

Lopresti v Alzoobae
2020 NY Slip Op 31197(U)
May 4, 2020
Supreme Court, Kings County
Docket Number: 507678/17
Judge: Bernard J. Graham
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of May, 2020.

P R E S E N T:

HON. BERNARD GRAHAM,

Justice.

-----X

FRANCESCO LOPRESTI,

Plaintiff,

- against-

Index No. 507678/17

FAIZ ALZOOBAEE, M.D., ADAM LANDSKOWSKY, M.D., ALZOOBAEE PEDIATRICS and BAY RIDGE MEDICAL IMAGING,

Mot. Seq. #6
NYCEF #137-166

Defendants,

-----X

The papers numbered 1 through 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1-3

Opposing Affidavits (Affirmations)_____

4-5

Reply Affidavits (Affirmations)_____

6

Upon the foregoing papers, and upon the prior papers and proceedings in this medical malpractice action seeking damages for failure to diagnose testicular cancer, defendants Faiz Alzoobae, M.D. (Dr. Alzoobae) and Alzoobae Pediatrics move for summary judgment dismissing the action as to them.

Background

Plaintiff, Francesco Lopresti (Lopresti), was only 19 years old in December 2016, when he was diagnosed with stage four testicular cancer. Before that diagnosis, from the time when Lopresti was age 12 through age 18, he was treated by his pediatrician, Dr. Alzoobae. By this action, Lopresti alleges that Dr. Alzoobae was negligent and departed from good and accepted standards of care by failing to diagnose his testicular cancer when it was at an earlier stage. Lopresti alleges that, had Dr. Alzoobae sent him for repeat sonograms after his initial complaint of testicular pain in May 2016, his cancer would have been discovered earlier, he would have been spared considerable pain and suffering and he would have had a better long-term prognosis.

When Lopresti's cancer was discovered in December 2016, seven months after his initial complaint, Lopresti was no longer seeing his pediatrician, Dr. Alzoobae, because he was over the age of 18. Lopresti was then being treated by his parent's primary care physician, Dr. Hussein, who is not a party to this action. The testicular cancer, by the time it was discovered, had metastasized and spread to Lopresti's lymph nodes. Lopresti underwent several surgeries; chemotherapy; physical therapy and treatments that kept him hospitalized intermittently for more than a year. Lopresti's prognosis is uncertain.

Dr. Alzoobae now moves for summary judgment dismissing the complaint as to him and his pediatric practice, contending that his treatment of Lopresti comported with good and proper medical practices and that he took all reasonable steps to diagnose and treat Lopresti.

Notably, Lopresti made no complaints of pain, nor did he report that he experienced unusual symptoms during his physical check-up with Dr. Alzoobae on May 9, 2016. However, at his physical exam on that date, Lopresti's mother advised Dr. Alzoobae that her son complained of occasional pain to the genital area. Dr. Alzoobae asserts that he acted in accordance with good and proper medical practices by examining Lopresti, reexamining and palpating his testicles and referring Lopresti for a testicular sonogram. According to Dr. Alzoobae, he specifically instructed Lopresti to contact him if he experienced any further symptoms. Dr. Alzoobae attests that when Lopresti's physical exam, blood work and sonogram were all negative for abnormality, there was no reason to schedule any further tests, especially in the absence of any further complaints by Lopresti. Dr. Alzoobae asserts that it was not a departure from accepted medical practices to not schedule follow up testing, under these circumstances, since Lopresti had no symptoms of testicular cancer at that time.

Dr. Alzoobae's expert, Arnold J. Goldman M.D., who is board certified in pediatrics, examined the deposition transcripts, the pleadings and Lopresti's medical records, and submitted an affidavit in support of Dr. Alzoobae's summary judgment motion. Dr. Goldman reviewed the facts and treatment as follows: Lopresti was examined by Dr. Alzoobae on May 9, 2016, for a well visit and an initial dose of the HPV vaccine. After Lopresti's physical exam, his mother told Dr. Alzoobae that Lopresti had been complaining of occasional pain to his genital area. Lopresti said that he experienced pain "on and off" and that it was "nothing." In response, Dr. Alzoobae reexamined Lopresti's genital area, palpated Lopresti's testicles a second time and, again,

found no lumps or abnormalities. Dr. Alzoobae nonetheless referred Lopresti for a sonogram. On May 14, 2016, Lopresti received a testicular ultrasound with Doppler by Dr. Landskowsky at Bay Ridge Medical Imaging. The sonogram was reviewed by Dr. Landskowsky, who found the results to be normal, with no lumps, masses or abnormality.

In addition, the blood test results from Lopresti's check-up on May 9, 2016, did not suggest testicular cancer. The blood test results were in the normal range, except for two slight deviations regarding Lopresti's cholesterol and MPV (platelet volume). A review of Lopresti's chart, depicting all of his past visits to Dr. Alzoobae, reflects that Lopresti's blood test results in May 2016 did not vary significantly from blood test results from preceding years.

Dr. Goldman opined to a reasonable degree of medical certainty that Lopresti had no symptoms of testicular cancer in May 2016, no injury or trauma, inflammation of testicle, nerve damage, cysts, fluid collection, varicocele, torsion or renal stones. Lopresti made no further complaints to Dr. Alzoobae about genital pain. Lopresti did not contact Dr. Alzoobae again until October 31, 2016, when he came in to get the second dose of the HPV vaccine. During that visit, Lopresti complained of a backache and muscle spasm and did not report any testicular pain. Dr. Alzoobae prescribed naxoprene for Lopresti's backache. Lopresti did not see Dr. Alzoobae again.

Inasmuch as Lopresti presented with no symptoms of testicular cancer during the time that Dr. Alzoobae was his pediatric physician, Dr. Goldman concluded that Dr. Alzoobae did not depart from good and accepted medical practice in his treatment of Lopresti, and Dr. Alzoobae's actions did not proximately cause any harm to Lopresti.

On November 18, 2016, Lopresti went to Maimonides Medical Center with sudden onset chest pain after weightlifting. Lopresti did not complain of testicular pain, and a review of his genitourinary system revealed no abnormalities. On November 30, 2016, Lopresti presented at Mercy Hospital complaining of testicular pain. Dr. Hussein referred him for testing, and Lopresti returned to Bay Ridge Medical Imaging, where, on December 8, 2016, he underwent a testicular sonogram and CT scan of his abdomen and pelvis. The scrotal sonogram identified a “new large complex left testicular mass measuring 5.6 cm. consistent with malignancy” and the CT scan showed evidence of metastatic disease.

Dr. Alzoobae contends that Lopresti had no symptoms of cancer in May 2016, when he referred Lopresti for testing with regard to his complaint of testicular pain, and that Lopresti did not report any further symptoms or testicular pain during the remaining time that he treated Lopresti. Dr. Alzoobae further argues that, inasmuch as there is no evidence that Lopresti had cancer in May 2016, it was not a departure from good and accepted practice to fail to continue to test for cancer once the sonogram, the appropriate initial diagnostic test for testicular cancer, was negative for irregularities.

Lopresti, in opposition, contends that Dr. Alzoobae did not meet his prima facie standard for summary judgment, and that there are issues of fact as to whether his treatment met acceptable standards. Lopresti further contends that Dr. Alzoobae departed from good and accepted medical practice by: (1) failing to follow up with him; (2) failing to schedule sequential sonograms after the May 16, 2016 sonogram; and (3) failing to maintain adequate records, as Dr. Alzoobae’s chart does not specifically note

Lopresti's complaint of testicular pain on May 9, 2016, nor does the chart note Dr. Alzoobae's recommendation that Lopresti follow up if more symptoms arose. Lopresti further contends that Dr. Alzoobae's summary judgment motion is technically deficient because it does not annex Lopresti's deposition transcript.

Lopresti opposes Dr. Alzoobae's summary judgment motion with the expert opinion of Richard Hirschman, M.D. (Dr. Hirschman), who is board certified in internal medicine, hematology and medical oncology. Dr. Hirschman generally opined that Dr. Alzoobae departed from good and accepted medical practices by failing to perform a differential diagnosis as to Lopresti's testicular pain and failing to rule out all causes for Lopresti's presenting symptoms. Dr. Hirschman avers that Lopresti should have been referred for sequential sonograms after the May 16, 2016 sonogram showed no abnormalities, and that Dr. Alzoobae, seeing nothing in the sonogram to explain Lopresti's reported testicular pain, was obligated to look further to discern the cause of the pain. Dr. Hirschman opines that if Dr. Alzoobae performed a proper differential diagnosis, Lopresti's cancer could have been discovered at a more easily treatable stage with a better long-term prognosis.

Dr. Alzoobae, in reply, contends that Lopresti failed to sustain his burden of proof in opposing the motion as Dr. Hirschman's expert affirmation is conclusory, speculative and contradicted by the record evidence. In particular, Dr. Alzoobae points to the records of Bay Ridge Medical Imaging, in which a worksheet notation from the May 16, 2016 ultrasound exam states that "Lt sided pain, pain went away." Dr. Alzoobae argues that the record reflects that Lopresti reported that he had no testicular

pain on May 16, 2016, hence, there were no symptoms indicating a need to follow-up. Dr. Alzoobae asserts that his failure to record in the chart that Lopresti reported pain on May 9, 2016 is insignificant, since Lopresti's complaint was recorded in the Bay Ridge Medical Imaging records as having been resolved, and Lopresti made no further complaints of testicular pain for six months following the May 2016 test. The test results from the May 2016 ultrasound, in combination with Lopresti's normal blood work and physical examination results, did not indicate the presence of a cancerous condition at that time. Dr. Alzoobae reasonably relied on those records, which showed no abnormalities, and no complaints were made that required any follow-up.

Dr. Alzoobae contends that Dr. Hirschman's expert opinion, that good and accepted medical practice required that additional ultrasound testing should have been ordered at monthly intervals, is not supported by the record. Dr. Alzoobae further argues that Lopresti's deposition testimony (which is amply represented in the record, including in the summary judgment motion of the co-defendants) did not raise any issues of fact. Dr. Alzoobae argues that the allegation that Lopresti may have complained of some testicular pain in 2015 does not impact the fact that he had no discernable markers of testicular cancer when he examined Lopresti in May 2016.

Dr. Alzoobae also points out that Dr. Landskowsky and Bay Ridge Medical Imaging also moved for summary judgment dismissing the complaint as to them (mot. seq. #5). Those co-defendants had performed and reviewed the ultrasound imaging test that showed no abnormalities in May 2016, and the testing on December 8, 2016 that identified the Lopresti's testicular cancer. Co-defendants' summary judgment motion

included the expert opinion of John Pellerito, M.D., a board-certified radiologist, who averred that Dr. Landskowsky appropriately interpreted the ultrasound images of May 2016. Co-defendants' motion was also supported by the expert affirmation of Gary H. Weiss, M.D., a board-certified urologist, who opined that Lopresti's cancer was not detectable on May 16, 2016. Dr. Weiss attested that "[i]t is my opinion to a reasonable degree of medical certainty that testicular cancer can be extremely aggressive and fast growing with doubling times as short as 8 days . . . and based on the imaging and medical history and documented in medical records and the deposition testimony, Mr. Lopresti's cancer was not detectable on ultrasound in May 2016."

Dr. Alzoobae notes that Lopresti did not submit an expert opinion to contradict these assertions, nor did he oppose the co-defendants' summary judgment motion. For this reason, Dr. Alzoobae contends that Lopresti has conceded that the imaging and conclusions reached by co-defendants' experts were correct, and that he had no duty to follow up with Lopresti in the absence of new complaints by him. Ultimately, the action against Dr. Landskowsky and Bay Ridge Medical Imaging was discontinued and the claims against them were dismissed.

Discussion

To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would

preclude a grant of summary judgment in favor of the defendants” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Additionally, 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 AD3d 303, 307 [2007] [citation omitted]). However, 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*, 99 NY2d at 544; *see also Foster-Sturup v Long*, 95 AD3d 726, 727-729 [2012]).

Here, Dr. Alzoobae and his practice have established their prima facie entitlement to summary judgment by submitting their expert’s affirmation, which explained that Dr. Alzoobae’s treatment was within, and in accordance with, good and accepted medical practice, and was not the proximate cause of Lopresti’s injury. Dr. Alzoobae’s expert, Dr. Goldman, affirmed that the blood test administered by Dr. Alzoobae did not indicate the presence of testicular cancer, no lumps or irregularities were found in the physical examination administered by Dr. Alzoobae and the sonogram performed at Bay Ridge Medical Imaging showed no irregularities that would give rise to a suspicion of testicular cancer or need to perform additional testing. Moreover, the uncontroverted expert opinions of Drs. Pellerito and Weiss, submitted in support of the co-defendants’ summary judgment motion, established that the May 16, 2016 sonogram was properly interpreted as showing no signs of testicular cancer and provided no basis to order follow-up testing.

Lopresti, in contrast, submitted the expert opinion of Dr. Hirschman, whose

assertion that Dr. Alzoobae departed from good and accepted medical practice was not supported by the evidence and was speculative (see *Romano v Stanley*, 90 NY2d 444, 451 [1997]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2008]; *Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710 [2007]; *Micciola v Sacchi*, 36 AD3d 869, 871 [2007]; *Thompson v Orner*, 36 AD3d 791 [2007]; *Sheridan v Bieniewicz*, 7 AD3d 508, 509 [2004]). Dr. Hirschman's expert affirmation was conclusory, and did not adequately address the prima facie showing in the detailed affirmation of Dr. Alzoobae's expert, Dr. Goldman (*Matter of Joseph v City of New York*, 74 AD3d 440, 440 [2010]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [2009]). While Dr. Hirschman opined that Dr. Alzoobae should have ordered monthly ultrasound tests, he fails to explain why such additional testing was necessary when Lopresti had reported no pain and there was no symptom to diagnose. Dr. Hirschman failed to address Dr. Weiss's testimony that testicular cancer can be extremely aggressive and fast growing with doubling times as short as eight days. Lopresti fails to present evidence that his testicular cancer was detectable during the time he was treated by Dr. Alzoobae, and prior to November 30, 2016, when Lopresti sought medical attention at Mercy Hospital for testicular pain.

Here, Lopresti has been unable "to submit evidentiary facts or materials, by affidavit or otherwise, rebutting defendants' evidence and demonstrating the existence of a triable issue of ultimate fact" (*Indig v Finkelstein*, 23 NY2d 728, 729 [1968]). Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted (*Laye v Shepard*, 48 Misc 2d 478 [Sup Ct, NY County 1965], *affd*

25 AD2d 498 [1966], and in the absence of a party challenging the veracity of the alleged facts, as is true in the instant case, there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 543-544 [1975]).

To sustain a cause of action for medical malpractice, a plaintiff must prove a deviation or departure from accepted practice and that such departure was a proximate cause of plaintiff's injury (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]). Here, defendants established their entitlement to judgment as a matter of law by submitting evidence, including medical records, hospital records, deposition testimony and the affirmations of various medical experts, demonstrating that they did not deviate from good and accepted medical practice in their diagnosis and treatment of Lopresti.

In opposition, plaintiffs failed to raise a triable issue of fact. The expert affirmation relied upon by plaintiff was insufficient, inasmuch as it failed to address the detailed affirmations of defendants' experts, averred the alleged departures from the standard of care and proximate cause only in conclusory terms and was, at times, contradicted by the record (*see Browder v New York City Health & Hosps. Corp.*, 37 AD3d 375 [2007]; *Mignoli v Oyugi*, 82 AD3d 443, 444 [2011]).

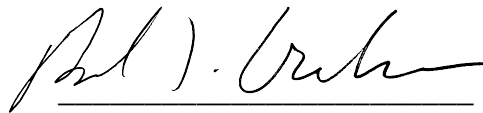
The record here is uncontroverted that Lopresti's testicular cancer was not diagnoseable in May 2016, and that he made no complaints of any symptoms to Dr. Alzoobae that would have reasonably provided a basis for further testing. Moreover, Lopresti's expert's opinion that Dr. Alzoobae failed in his duty to discover Lopresti's testicular cancer was a bare legal conclusion that is unsupported by the record and insufficient to raise a triable issue of fact (*Burns v Goyal*, 145 AD3d 952, 954 [2016]; *cf.*

Olgun v Cipolla, 82 AD3d 1186, 1187 [2011]; *Donnelly v Parikh*, 150 AD3d 820, 823 [2017]). Accordingly, it is

ORDERED that Dr. Alzobaee and Alzobaee Pediatric's summary judgment motion is granted, and Lopresti's complaint is hereby dismissed as against Dr. Alzobaee and Alzobaee Pediatrics.

This constitutes the decision, order and judgment of the court.

E N T E R,

A handwritten signature in black ink, appearing to read "Paul J. Urbani", is written over a horizontal line.

J. S. C.