

Gallagher v Northwell Health, Inc.

2021 NY Slip Op 33243(U)

November 22, 2021

Supreme Court, Nassau County

Docket Number: Index No. 610559/17

Judge: David J. Gugerty

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DAVID J. GUGERTY, J.S.C.

X TRIAL/IAS PART 24

JEAN M. GALLAGHER,

Plaintiff,

- against -

Index No. 610559/17
Mot. Seqs. 002 & 003
Submit Date 6/14/21

NORTHWELL HEALTH, INC. NORTH SHORE
UNIVERSITY HOSPITAL, ILANA A. KAFER, M.D.,
BRIAN J. BURKE, M.D., ERICH Y. LEE, M.D.,
JOHN R. ACERRA, M.D., TIMOTHY J. PALMIERI,
M.D., "JOHN DOE/JANE DOE, M.D.", JONATHAN D.
HERMAN, M.D., and ELITE WOMENS
HEALTHCARE, LLP,

Defendants.

X

The following papers were read on this motion:

NYSCEF Numbered

Notice of Motion, Affirmation, and Exhibits	69 – 91
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Defendants, Jonathan D. Herman, M.D. ("Herman"), and Elite Women's Healthcare, LLP ("Elite"), move by notice of motion (Mot. Seq. 002) for an order: (a) for summary judgment pursuant to CPLR §3212 dismissing all claims against Herman and Elite; and (b) for such other and further relief as this court may deem just and proper.

Defendants, Northwell Health, Inc. ("Northwell"), North Shore University Hospital ("North Shore"), Ilana A. Kafer, M.D. ("Kafer"), Brian J. Burke, M.D. ("Burke"), John R. Acerra, M.D. ("Acerra"), and Timothy J. Palmieri, M.D. ("Palmieri"), move by notice of motion (Mot. Seq. 003) for an order: (1) pursuant to CPLR §3212, granting summary judgment and dismissing the complaint with prejudice against Northwell, North Shore, Kafer, Burke, Acerra, and Palmieri; or in the alternative, (2) partial summary judgment pursuant to CPLR §§3212(e) and (g); and (3) for such other and further relief as this court may deem just and proper.

The instant action sounds in medical malpractice related to the diagnosis and treatment of plaintiff's appendiceal cancer. The complaint contains two causes of action, alleging defendants negligently committed "acts and/or omissions of malpractice which were the competent and contributing and proximate cause of the injuries to plaintiff" and lack of informed consent.

By stipulation, dated May 24, 2021, the action has been discontinued against Northwell. Defendant, Erich Y. Lee ("Lee") has not appeared in the action.

"It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993])."

(*Stonehill Capital Management, LLC v Bank of the West*, 28 N.Y.3d 439, 448 [2016])

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider "departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." (*Schmitt v Medford Kidney Ctr.*, 121 A.D.3d 1088, 1088 [2nd Dept. 2014] [quoting *DiGeronimo v Fuchs*, 101 A.D.3d 933, 936 [2nd Dept. 2012]]; *Fink v DeAngelis*, 117 A.D.3d 894, 896 [2nd Dept. 2014]; *Stukas v Streiter*, 83 A.D.3d 18, 23 [2nd Dept. 2011]). "A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." (*Michel v Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 945 [2nd Dept. 2015], lv denied, 26 N.Y.3d 905 [2015]; see also *Barrocales v New York Methodist Hosp.*, 122 A.D.3d 648, 649 [2nd Dept. 2014]; *Berthen v Bania*, 121 A.D.3d 732, 732 [2nd Dept. 2014]; *Trauring v Gendal*, 121 A.D.3d 1097, 1097 [2nd Dept. 2014]; *Stukas*, 83 A.D.3d at 23). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as

to the elements on which the defendant met the *prima facie* burden.” (*Gillespie v New York Hosp. Queens*, 96 A.D.3d 901, 902 [2nd Dept. 2012]).

“Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant’s departure was a substantial factor in causing the plaintiff’s injury.” (*Semel v Guzman*, 84 A.D.3d 1054, 1056 [2nd Dept. 2011] [citing *Johnson v Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 883 [2nd Dept. 2005]]; *Goldberg v Horowitz*, 73 A.D.3d 691 [2nd Dept. 2010]; see also *Skelly–Hand v Lizardi*, 111 A.D.3d 1187, 1189 [2nd Dept. 2013]). A plaintiff is not required to eliminate all other possible causes. (*Skelly–Hand* at 1189).

“[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant’s motion for summary judgment (citations omitted).” (*Bendel v Rajpal*, 101 A.D.3d 662, 663 [2nd Dept. 2012] [quoting *Bezerman v Bailine*, 95 A.D.3d 1153, 1154 [2nd Dept. 2012]]; see also *Savage v Quinn*, 91 A.D.3d 748, 749 [2nd Dept. 2012]; *Myers v Ferrara*, 56 A.D.3d 78, 84 [2nd Dept. 2008]).

Initially, the court notes that plaintiff’s opposition papers are devoid of any arguments in opposition to the dismissal of the action as against defendants, Elite, Acerra, Palmieri, and Kafer. Therefore, the arguments made by Elite, Acerra, Palmieri, and Kafer in support of summary judgment are deemed conceded and the court is constrained to dismiss the action against them.

Accordingly, defendants’ motions are **GRANTED** in their entirety as to Elite, Acerra, Palmieri, and Kafer.

“To demonstrate a lack of informed consent, the plaintiff is required to establish that (1) the defendant failed to disclose the material risks, benefits, and alternatives to the [procedure] which a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the plaintiff to make a knowledgeable evaluation, and (2) a reasonably prudent person in the plaintiff’s position would not have undergone the [procedure] if he or she had been fully informed (see Public Health Law § 2805-d[1], [3]; *Sarwan v. Portnoy*, 51 A.D.3d 655, 656-657; *Davis v. Nassau Ophthalmic Servs.*, 232 A.D.2d 358). The alleged qualitative insufficiency of the consent must be supported by expert medical testimony (see *Davis v. Nassau Ophthalmic Servs.*, 232 A.D.2d at 358).”

(*Johnson v. Jacobowitz*, 65 A.D.3d 610, 613 [2nd Dept. 2009])

Here, plaintiff is alleging that defendants failed to timely diagnose appendiceal cancer, resulting in injury. For a failure to diagnose to be the basis of a cause of action for a lack of informed consent there must be a related invasive procedure (see *Lewis v. Rutkovsky*, 153 A.D.3d 450, 456 [1st Dept. 2017]; *Janeczko v. Russell*, 46 A.D.3d 324 [1st Dept. 2007]; Public Health Law §2805-d[2][b]). Plaintiff has not presented any evidence to support that her claim of injury

is related to an invasive procedure. As such, the cause of action for lack of informed consent cannot be maintained.

Accordingly, the branches of defendants' motions seeking summary judgment dismissing the second cause of action for lack of informed consent are **GRANTED** in their entirety.

With regard to the remaining cause of action for medical malpractice against defendants, North Shore, Burke, and Herman, plaintiff had been a patient of Herman, a gynecologist, since at least February 1998. During her time as his patient, plaintiff treated for such things as excessive menstrual bleeding with uterine/endometrial ablations and in November 2012 he performed a laparoscopy and left salpingo-oophorectomy for ovarian chocolate cyst and endometriosis. In June 2014 Herman removed two lesions from plaintiff's uterus which pathology determined to be benign. In April 2015 Herman advised plaintiff to have a colonoscopy performed but she did not comply.

On November 13, 2015, plaintiff had pain in her right abdomen and went to the emergency room at North Shore where she was evaluated by Acerra, the attending emergency medicine doctor, and Palmieri, a resident emergency medicine doctor. After conducting a history and physical examination, Acerra ordered blood tests and a CT scan of the abdomen and pelvis. The white blood cell and neutrophil counts were high, indicative of an infection. The CT scan was interpreted by Burke, the attending radiologist, and Kafer, a resident radiologist. Burke provided the report, finding, among other things, bilateral soft tissue lesions in the pelvis that may represent endometriosis and recommended a pelvic sonogram.

Upon review of the CT scan, Acerra arranged for a gynecological consult and then signed plaintiff off to the oncoming attending emergency medicine doctor as his shift was ending. Burke's shift was also ending, and the sonogram was interpreted by the then attending radiologist, Lee, and Kafer. Lee's findings included a heterogenous, hypoechoic lesion in the anterior right lower quadrant, corresponding to the CT scan findings and consistent with endometriosis. He further found a lesion in the posterior uterine body to likely be adenomyoma and a complex right hydrosalpinx to correlate clinically for a superimposed infection.

A gynecological consult was then performed in the emergency department. The gynecologist's impression was that plaintiff's right lower quadrant pain was likely caused by endometriosis with a possible inflammatory response. The gynecologist did not feel that acute gynecological intervention was required at that time. Plaintiff was discharged early in the morning on November 14, 2015 with a diagnosis of endometriosis and instructions to follow-up with her gynecologist for further evaluation.

Plaintiff made the appointment with Herman, as recommended, and saw him the next day, November 16, 2015. Herman performed an exam, blood tests, and an ultrasound, while also reviewing the labs and radiology reports from North Shore. He was not provided with the actual images. Herman diagnosed plaintiff with an infection in her fallopian tube and prescribed Flagyl, an antibiotic. Plaintiff followed up with Herman on November 20, 2015 and November 27, 2015. Although she still exhibited some abdominal tenderness, it had decreased, plaintiff was

feeling better, and her white blood cell count had decreased to within the normal range. Plaintiff next saw Herman on February 23, 2016, complaining of pelvic pain for the prior two weeks. Lab results found a normal white blood cell count.

On March 3, 2016, plaintiff went to Long Island Jewish Hospital ("LIJ") complaining of increased abdominal pain. A CT scan found lesions and an endometrial biopsy was performed. The specimen was diagnosed as inactive endometrium. A surgical oncologist performed a colonoscopy, which resulted in a diagnosis of appendiceal cancer. Surgery was performed at North Shore on March 12, 2016 which removed the cancer. Pathology revealed metastatic mucinous adenocarcinoma consistent with appendiceal origin to the right adnex/ovary, pelvic peritoneal implant, left sigmoid colon and liver, consistent with Stage IV disease. Thereafter, plaintiff underwent chemotherapy from May through December 2016.

On September 19, 2019, due to a recurrence of the metastatic appendiceal carcinoma, plaintiff underwent surgery at LIJ to remove the mass. There was no indication that the cancer had spread beyond the abdomen. At North Shore on February 12, 2021, as the result of the appendiceal cancer metastasizing, plaintiff underwent a left frontotemporal craniotomy and gross total excision of a large extra axial tumor which eroded through the cranium and into the brain.

With regard to the claim of medical malpractice against Herman, plaintiff alleges that Herman departed from accepted standards of care by treating plaintiff for an infection on November 16, 2015 without performing a laparoscopy to examine tissue by pathology in order to obtain a definitive diagnosis of the masses found on the CT scan. Plaintiff additionally contends that Herman failed to obtain a surgical consult and that the delay in diagnosis from November 16, 2015 to March 3, 2016 resulted in injuries.

In moving for summary judgment, Herman argues that he conformed to the standard of care and that he had previously recommended that plaintiff obtain a colonoscopy which may have revealed the appendiceal cancer, but plaintiff failed to have one. In support of his motion Herman submits the affirmation of Robert Berg, M.D. ("Berg"), as an expert in gynecology. Berg opines with a reasonable degree of medical certainty that the findings of the tests conducted by Herman confirm that his diagnosis of an infection was reasonable and conformed to the standard of care. Berg affirms that there is no diagnostic standard that requires tissue or pathology confirmation of a pelvic infection and that prescribing Flagyl is consistent with the standard of care for such an infection. Moreover, Berg opines that plaintiff's positive response to the antibiotic confirms the diagnosis. Berg further affirms that although plaintiff had abdominal pain, there were no signs or imaging results that evidenced appendicitis.

With regard to plaintiff's endometriosis, Berg opines that Herman was justified in relying on that diagnosis by the radiologists at North Shore based on plaintiff's history and the radiological report. Berg further affirms that in his opinion there was no need for immediate treatment of the endometriosis upon successful treatment of the pelvic infection because plaintiff was not symptomatic.

Finally, Berg opines that there is no evidence that the cancer metastasized beyond the abdomen from November 2015 through March 2016 when plaintiff had surgery. Moreover, at the time of the cancer's recurrence in September 2019 it remained confined to the abdomen. Thus, Herman argues that plaintiff's injuries are the result of cancer that had spread prior to the dates of the alleged malpractice in November 2015, and that any alleged delay in treatment caused no harm.

In opposition, plaintiff submits the affirmation of Dan-Arin Silasi, M.D. ("Silasi"), as an expert in gynecological oncology. Silasi, without addressing plaintiff's failure to have a colonoscopy as recommended by Herman, opines that Herman departed from accepted medical standards by treating plaintiff based on a diagnosis of a pelvic infection and presuming that the masses were benign endometriosis without doing further testing. He opines that without further testing the diagnosis remained unproven and that a diagnosis of endometriosis was unlikely because of the ablation performed in 2012.

Silasi goes on to opine that the standard of care requires that a laparoscopy be performed to examine the masses as the only way to determine whether they are malignant or benign, and that a surgical consultation was necessary. In support of this, plaintiff points to Herman performing a laparoscopy in August 2012 when a mass was found in plaintiff's abdomen. Silasi affirms that these departures were a substantial factor or proximate cause of the harm allegedly caused to plaintiff, opining that the masses grew during the delay in diagnosis, but that timely diagnosis and removal could have decreased or eliminated the chance of future disease. Moreover, Silasi opines that the departure increased the likelihood of the cancer becoming blood borne and spreading to plaintiff's brain.

Plaintiff also submits the affirmation of Mark Levin, M.D. ("Levin"), an expert in oncology and internal medicine. Levin opines that the absence of treatment from November 13, 2015 through March 3 and March 12, 2016 was a substantial factor and proximate cause in the alleged injury sustained by plaintiff. He believes that the cancerous tumors grew during this period, making the eventual surgery more difficult with decreased effectiveness. Levin further opines that the cancer would not have entered the blood stream and metastasized to plaintiff's brain had it been treated sooner.

In reply, Herman argues, among other things, that plaintiff's experts failed to address plaintiff's failure to have a colonoscopy in April 2015, as advised by Herman. Herman further argues that plaintiff's expert failed to address that the CT scan of November 13, 2015 and the sonogram of November 14, 2015 showed the presence of hydrosalpinx, which, as affirmed by Berg, is typically associated with a pelvic infection. Herman also argues that as the use of antibiotics improved plaintiff's condition, Silasi's argument that a laparoscopy should have been conducted is only in hindsight as the imaging evidence provided no reason to do so. Herman additionally argues that Silasi's assertion that Herman should have followed plaintiff to baseline resolution of presumed infection and performed a laparoscopy is misplaced because plaintiff had not entirely returned to baseline, rendering such a course of action impossible. Moreover, Herman asserts that it is impossible for anyone to know when distant metastasis occurred as there is no evidence as to when the cancer entered the blood stream.

Based upon these submissions the court finds that the parties have adduced conflicting medical expert opinions, rendering summary judgment inappropriate (*Feinberg v. Feit*, 23 A.D.3d 517 [2nd Dept. 2005]). Questions have been raised as to whether Herman conformed to the standard of care based upon the imaging findings of November 13 and November 14, 2015. And even if Herman did not conform there are questions as to whether the failure to do so and the alleged resulting delay in diagnosis and treatment was a proximate cause of the alleged injury to plaintiff. These issues that have been raised by the conflicting expert opinions can only be resolved by the trier of fact (*DiGeronimo v. Fuchs*, 101 A.D.3d 933 [2nd Dept. 2012]; *see also Hayden v. Gordon*, 91 A.D.3d 819 [2nd Dept. 2012]).

Accordingly, Herman's motion for summary judgment is **DENIED**.

In support of their motion for summary judgment North Shore and Burke submit the affirmations of Denise Nassisi, M.D. ("Nassisi"), an emergency medicine expert; Michael Sadler, M.D. ("Sadler"), a radiology expert; and William Burke, M.D. ("expert Burke"), a gynecologic oncology expert. All of the experts opine that North Shore and Burke adhered to accepted standards of medical practice. Moreover, their care was not a substantial factor in causing the injuries alleged by plaintiff.

Nassisi affirms that the North Shore emergency medicine providers followed accepted medical standards in evaluating plaintiff and administering tests. A definitive diagnosis was not made, and plaintiff was advised to follow up with her treating gynecologist.

Sadler affirms that the CT and sonogram performed at North Shore were performed, interpreted, and reported in accordance with accepted medical standards. He opines that such tests can only provide a presumptive diagnosis and that a definitive diagnosis requires a biopsy for pathological assessment. Sadler affirms that Burke, in his report, advised plaintiff's treating physicians of the findings and the need for additional testing.

Expert Burke affirms that the gynecology consult was performed in conformance with accepted medical standards. He opines that the consultant's presumptive diagnosis of endometriosis was reasonable based upon plaintiff's history, labs, and radiologic imaging reports. Moreover, expert Burke affirms that the consultant properly instructed plaintiff to follow up with her gynecologist. Expert Burke further opines that the alleged delay in diagnosis would not have changed plaintiff's treatment, staging, outcome, prognosis, or life expectancy, and that the same surgery and chemotherapy would have resulted.

In opposition, plaintiff submits the affirmation of Benjamin Seckler, M.D. ("Seckler"), an expert in radiology. Seckler opines that Burke deviated from accepted standards of medical practice by failing to include in his report a finding of neoplasm, which was contained in his differential diagnosis during the review of the CT scan. Seckler affirms that such inclusion would have led to a recommendation for further evaluation to rule out malignancy. Seckler also affirms that Lee departed from accepted standards by failing to state in his impression that the heterogeneous hypoechoic lesion identified in the sonogram could be a malignancy, which would have resulted in further testing to rule it out. Seckler opines that these departures resulted

in a delay in diagnosis, which was a substantial factor or proximate cause of injury to plaintiff as the cancer was allowed to spread.

Plaintiff also submits the affirmation of Mark Levin, M.D. ("Levin"), an expert in oncology and internal medicine. Levin opines that even if it is accurate that plaintiff's cancer was at Stage IV in both November 2015 and March 2016, if the surgery had been performed earlier, plaintiff's prognosis would have been more favorable. Levin further affirms that the delay increased the likelihood of the cancer becoming blood borne, opining that an earlier diagnosis would have prevented the cancer from metastasizing to plaintiff's brain. As such, Levin believes that the delay in diagnosis was a substantial factor or proximate cause of injury to plaintiff.

In reply North Shore and Burke argue that the delay in diagnosis is not statistically significant, predictive, or prognostic of plaintiff's survival or outcome, and that claims to the contrary are contradicted by peer reviewed medical literature referenced by expert Burke. Moreover, North Shore and Burke assert that any claim that the delay worsened plaintiff's condition is moot because plaintiff has now surpassed the five year survival period. North Shore and Burke also contend that it is moot whether the radiologists included the possibility of malignancy within their impression because Herman testified at his deposition that he considered that the identified lesions could be malignant.

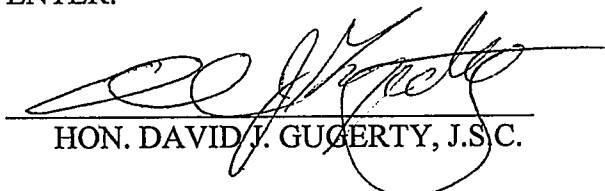
In reviewing the submissions, it is apparent that plaintiff's claim of medical malpractice against North Shore and Burke hinges on the claim that the radiology report, which was relied upon by Herman, failed to include a mention of neoplasm, and that if it had, further testing for malignancy would have been conducted, leading to an earlier diagnosis of plaintiff's cancer. North Shore and Burke have established entitlement to summary judgment by demonstrating that even if the failure to include neoplasm in the report is a departure from standard medical practice, it did not result in the alleged delay in diagnosis as Herman testified at his deposition that he considered that the lesions could be malignant when he saw plaintiff the very next day, November 16, 2015. This renders moot the issue of whether neoplasm should have been mentioned in the report, and plaintiff has failed to offer any evidence that would raise a triable question of fact related to this issue. As such, the alleged failure to mention neoplasm in the radiology report is not a substantial factor or proximate cause of plaintiff's alleged injury and summary judgment is warranted.

Accordingly, North Shore and Burke's motion for summary judgment is **GRANTED** in its entirety.

This constitutes the decision and order of this court.

Dated: November 22, 2021
Mineola, New York

ENTER:



HON. DAVID J. GUGERTY, J.S.C.

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Nov 24 2021

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