

Evans v Esposito
2018 NY Slip Op 32113(U)
July 12, 2018
Supreme Court, Bronx County
Docket Number: 21144/2011
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A

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Joyce Evans,

Plaintiff,

- against -

INDEX NO: 21144/2011

Darren Esposito, M.D., Advantage Care Medicine, P.C.,
Deborah J. White, M.D., Muhammad Anwar, M.D.,
Jeffrey Roberts, M.D., Montefiore Medical Center
Weiler/Einstein Division, The Weiler Hospital, Albert
Einstein Hospital, and Akinori Adachi, M.D.;

DECISION/ORDER

Defendant(s).

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HON. LEWIS J. LUBELL

Defendants Deborah J. White, M.D. (White), Montefiore Medical Center Weiler/Einstein Division, The Weiler Hospital, Albert Einstein Hospital (collectively, "Montefiore" or "Montefiore Medical Center"), and Akinori Adachi, M.D. (Adachi) move for summary judgment dismissing plaintiff's complaint and all cross-claims against them.

By separate motion, defendants Darren Esposito, M.D. (Esposito) and Advantage Care Medicine, P.C. (Advantage) move for summary judgment dismissing plaintiff's complaint and all cross-claims against them.

On May 6, 2009, the 61-year-old plaintiff, a retired nurse, sought treatment at the Emergency Room (ER) of Montefiore Medical Center with symptoms including vaginal bleeding. Plaintiff was examined by defendant White. Several tests were conducted, but according to defendant White none indicated that the plaintiff was suffering from a fistula. Dr. White in fact suspected that the source of the bleeding was plaintiff's bladder. Plaintiff was discharged from the ER on May 7. Dr. White did not see or examine the plaintiff after her discharge.

On May 11, 2009, plaintiff sought treatment from defendant Esposito, her primary care physician. Plaintiff was examined by defendant Esposito's associate. Dr. Wright referred plaintiff to defendant Adachi, an OBGYN, for further assessment. On May 27, 2009, plaintiff was examined by Adachi, who suspected and wanted to "rule out" a recto-vaginal fistula, and accordingly ordered a vaginogram. Plaintiff was instructed to schedule an appointment within two weeks to review the results of the vaginogram.

On June 1, 2009, the radiologist performed a barium enema – it is undisputed that under the circumstances a barium enema would be as effective as a vaginogram in detecting a fistula. A small amount of barium was detected in the plaintiff's vagina, which the radiologist interpreted as indicative of a fistulous connection or retrograde reflux into the vagina. Plaintiff's deposition testimony indicates that at the time the barium enema was conducted, she was aware that a fistula was present. Her deposition testimony indicates as follows:

Q. Did you learn the results of the barium enema.

A. Immediately . . . I had barium coming out of my vagina. I knew there was a connection.

* * *

Q. Did the x-ray technician tell you the type of fistula, that it was a rectovaginal fistula?

A. Yes.

* * *

Q. Did you want to speak to [Adachi] about further treatment?

A. No, I did. But I figured the next step is going to be a surgeon."

Plaintiff further testified that she called Dr. Adachi's office on several occasions, but that she was not given an appointment, and that he never communicated the diagnosis of the presence of a fistula to her, nor did he refer her to seek immediate surgical treatment.

Plaintiff was seen by defendant Esposito on July 6, and referred to Dr. Reich, a gastroenterologist. On July 23, a colonoscopy was performed, and again a diagnosis of fistula was confirmed. Dr. Reich referred the plaintiff to a surgeon. Plaintiff did not seek further treatment until she became septic. She then presented to the Montefiore ER in September 2009. On September 24 the fistula was surgically repaired.

As to defendant White, the defendants argue that contend that no signs of the fistula were present on May 6 when plaintiff was treated in the ER, and that defendant White took all appropriate steps and ordered appropriate tests in view of plaintiff's complaints and history. These arguments are supported by the expert report of Dr. Kenneth Sable, board certified in Emergency Medicine, who further states that even if Dr. White committed malpractice, the course of treatment would have remained the same, and thus proximate cause is lacking.

As to defendant Adachi, the defendants argue that he made the correct diagnosis and ordered an appropriate test to confirm that diagnosis. They argue that it was appropriate for him to wait to discuss the results with plaintiff when she returned to the office, and they dispute the plaintiff's contention that she was unable to obtain a follow-up appointment with Dr. Adachi, or that he committed malpractice in waiting to advise the plaintiff of the results of the barium enema at her next office visit --- a visit which the defendants argue did not occur due to the plaintiff's own fault. However, even conceding that malpractice occurred, they argue that the record is clear that plaintiff, by her own admission, understood that that she had a fistula and that surgery was required as of June 1, when the barium enema was performed. Defendants White, Adachi and

Montefiore further submit expert evidence in the form of an affirmation from Dr. Michael Brodman, a board certified OBGYN, who states that a rectovaginal fistula, while uncomfortable, does not require urgent care, and that the surgery would in any event have been performed months later. Thus, the course of treatment, they argue, was not affected by the alleged malpractice in failing to personally advise the plaintiff of her condition.

Defendants Esposito and Advantage similarly present expert testimony by Dr. John W. O'Grady, M.D., board certified in internal medicine, that plaintiff was aware that she had a fistula, and that Dr. Reich confirmed the presence of a fistula with a colonoscopy, and referred the plaintiff to a surgeon. There was thus no more action that defendants Esposito and Advantage could take.

Plaintiff contends that the defendants "sat idle" while the plaintiff suffered from a fistula, and failed to refer her to surgery for repair of the fistula. According to the plaintiff, the failure to refer her to a surgeon resulted in needless suffering, and resulted in an infection which required hospitalization. Plaintiff's expert, a specialist in Colorectal Surgery, opines that Dr. Adachi committed malpractice in failing to immediately refer the plaintiff to a surgeon in that plaintiff had "progressively worsening symptoms" and that "the fistula was not going to heal without surgery..." The plaintiff's expert further opined that Dr. Esposito failed to make a referral to a surgeon, which also constituted malpractice.

Analysis

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." (*Anyie B. v Bronx Lebanon Hosp.*, 128 A.D.3d 1, 3, 5 N.Y.S.3d 92,

93, [1st Dept. 2015] [citation omitted]). If a defendant makes a prima facie case, the burden shifts to the plaintiff to rebut that showing by adducing medical evidence showing that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged. (*See Scalisi v Oberlander*, 96 A.D.3d 106, 120, 943 N.Y.S.2d 23 [1st Dept. 2012].)

Each of the defendants has made a prima facie showing of entitlement to judgment as a matter of law by submitting medical records, deposition testimony, and the affirmation of an expert demonstrating that the alleged malpractice (failing to make an immediate surgical referral) was not the proximate cause any damage to the plaintiff. (*See e.g. Kristal R. v Nichter*, 115 AD3d 409, 411, 981 N.Y.S.2d 399 [1st Dept. 2014]).¹ The burden thus shifts to the plaintiff to demonstrate otherwise.

A plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." (*Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 307, 833 N.Y.S.2d 89 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Giampa v. Marvin L. Shelton, M.D., P.C.*, 67 A.D.3d 439, 886 N.Y.S.2d 883 [1st Dept. 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturup v Long*, 95 A.D.3d 726, 728-729, 945 N.Y.S.2d 246 [1st Dept. 2012]).

As to defendant White, the plaintiff raised no arguments.

¹ It is noted that no malpractice is attributed by plaintiff's expert to defendant White.

With respect to defendants Esposito and Advantage, the plaintiff's expert raises issues of fact as to whether they failed to make a timely referral to a surgeon. In this regard, the record does not indicate as a matter of law that care for the fistula was taken over by other physicians, such that defendants Esposito and Advantage, who continued to treat plaintiff for this and other illnesses during the relevant time period, were relieved of the duty to make an appropriate diagnosis and referral.

Defendants Montefiore and Adachi argue, in essence, that plaintiff knew as of June that she had a fistula, and, as a retired nurse, she understood that surgery was required. They argue that even if the defendants committed malpractice in failing to make an immediate referral to a surgeon, the plaintiff has failed to raise an issue of fact as to proximate cause. Plaintiff's expert affidavit, however, opines that, "Plaintiff had already been experiencing progressively worsening symptoms for about three months and ...her fistula was not going to heal without surgery and she should have been immediately referred to a surgeon." Although defendants dispute that the "condition was worsening," issues of fact exist as to when the condition arose, when it should have been detected, and more importantly, whether it was in fact "worsening" such that immediate intervention was required.

Plaintiff's expert report indicates that had an "immediate referral" to a surgeon been made, the surgeon would have "immediately performed" surgery. Specifically, plaintiff's expert states, "[H]ad the Plaintiff been referred to a surgeon in June 2009, the fistula would have been repaired shortly thereafter." Plaintiff's expert's opinion is sufficient to raise an issue of fact that as to whether "immediate" surgery was required.

While plaintiff, a retired nurse, was aware of both the presence of a fistula and the eventual need for surgery, the record does not disclose that she also was aware that her need for surgery was immediate.

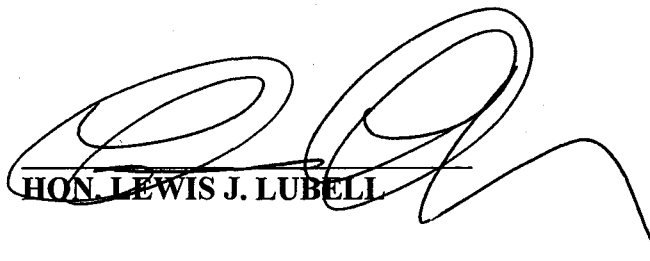
Plaintiff, as noted, has attributed no malpractice to defendant White.

Accordingly, is

ORDERED that the motion of defendants, Deborah J. White, M.D., Montefiore Medical Center Weiler/Einstein Division, The Weiler Hospital, Albert Einstein Hospital, and Akinori Adachi, M.D. is granted only to the extent of dismissing all claims against defendant Deborah J. White, M.D., and all claims against the Montefiore defendants based on her conduct, and it is further

ORDERED that the motion of the defendants Darren Esposito, M.D. and Advantage Care Medicine, P.C. is denied.

Dated: July 12, 2018


HON. LEWIS J. LUBELL