

Miano v Wing

2020 NY Slip Op 35017(U)

May 8, 2020

Supreme Court, Westchester County

Docket Number: Index No. 53224/2018

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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ANTONIETTA MIANO,

DECISION & ORDER

Plaintiff,

Index No: 53224/2018

-against-

Motion Return Date:

MARIA WING, M.D., STEPHANIE SIMS, M.D.,
WHITE PLAINS HOSPITAL, WHITE PLAINS
HOSPITAL PHYSICIAN ASSOCIATES, and
NORTHRIDGE MEDICAL ASSOCIATES,

April 10, 2020

Motion Sequence No. 3

Defendants.

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The following papers (e-filed documents 123-169; 174) were read on the motion by the defendant, Stephanie Sims, M.D., for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against her.

Notice of Motion-Affirmation-Exhibits (A-F; G1-G4; H-S)
Affirmation in Opposition-Exhibits (A-K¹)
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion is granted solely to the extent that the causes of action to recover damages against the defendant, Stephanie Sims, M.D., for medical malpractice premised upon lack of informed consent and res ipsa loquitor are both dismissed; and it is further

ORDERED the motion is otherwise denied; and it is further

ORDERED the matter is hereby referred to the Settlement Conference Part. Due to the COVID-19 health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

¹ NYSCEF doc. nos. 161-168 are duplicates of exhibits “D-K” (NYSCEF doc. nos. 151-158) but with redactions. NYSCEF doc. no. 169 is a notice of hardcopy submission of exhibit “B” (NYSCEF doc. no. 149).

Plaintiff sues alleging medical malpractice.

On May 24, 2016, plaintiff presented to her primary care physician, the defendant, Maria Wing, M.D., with complaints of difficulty swallowing food the day prior, chest discomfort and profuse sweating. Following her examination, Dr. Wing noted an impression of difficulty swallowing solids for which she recommended an endoscopy; parotid swelling for which she recommended plaintiff to an ENT; and chest discomfort for which she recommended an ECG. Results of blood work taken that day revealed an abnormal level of Amylase at 1,569 (normal 30-121). Based thereon, Dr. Wing testified at deposition that the finding of elevated Amylase could have been due to a process in the gallbladder, liver or pancreas. Accordingly, Dr. Wing ordered a complete abdominal ultrasound STAT, in which she noted a diagnosis of right upper quadrant pain and clinical information of abdominal pain, Amylase over 1,000, and an evaluation for gallstones. Although plaintiff had a history of kidney lesions, this information was not provided in the clinical information. In fact, there was no clinical information concerning the kidneys or reference to the kidneys in the diagnosis.

On May 25, 2016, plaintiff underwent the abdominal ultrasound which was interpreted by the movant-radiologist herein, Stephanie Sims, M.D. Based upon the clinical information provided by Dr. Wing, the non-party ultrasound technologist focused her imaging on the plaintiff's liver, gallbladder, bile ducts, and pancreas. Multiple images of the abdomen were obtained. As part of the protocol for a complete abdominal ultrasound, images of the kidneys were also obtained. At deposition, Dr. Sims testified that the ultrasound examination was "diagnostic" (i.e., "targeted" or "focused") with respect to the liver, pancreas, and gallbladder based on the clinical information that was provided to her which was to rule out gallstones (Sims tr at 228, lines 16-25; at 230, lines 17-21) and testified that the examination was "screening" (i.e., "general" "for an overall wellness check") with respect to the kidneys (Sims tr at 228, lines 16-25; at 229, lines 2-9; at 230, lines 22-23; at 232, lines 114-118). Dr. Sims testified that whether the study is considered diagnostic or screening does not affect her evaluation of the images (Sims tr at 231, lines 11-18). The ultrasound report noted, inter alia, a small amount of gallbladder sludge, mild fatty infiltrate of the liver, kidneys that were normal in size, with normal and symmetric vascular flow and no evidence of solid renal mass or calculus. At deposition, Dr. Wing testified that the finding of gallbladder sludge may have caused the plaintiff's elevated Amylase.

Nearly one year later, on April 13, 2017, plaintiff presented to White Plains Hospital Physician Associates with complaints of blood in her urine. Following laboratory studies, plaintiff underwent a renal ultrasound, also interpreted by Dr. Sims. This study was compared to the abdominal ultrasound taken on May 25, 2016, and the April 13, 2017, study, revealed a hypoechoic mass in the upper pole of the right kidney, with no evidence

of renal mass or calculus in the left kidney. CT scan of the abdomen and pelvis was recommended for further evaluation.

The following day, on April 14, 2017, a CT scan was performed and interpreted by Dr. Sims. The results of the CT revealed, among other things, an impression of bilateral suspicious renal masses.

On June 6, 2017, plaintiff underwent right nephroureterectomy. Surgical pathology of the right kidney specimen revealed, among other things, a lesion measuring 4.5 cm in the greatest dimension. Plaintiff was subsequently diagnosed with kidney cancer which had metastasized to her lymph nodes.

Alleging, inter alia, that the May 25, 2016, abdominal ultrasound, was improperly interpreted, plaintiff commenced this action against, among others, Dr. Sims. The allegations insofar as asserted against Dr. Sims, in sum and substance, are the failure by Dr. Sims to recognize abnormalities of the plaintiff's right kidney, report on same, and recommend additional imaging following this ultrasound examination.

Following the completion of discovery, Dr. Sims moves for an order granting summary judgment dismissing so much of the complaint as asserts a cause of action against her.

Malpractice

A defendant-physician moving for summary judgment dismissing a claim for medical malpractice must demonstrate, prima facie, that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Meade v Yland*, 140 AD3d 931, 932-933 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]). Once the defendant-movant sets forth a prima facie case, the burden of going forward shifts to the plaintiff-opponent of the motion to produce sufficient evidence to establish the existence of a material issue of fact, but only as to those elements on which the movant met its prima facie burden (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]; *Keane v Dayani*, 178 AD3d 797, 798 [2d Dept 2019]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions[]" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017] [internal quotation marks and citation omitted]).

The papers submitted, including the affirmation of Dr. Lawrence H. Schwartz, a board certified diagnostic radiologist, submitted in support of defendant's motion and the affirmation of plaintiff's expert, also a board certified diagnostic radiologist, submitted in opposition, raise triable issues of fact precluding the grant of summary judgment in defendant's favor. According to plaintiff's expert, based upon an interpretation of the abdominal ultrasound taken May 25, 2016, a mass on the plaintiff's right kidney was

present, a fact not disputed by defendant's expert, Dr. Schwartz. The experts differ, however, in their interpretations of the abdominal ultrasound and whether Dr. Sims departed from the accepted standard of medical care in failing to recognize the mass.

Dr. Schwartz opines that it was not a departure by Dr. Sims in failing to recognize the presence of the right kidney mass on May 25, 2016, which he opines was similar in echo-texture to the surrounding parenchyma, less well-defined and smaller in size when compared to the image of the mass as seen from the renal ultrasound taken April 13, 2017. Dr. Schwartz notes that Dr. Sims was provided with only limited information of right upper quadrant pain, abdominal pain, Amylase greater than 1,000, with the request to evaluate for gallstones and did not have any of the plaintiff's previous diagnostic studies available for comparison. Thus, Dr. Schwartz opines that the focus of the abdominal ultrasound taken May 25, 2016, was diagnostic for gallbladder pathology and, accordingly, limited views of the kidneys were obtained for a general overview only and not for evaluation of a mass. Dr. Schwartz opines that Dr. Sims did not depart from the standard of care by failing to recommend additional diagnostic testing because she answered the specific clinical question, ruled out gallstones and deemed the pancreas normal.

Plaintiff's expert opines that Dr. Sims departed from the standard of care by failing to detect the mass upon her interpretation of the images (*cf. Donnelly v Parikh*, 150 AD3d 820, 824 [2d Dept 2017]). Although plaintiff's expert concedes that the mass on the right kidney was smaller in size on May 25, 2016, when compared to the renal ultrasound on April 13, 2017, plaintiff's expert, nevertheless, opines that "it [the mass] is still visible and should have been recognized and reported on by Dr. Sims" regardless of the nature of the examination (abdominal ultrasound). According to the plaintiff's expert, the failure to see the mass, report it and recommend further imaging was a departure from good and accepted radiologic practice.

In light of the conflicting medical expert opinions on the issue of whether Dr. Sims departed from good and accepted medical care, summary judgment is inappropriate. The reasoning is that it is not within the purview of the court to resolve credibility issues in a summary judgment context (*see M.C. v Huntington Hosp.*, 175 AD3d 578, 581 [2d Dept 2019]; *Cummings, supra*, 147 AD3d at 904; *Feinberg v Felt*, 23 AD3d 517, 519 [2d Dept 2005]). Moreover, since defendant failed to establish, *prima facie*, that the plaintiff's injuries were not proximately caused by the alleged departure, plaintiff was not required to raise a triable issue of fact as to this element (*see DeGiorgio v Racanelli*, 136 AD3d 734, 737 [2d Dept 2016]). Nevertheless, plaintiff's expert opines that the failure by Dr. Sims to detect the mass in the ultrasound image of the right kidney on May 25, 2016, was a proximate cause of the plaintiff's injuries.

Lack of Informed Consent


Plaintiff does not oppose this branch of defendant's motion.

Res Ipsa Loquitor

Plaintiff does not oppose this branch of defendant's motion.

E N T E R,

Dated: White Plains, New York
May 8, 2020

Joan B. Lefkowitz  Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz,
E=jlefkowi@nycourts.gov
Reason: I am the author of this document
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HON. JOAN B. LEFKOWITZ, J.S.C.