

**Cusano v Kotlyar**

2020 NY Slip Op 34962(U)

April 3, 2020

Supreme Court, Rockland County

Docket Number: Index No. 33338/2018

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
PAUL CUSANO and MARIA CUSANO

*Plaintiffs,*

*-against-*

**DECISION AND ORDER  
ON MOTION FOR  
SUMMARY JUDGMENT**

Index No.: 33338/2018

YANINA KOTLYAR M.D. and ROCKLAND NY MEDICAL  
SERVICES, P.C.

*Defendants.*

-----X  
*Sherri L. Eisenpress, J.*

The following papers, numbered 1 to 5, were reviewed in connection with the Notice of Motion filed by defendants Yanina Kotlyar M.D. ("Zwickler") and Rockland NY Medical Services, P.C. ("ROCKLAND NY"), for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the Complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXPERT AFFIRMATION/ EXHIBITS A-I	1-2
AFFIRMATION IN OPPOSITION/REDACTED EXPERT AFFIDAVIT/EXHIBITS A-L	3-4
AFFIRMATION IN REPLY	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

**Factual Background**

This medical malpractice action was commenced by Plaintiffs on June 13, 2018. The Defendants answered on or about July 19, 2018, discovery proceeded and the instant summary judgment motion has been timely brought by Defendants. Plaintiffs' allegations center around defendants' failure to properly and timely diagnose and treat Paul Cusano for prostate cancer beginning on or about March 21, 2016 through on or about January of 2018, resulting

in a spread and progression of the cancer.

On or about June 7, 2008, Plaintiff, Paul Cusano, age 59 at the time, switched his primary care physician to the care of Defendants, Dr. Kotlyar and her family medicine practice Rockland NY. His recent medical history was significant for an enlarged prostate and elevated PSA levels, and several negative biopsies between September 2006 and April 2009. Plaintiff claims that he told Dr. Kotlyar that he was no longer receiving treatment by his prior treating urologist, Dr. Fraiman since the time period around his last biopsy in 2009. Dr. Kotlyar's records and testimony reveal that she undertook management of Plaintiff's overall medical care which included ordering routine blood testing and PSA levels at least once a year.

In May 2010 through February 15, 2014, Dr. Kotlyar prescribed Adovart which is specifically intended to reduce the size of the prostate in an attempt to bring PSA levels down. Beginning on or about March 17, 2011, the lab reports show that Plaintiff's PSA levels were consistently above normal beginning on or about March 17, 2011, at which he had a level of 4.5 (normal 4.0). By March 21, 2016, Plaintiff's PSA level was recorded as 15.0, the highest level in 5 years. The chart has the word "urologist" written on the bottom of her hand-written notes next to "referral." Plaintiff testified that he was never told of his raised PSA levels or advised to get a urology consult by Dr. Kotlyar. Although prescriptions had been written for other type of referrals, no referral slip for a urologist is contained in the chart. Dr. Kotlyar also prescribed Androgel, a form of testosterone, which Plaintiff alleges was contraindicated in a patient with significantly elevated PSAs. Dr. Kotlyar next saw Mr. Cusano in her office on July 5, 2016, at which time his PSA level was 35.3. On November 3, 2016, Mr. Cusano's level had risen to 62. The chart notes "PSA not falling" but does not reflect whether Plaintiff had been seen by a urologist. By October 2017, Plaintiff's PSA had risen to over 195. Dr. Kotlyar continued to prescribe Androgel.

When Plaintiff returned to the office for blood work on January 5, 2018, his PSA had risen to 301.2. On January 12, 2018, Dr. Kotlyar referred Plaintiff for an immediate MRI

which was performed the next day. The result of the MRI showed that his prostate was significantly enlarged. On January 24, 2018, based upon the results of Plaintiff's prostate biopsy, his final diagnosis was adenocarcinoma of the prostate in 11 of the 12 sections biopsied with Gleason scores of 9-10, which is considered Stage 4 cancer.

### **The Parties' Contentions**

In support of their summary judgment motion, Defendants submit the affidavit of James Sayegh, M.D., who is a primary care provider in the lower mid-Hudson region and who is board eligible in the field of family practice. Dr. Sayegh notes that Dr. Kotlyar testified at her examination before trial that she advised Plaintiff on numerous occasions about his rising PSA levels and that Plaintiff continually reassured her that he was under the care of an urologist. Thus, Dr. Sayegh opines that it was the patient's obligation to follow those recommendations and that Dr. Kotlyar's actions comported with an appropriate standard of care. Dr. Sayegh notes that Plaintiff's elevations in PSA during the latter portion of 2016 and throughout 2017 may certainly have been related to his advanced prostate cancer but that "it is difficult to say with any degree of certainty as to when treatment initiated along that spectrum would have yielded a more favorable prognosis for Mr. Cusano." He further opines that Dr. Kotlyar comported with the standard of care by testing the patient with frequent laboratory monitoring and appropriately adjusting his medications, as well as her instruction to Plaintiff to diligently follow up with his urologist.

In opposition to the summary judgment motion, Mr. Cusano denies that Dr. Kotlyar ever advised him of his PSA results or that he needed to follow up with a urologist. He testified that he had advised Dr. Kotlyar that he had stopped seeing his former urologist Dr. Fraiman around 2009-2010. Mr. Cusano further notes that the last reference in defendants' chart to an alleged referral for a urology consult was on March 29, 2016, and that there are no notes of any kind in Dr. Kotlyar's charts documenting that an actual urology consult ever took place. Plaintiffs assert that Dr. Kotlyar admitted that she never once requested a single

urological report for her patient. As such, Plaintiffs submit that based on this alone, there is a triable issue of fact as to Defendants' malpractice.

Additionally, Plaintiffs submit the redacted affirmation of a physician who is Board Certified in Internal Medicine and Oncology. Based upon the doctor's review of the depositions and medical records, he opines that Dr. Kotlyar departed from accepted standards of medical practice. He further opines that within a reasonable degree of medical certainty, those deviations by Dr. Kotlyar were a significant factor in causing the progression and spread of Mr. Cusano's prostate cancer and metastasis of the disease and drastically diminished Plaintiff's chances of a 5 year survival rate from 98% to only 15%, as the delay in treatment allowed the cancer to spread to distant tissue, bones, organs and lymph nodes and was classified as a Grade Group 5 at the time it was diagnosed in January of 2018.

More specifically, Plaintiff's expert notes that while Dr. Kotlyer's hand-written notes in her chart have the word "urologist" written next to "referral, Mr. Cusano's testimony was that she never sent him to one, there is no written referral and it is undisputed that Dr. Kotlyar never received any records from a treating urologist, never requested records, and attempted to contact a treating urologist during the entire time of her treatment, which in the expert's opinion departed from accepted practice. Additionally, the doctor opines that the failure to perform any digital rectal examinations at any time at any time during treatment is a deviation from the standard of care which would have potentially led to an earlier diagnosis of prostate cancer.

Plaintiff's expert further opines that the prescription of Androgel, which is a form of testosterone, is highly contraindicated in a patient with Plaintiff's medical history and significantly elevated PSA's, and has the potential to speed up the progression of prostate cancer cells. The expert notes that despite the fact that Plaintiff's PSA level was steadily climbing, she continued to prescribe Androgel on 7/21/2016, 11/29/2017 and 1/12/2018.

Additionally, the doctor notes that men with a PSA level between 4 and 10 have

about a 1 and 4 chance of having prostate cancer and that if the PSA is more than 10, the chance of having prostate cancer is over 50%. The expert opines that in March of 2016, Plaintiff's SSA was 15 and therefore a prostate biopsy should have been ordered no later than that date. Had the cancer been diagnosed at that time, the expert opines that Mr. Cusano's condition would have been 98% curable but instead, as a result of Dr. Kotlyar's departures, the expert opines that his chance of 5 year survival is less than 15% and his chance of 10 year survival rate is nearly eliminated.

In reply, Defendants argue that Plaintiff's expert is not qualified to offer an expert opinion as to the standard of care of primary care providers, notwithstanding that he is Board Certified in Internal Medicine. They assert that Mr. Cusano's testimony that he was neither told of the elevated PSA levels nor referred to a urologist is "simply incredible and not worthy of belief."

#### **Legal Discussion**

Turning now to Defendants' motions for summary judgment, the proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp.

v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party." Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from accepted practice; and 2) evidence that such departure was a proximate cause of injury or damage. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006). In a summary judgment motion on a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby. Belak-Redl v. Bollinger, 74 A.D.3d 1110, 1111, 903 N.Y.S.2d 508 (2d Dept. 2010). The defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993).

As an initial matter, while it is generally true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Behar v. Coren, 21 A.D.3d 1045, 1046-47, 803 N.Y.S.2d 629 (2d Dept. 2005), *appeal denied* by 6 N.Y.3d 705 (2006); Shectman v. Wilson, 68 A.D.3d 848, 849, 890 N.Y.S.2d 117 (2d Dept. 2009). The Court finds that Defendants' contention that a Board Certified Internist cannot opine with respect to the standard of care for a primary care physician is without merit.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as such credibility issues can only be resolved by a jury. Feinberg v. Feit, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661 (2d Dept. 2005); Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); Bengston v. Wang, 41 A.D.3d

625, 839 N.Y.S.2d 159 (2d Dept. 2007); Barbuto v. Winthrop University Hosp., 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d dept. 2003); Fink v. DeAngelis, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014). Where an expert's opinion is neither speculative nor conclusory, but relies on specifically cited evidence in the record, it may be sufficient to raise a question of fact precluding summary judgment. Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008). The Court finds that the expert opinions offered in this matter are neither speculative nor conclusory, and that they make appropriate references to the record.

In the instant matter, there are triable issues of fact sufficient to deny summary judgment, including whether Dr. Kotlyer advised Plaintiff of his rising PSA levels; whether she referred him to a urologist; whether she appropriately followed up with respect to a urological referral; whether she ordered and/or conducted the appropriate tests or procedures in response to the rising PSA levels; and whether she prescribed medication that was contraindicated under the circumstances. As such, Defendants' summary judgment motion is denied in its entirety.

Accordingly, it is hereby

**ORDERED** that the Notice of Motion (#1) for summary judgment is hereby DENIED in its entirety; and it is further

**ORDERED** that the parties are to appear in the Trial Assignment Part for a conference on **WEDNESDAY, JUNE 17, 2020, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York  
April 3, 2020

  
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**HON. SHERRIL EISENPRESS**  
Acting Justice of the Supreme Court

To: All parties via e-filing