

**Giardina v Lago**

2018 NY Slip Op 30822(U)

May 2, 2018

Supreme Court, Suffolk County

Docket Number: 13-25269

Judge: Thomas F. Whelan

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CAL. No. 17-25269

**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 1-5-18 (008)  
MOTION DATE 1-5-18 (009)  
ADJ. DATE 3-5-18  
Mot. Seq. # 008 MotD  
# 009 MotD

-----X  
LEO GIARDINA as Administrator of the Estate  
of LAURA GIARDINA, Deceased,  
  
Plaintiff,  
  
- against -  
  
FRANCISCO LAGO, ADVANCED PODIATRY  
OF HUNTINGTON, GERARD FURST and  
JOHN T. MATHER MEMORIAL HOSPITAL  
WOUND TREATMENT CENTER,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 47 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 39; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 40 - 43; Replying Affidavits and supporting papers 44 - 45; 46 - 47; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (seq. 008) by defendant John T. Mather Memorial of Port Jefferson, New York, Inc., and the motion (seq. 009) by defendant Gerard Furst are consolidated for purposes of this determination; and it is

**ORDERED** that the motion by defendant John T. Mather Memorial Hospital of Port Jefferson, New York, Inc., for summary judgment its favor dismissing the complaint asserted against it is granted as set forth herein, and is otherwise denied; and it is further

**ORDERED** that the motion by defendant Gerard Furst for summary judgment in his favor dismissing the complaint asserted against him is granted as set forth herein, and is otherwise denied.

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Laura Giardina commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice, *inter alia*, in failing to timely diagnose and properly treat squamous cell carcinoma in her right foot, which ultimately led to surgery, chemotherapy, radiation, deprivation of a cure, metastasis and death. Plaintiff also alleged causes of action for failing to obtain informed consent, and negligent hiring or retention. On March 25, 2014, Laura Giardina passed away. Leo Giardina, as administrator of her estate, was substituted as plaintiff herein, and the complaint was amended to include a cause of action for wrongful death. Issue has been joined, discovery is complete, and a note of issue has been filed. Prior to the filing of the note of issue defendants Dr. Francisco Lago and Advanced Podiatry of Huntington entered into a settlement with plaintiff and the matter was discontinued against them.

John T. Mather Memorial Hospital of Port Jefferson, New York, Inc., i/s/a John T. Mather Memorial Hospital Wound Care Treatment Center (hereinafter "John T. Mather"), now moves for summary judgment in its favor dismissing the complaint asserted against it. In support of the motion, John T. Mather submits, among other things, copies of the pleadings; the deposition transcripts of Leo Giardina, Gerard Furst, Maria Giardina, and James Giardina; decedent's medical records; and the expert affirmations of Michael J. Trepal, D.P.M. and Paul Bader, M.D. Gerard Furst, D.P.M., also moves for summary judgment in his favor dismissing the complaint asserted against him. In support of the motion, he submits an expert affirmations of Edwin Wolf, D.P.M., and Santo M. DiFino, M.D.; copies of the pleadings; his own deposition transcript; and decedent's medical records. In opposition to the motions, plaintiff submit affirmations from Adam Cirlincione, D.P.M., and an expert oncologist.

On September 12, 2005, decedent was seen by Dr. Arthur Cohen, a podiatrist, for complaints related to her right foot. Dr. Cohen's records indicate that decedent's foot was disfigured from arthritis, and that she had hyperkeratotic lesions on the the ball of her foot. On January 24, 2008, decedent was evaluated by Dr. Lago. Dr. Lago's records indicate that decedent had contractures of her second to fifth digits at the PIP joint, prominence at the plantar forefoot at the second, third and fourth submetatarsal with hyperkeratotic lesions in that area. Dr. Lago's impression was capsulitis, a condition in which ligaments have become inflamed, and he performed a debridement. Dr. Lago treated plaintiff monthly up until November 28, 2012.

Medical records reveal that on November 29, 2012, decedent, who was then 72 years old, was seen at John T. Mather and evaluated by Dr. Roque. Dr. Lago referred decedent to John T. Mather to evaluate a right second metatarsal head ulceration. Dr. Roque's noted that decedent had a history of hip replacement, surgery for a fractured femur, staph infection of her right thigh, osteomyelitis, and rheumatoid arthritis. Dr. Roque treated decedent's wound with Silvadene cream, prescribed an offloading device to relieve pressure on the foot, recommended X-rays and referred decedent to Dr. Furst.

On December 6, 2012, decedent was seen by Dr. Furst, who testified that he is a board-certified, attending podiatrist and not an employee of John T. Mather. Dr. Furst testified that decedent had a wound of the second metatarsal of her right foot that extended through the subcutaneous tissue with no signs of secondary infection. Medical records indicate a severe prominence of all metatarsal heads bilaterally with diminished and displacement of the plantar fat pad. X-rays showed no signs of osteomyelitis. Dr. Furst testified he discontinued the Silvadene cream and ordered daily wound care. He recommended surgical metatarsal resection, which decedent declined. Medical records indicate that on December 13, 2012,

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December 20, 2012, January 3, 2013, January 17, 2013, January 31, 2013, and February 21, 2013, Dr. Furst debrided, cleaned and dressed the wound, and issued wound care orders.

At an examination of decedent conducted on March 14, 2013, Dr. Furst noted an increased granulation of the wound and no sign of infection. His assessment was rheumatoid arthritis. On March 28, 2013, Dr. Furst again debrided the wound and recommended surgery, which decedent declined; notes of an examination on April 11, 2013 indicate the wound was not infected and was debrided. On April 25, 2013, Dr. Furst noted that the wound had changed in appearance and that there was an excessive growth extending medially. Dr. Furst testified that he performed a punch biopsy of the lesion. The biopsy report, discussed by the pathologist with Dr. Furst on April 29, 2013, indicated well-differentiated squamous cell carcinoma. Decedent was advised of the biopsy results by Dr. Furst on May 9, 2013.

On June 4, 2013, decedent treated at Sloan-Kettering Cancer Center. An MRI on June 10, 2013, of decedent's foot revealed a 5.8 cm by 3.9 cm by 7.4 cm soft tissue mass in the plantar aspect of her forefoot with destructive bone and bone marrow edema. A CT scan on June 17, 2013, revealed right deep inguinal lymphadenopathy with two nodes measuring 1 cm or more. On June 30, 2013, decedent underwent a right distal foot amputation of all five digits and a right inguinal node dissection. Surgical pathology revealed well to moderately differentiated squamous cell carcinoma of the foot ulcerated, measuring 9 cm, involving the dermis, subcutaneous adipose tissue, skeletal muscle and bone. Two of 13 lymph nodes were positive for metastatic cancer. On March 24, 2014, decedent passed away.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the 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 triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med.*

*Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (see *Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, John T. Mather and Dr. Furst have established a prima facie case of entitlement to summary judgment dismissing the complaint. John T. Mather's expert Michael J. Trepal, a board-certified podiatrist, opines that the care provided by John T. Mather was appropriate and met the accepted standards of podiatric and medical care. There is no indication in the record that decedent was treated by a staff physician's assistant, nurse's aide, radiologist, surgeon or oncologist during her treatment at John T. Mather. Dr. Trepal opines that the care rendered by the nurses at John T. Mather met the accepted standard of care. Dr. Trepal also opines that prior to March 14, 2013, a biopsy of decedent's wound was not indicated, and the failure to perform a biopsy was not a deviation or departure of the accepted standard of care. Paul Bader, M.D., a board-certified oncologist, opines that the alleged approximate five month delay in diagnosing decedent's cancer did not change the staging of the cancer, her prognosis or outcome. He specifically opines that if a biopsy, MRI or other radiological study had been performed earlier as part of decedent's treatment she still would have needed surgery, radiation and chemotherapy and would have been at high risk for reoccurrence, and the outcome would have been the same.

Dr. Furst's expert, Edwin Wolf, D.P.M., opines that it was not a departure the standard of care not to perform a biopsy on March 14, 2013, March 28, 2013, and April 11, 2013. He opines that the treatment rendered by Dr. Furst to decedent was at all times consistent with accepted standards of care for podiatry. He opines that Dr. Furst was not negligent in his care, testing, evaluation, diagnosis, treatment and management of decedent, and that informed consent was obtained to the extent that it was required. Santo M. DiFino, M.D., Dr. Furst's board-certified oncologist, opines decedent had metastatic cancer prior to her first visit to Dr. Furst on December 6, 2012, based upon the size of the inguinal lymph nodes and the extra nodal extension documented on June 20, 2013. He opines that a biopsy, MRI or referral to another practitioner would have led to the same treatment Dr. Furst provided decedent including surgery, radiation, and chemotherapy, and that decedent's prognosis would be the same. He specifically opines that decedent was not deprived of a cure, as the cancer was already metastatic and had spread beyond the foot and an earlier diagnosis would not change the prognosis or outcome. Dr. DiFino also opines that Dr. Furst's care and treatment of decedent was not the proximate cause of decedent's injuries.

In opposition, plaintiff has raised a triable issue of fact through the expert affirmation of podiatrist Adam Cirlincione and of an expert oncologist. Dr. Cirlincione avers that the differential diagnosis of a chronic lesion that is ulcerated includes carcinoma. He opines that the failure to order an MRI in December of 2012 was a departure from the standard of good and accepted podiatric practice. Plaintiff's oncologist opines that the lesion had not spread to the lymph nodes prior to February 2013, and that patients with lesions that have not spread have greater long term survival rates. He concludes that the delay in performing a biopsy was the proximate cause of the tumor progressing from a small squamous cell carcinoma with good

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prognosis to a metastatic squamous cell carcinoma with lymph node involvement which ultimately caused decedent's death.


Plaintiff's submissions raise a triable issue as to whether Dr. Furst deviated from accepted podiatric practice in failing to timely order an MRI or perform a biopsy. Accordingly, as to plaintiff's first cause of action with regard to medical malpractice, the defendants' motions are denied.

As to the second cause of action for lack of informed consent, Public Health Law § 2805-d (1) defines lack of informed consent as "the failure of the person providing the professional treatment \* \* \* to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make knowledgeable evaluation." To establish a medical malpractice claim based on lack of informed consent, a plaintiff must show (1) that the defendant failed to disclose alternatives to the proposed treatment and the foreseeable risks associated with such treatment, that a reasonable medical practitioner under similar circumstances would have disclosed, (2) that a reasonably prudent person in the patient's 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 (*see* Public Health Law §2805-d [3]; *Manning v Brookhaven Mem. Hosp. Med. Ctr.*, 11 AD3d 518, 782 NYS2d 833 [2d Dept 2004]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Foote v Rajadhyax*, 268 AD2d 745, 702 NYS2d 153 [3d Dept 2000]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Mondo v Ellstein*, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]). As plaintiff has not raised any issue of fact, the cause of action is dismissed as to both defendants.

Plaintiff's third cause of action alleges negligent hiring, negligent supervision, negligent retention, abandonment, and failure to enforce any policy or protocol relating to the care and treatment rendered by John T. Mather nurses, affiliated physicians, and employees. Defendants have established their prima facie entitlement to dismissal of this cause of action. In opposition, plaintiff has failed to raise an issue of fact as to this cause of action. Accordingly, the third cause of action of plaintiff's amended complaint is dismissed.

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 5/2/18

  
THOMAS F. WHELAN, J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION