

Fernandez v Ionescu
2020 NY Slip Op 32265(U)
July 9, 2020
Supreme Court, New York County
Docket Number: 805138/17
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1 MMSP

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MILTON FERNANDEZ,

Plaintiff,

INDEX NO.: 805138/17

Seq. No. 002

-against-

GABRIEL IONESCU, M.D., MOUNT SINAI HEALTH
SYSTEM and MOUNT SINAI ST. LUKE'S HOSPITAL,

Defendants.

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HON. MARTIN SHULMAN, J.S.C.:

In this action seeking damages for alleged medical malpractice, defendants Gabriel Ionescu, M.D. (Dr. Ionescu) and St. Luke's-Roosevelt Hospital Center s/h/a Mount Sinai St. Luke's West (St. Luke's),¹ move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the grounds that no material issues of fact exist. Plaintiff, Milton Fernandez, opposes the motion.

BACKGROUND

This action arises from the medical treatment and care defendants provided to plaintiff between 2011 and 2016. Plaintiff's treatment with defendants consisted of care rendered by Dr. Ionescu, a gastroenterologist, for ulcerative colitis and other gastrointestinal conditions. Plaintiff alleges that defendants negligently failed to timely

¹ Dr. Ionescu was a St. Luke's employee at all relevant times.

diagnose anal cancer, causing the condition to progress to stage II and necessitating further and otherwise unnecessary invasive treatment. His alleged injuries include constipation, severe rectal pain, bleeding, lost opportunity for a cure, residuals of surgeries including scarring, pain, stiffness, restriction of motion, function and use, embarrassment, headaches, insomnia, nervousness, and pain and suffering (plaintiff's verified bill of particulars at ¶ 3).

Plaintiff submits that defendants departed from good and accepted standards of medical care through the use of negligent diagnostic and examination procedures. Plaintiff further alleges that defendants' negligence resulted in permanent injury through the failure to employ the skill, care, and diligence commonly and ordinarily possessed by, and required of medical doctors, and their agents, servants and employees, in the locality wherein defendants practice; that defendants failed to properly advise, diagnose, treat, prescribe, and otherwise attend to the condition from which plaintiff was suffering; and that defendants were otherwise careless and negligent by failing to employ reasonable and proper steps, procedures, and practices for the health, welfare and care of plaintiff to avoid injury to him (*id.* at ¶ 1).

Defendants now argue that they are entitled to summary judgment because the treatment rendered to plaintiff was within the standards of good and accepted medical care, and plaintiff cannot establish liability against Dr. Ionescu or vicarious liability against St. Luke's. In opposition, plaintiff argues that triable issues of fact exist as to whether Dr. Ionescu: 1) conducted inadequate physical examinations by failing to perform digital rectal examinations on several occasions; and 2) failed to order routine tests, including a colonoscopy, CT or MRI and tumor markers.

Although the 2017 complaint and verified bill of particulars allege generalized treatment departures from the standard of care for the period of 2011-2016, plaintiff's medical expert, Meyer Solny, M.D. (Dr. Solny), for the first time raises certain alleged treatment departures limited solely to plaintiff's August 26, 2015 and November 2, 2015 appointments with Dr. Ionescu. Dr. Solny opines that plaintiff's clinical presentation and description of his symptoms required Dr. Ionescu to perform digital rectal examinations and order a colonoscopy, which presumably would have revealed the anal mass prior to its discovery in February 2016. Dr. Solny concludes that these alleged departures resulted in a delayed diagnosis and treatment of plaintiff's anal cancer.

Dr. Solny fails to address Dr. Ionescu's care and treatment of plaintiff prior to August 2015 and as such, those claims must be dismissed. Further, Dr. Solny does not identify the symptoms plaintiff presented with during those appointments that were consistent with cancer and not ulcerative colitis and/or gastroparesis, nor does he opine as to Dr. Ionescu's referrals for an anorectal manometry in August 2015 or a flexible sigmoidoscopy in November 2015² as suitable alternatives to a colonoscopy (both tests would have revealed an incidental finding of the mass). Plaintiff's expert also cannot competently refute an August 26, 2015 note in the medical chart recording plaintiff's refusal to see a colorectal surgeon (plaintiff's claimed denial is unsupported on this record). Finally, Dr. Solny does not factually support how plaintiff's outcome as to

² Plaintiff was scheduled for a flexible sigmoidoscopy on November 16, 2015 but failed to appear.

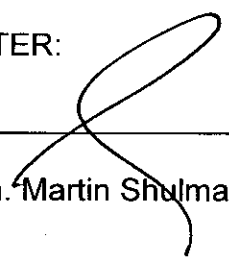
staging the cancer and its subsequent treatment would have been materially different had his anal cancer been discovered in August or November 2015.³

Based on the foregoing, plaintiff's expert's opinions are insufficient to rebut defendants' prima facie showing of entitlement to summary judgment, and their motion must be granted. The clerk is directed to enter judgment in favor of Dr. Ionescu and the institutional defendants dismissing this action in its entirety.

This constitutes this court's decision and order.

Dated: July 9, 2020

ENTER:



Hon. Martin Shulman, J.S.C.

³ As noted by defendants' expert, Matthew J. McKinley, M.D., in his supplemental affirmation submitted in reply, both stage I and stage II anal cancer are treated with chemotherapy and radiation, and plaintiff's cancer presently is in remission.