

Diamond v Walker

2020 NY Slip Op 35518(U)

April 23, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 14-69157

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX No. 14-69157

CAL. No. 18-01575MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI

Acting Justice Supreme Court

MOTION DATE 1-17-19

ADJ. DATE 8-1-19

Mot. Seq. # 003 - MotD

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ALAN DIAMOND, Individually and as the
Executor of the Estate of KATHLEEN
DIAMOND,

Plaintiff

DUFFY & DUFFY, PLLC
Attorney for Plaintiff
1370 RXR Plaza
West Tower, 13th Floor
Uniondale, New York 11556

- against -

JAMES WALKER, M.D., PAUL GRAPPELL,
M.D., PAUL M. GRAPPELL, M.D., JAMES
T. WALKER, M.D., P.C. and MEDICAL
ARTS RADIOLOGICAL GROUP, P.C.

KOSTER, BRADY & NAGLER, LLP
Attorney for Defendants
One Whitewall Street, 10th Floor
New York, New York 10004

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, filed December 19, 2018; Notice of Motion/Order to Show Cause and supporting papers _____; Answering Affidavits and supporting papers by plaintiff, filed May 30, 2019; Replying Affidavits and supporting papers by defendants, filed July 31, 2019; Other _____; it is.

ORDERED that the motion by defendants James Walker, M.D., Paul Grappell, M.D., Paul M. Grappell, M.D., James T. Walker, M.D., P.C., and Medical Arts Radiological Group, P.C., for summary judgment dismissing the complaint is granted in part and denied in part.

This action seeks to recover damages for injuries allegedly sustained by plaintiff's decedent and wife, Kathleen Diamond, due to defendants' negligence. The medical malpractice claims arise from defendants' treatment of Mrs. Diamond from December 30, 2010 to October 22, 2012. Alan Diamond, suing on behalf of Mrs. Diamond, who passed away in June 2015, at age 53 and after the commencement of this action, alleges that defendants were negligent in, among other things, failing to timely and properly interpret mammography and ultrasound studies, and failing to diagnose metastatic breast cancer. He also

alleges causes of action for lack of informed consent and wrongful death, and sues derivatively for loss of services.

Defendants now move for summary judgment dismissing the complaint against them, arguing that they did not depart from good and accepted practices in the medical treatment they rendered to Mrs. Diamond and that such treatment did not cause her alleged injuries. They submit, among other things, copies of the pleadings, the bills of particulars, the certified medical records of Medical Arts Radiology, an affirmation of radiologist Stanley Rosenfeld, M.D., and the transcripts of the deposition testimony of plaintiff, Dr. Walker, and Dr. Grappell. In opposition, plaintiff argues that defendants deviated from good and accepted practices in the medical treatment they rendered to Mrs. Diamond, and that such deviations proximately caused her alleged injuries and death. Plaintiff submits, in opposition, a redacted expert affirmation.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and the alternatives, and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see* Public Health Law § 2805-d [1]; *Wright v Morning Star Ambulette Servs., Inc.*, *supra*; *Dyckes v Stabile*, 153 AD3d 783, 785, 61 NYS3d 110 [2d Dept 2017]; *Schussheim v Barazani*, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Mondo v Ellstein*, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]).

In this case, defendants established, *prima facie*, that the lack of informed consent was not the proximate cause of Mrs. Diamond's injuries, as Dr. Rosenfeld opined that Dr. Walker's and Dr. Grappell's treatment was not a proximate cause of her injuries (*see Tsimbler v Fell*, 123 AD3d 1009, 999 NYS2d 863 [2d Dept 2014]). In opposition, plaintiff failed to raise a triable issue of fact (*see Tsimbler v Fell*, *supra*). Therefore, plaintiff's cause of action alleging lack of informed consent is dismissed.

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused his or

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her injuries (*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Macancela v Wyckoff Heights Med. Ctr.*, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a *prima facie* entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that such departure did not proximately cause the plaintiff's injuries (*Macancela v Wyckoff Heights Med. Ctr.*, *supra*; *Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 96 NYS3d 80 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *LaVecchia v Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]). However, "bare conclusory assertions by defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (*DiLorenzo v Zaso*, 148 AD3d 1111, 1112, 50 NYS3d 503 [2d Dept 2017], quoting *Winegrad v New York Univ. Med. Ctr.*, *supra* at 853; see *Garcia-DeSoto v Velpula*, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]).

After making this *prima facie* showing, the burden shifts to the plaintiff to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (*Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Stukas v Streiter*, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the *prima facie* burden (*Bueno v Allam*, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; *Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; *Hernandez v Hwaishienyi*, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, *supra* at 325; see *Wright v Morning Star Ambulette Servs., Inc.*, *supra*; *Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, *supra*; *Hernandez v Hwaishienyi*, *supra*). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*Macancela v Wyckoff Heights Med. Ctr.*, *supra*; *Lefkowitz v Kelly*, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; *Lowe v Japal*, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; *Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

Defendants established a *prima facie* case of entitlement to summary judgment dismissing the medical malpractice and wrongful death claims against them by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment rendered to Mrs. Diamond (see *Jagenburg v Chen-Stiebel*, *supra*; *Galluccio v Grossman*, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, *supra*; *Faccio v Golub*, *supra*). By his affirmation, Dr. Rosenfeld stated that he reviewed the

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pleadings, the bills of particulars, Mrs. Diamond's medical records, and deposition testimony of the parties. He opined within a reasonable degree of medical certainty that the defendants did not depart from any good and accepted medical practice and that such medical care was not a proximate cause of Mrs. Diamond's alleged injuries. More specifically, Dr. Rosenfeld stated that the radiological studies undertaken were "good quality and technically adequate." Dr. Rosenfeld also opined that the radiological studies were properly interpreted, and timely and appropriately reported.

Dr. Rosenfeld stated that the medical records establish that Dr. Walker interpreted studies conducted on December 30, 2010, January 17, 2011, and July 27, 2011, and that Dr. Grappell interpreted a study conducted on August 1, 2012. Dr. Rosenfeld explained that radiologists are confined to interpreting films and images without hindsight knowledge, as they must be evaluated in the present. He stated that radiological films "cannot be interpreted in light of any abnormality that might be apparent on subsequent imaging studies." Dr. Rosenfeld opined that each of the mammography and sonography studies were interpreted appropriately and accurately. He opined that there was no indication for Dr. Walker or Dr. Grappell to request additional views, a Doppler study, a breast MRI, or fine needle and/or excisional biopsies.

Defendants also established their *prima facie* entitlement to summary judgment dismissing plaintiff's claims against Medical Arts Radiological Group, P.C. and Paul M. Grappell, M.D., James T. Walker, M.D., P.C. As Medical Arts Radiological Group is a professional corporation, it is vicariously liable under respondeat superior for wrongful acts committed by its employees (*see Poplawski v Gross, supra; Keitel v Kurtz, supra; Monir v Khandakar, supra*). However, defendants demonstrated that Dr. Walker and Dr. Grappell, employees of Medical Arts Radiology, were not negligent in Mrs. Diamond's medical treatment. In addition, Dr. Walker and Dr. Grappell testified that the entity Paul M. Grappell, M.D., James T. Walker, M.D., P.C., ceased activity in 2009 or 2010.

Defendants having met their initial burden on the motion, the burden shifted to the non-moving party to submit admissible evidence raising a triable issue of fact (*see Jagenburg v Chen-Stiebel, supra; Williams v Bayley Seton Hosp., supra; Makinen v Torelli, supra; Stukas v Streiter, supra*). In his affirmation, plaintiff's expert stated that he reviewed the bills of particulars, the parties' deposition testimony, and the relevant medical records and reports of Medical Arts Radiology Group, Zwanger Pesiri Radiology, Brookhaven Memorial Hospital, Brookhaven Breast Health Services, Island Surgical and Vascular Group, P.C., and Memorial Hospital for Cancer and Allied Diseases (Memorial Sloan Kettering Cancer Center). Plaintiff's expert opined within a reasonable degree of medical certainty that defendants departed from good and accepted medical practice and that such care was a substantial contributing factor in causing Mrs. Diamond's injuries and death.

Plaintiff's expert explained that a radiologist's role in treating a patient like Mrs. Diamond involves interpreting diagnostic imaging studies, identifying suspicious findings, such as masses, calcifications, spiculations, nodules, and asymmetries, informing medical providers of the findings and their potential differential causes, and, at times, providing recommendations for further work-up. He stated that failure to visualize, identify, and reporting findings demonstrated on the diagnostic imaging studies is a departure from accepted standards of care, and that failure to properly interpret radiological films can delay diagnosis and treatment. Plaintiff's expert also stated that any delay in work-up or

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treatment of such findings is attributable to the radiologist who failed to report the finding, and that such delay can be a substantial contributing factor to damage sustained. Plaintiff's expert explained that early identification and detection of carcinoma saves lives, as early detection and treatment of breast carcinoma allows for a wider range of treatment options. He attributed time as a critical factor in diagnosing and treating breast carcinoma.

Plaintiff's expert opined that the breast imaging studies conducted at Medical Arts Radiology "were of adequate and sufficient quality for diagnostic interpretation." Plaintiff's expert opined that the December 30, 2010 screening mammogram study, January 17, 2011 diagnostic bilateral breast ultrasound study, July 27, 2011 diagnostic bilateral breast mammogram and right breast ultrasound studies, and the August 1, 2012 bilateral screening mammogram and bilateral breast ultrasound studies demonstrated an abnormal finding in the upper quadrant of Mrs. Diamond's right breast. He stated that such abnormal finding was suspicious for carcinoma and warranted further investigation and work-up, including performance of a breast ultrasound with color Doppler to evaluate neovascularity and a referral to a breast surgeon.

Plaintiff's expert opined that Dr. Walker and Dr. Grappell departed from accepted standards of medical care in failing to timely and properly interpret the diagnostic imaging studies and report on the upper outer quadrant of Mrs. Diamond's right breast, which was highly suspicious for carcinoma. He opined that Dr. Walker's and Dr. Grappell's misreading and misinterpretation of the diagnostic imaging studies obtained between December 30, 2011 and August 1, 2012 substantially contributed in causing Mrs. Diamond's injuries, including the metastatic spread of her breast cancer to 21 out of 23 lymph nodes in her right axilla, and distant metastasis to her liver and right acetabulum. Plaintiff's expert stated that the departures from standard medical care allowed the undiagnosed and untreated carcinoma in Mrs. Diamond's right breast to grown, spread, and metastasize for more than 20 months, which progressed her cancer.

Plaintiff's expert opined that Dr. Walker and Dr. Grappell failed to recognize the significance that Mrs. Diamond was nulligravida, in menopause, and obese. He stated that Dr. Walker and Dr. Grappell should have recognized her increased risk of breast carcinoma with these three risk factors and taken appropriate measure to adequately perform and interpret the radiological studies. He opined that there should have been heightened concern given these factors, especially considering the findings in the upper outer quadrant of her right breast.

Plaintiff's expert concluded that properly interpreted diagnostic imaging studies would have compelled further investigation and earlier detection of Mrs. Diamond's carcinoma. He explained that early detection would have led to timely and proper intervention and treatment, and diminished or avoided Mrs. Diamond's injuries. The expert also stated that the failure to properly interpret the diagnostic imaging studies caused a delay in diagnosis, which permitted Mrs. Diamond's right breast carcinoma in the axillary tail of the upper outer quadrant to progress to the stage it was in when ultimately diagnosed in October 2012.

As plaintiff's expert described the applicable standards of care under the circumstances, how Dr. Walker and Dr. Grappell departed or deviated from such standards, and that these departures were

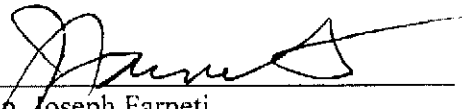
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competent causes of Mrs. Diamond's injuries and death, his affirmation is sufficient to raise triable issues of fact (*see Memoli v Winthrop-University Hosp.*, 147 AD3d 931, 47 NYS3d 128 [2d Dept 2017]; *Kitt v Okonta*, 143 AD3d 601, 39 NYS3d 456 [1st Dept 2016]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Williams v Bayley Seton Hosp.*, *supra*; *Stukas v Streiter.* *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, an Order granting summary judgment is not appropriate (*see Jagenburg v Chen-Stiebel.* *supra*; *Leto v Feld.* *supra*; *Gressman v Stephen-Johnson.* *supra*; *Moray v City of Yonkers.* *supra*).

Accordingly, the motion by defendants is granted in part and denied in part.

The unredacted affirmation of plaintiff's medical expert submitted for in camera review will be returned by mail to plaintiff's counsel.

Dated: April 23, 2020



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION