pathology showed invasive ductal carcinoma with a sixteen-millimeter invasive diameter, Nottingham Histologic Grade 3 of 3, with no lymphovascular invasion. The margins were negative and zero out of fifteen lymph nodes were positive for metastases. *Id.* at at ¶¶ 19-20. An oncologist confirmed the diagnosis of Stage IC breast cancer. Plaintiff elected to undergo a bilateral mastectomy followed by chemotherapy.

Plaintiff filed a complaint on January 30, 2014, alleging defendants departed from acceptable standards of medical care in, *inter alia*, failing to make a proper and timely diagnosis of her breast cancer.

Before the Court now are two motions for summary judgment by each of the defendant doctors.[1] It is each of their positions that their interpretations of plaintiff's

[1] Dr. Yacovone and Dr. Beatty each submitted motions for summary judgment. As the only claims asserted against Chelsea are vicarious liability claims for any alleged malpractice on the part of Dr. Yacovone and Dr. Beatty, Chelsea did not submit its own

mammograms comported with good and acceptable medical practice, and that any alleged departure on behalf of the defendants did not proximately cause any injury to plaintiff because at the time of her diagnosis with DCIS, plaintiff actually had Stage I breast cancer which therefore did not advance in stage sufficient to cause injury.

Defendants' motions are supported by expert affirmations by Dr. Lawrence Cicchiello, a board certified diagnostic radiologist licensed to practice medicine in the State of New York. Dr. Cicchiello has reviewed the films and ultrasound of August 5, 2011 interpreted by Dr. Yacovone, and those of September 18, 2012 and September 23, 2013 interpreted by Dr. Beatty. He has also reviewed the biopsy and diagnosis of Stage I invasive ductal carcinoma.

Dr. Cicchiello opined with a reasonable degree of medical certainty that Dr. Yacovone's interpretation of the August 5, 2011 mammogram comported with good and accepted medical and radiological practices because the images "showed no pathology which necessitated any further imaging or any further studies." He further opined with a reasonable degree of medical certainty that Dr. Yacovone's interpretation of the August 5, 2011 around the clock ultrasound conformed with good and accepted standards of radiologic care because the images depicted "no suspicious solid lesions" and "showed no pathology which necessitated any further imaging or any further studies [or] of which a biopsy should be taken."

Dr. Cicchiello also affirmed that Dr. Beatty's interpretation of the September 18, 2012 mammogram conformed with good and accepted standards of radiologic care because "the mammogram images show no dominant masses, no suspicious calcifications and no architectural distortion," but rather, "showed benign appearing calcifications which

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motion.

were not suspicious for or indicative or breast cancer bilaterally, and showed no pathology which necessitated any further imaging or any further studies[, or] of which a biopsy should be taken." He further opined with a reasonable degree of medical certainty that Dr. Beatty's interpretation of the September 18, 2012 bilateral screening ultrasound conformed with good and accepted standards of radiologic care because because the sonogram depicted "no suspicious solid lesions" and therefore "showed no pathology which necessitated any further imaging or any further studies [or] of which a biopsy should be taken." *Id.* at ¶ 12.

On the issue of causation, Dr. Cicchiello opined with a reasonable degree of medical certainty that "at the time of her diagnosis of invasive ductal carcinoma, . . . plaintiff's cancer was Stage I." He further stated,

> In view of the fact that plaintiff was diagnosed with Stage I breast cancer one year after Dr. Beatty [and two years after Dr. Yacavone] interpreted the screening mammogram[s] and screening breast ultrasound[s], it is my opinion, with reasonable medical certainty that if plaintiff had breast cancer it was Stage I. Therefore, it is my opinion with reasonable medical certainty, that nothing done or failed to be done by Dr. Beatty [or Dr. Yacovone] was a proximate cause of injury to plaintiff.[2]

Defendants argue that "had a diagnosis been made one year previously, or even two years previously, the pathology would have been the same (Grade 3. High recurrence score on Oncotype, etc.) and surgical treatment, the chemotherapy and hormonal therapy would have been exactly the same."

This evidence suffices to establish a *prima facie* case that defendants did not depart from acceptable standards of medical care in their interpretations of plaintiff's breast examinations, and that any alleged departures on the part of either defendant doctor did not proximately cause plaintiff's injuries.

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[2] Dr. Cicchiello's affirmation, ¶¶ 15-18.

In opposition, plaintiff submitted affirmations from an unnamed diagnostic radiologist and an unnamed surgical oncologist. Plaintiff's expert diagnostic radiologist is board certified and licensed to practice medicine in the State of New York. S/he reviewed all of plaintiff's images chronologically and compared them with prior studies taken at New York Medical Imaging Associates, something Dr. Cicchiello did not do. Plaintiff's expert radiologist opines that Dr. Yacovone departed from good and accepted medical practice in his interpretation of plaintiff's August 5, 2011 bilateral screening mammogram by failing to appreciate and/or report the presence of three areas of suspicious microcalcifications in the left breast, which are suspicious for breast cancer because they are new findings in comparison to the August 20, 2010 mammogram films. He opines with a reasonable degree of medical certainty that "[h]ad Dr. Yacovone assigned a BIRAD Category 0 [(incomplete evaluation)] and recommended an investigation of the aforesaid calcifications with spot compression and magnifications views and a targeted ultrasound of the upper quadrant of the left breast, . . . a biopsy of that area would have immediately followed and [plaintiff] would have received the benefits of an earlier diagnosis of breast cancer."

Plaintiff's expert radiologist opines that Dr. Beatty departed from good and accepted medical practice in her interpretation of plaintiff's September 18, 2012 mammogram films because they depict "an interval increase" in calcifications in the upper quadrant of the left breast from the August 5, 2011 mammogram films and a new "area of questionable architectural distortion" in plaintiff's left breast at 2 o'clock. He opined with a reasonable degree of medical certainty that "[h]ad Dr. Beatty assigned a BIRAD Category 0 and recommended an investigation of the aforesaid calcifications and questionable architectural distortion with spot compression and magnifications views and a targeted

ultrasound of the upper quadrant of the left breast, . . . a biopsy of that area would have immediately followed and [plaintiff] would have received the benefits of an earlier diagnosis of breast cancer."

This evidence suffices to establish the existence of material issues of fact regarding whether defendants departed from accepted standards of medical care.

Plaintiff also submitted an affirmation from an expert board certified in surgical oncology and licensed to practice medicine in the State of New York. The surgeon opines with a reasonable degree of medical certainty that in August 2011, plaintiff had ductal carcinoma in situ (DCIS), which is a pre-cancerous breast mass, and in September 2012, plaintiff had either DCIS or Stage IA breast cancer. Thus, plaintiff's "breast mass grew from a pre-cancerous lesion to Stage IC breast cancer [diagnosed in November 2013] which substantially decreased her chance of cure and/or survival and required her to undergo chemotherapy and Tamoxifen therapies that would not have been necessary had her breast mass been removed when it was still pre-cancerous or Stage IA."

At the oral argument on March 16, 2016, plaintiff's counsel argued that when pathology is found indicating DCIS, as in the October 21, 2013 biopsy performed by Dr. Beatty,[3] it means that the patient at one point had DCIS. It is plaintiff's position that she was injured when her cancer advanced from DCIS to Stage IC breast cancer. It is defendants' position that "at the time of her diagnosis of invasive ductal carcinoma, . . . plaintiff's cancer was Stage I." Dr. Cicchiello's affirmation, ¶¶ 15-18.

[3] Dr. Beatty's impression of the October 21, 2013 core biopsy indicated: "Final histology shows ductal carcinoma in situ, high-grade with associated microcalcifications." Defendants' attorney affirmations, exh. "M."

This evidence suffices to establish the existence of triable issues of material fact regarding whether plaintiff's cancer had advanced in stage sufficient to injure her prognosis.

Defendants rely on *Bossio v Fiorillo*, 210 AD2d 836 [3d Dept 1994], to argue that plaintiff failed to meet her burden on the issue of proximate cause. In *Bossio*, defendants performed a mammogram of plaintiff in 1988 and interpreted it as normal, despite its depiction of a three- to four-millimeter nodule. *Bossio*, 210 AD2d at 836-37. Two years later, a mammogram revealed the presence of a nine-millimeter tumor in the same area as the nodule from the previous mammogram. The tumor was found to be cancerous and was removed during a lumpectomy, which revealed no spread of the cancer beyond the isolated tumor. *Id.*

The *Bossio* Court concluded that defendants were entitled to judgment as a matter of law because plaintiff failed to meet her burden on the issue of physical injury caused by the alleged delay in diagnosis, stating: "Absent . . . is any evidence that the delay allowed the cancer to advance from one stage to another, thereby drastically reducing the chance for survival. Instead, this is a case where the prognosis would have been the same without the delay." *Id.* at 838-39 (citations omitted).

Defendants contend that at the time of her diagnosis with DCIS, plaintiff actually had Stage 1 breast cancer. As such, they argue that plaintiff failed to meet her burden on causation for the same reason as in *Bossio*: because "there was no 'evidence that the delay allowed the cancer to advance from one stage to another, thereby drastically reducing the chance for survival . . . and the prognosis would have been the same without the delay.'" Defendants' reply at 7 (emphasis omitted) (quoting *Bossio*, 210 AD2d at 838).

Here, however, plaintiff's experts opined that her cancer was pre-cancerous DCIS (Stage 0 breast cancer) in August 2011 and either DCIS or Stage IA breast cancer in September 2012, and advanced to Stage IC breast cancer by 2013. This proves the existence of material issues of fact whether a delay allowed the cancer to advance from one stage to another.

In response, defendants argue that "the mere *possibility* of avoiding a certain course of treatment, which plaintiff's expert does not even claim resulted in any independent injury to plaintiff, is wholly insufficient to raise a triable question of fact on the issue of proximate cause." Defendants' reply at 7.

However, the progression of cancer from one stage to another is a sufficient injury. *See Windisch v. Weiman*, 161 AD2d 433, 437, 555 NYS2d 731, 734 [1st Dept 1990] ("[A]n examination of the record demonstrates sufficient proof so that a rational view of the evidence would permit the jury to find that defendant's negligence was a proximate cause of plaintiff's disease progressing from one stage to another and, thus, not only necessitating more extensive surgery but drastically reducing his chance of survival.").

Finally, Defendants argue that plaintiff improperly asserts a new theory of liability in her opposition, namely, that Dr. Yacovone and Dr. Beatty should have recommended that the benign (or possibly Stage I) condition be surgically removed in August 2011 and September 2012, respectively. *See* Defendants' reply at 5. This argument is unpersuasive for two reasons.

First, it does not appear that plaintiff is suggesting that defendants departed from the standard of care in failing to recommend that the condition be surgically removed. Plaintiff's expert radiologist suggests that the departures occurred when defendants failed

to order further testing—namely, spot compression and magnification views—in response to the breast mass calcifications, and that had further testing been ordered, pre-cancerous diagnoses would have been made, leading to treatment of the mass before it advanced to Stage IC breast cancer. Plaintiff's expert surgical oncologist merely[4] opines that had further testing been ordered, a biopsy would have been indicated, and plaintiff would have been diagnosed when her breast mass was pre-cancerous (DCIS) or Stage IA breast cancer. This opinion regarding the manner in which defendants' alleged departures causally led to plaintiff's injury is not a new theory of liability improper in opposition to a *prima facie* case for summary judgment.

Second, in her bill of particulars, plaintiff alleged that defendants committed malpractice, *inter alia*, "in failing to immediately refer plaintiff to a breast surgeon." Plaintiff's bill of particulars, ¶ 1. This allegation suffices to allege malpractice leading up to the injuries suffered by plaintiff when her pre-cancerous DCIS advanced to Stage IC breast cancer. As such, plaintiff's theory that she was injured when her diagnosis advanced from DCIS to Stage IC breast cancer is not improper as being raised for the first time in opposition to a *prima facie* case for summary judgment.

While the defendants established a prima facie case in their moving papers, this Court finds that plaintiff, via the opinions expressed by her experts in opposition, raised triable issues of fact as to whether defendants departed from good and accepted medical practice in the care and treatment of plaintiff, and whether such departures were a proximate cause of injury to her. These issues cannot be resolved on a motion for summary judgment. A trial is required.

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[4] Plaintiff's expert surgical oncologist does not address departure at all; rather, solely opines on the issue of proximate cause.

Accordingly, it is hereby

ORDERED that the defendants' motions for summary judgment are denied in accordance with the court's memorandum decision. Plaintiff shall serve a copy of this decision and order with notice of entry within 20 days of entry

Dated: June 16, 2016

JUN 16 2016

J.S.C.

ALICE SCHLESINGER