

<b>McFarquhar v Park</b>
2020 NY Slip Op 35045(U)
March 6, 2020
Supreme Court, Westchester County
Docket Number: Index No. 56937/2018
Judge: Terry Jane Ruderman
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To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
JOAN McFARQUHAR,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 2  
Index No. 56937/2018

SEOUNG PARK, M.D.,

Defendant.  
-----X

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - J	1
Affirmation in Opposition, Exhibits A - D	2
Reply Affirmation	3

This medical malpractice action concerns the care and treatment given to plaintiff Joan McFarquhar by defendant Seoung Park, M.D. ("defendant" or "Dr. Park") on November 7, 2017. Plaintiff claims that since 2010, Dr. Park treated her for hypertension, thyroid dysfunction, osteoporosis, and other health issues. On November 7, 2017, she contacted Dr. Park, stating that she needed to be seen that day, and when she saw him at his office she complained of having difficulty in writing since November 2, 2017. Dr. Park conducted an examination of plaintiff and instructed plaintiff to see a neurologist, recommending a particular specialist whose office was nearby, and further instructing her to return as needed or within one month. However, plaintiff

suffered a stroke and collapsed on November 10, 2017, and was brought by ambulance to the Lawrence Hospital emergency room. She was thereafter hospitalized until December 5, 2017, and then in rehabilitation facilities until April 6, 2018. According to her current primary care physician, she now presents with right spastic hemiplegia with global aphasia, apraxia of speech, and requires assistance for her activities of daily living.

This action was commenced on May 1, 2018. Plaintiff contends that Dr. Park failed to recognize the symptom of a transient ischemic attack and the urgency of consulting a neurologist, and that he should have either arranged for her to see the recommended neurologist that day, or had her go to a hospital emergency room.

In moving for summary judgment, defendant contends that the factual assertions and the record fail to support any malpractice. Defendant submits an expert affirmation by Marvin M. Lipman, M.D., who opines that the treatment rendered by the defendant in this matter did not depart from accepted standards of medical practice and was not the proximate cause of plaintiff's injuries. Dr. Lipman states that on November 7, 2017, Dr. Park performed an appropriate examination of plaintiff, documenting that she had no focal abnormalities, and observing nothing to raise suspicion that a stroke was in evolution. Indeed, in Dr. Lipman's view, it would not have been appropriate to send plaintiff to the Emergency Room with the symptom she reported, namely difficulty with her handwriting, which she asserted was actually getting better. With regard to plaintiff's specific assertion that Dr. Park's failure to ensure the necessary prompt attention prevented plaintiff from obtaining tPA treatment, Dr. Lipman asserts that by the time plaintiff saw Dr. Park, she was outside the window for administration of tPA; since by that time her symptoms pertaining to her hand had begun five days earlier. In addition, Dr. Lipman

asserted that Dr. Park acted appropriately in referring plaintiff to a neurologist on November 7, 2016, and that plaintiff's failure to do so was in keeping with her history of non-compliance throughout the time that she was Dr. Park's patient.

Defendant also contends that the informed consent claim is meritless on its face, and in any event was not mentioned in plaintiff's response to defendant's CPLR 3101 (d) demand, it should be dismissed.

In opposition, plaintiff's expert submits an affidavit stating the opinion, to a reasonable degree of medical certainty, that the stroke plaintiff suffered, and her subsequent permanent disabilities, were caused and/or contributed to by departures from accepted medical practice on the part of her internist, Dr. Park. The affidavit recounts that on the morning of November 7, 2017, plaintiff called Dr. Park's office asking to be seen that day. In response to her complaint that she had been having difficulty writing with her right, dominant hand, since November 2nd, although the problem had seemed to improve "but [was] still somewhat clumsy," Dr. Park's notes indicated that he urged her to take the medication he had previously prescribed, and referred her to a neurologist. Observing that Dr. Park's records indicate that he issued plaintiff "strong advice" to re-start the medication, but do not indicate that plaintiff was strongly advised to see a neurologist immediately, plaintiff's expert opines that

"Ms. McFarquhar presented with a TIA (transient ischemic attack), an episode or episodes of focal neurologic symptoms due to decreased or interrupted blood flow to the brain, most likely emanating from the internal carotid artery."

The expert goes on, that

"given her race, age, hypertension, 'pre-diabetes,' and presenting complaints, appropriate care required that Dr. Park get his patient the urgent neurological evaluation that she required on that date. He should either immediately have sent

her to the Emergency Room, or at the very least called Dr. Rafat (the neurologist he recommended who had an office down the block from Dr. Park), while Ms. McFarquhar was in the office, and arranged for her to be seen immediately.”

Plaintiff's expert adds that based on plaintiff's longstanding noncompliance with Dr. Park's advice and prescribed medications, her repeated failures to go for tests that Dr. Park had ordered and the cardiology consult that he arranged, it was even more appropriate that he take steps to ensure that she see a neurologist on that day. The expert explains that immediate imaging, such as CT or a MRI/MRA, or a carotid ultrasonography, would likely have showed decreased or inadequate blood flow and/or intermittent ischemia, and would have prompted appropriate treatment to prevent or lessen the effects of the November 10th stroke.

In reply, defendant observes that plaintiff's expert ignored Dr. Park's deposition testimony, in which he stated that he advised plaintiff to see the neurologist “as early as possible,” and indeed, that he “begged,” “pushed” and “urged” her to do so, although he did not so indicate in his notes. Finally, defendant notes that nothing in the submitted opposition supports either the informed consent claim, or the claimed departure based on the failure to make a cardiac referral.

#### Analysis

The elements of proof in a medical malpractice action are a deviation or departure from accepted practice, and evidence that the departure was a proximate cause of injury or damage (*see Thompson v Orner*, 36 AD3d 791 [2d Dept 2007]). On a motion for summary judgment, the defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice, or the absence of injury as a result of any alleged malpractice (*see Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]).

Defendant's submissions on these motions have established a prima facie showing of the absence of any departure from good and accepted medical practice, through Dr. Lipman's opinion that defendant's handling of plaintiff's complaint was in accordance with the standard of care.

Plaintiff's showing in opposition is sufficient to require the denial of defendant's motion regarding the medical malpractice claim. "A plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing" (*Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dept 2013] [internal quotation marks and citation omitted]). "Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]; see also *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008] [citing *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]]).

The opinion provided by plaintiff's expert is neither conclusory nor unsupported by evidence. It sufficiently and appropriately focused on the defendant's alleged departures from accepted practice in regard to the care provided to plaintiff on November 7, 2017, as gleaned from the medical records. Defendant is not entitled to have the assertions of plaintiff's expert at his deposition treated as established facts. The question of whether defendant properly conveyed to plaintiff how critical it was to see a neurologist immediately, like the question of whether plaintiff's symptoms on November 7, 2017 required different handling than that which defendant provided, present issues of fact.

There being no opposition to the portion of the motion seeking to dismiss the claim based on a failure to obtain informed consent, that branch of the motion is granted. The complaint's claim of a departure based on the failure to refer plaintiff to a cardiologist will not be dismissed in this context, because that relief was not sought in the moving papers, but only in the reply.

In accordance with the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted only to the extent that the second cause of action is dismissed; and it is further

ORDERED that the parties are directed to appear on Tuesday, April 28, 2020 at 9:15 a.m., in the Settlement Conference Part of the Westchester County Courthouse located at room 1600, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
March 6, 2020

  
HON. TERRY JANE RUDERMAN, J.S.C.