

Scarinci v Zelefsky

2019 NY Slip Op 30158(U)

January 16, 2019

Supreme Court, New York County

Docket Number: 805438/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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DENNIS SCARINCI and ANTOINETTE SCARINCI,

Index No.
805438/2013

Plaintiffs,

**Decision and
Order**

-against-

MICHAEL ZELEFSKY MD and MEMORIAL SLOAN-
KETTERING CANCER CENTER,

Mot. Seq. 003

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Defendants Michael Zelefsky, M.D. (“Dr. Zelefsky”) and Memorial Sloan-Kettering Cancer Center (“MSK”) (collectively, “Defendants”) move by Order to Show Cause pursuant to CPLR § 3212 for an Order granting summary judgement dismissing Plaintiffs’ Dennis Scarinci (“Mr. Scarinci”) and Antoinette Scarinci (“Mrs. Scarinci”) (collectively, “Plaintiffs”) Summons and Verified Complaint. Plaintiffs oppose Defendants’ motion. For the reasons, discussed below, the motion for summary judgment is granted in its entirety.

Background

This action, sounding in medical malpractice, lack of informed consent and loss of service, concerns the medical care that was provided to Mr. Scarinci by Dr. Zelefsky.

It is uncontroverted that in September 2006, Mr. Scarinci went to his primary care physican due to lower back pain. In a routine blood test, Mr. Scarinci was found to have an elevated prostate-specific antigen (“PSA”). On December 6, 2006, Mr. Scarinci had a consultation with Dr. Zelefsky at MSK. On December 13, 2006, Mr. Scarinci began hormone therapy of Casodex and a one-month injection of Lupron. On January 15, 2007, Mr. Scarinci received a three-month injection of Lupron. On April 16, 2007, Mr. Scarinci received another three-month injection of Lupron. On March 14, 2007, Mr. Scarinci was admitted to MSK for high-dose brachytherapy administered by Dr. Zelefsky. Between April 6, 2007 and May 15, 2007, Mr. Scarinci underwent beam radiation.

On February 12, 2008, Mr. Scarinci reported to Dr. Zelefsky increasing urinary frequency, and was referred to Dr. Jaspreet Sandhu (“Dr. Sandhu”). By July 2011, Mr. Scarinci’s PSA had increased. Mr. Scarinci had an MRI and bone scan, which came back as stable. On December 22, 2011, by Dr. Zelefsky’s recommendation, Mr. Scarinci had a 16-core biopsy by Dr. Vincent Laudone, which came back negative. On April 24, 2012, Mr. Scarinci’s PSA increased. On June 5, 2012, Mr. Scarinci saw Dr. Sandhu for a routine check-up.

On June 6, 2012, Mr. Scarinci started to see Dr. Lewis Kampel (“Dr. Kampel”), a medical oncologist. Dr. Kampel started Mr. Scarinci on androgen suppressive therapy and continued to follow his PSA levels. Mr. Scarinci was a patient at MSK until around December 2016. After leaving MSK, Mr. Scarinci sought treatment at John Hopkins, and continued the Lupron treatment.

Mr. Scarinci claims that Defendants failed to timely and appropriately treat Mr. Scarinci after the initial diagnosis of prostate cancer; failed to provide the appropriate follow up; failed to send Mr. Scarinci to the appropriate consultants; failed to prevent the spread of cancer; failed to provide the best opportunity for recovery; failed to perform a radical prostatectomy; failed to appropriately advise of appropriate treatments; and failed to timely initiate appropriate treatment beginning in 2006. Mr. Scarinci claims that “other doctors” warned him of Dr. Zelefsky and that there is a malpractice when there is a delay in hormone therapy. Additionally, Plaintiffs claim there was a lack of informed consent, fraud and breach of contract. Mrs. Scarinci brings a claim for loss of her husband’s services.

Summary Judgment Standard

CPLR § 3212 provides in relevant part, that a motion for summary judgment,

“shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”

A defendant moving for summary judgment in a medical malpractice case has the burden of making a *prima facie* showing of entitlement to judgment as a matter

of law by showing that “there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged” by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 A.D.3d 204, 206 [1st Dept. 2010]. Once the defendant has made this showing, the burden shifts to the party opposing the motion “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 Hospital*, 68 N.Y.2d 320, 324 [1986]. Specifically, a plaintiff “must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” *Rogues*, 73 A.D.3d at 207.

A defendant moving for summary judgment on a lack of informed consent claim must show that there is no factual dispute as to whether the plaintiff was informed “of any foreseeable risks, benefits or alternatives” of the treatment rendered. *Balzola v. Giese*, 107 A.D.3d 587, 588 [1st Dept. 2013].

In a medical malpractice claim a plaintiff can have a separate cause of action for fraud where the physician’s concealment of his own malpractice is the basis. *Harkin v. Culleton*, 156 A.D.2d 19, 21 [1st Dept. 1990]. “[I]n order to have a separate cause of action for fraud, the plaintiff must show that the personal injuries caused by the fraud are different from those caused by the malpractice.” *Id.* A defendant will be entitled to summary judgement when the moving party can show there are not separate injuries. *Id.*

“It is also well-established New York law that where a cause of action lies in medical malpractice, a breach of contract action is legally redundant, and may not be pursued unless plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result.” *Scalisi v. New York Univ. Med. Ctr.*, 24 A.D.3d 145, 147 [1st Dept. 2005].

When a court grants summary judgment and dismisses a patient’s direct claim, dismissal of the spouse’s derivative claim for loss of services is mandated. *Camadeo v. Leeds*, 290 A.D.2d 355, 356 [1st Dept. 2002].

Defendants’ Pending Summary Judgment Motion

In support of Defendants’ motion for summary judgment, Defendants submit the Affidavit of Paul L. Nguyen, M.D.’s (“Dr. Nguyen”) and the Affirmation of James K. Gerstley, M.D. (“Dr. Gerstley”), board-certified radiation oncologists.

According to Dr. Nguyen's Affidavit, he reviewed the medical records, the bill of particulars, and deposition transcripts. Dr. Nguyen details the steps taken to treat Mr. Scarinci, including the care prior to the treatment, the decision to start hormone therapy and radiation and his follow-up care, and opines that all of the treatment adhered to "good and accepted standards of medical practices". Dr. Nguyen opines that the treatment that Mr. Scarinci received was in accordance with the National Comprehensive Cancer Network ("NCCN") guidelines, was supported by a 2012 study and was based on the appropriate Gleason score at that time. Dr. Nguyen further opines that the one week "delay" in Dr. Zelefsky administering hormone therapy to Mr. Scarinci would not "diminish the efficacy of the treatment".

As for Mr. Scarinci's informed consent claim, Dr. Nguyen states that on March 2, 2007, Mr. Scarinci signed a "Patient Consent form for Diagnostic and Therapeutic Procedures" before beginning the high dose of brachytherapy. Dr. Nguyen opines that this form serves as a signed acknowledgement that the patient discussed the risks, benefits and alternatives with his physician and understands that no guarantees have been made concerning the patient's treatment.

After reviewing the medical records and the bill of particulars, Dr. Gerstley opines that the care and treatment provided by Dr. Zelesky and MSK was at all times in complete accordance with "good and accepted medical standards of due care and absent of any negligence or medical malpractice". Dr. Gerstley states that he does not recall making any statements warning Mr. Scarinci of Dr. Zelefsky. Dr. Gerstley states that if he did make such statement that he retracts and rescinds it because he claims that it has been "grossly taken out of context" and the statement should never have been made.

In opposition, Mr. Scarinci states that Defendants did not act according to the standard of care. Mr. Scarinci states that Dr. Zelefsky failed to disclose that the treatment had failed and Mr. Scarinci's prostate cancer had metastasized. Furthermore, Mr. Scarinci states that Defendants tried to hide their misdiagnosis and lies by attempting to cover up their mistakes. Mr. Scarinci states Dr. Sandhu told him that he has "terminal cancer" and Dr. Zelefsky lied about the diagnosis. Mr. Scarinci states that his medical records were manipulated by doctors and staff to include the information they wanted and not all of the information that was told to Mr. Scarinci and Mrs. Scarinci.

Discussion

Defendants make a *prima facie* showing of entitlement to summary judgment to the medical malpractice claim. *Alvarez*, 68 N.Y.2d at 324. Defendants, through Dr. Nguyen's Affidavit and Dr. Grestley's Affirmation, demonstrate that they acted in accordance with good and accepted medical standards of due care in the medical care that they provided to Mr. Scarinci and that any departure in care was not a proximate cause of Mr. Scarinci's injuries. Dr. Nguyen opines that seven months of hormone therapy with high dose radiation with the addition of brachytherapy for a high-risk patient was consistent with the NCCN guidelines and a 2012 study. Dr. Nguyen states that the Gleason scoring system, used by pathologist to grade prostate cancer, changed between 2006 and 2012, and therefore, the treatment by Dr. Zelefsky in 2006 was based on the appropriate score at that time. Moreover, Dr. Nguyen and Dr. Gerstley state that there was no causal relationship between the alleged delay of administering hormone therapy to Mr. Sarinci and the injuries. Mr. Scarinci began hormone therapy exactly one week after his consultation with Dr. Zelefsky, and Defendants' experts state that one week is not a significant delay.

Since the Defendants have made a *prima facie* showing of entitlement to summary judgment, the burden now shifts to Plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 A.D.3d at 639. Specifically, in a medical malpractice claim, a plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 A.D.3d at 207. Mr. Scarinci provides his own statement and does not provide expert medical opinion that demonstrate how the Defendants departed from the standard care or that the departure was the proximate cause of the injury. Here, Mr. Scarinci failed to meet his burden that there exists material issues of fact.

Defendants are entitled to summary judgment for Plaintiffs' lack of informed consent claim. Mr. Scarinci signed the "Patient Consent form for Diagnostic and Therapeutic Procedures" on March 2, 2007. Dr. Nguyen opines that this form serves as a signed acknowledgement that the patient discussed the risks, benefits and alternatives with his physician and understands that no guarantees have been made concerning the patient's treatment. Plaintiff was informed "of any foreseeable risks, benefits or alternatives" of the treatment rendered by Dr. Zelefsky. *Balzola*, 107 A.D.3d at 588. Plaintiffs in opposition have failed to raise an issue of fact.

Additionally, Plaintiffs failed to demonstrate that personal injuries caused by Defendants' fraud are different from the injuries caused by the medical malpractice,


and therefore Defendants are entitled to summary judgment for Plaintiffs fraud claims. *Harkin*, 156 A.D.2d at 21. Plaintiffs have also failed to demonstrate a breach of contract claim. Defendants have shown that Plaintiffs' interpretation that there was "guaranteed a cure" was not consistent with the consultation notes. Defendants show that there was no exact promise to "effect a cure or to accomplish some definite result", therefore Defendants are entitled to summary judgment for Plaintiff's breach of contract claim. *Scalisi*, 24 A.D.3d at 147. Dismissal of Mr. Scarinci's direct suit mandates dismissal of Mrs. Scarinci's derivative cause of action for loss of services. *Camadeo*, 290 A.D.2d at 356.

Wherefore, it is hereby

ORDERED that Defendants Michael Zelefsky, M.D. and Memorial Sloan-Kettering Cancer Center's motion for Summary Judgment pursuant to CPLR § 3212 is granted in its entirety and the complaint is dismissed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: January 16, 2019



Eileen A. Rakower, J.S.C.