

Caruso v Wultz
2018 NY Slip Op 30524(U)
March 23, 2018
Supreme Court, New York County
Docket Number: 805380/2014
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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SANDRA CARUSO and MICHAEL CARUSO,

Index 805380/2014
Motion Seq. 001

DECISION & ORDER

Plaintiffs,

-against-

CHRISTINA WELTZ, M.D., AUSTIN ABRAMSON,
M.D., GEORGE HERMANN, M.D., NEESHA S. PATEL, M.D.
DUBIN BREAST CENTER, and MOUNT SINAI HOSPITAL

Defendants
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GEORGE J. SILVER, J.S.C.:

In this medical malpractice action plaintiff Sandra Caruso (“plaintiff”) alleges negligence by defendants Austin Abramson M.D., Christina Weltz, M.D., George Hermann, M.D., Neesha S. Patel, M.D., Dubin Breast Center, and Mount Sinai Hospital (collectively “defendants”) from September 2011 through February 24, 2014, during which plaintiff states that defendants singularly, and/or in combination, failed to diagnose her breast cancer. Defendants move for summary judgment pursuant to CPLR § 3212, arguing that plaintiff cannot prove either that defendants deviated from good and acceptable medical practice or that anything defendants did or did not do proximately caused or contributed to plaintiff’s alleged injuries. Defendants further submit, pursuant to CPLR § 3211, that plaintiff’s second cause of action for lack of informed consent fails to state a claim, and that plaintiff’s third cause of action for plaintiff Michael Caruso’s derivative damages fails to state claim. Finally, defendants state that plaintiff’s claims against defendants Weltz and Patel are time-barred pursuant to CPLR § 214-a.

In opposition, plaintiff argues that plaintiff’s experts’ affidavits set forth fact-specific opinions that defendants’ failure to properly diagnose plaintiff deviated from good and acceptable

standards of care. Plaintiff's experts further aver that defendants' actions, singularly and in combination, were a proximate cause and/or substantial contributing factor in causing plaintiff to sustain the unfettered progression of a palpable mass in her right breast that ultimately resulted in a breast cancer diagnosis.

BACKGROUND

Plaintiff first discovered a crescent-shaped lump on her right breast on September 17, 2011. Shortly thereafter, she notified defendant Abramson by email. At the time, defendant Abramson had last seen plaintiff in his office on September 13, 2010. During an exam performed at that visit, plaintiff's breasts were symmetrical with no dominant lesions, no nipple discharge, and no masses in the axilla. A day later, defendant Abramson faxed a copy of his mammogram report to the Westchester Medical Group. His report noted that he had found no mammographic evidence of malignancy.

In response to plaintiff's e-mail, defendant Abramson emailed her back and referred her to defendant Wertz, a breast surgeon. On September 22, 2011, plaintiff underwent a breast examination by defendant Wertz. In a progress note in the Mount Sinai records, defendant Wertz notes that plaintiff is a 41-year-old woman with a history of bilateral mastopexy (breast lift) performed in February 2010 who presented on September 22, 2011 for evaluation of her right breast mass that she had detected on self-exam, one week ago, which defendant Wertz described as a soft crescent-shaped bailable mass that she assumed was a cyst, which had since resolved. Upon clinical exam, defendant Wertz noted that plaintiff's breasts were visually normal, no abnormalities of the skin, nipple or areola, nor any masses in either breast. She also noted well-healed scars from a plastic surgery mammoplasty procedure.

Defendant Wertz subsequently requisitioned a mammogram, which was performed and interpreted by a radiologist, defendant Patel, on September 23, 2011. At the time of this mammogram, there was no suspicious underlying mass. Nevertheless, defendant Patel recommended bilateral breast ultrasounds for a more complete evaluation. These were done on September 26, 2011 and also interpreted by defendant Patel. No abnormality was visualized.

Plaintiff's next visit to defendant Abramson was on September 28, 2011. Defendant Abramson performed a physical exam that was ordinary and inconspicuous. Plaintiff was to return to defendant Abramson in one year. A bilateral breast ultrasound was performed on April 27, 2012, and was interpreted by defendant Hermann, a radiologist. There was no sign of malignancy when compared to the previous study.

The next visit to defendant Abramson was on January 9, 2013. Defendant Abramson noted that the physical exam was once again ordinary and inconspicuous. He also noted that a mammogram from September 2011 had been negative. A breast sonogram in April 2012 had been normal. Plaintiff was to follow up in one year.

On February 22, 2013, a routine bilateral screening mammogram was done for defendant Abramson and interpreted by defendant Patel. There were no significant findings and the impression was a benign exam.

Plaintiff's next office visit to defendant Abramson occurred a year later, on February 24, 2014. At that appointment, defendant Abramson palpated a 1.5 cm firm mobile mass in plaintiff's right breast. Based on his finding, defendant Abramson sent plaintiff to New York Medical Imaging for a mammogram and sonogram that same day. A mammogram and sonogram were subsequently performed, revealing a 1.7 cm solid mass and an adjacent 1 cm lesion suspicious for malignancy. Plaintiff was subsequently diagnosed with breast cancer.

ARGUMENTS

Defendants argue that judgment in their favor is warranted because plaintiff has failed to show that they were negligent and that this negligence was the proximate cause of her injury. Defendants further contend that plaintiff cannot maintain a cause of action for lack of informed consent, because plaintiff has failed to show that there was a physical violation of the integrity of plaintiff's body. Without such a violation or invasion, defendants submit that a cause of action for lack of informed consent cannot be maintained. Defendants also aver that in order for co-plaintiff Michael Caruso to maintain a derivative cause of action for damages based on injuries to his wife, plaintiff, his wife must have a valid cause of action for personal injury to herself. Assuming that plaintiff's claims are dismissed, defendants submit that plaintiff Michael Caruso's claims must be dismissed as a matter of law. Finally, defendants aver that co-plaintiff failed to commence a medical malpractice suit against defendants Weltz and Patel within the requisite two years and six-months statute of limitation.

In support of the instant motion, defendants have submitted the expert affidavit of Obstetrician/Gynecologist Gary Mucciolo, M.D., who opines that there was no negligence on the part of defendants Weltz and Abramson in their treatment of plaintiff, and that no act on the part of these defendants caused or contributed to her alleged injury. Defendants have also submitted the expert affidavit of breast surgeon Dana O. Monaco, M.D., who concurs with Dr. Mucciolo's opinion that there was no negligence on the part of defendants Weltz and Abramson, and that no act on the part of these defendants caused or contributed to plaintiff's alleged injury. Significantly, defendants underscore Dr. Monaco's assessment that the nature of the cancer that plaintiff was diagnosed with in February 2014 was such that it could not have been present in September 2011.

Defendants have also submitted the expert affidavit of radiologist Thomas M. Kolb, M.D., who opines that there was no negligence in the interpretation of the mammograms and ultrasounds in issue in this lawsuit, and that no act on the part of defendant radiologists Hermann or Patel caused or contributed to any alleged injury to plaintiff. Dr. Kolb has reviewed and compared all of the films in question and attests that there was nothing suspicious on any of the films prior to February 2014 at which time the cancer was diagnosed.

Defendants have also submitted the affidavits of defendants Wertz, Abramson, Hermann, and Patel. Each of these defendants recounts his or her care of plaintiff and attests that all of the care rendered to plaintiff by himself or herself was rendered in accordance with good and accepted medical practice or radiological practice.

Defendants further argue that there is no allegation in the case that any specific act or omission by any member of the staff of defendant Mount Sinai Hospital other than the individual defendants resulted in any injury to the plaintiff. As such, defendants argue that if the individual defendants are found to be entitled to summary judgment, then the same must be granted to defendant Mount Sinai Hospital in the absence of any specific claims of negligence against it.

Moreover, defendants emphasize that it is well-settled that for a plaintiff to recover damages based on the failure to obtain an informed consent, she must establish that there was an unconsented affirmative violation of her physical integrity (*see Janeczko v. Russell*, 46 D3d 324, N.Y.S.2d 44 [1st Dept. 2007])["A failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that “ involve[s] invasion or disruption of the integrity of the body”] *see also* Public Health Law § 2805-d[2][b]; *Sample v.*

Levada, 8 AD3d 465 [2004]; *Schel v. Roth*, 242 AD2d 697, 698 [1997]). Defendants argue that the instant case involves an alleged failure to diagnose breast cancer. Absent from the pleadings, in defendants' estimation, is any allegation of any violation of the plaintiff's bodily integrity.

Defendants further submit that Plaintiff Michael Caruso's cause of action against the defendants for loss of services, society, companionship and consortium is entirely derivative of his wife's claims, and therefore must be dismissed as a matter of law upon dismissal of plaintiff's causes of action (*see Maddox v. City of New York*, 108 AD2d 42 [2d Dept 1985], *aff'd* 66 N.Y.2d 270 [1985]).

Finally, defendants submit that defendant Weltz saw plaintiff only on September 22, 2011, as she attests in her affidavit. For any action against her to be timely, the summons and complaint had to have been filed within two years and six months thereafter, or not later than March 22, 2014. This action was commenced by the filing of the summons and complaint more than three years later, on October 21, 2014. Inasmuch as the action as to defendant Weltz was not timely commenced in accordance with CPLR § 214-a, defendants argue that it must be dismissed as time-barred.

Similarly, defendants highlight that defendant Patel interpreted mammograms on September 23, 2011 and an ultrasound on September 26, 2011, again more than three years prior to the filing of the summons and complaint on October 21, 2014. For any action against her to be timely, the summons and complaint had to have been filed no later than March 26, 2014, which it was not.

Although defendant Patel interpreted a routine mammogram on February 22, 2013, defendants argue that this act did not constitute continuous treatment such as to extend the statute of limitations. Indeed, defendants submit that this mammogram was performed at the direction of

defendant Abramson in conjunction with the plaintiff's routine annual physical examination. Where diagnostic services are discrete and intermittent, they do not constitute continuous treatment (*see Massie v. Crawford*, 78 NY2d 516 [1991][“Routine examinations of a patient who appears to be in good health or diagnostic examinations, even when conducted repeatedly over a period of time, are not ‘a course of treatment’”]).

Defendants argue that defendant Patel's interpretation of the routine screening mammogram on February 22, 2013 was a discrete exam taken only to ascertain the state of her condition on her return to defendant Abramson for her routine annual examination. As such, defendants submit that it does not constitute continuous treatment such as to extend the statute of limitations, thereby making the claims against defendant Patel time-barred.

In opposition, plaintiff submits that defendants' experts' findings are not sustained by the evidence, much of which plaintiff argues the experts overlooked, or failed to analyze. Indeed, plaintiff asserts that the affidavits of Dr. Mucciolo, Dr. Monaco, and Dr. Kolb are conclusory and are not related to the radiologist reports, the medical records and the deposition testimony. With respect to the deposition testimony, plaintiff specifically avers that she repeatedly told defendants that the “lump” for which she sought out treatment was always present. As such, the defense experts “opinions” are unreliable, invalid and should not be considered. In support of this position, plaintiff refers to plaintiff's expert affidavit wherein it is observed that “it is preposterous for the defendants to take the position that the lump resolved especially in light of the fact that according to plaintiff's testimony, that the lump never went away.” In plaintiff's expert's view, the presence of a visible mass on plaintiff's body that escaped defendants notice and consequently was not noted by defendants' experts, invalidates defendants' motion. Plaintiff further submits that because the

defendant physicians are interested witnesses, their credibility should rightfully be questioned by this court.

Finally, plaintiff argues that defendants' contention that plaintiffs' claims against defendants Weltz and Patel are time-barred is unsupported by the record. Contrary to defendants' position, plaintiff submits that defendant Weltz had contact with plaintiff after requisitioning a mammogram, even if that contact did not include physical contact. Indeed, plaintiff submits that defendant Weltz received a report of an ultrasound that she shared with plaintiff on April 27, 2012, and reviewed as later as November 20, 2013. With respect to defendant Patel, plaintiff argues that defendant Patel cannot limit her liability to events in April 2012 based on the fact that plaintiff was requisitioned for a follow-up ultrasound that was interpreted by another physician. Relying on *Ganavolskava v. V.I. P. Medical Associates*, 221 AD2d 59, 62-63 (1st Dept. 1996), plaintiff argues that "continuing treatment by one will be imputed to the other in the presence of an agency relationship." In plaintiff's view, after an April 27, 2012 ultrasound, defendant Patel continued her participation in the diagnostic care and treatment of plaintiff, thereby obviating any argument that plaintiff's claims against defendant Patel are time-barred.

In reply, defendants note plaintiff's failure to oppose that portion of defendants' motion asking this court to dismiss plaintiff's second cause of action for lack of informed consent. Defendants also note plaintiff's lack of opposition to defendant Mount Sinai Hospital's argument that in the absence of any specific claims against it, it is entitled to summary judgment if the individual physicians are granted summary judgment. Defendants also observe plaintiff's failure to discredit their argument that if plaintiff's claim for personal injury is dismissed, co-plaintiff Michael Caruso's derivative claim must also be dismissed.

Defendants also argue in reply that plaintiff's opposition papers, taken as a whole, do not raise a triable issue of fact sufficient to defeat summary judgment for each defendant. Defendants aver that plaintiff's assertion that she continually complained to defendants that she felt a lump in her breast after first having undergone examinations in September 2011 is not supported by credible evidence. Notably, defendants mention that as a radiologist, defendant Patel only interpreted the September 2011 mammograms and ultrasound, and did not physically examine plaintiff. Furthermore, defendants note that in her personal affidavit, plaintiff contends that when she went to defendant Wertz's office, she "was unable to feel the lump" but she "made it very clear to Dr. Wertz that the lump was not gone, but simply difficult to find." Defendants argue that plaintiff does not explain how she knew the lump was not gone, notwithstanding that she could not find it, and notwithstanding that she had had a lump several years earlier that had spontaneously resolved. Furthermore, even if her concerns were voiced, defendants note that plaintiff cannot account for defendants Abramson and Wertz's inability to find a mass upon physical examination as well as defendant Patel's failure to observe a mass on the mammogram results that she interpreted. Moreover, defendants contend that plaintiff's statement in her affidavit in opposition to the motion for summary judgment that "at all of my appointments I did tell my physicians that the lump was still present, but that sometimes it was difficult to find," is contradicted by her deposition testimony. According to her deposition testimony, plaintiff did not remember whether or not she discussed a complaint about an on-going lump at her one and only office visit with defendant Abramson between September 2011 and February 2014. Because plaintiff's experts' findings are predicated on plaintiff's contradictory statements about the presence of a lump on her breast, defendants reiterate that the findings are discredited and should be discounted by this court.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 AD3d at 195). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once defendant makes a prima facie showing, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" *Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dep't 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

However, the First Department noted in *Oestreich v. Present, et al.*, 50 AD3d 522 [1st Dept. 2008]) that where a plaintiff's expert opinion is based on erroneous facts, such an opinion does not raise a triable issue of fact. This principle has been noted in several cases (*see Ramirez v. Columbia-Presbyterian Medical Center*, 16 AD3d 238 [1st Dept. 2005][plaintiffs expert affirmation was flawed by its misstatements of the evidence and its unsupported assertions]; *Wong v. Goldbaum*, 23 AD3d 277 [1st Dept. 2005][expert's opinion has no probative force where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation]; *Coronel v. New York City Health and Hospitals Corporation*, 47 AD3d 456 [1st Dept. 2008][plaintiffs failed to raise a triable issue of fact as their expert's affirmation set forth general conclusions, misstatements of evidence and unsupported assertions, which were insufficient to demonstrate that defendants failed to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiffs injuries]).

Moreover, as defendants note, affidavits in support of or in opposition to motions for summary judgment cannot be "tailored" to avoid the consequences of prior deposition testimony. In *Sunshine Care Corn. v. Warrick*, 100 AD3d 981 [2d Dept. 2012], the Second Department reversed a trial court's findings where the claims made by the defendant in her affidavit in opposition to the plaintiff's motion for summary judgment were "contrary to her prior deposition testimony, and we reject them as an attempt to create feigned issues of fact designed to avoid the consequences of the earlier testimony." Similarly, in *Soussi v. Gogin*, 87 AD3d 580 (2nd Dept. 2011), the Second Department upheld the trial court's granting of summary judgment to one of the defendants, noting that "the plaintiff's affidavit, in which she contradicted her deposition testimony ... was an attempt to raise a feigned issue of fact ... and, thus, insufficient to defeat summary judgment."

Here, defendant set forth a prima facie case in favor of dismissal, as evidenced by the submission of defendants' medical records, defendants' personal affidavits attesting to their own treatment of plaintiff and further attesting that their care was in accordance with good and acceptable medical practice. Additionally, defendants' experts' affidavits each attest to the good care of defendants within the requisite fields of expertise, and provide support for the contention that nothing each defendant did or did not do caused any injury to plaintiff. The affidavits are detailed and predicated upon ample evidence within the record. As defendants have made prima facie showing, the burden shifts to plaintiff.

To defeat summary judgment, plaintiff has produced a personal affidavit in which she contends that she continued to feel a lump in her breast after having undergone examinations by defendant Abramson and defendant Wertz in September 2011. This affidavit is critical to plaintiff's argument, as it informs plaintiff's claim that defendants ignored or incompetently neglected to find a lump on her breast between September 2011 and February 2014. Plaintiff's self-serving affidavit, however, is contradicted by her deposition testimony, wherein plaintiff did not remember whether or not she discussed a complaint about an on-going lump at her only follow-up office visit with defendant Abramson between September 2011 and February 2014. As such, plaintiff's affidavit is "tailored" to avoid the consequences of her prior deposition testimony (*Sunshine, supra*, 100 AD3d 981). Notwithstanding plaintiff's affidavit, no other evidence in the record supports the contention either that plaintiff's lump remained or that plaintiff continued to complain about the lump to her physicians. Rather, there is ample evidence to the contrary. Notably, plaintiff could not have complained about her lump to some of the physicians, because those physicians merely interpreted the results of plaintiff's mammogram, and did not perform physical examinations. For instance, defendant Patel only interpreted the September 2011

mammograms and ultrasound, and did not physically examine plaintiff. The same applies to defendant Hermann. Additionally, defendants Abramson and Wertz's inability to find a mass upon physical examination of plaintiff is supported by mammograms they requisitioned that came to the conclusion that there was no mass on plaintiff's breast. Because plaintiff's experts' findings are predicated on statements about the presence of a lump on her breast that is unsupported by evidence in the record, such findings do not raise a triable issue of fact (*Oestreich, supra*, 50 AD3d 522).

Separately, plaintiff's claims to recover damages based on the failure to obtain informed consent are without merit, as plaintiff has not established that there was an unconsented affirmative violation of her physical integrity (*see Janeczko, supra*, 46 AD3d 324).

Moreover, as plaintiff's claims lack merit and fail to raise issues of triable fact, co-plaintiff Michael Caruso cannot maintain a derivative cause of action for damages based on injuries to his wife (*see Maddox v. City of New York*, 108 AD2d 42 [2d Dept 1985], *aff'd* 66 N.Y.2d 270 [1985]).

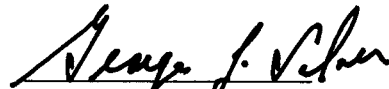
Similarly, as summary judgment is warranted as to the individual defendants, and as plaintiff has failed to make separate and specific claims against defendant Mount Sinai Hospital, summary judgment is warranted as to defendant Mount Sinai Hospital.

As summary judgment is warranted, the court will not address defendants' additional argument that plaintiff's claims as to defendants Wertz and Patel are time-barred.

Based on the foregoing, it is hereby ORDERED that defendants' motion for summary judgment is GRANTED in its entirety, and all claims in this action are dismissed. The Clerk is directed to enter judgment in favor of defendants.

This constitutes the decision and order of the court.

March 23, 2018


HON. GEORGE J. SILVER