

Colby v Nassau Radiologic Group, P.C.

2017 NY Slip Op 32211(U)

September 18, 2017

Supreme Court, Suffolk County

Docket Number: 12-8118

Judge: Joseph Farneti

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INDEX No. 12-8118

CAL. No. 15-00793MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-30-16
ADJ DATE 5-11-17
Mot. Seq. # 005 - MG
006 - MG; CASEDISP

-----X

MICHELE COLBY and GEORGE COLBY,

Plaintiffs,

- against -

NASSAU RADIOLOGIC GROUP, P.C., DAVID
KAPLAN, M.D., and FRANK MONTELEONE,
M.D.,

Defendants.

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Upon the following papers numbered 1 to 56 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-33; 34-56; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; it is,

ORDERED that the motion (seq. #005) of defendant Dr. Frank Monteleone, and the motion (seq. #006) of defendants Nassau Radiologic Group, P.C., and Dr. David Kaplan are consolidated for the purposes of this determination; and it is further

ORDERED that the unopposed motion of defendant Dr. Frank Monteleone for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the unopposed motion of defendants Nassau Radiologic Group, P.C., and Dr. David Kaplan for summary judgment dismissing the complaint against them is granted.

Plaintiff Michelle Colby commenced this action against defendants to recover damages for medical malpractice and lack of informed consent. Plaintiff's husband, George Colby, brought a derivative claim for loss of services and companionship. By bill of particulars, plaintiff alleges, among other things, that during the period from March 2004 through October 2012, Dr. Frank Monteleone, committed medical malpractice by failing to timely diagnose her with breast cancer. Plaintiff further alleges that defendant Nassau Radiological Group is vicariously liable for the conduct of Dr. Kaplan and was negligent in hiring and supervising its staff.

Dr. Monteleone now moves for summary judgment in his favor on the ground that his treatment of plaintiff did not depart from accepted medical practice, and was not a proximate cause of her injuries. Further, Dr. Monteleone argues that he cannot be liable for lack of informed consent. In support of the motion, Dr. Monteleone submits copies of the pleadings, the bill of particulars, expert affidavits, and the transcripts of the parties' deposition testimony. Plaintiffs do not oppose the motion.

At his deposition, Dr. Monteleone testified that he is board certified in general surgery and was working at Nassau Surgical Associates in 2004 when plaintiff presented on April 5, 2004. He testified that plaintiff was referred to Nassau Surgical Associates by Dr. Gary Levine, a gynecologist at Winthrop Hospital, to perform an examination on plaintiff's breasts, as her left one had a cyst in it. Dr. Monteleone testified that he reviewed the results of an ultrasound that was performed on plaintiff prior to presenting to his office, and the results did not indicate any abnormalities. He testified that he obtained plaintiff's medical history, performed a physical examination of plaintiff's breasts, and that her left breast had a palpable, tender, cyst near the areola less than .5 centimeters, and that he advised her to return in six months for an ultrasound.

Dr. Monteleone testified that plaintiff returned on October 4, 2004, that the results of the ultrasound were normal, and that he performed a physical examination of her breasts. He testified that the cyst did not change, and that plaintiff was in her fifth month of pregnancy, so he advised her to return six months after she delivered the baby. He testified that plaintiff presented to his private practice on August 22, 2005, as he no longer worked at Nassau Surgical Associates, that he obtained her medical history, and performed a physical examination of her breasts. Dr. Monteleone testified that he advised plaintiff to have a repeat ultrasound and follow up with her gynecologist; the sonogram indicated that the cyst was stable, and that there were no abnormalities. He testified that plaintiff presented on January 11, 2006 for a follow-up examination, that she was in her twelfth week of pregnancy, and he advised her to return five months after she delivered the baby. On January 27, 2007, plaintiff presented without complaint, and Dr. Monteleone testified that he performed a physical examination of her breasts, and he gave her a prescription for a baseline mammography, as she was 35 years old at the time. He testified that the results revealed a calcification in the upper quadrant of the left breast, and that the radiologist recommended that she undergo a stereotactic breast biopsy, the results of which were benign.

Dr. Monteleone testified that plaintiff returned on March 22, 2007, with complaints of palpable nodules on her left breast, and that he ordered a Magnetic Resonance Imaging (MRI) examination. He testified that he reviewed the report of the results which indicated that the nodules were benign. He testified that in August 2007, he recommended that she have a mammography, and that he reviewed the

report which was negative, although a cyst was revealed on a sonogram. Dr. Monteleone testified as to several similar visits and examinations that were performed up to November 2009, and according to his testimony, there were no abnormalities.

Dr. Monteleone testified that in November 2009, plaintiff presented with a cyst on her neck that was infected, and that his physician assistant, Grace Monteleone, treated it. He testified that in December 2009, he surgically removed the cyst which proved to be benign. He testified that plaintiff underwent a mammography of both of her breasts in September 2010, and the results revealed an irregular mass in her left breast and left axillary lymph node, which was suggestive of a malignancy. He testified further that a sonogram also revealed a solid mass in her left breast, and he provides the details of the size and position. Dr. Monteleone testified that he contacted plaintiff, and that she presented to his office on September 30, 2010, and he performed a core biopsy and discussed the results with her and her husband. He testified that he recommended to plaintiff that she undergo a bilateral mastectomy and reconstruction, and that he answered several questions, but that she did not return to his office for further treatment.

It is well-settled that 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 eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, who must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To impose liability upon a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a *prima facie* showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in his or her treatment of the patient, or that any departure was not a proximate cause of plaintiff's injuries (see *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 2002]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

Here, Dr. Monteleone submits an affidavit of Dr. Erna Busch-Devereaux, a board certified surgeon. Dr. Devereaux states in her affidavit that she is a practicing breast surgeon affiliated with

Huntington Hospital and North Shore University Hospital. She states that she has reviewed the medical and radiological records relating to Dr. Monteleone's treatment of plaintiff, the transcripts of the parties' deposition testimony, the pleadings, and the bill of particulars. Dr. Devereaux opines, with a reasonable degree of medical certainty, that Dr. Monteleone's treatment of plaintiff did not depart from accepted medical practice and was not a proximate cause of her injuries. She states that during the period from 2004 through 2010, Dr. Monteleone appropriately relied on the reports created by the radiologists who interpreted the studies at Nassau Radiological Group. She states that Dr. Monteleone properly acted on those findings in his care and treatment of plaintiff and was not the cause of plaintiff's injuries.

Dr. Devereaux opines that Dr. Monteleone ordered biopsies at appropriate times, that he ordered an MRI examination in April 2007 when he discovered a cyst in March 2007, and that the MRI images did not reveal any abnormalities which would require a biopsy in April 2007. She states further that the sonogram of September 2008 revealed a cyst measuring 4mm, and that the radiologist concluded that it was benign. She opines that there was no need to perform a biopsy in September 2008, and that in September 2009, the sonogram revealed that the cysts had resolved. Further, she opines that it was not the standard of care in 2009 to order a mammography, and that Dr. Monteleone did not depart from acceptable medical practice by not ordering one at that time; rather ordering it in 2010 was within the appropriate standard of care. Dr. Devereaux opines that plaintiff was not at a high risk for breast cancer during the years 2004 to 2010, as she was young, she was in good health, and there was no first degree family history of breast cancer. She opines that the presence of fibrocystic breasts does not indicate or create a risk for cancer. She opines that there was no evidence of a malignancy based on the physical examinations and ultrasound results, and that neither Dr. Monteleone nor plaintiff's gynecologist detected any palpable masses. She opines that even if an MRI examination was performed in September 2009, the mass would not have been revealed, as plaintiff's type of cancer is an extremely aggressive form which only takes a few months to grow to a detectable size. Dr. Devereaux states that in June 2010, Dr. Monteleone did not palpate any masses in plaintiff's left breast, and that she presented with no complaints regarding her breasts.

Dr. Monteleone also submits his own affidavit as an expert opinion. "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" (*Lau v Wan*, 93 AD 3d 763, 940 NYS2d 662 [2d Dept 2012]; *Micciola v Sacchi*, 36 AD3d 869, 828 NYS2d 572 [2d Dept 2007]). Here, Dr. Monteleone's affidavit comports with Dr. Devereaux's opinion set forth in her affidavit and with his deposition testimony. He opines, with a reasonable degree of medical certainty, that no further imaging studies or biopsies were indicated in September 2009, as the breast ultrasound results were negative, she was under the age of 40, and that she previously had a mammography. He states that Dr. Kaplan's review of the September 2009 sonogram demonstrated that there were no lumps, masses, cysts or nodules present which would require further studies.

Further submitted is the affirmation of Dr. Daphne Roitberg, a board certified radiologist. In her affirmation, Dr. Roitberg states that she reviewed all of the films regarding plaintiff at Nassau Radiological Group, and that the images of the September 16, 2009 breast ultrasound were technically

sufficient. She opines, with a reasonable degree of medical certainty, that her interpretation of the sonogram mimics Dr. Kaplan's impression documented in his report, and concludes that there was no indication of breast cancer.

Dr. Monteleone's submissions establish, *prima facie*, that his treatment of plaintiff was in accord with accepted medical practice and was not a cause of plaintiff's injuries. Additionally, Dr. Monteleone has established, *prima facie*, that liability cannot be imposed for lack of informed consent.

The elements of a cause of action for lack of informed consent are: "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). For the claim to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of a plaintiff's physical integrity (*Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Lack of informed consent does not apply to injuries that allegedly result from a failure to undertake a procedure (*id.*). As the alleged injuries are alleged to have occurred from the failure to diagnose, lack of informed consent is inapplicable. As no opposition papers were submitted by plaintiff, the motion of Dr. Monteleone for summary judgment dismissing the complaint against him is granted.

Regarding the motion for summary judgment by defendants Dr. Mark Kaplan and Nassau Radiological Group, defendants submit the transcript of deposition testimony of Dr. Kaplan and the affirmation of Dr. Daphne Roitberg, among other things. Dr. Kaplan testified that he is board certified in diagnostic radiology, and that he has worked at Nassau Radiological Group since 1997. He testified that plaintiff presented in September 2009 with a prescription for a routine bilateral mammography and ultrasound, and that she filled out a mammography information sheet and informed Dr. Kaplan that she had a benign biopsy in 2007. Dr. Kaplan testified that the sonographer performed an ultrasound on plaintiff's breast on September 16, 2009 and that he obtained 14 images from the study. He testified that he read the results of the study on September 21, 2007, that seven images were obtained from each breast, and that the study was technically adequate. He testified that he compared the study with the sonogram from 2008, and that he found no evidence of a malignancy. He testified that the sonogram from 2008 revealed small, simple cysts, which are very common, and that such cysts come and go. He testified that there was no evidence of any cysts in the 2009 sonogram, and that he did not recommend that any further studies be conducted nor was a mammogram required by the standards under the American College of Radiology.

In her affirmation, Dr. Roitberg states that she reviewed all of the films regarding plaintiff at Nassau Radiological Group, and that the images of the September 16, 2009 breast ultrasound were technically sufficient. She opines, with a reasonable degree of medical certainty, that her interpretation

of the sonogram mimics Dr. Kaplan's impression documented in his report of the September 16, 2009 examination. She states that the technician scanned both breasts and took standard views which included seven images of each breast, and that the technician performed the ultrasound in accordance with the standard of care as it existed in 2009. Dr. Roitberg opines, with a reasonable degree of medical certainty, that the images produced were technically sufficient, and that there was no abnormal acoustical shadowing, nor were any cystic or solid lesions identified. She states that she agrees with Dr. Kaplan's report, which indicates that there were no suspicious findings and that there was no evidence of a malignancy. Dr. Roitberg opines, with a reasonable degree of medical certainty, that no further studies or biopsies were indicated based on the results of the September 16, 2009 sonogram, and that neither Dr. Kaplan nor Nassau Radiological Group departed from accepted radiological practice or caused plaintiff's injuries.

The aforementioned submissions establish, *prima facie*, that defendants are entitled to summary judgment. As there is no opposition to the motion, defendants Dr. Kaplan and Nassau Radiological Group are granted summary judgment, and the complaint is dismissed as against them.

Dated: September 18, 2017


Hon. Joseph Farneti
Acting Justice Supreme Court

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