

Dullea v Amico

2017 NY Slip Op 31442(U)

July 3, 2017

Supreme Court, Suffolk County

Docket Number: 13596/2011

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Debra Dullea and Jerome Dullea,

Index No.: 13596/2011

Plaintiffs,

Motion Sequence No.: 002; MG

Motion Date: 7/14/16

Submitted: 4/26/17

-against-

Frank J. Amico, D.O., Syosset Internal
Medicine, P.C., Leonard V. Gioia, M.D.,
Thomas J. Fahey, M.D., Thomas J. Fahey, M.D.,
P.C., Weill Cornell Surgical Associates and
Cornell Surgical Associates, P.C.,

Motion Sequence No.: 003; MG; CD

Motion Date: 8/11/16

Submitted: 4/26/17

Plaintiffs Pro Se:

Defendants.

Debra Dullea and Jerome Dullea
986 Montauk Highway
Oakdale, NY 11769

Attorney for Defendants

Thomas J. Fahey, M.D., P.C.,
Weill Cornell Surgical Associates
and Cornell Surgical Associates, P.C.:

Attorney for Defendants

Frank J. Amico, D.O. and
Syosset Internal Medicine, P.C.:

Martin Clearwater Bell, LLP
220 East 42nd Street
New York, NY 10017

Shaub, Ahmuty, Citrin & Spratt, LLP
1983 Marcus Avenue
Lake Success, NY 11042

Clerk of the Court

Upon the following papers numbered 1 to 47 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 24; 25 - 47; it is

ORDERED that the motion (seq. 002) by defendants Thomas J. Fahey, M.D., Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, P.C., and the motion (seq. 003) by defendants Frank J. Amico, D.O., Syosset Internal Medicine, P.C., and Leonard V. Gioia, M.D., are consolidated for purposes of this determination; and it is

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ORDERED that the motion by defendants Thomas J. Fahey, M.D., Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, P.C., for summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that the motion by defendants Frank J. Amico, D.O., Syosset Internal Medicine, P.C., and Leonard V. Gioia, M.D., for summary judgment dismissing the complaint against them is granted.

This action was commenced by plaintiff Debra Dullea to recover damages for injuries she allegedly sustained due to the medical malpractice of defendants during the period from October 21, 2008 to August 31, 2009. Specifically, Mrs. Dullea alleges that defendants' actions delayed the diagnosis of her thyroid cancer by approximately eight months. Her husband, Jerome Dullea, asserts a derivative claim for loss of services.

Defendants Thomas J. Fahey, M.D., Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, P.C., now move for summary judgment in their favor on the ground that their medical treatment of Debra Dullea was at all times within the relevant standard of care. In support of their motion, they submit copies of the pleadings, transcripts of the parties' deposition testimony, an affirmation of Martha Zeiger, M.D., a transcript of nonparty Michael Braff's deposition testimony, and copies of Mrs. Dullea's medical records.

Defendants Frank J. Amico, D.O., Syosset Internal Medicine, P.C., and Leonard V. Gioia, M.D., also move for summary judgment in their favor, arguing that their medical treatment of plaintiff at all times comported with the accepted standards of medical care and treatment. In support of their motion, they submit, among other things, an affirmation of Howard D. Kolodny, M.D.

Initially, the Court notes that plaintiffs' counsel moved, by order to show cause dated November 15, 2016, for leave to withdraw from representation. That application was granted by order of the Court dated February 16, 2017. Concomitant with that order, the Court imposed a stay of the instant action for 60 days to afford plaintiffs the opportunity to retain new counsel. At this time, the Court record lacks any indication plaintiffs retained substitute counsel. Defendants' motions for summary judgment were adjourned until April 26, 2017, at which time they were submitted for decision without opposition.

Plaintiff Debra Dullea testified that she began seeing her former primary care physician, Dr. Frank Amico, in approximately 1996. Mrs. Dullea stated that her prior medical history includes cervical cancer in 1998, resolved by hysterectomy, and gall bladder removal in 2006. She indicated that in 2008, she visited a Dr. Durkin for an unrelated procedure, during which diagnostic imagery was taken of her neck. The imagery revealed abnormalities in her thyroid gland, and she was advised to see an endocrinologist. She testified that in the fall of 2008, she visited defendant Dr. Leonard Gioia, who diagnosed her with Hashimoto's, a disease that can result in an underactive thyroid. Mrs. Dullea indicated that approximately two weeks later, she returned to her primary care physician, Dr. Amico, who ordered a thyroid sonogram. Mrs. Dullea stated that she received the results of that

thyroid sonogram, which indicated the presence of nodules, on December 24, 2008. She testified that Dr. Amico recommended she see an endocrinologist by January 1, 2009.

Mrs. Dullea testified that pursuant to Dr. Amico's recommendation that she see an endocrinologist immediately, she contacted the office of defendant Dr. Thomas Fahey, whom she learned was unavailable until January 21, 2009. She stated that, given Dr. Fahey's unavailability, she elected to return to the office of Dr. Gioia some time between December 26 and December 31. Mrs. Dullea indicated that Dr. Gioia examined her thyroid gland, attempted to locate any nodules, then told her "if [he] [doesn't] see them and [he] [doesn't] feel them, you don't have them, you're fine, go home." She testified that Dr. Gioia ordered no additional thyroid testing. Mrs. Dullea indicated that she then saw Dr. Fahey at Cornell Medical Center on January 21, 2009, at which time he ordered a sonogram of her thyroid. She explained that after Dr. Fahey viewed her thyroid using sonogram imaging, he informed her that nodules were normal for someone over the age of 50, and that there was no reason to biopsy them. She stated that she did not see Dr. Fahey again after that visit.

Mrs. Dullea testified that in August of 2009, she had a fainting episode, which prompted her to visit Southside Hospital. There, she saw a Dr. Hito, who ordered an endocrine screening. Mrs. Dullea stated that Dr. Hito ordered a thyroid biopsy, which she underwent in September 2009 at Good Samaritan Hospital. That biopsy revealed that she had thyroid cancer. She testified that she had surgery to remove her thyroid and parathyroid glands on September 29, 2009, which effectively addressed her cancer. Upon questioning, Mrs. Dullea testified that no physician has ever told her that, had she been diagnosed earlier, she could have avoided a thyroidectomy, could have avoided radioactive iodine therapy, could have avoided a Stage III cancer diagnosis, or could have avoided the need for lifetime synthroid medication.

In her affirmation on behalf of defendants Dr. Fahey, Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, Dr. Martha Zeiger states that she is licensed to practice medicine in the State of Maryland, that she is board certified in general surgery, and that she specializes in endocrine surgery. She further states that she is the president-elect of the American Association of Endocrine Surgeon; that she is a professor of surgery, oncology, cellular and molecular medicine; that she is the chief of endocrine surgery at the Johns Hopkins University School of Medicine; and that, during the course of her career, she has assessed thousands of patients with thyroid nodules. She states she reviewed the pleadings in the instant matter, the bills of particulars, the pertinent medical records, and the parties' deposition transcripts. Dr. Zeiger opines that upon such review, as well as upon her own medical education and experience, the actions of defendants Dr. Fahey, Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, were at all times appropriate, were within the standard of care, and were not a contributing factor in any of plaintiffs' alleged injuries. Dr. Zeigler concludes that Dr. Fahey's unheeded recommendation Mrs. Dullea follow-up with him within four to six months was appropriate, and that no treatment by Dr. Fahey could have avoided her later tribulations.

Dr. Howard Kolodny supplied an affirmation on behalf of defendants Dr. Amico, Dr. Gioia, and Syosset Internal Medicine, stating that he is licensed to practice medicine in the State of New

York, that he is board certified in internal medicine and endocrinology, that he is a professor of clinical medicine at Albert Einstein College of Medicine, and that he has over 20 years of clinical treatment experience. He further states that he is fully familiar with the applicable standards of care and treatment as it relates to the evaluation of thyroid nodules and the diagnosis of thyroid malignancies.

Regarding the instant matter, Dr. Kolodny states that he reviewed the bills of particulars as to Dr. Amico, Syosset Internal Medicine, and Dr. Gioia, Mrs. Dullea's medical records, and the parties' deposition testimony. Dr. Kolodny opines that, based upon his review of the aforementioned materials and his years of experience, the medical treatment of Mrs. Dullea by those defendants was at all times in accordance with the accepted standards of medical practice. Further, Dr. Kolodny states such medical treatment was not a proximate cause of Mrs. Dullea's alleged injuries. Specifically, Dr. Kolodny states that each physician involved with Mrs. Dullea's medical treatment properly advised her, and that any delay in her thyroid cancer diagnosis was primarily the result of her own inaction. In conclusion, Dr. Kolodny opines that had defendants discovered Mrs. Dullea's thyroid cancer at an earlier time, the outcome would have been identical to that which she experienced. Dr. Kolodny notes that Mrs. Dullea's papillary thyroid carcinoma is a slow-growing malignancy and, in all likelihood, had not significantly progressed in the time between defendants' examinations of her, and the time it was discovered.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is well settled that "a physician may not be held liable for a mere error in professional judgment . . . it must be demonstrated that the physician's treatment decisions were something less than a professional medical determination" (*Davis v Patel*, 287 AD2d 479, 480, 731 NYS2d 204 [2d Dept 2001] [internal quotes and citations omitted]). A medical malpractice action, which is type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2)

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that such deviation or departure was a proximate cause of his or her injury or damage (*see Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]).

“[A] defendant moving for summary judgment must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries” (*Elmes v Yelon*, 140 AD3d 1009, 1010, 34 NYS3d 470 [2d Dept 2016] [internal quotation omitted]). And while summary judgment is not appropriate where the parties present conflicting expert opinions, an affidavit of a plaintiff’s expert that is conclusory or speculative is insufficient to defeat a defendant’s prima facie showing (*see Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]).

Here, defendants have established a prima facie case of entitlement to summary judgment through the expert affirmations of Drs. Zeiger and Kolodny (*see Elmes v Yelon, supra; see generally Alvarez v Prospect Hosp., supra*). Those affirmations support defendants’ contention that their treatment of Mrs. Dullea was at all times appropriate, and that no intervention by any defendant was capable of effecting an alternate outcome. Defendants having established a prima facie case, the burden shifted to plaintiffs to raise a triable issue (*see Vega v Restani Constr. Corp., supra*).

Plaintiffs, submitting no opposition to defendants’ motions, fail to raise a triable issue. Accordingly, the motions by defendants Dr. Fahey, Thomas J. Fahey, M.D., P.C., Weill Cornell Surgical Associates, and Cornell Surgical Associates, P.C., and the motion by defendants Dr. Amico, Dr. Gioia, and Syosset Internal Medicine for summary judgment dismissing the complaint against them are granted.

Dated:

July 3, 2017


 HON. WILLIAM B. REBOLINI, J.S.C.

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