

Morales v Caremount Med., P.C.
2021 NY Slip Op 33428(U)
September 29, 2021
Supreme Court, Westchester County
Docket Number: Index No. 70349/2018
Judge: Alexandra D. Murphy
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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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

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MONIQUE MORALES,

Plaintiff,

Index No. 70349/2018

– against –

Seq. No. 1, 2 & 3

CAREMOUNT MEDICAL, P.C., ANDREW NEEDLEMAN, M.D., STEVEN JACOBS, M.D., HEALTH QUEST MEDICAL PRACTICE, P.C., and RICHARD MERRILL, M.D.,

DECISION & ORDER

Defendants.

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In an action to recover damages for medical malpractice, the defendants, Caremount Medical, P.C. and Steven Jacobs, M.D. (motion seq. 1), Health Quest Medical Practice, P.C. and Richard Merrill, M.D. (motion seq. 2), and Andrew Needleman, M.D. (motion seq. 3), separately move for summary judgment, pursuant to CPLR 3212, dismissing the complaint:

Papers Considered

NYSCEF Doc. No. 41-101; 115-154

1. Notice of Motion/Affirmation of Michael N. Romano, Esq./Exhibits A-M;
2. Notice of Motion/Affirmation of Patrick J. Brennan, Esq./Exhibits A-Q;
3. Notice of Motion/Affirmation of Clifford A. Platt, Esq./Exhibits A-P;
4. Affirmation of Aaron S. Halpern, Esq. in Opposition/Exhibits A-F;
5. Reply Affirmation of Michael N. Romano, Esq.;
6. Reply Affirmation of Patrick J. Brennan, Esq./Exhibits R-U;
7. Affirmation of Aaron S. Halpern, Esq. Objecting to Reply.

Factual and Procedural Background

The plaintiff, Monique Morales, commenced this action against the defendants for failure to timely diagnose Diffuse Interstitial Pulmonary Neuroendocrine Hyperplasia (DIPNECH), a rare lung condition in which the abnormal growth of pulmonary neuroendocrine cells causes pulmonary nodules.

The defendants, Caremount Medical, P.C. and Steven Jacobs, M.D., move for summary judgment dismissing the complaint insofar as asserted against them. They

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argue that Dr. Jacobs was the plaintiff's primary care physician who fulfilled his duty by referring the plaintiff to a pulmonologist.

Dr. Jacobs submits an expert affirmation of Alan Fein, M.D., who is board certified in internal medicine, pulmonary diseases and critical care medicine. Dr. Fein avers that DIPNECH is a very rare and poorly understood lung condition. As of 2018, fewer than 400 cases had been reported since the discovery of the condition in 1992. Dr. Fein states that DIPNECH is not a life-threatening condition but is slowly progressive. Symptoms include chronic cough and shortness of breath with exertion and wheezing. Dr. Fein has treated patients diagnosed with DIPNECH, however, since it is such a rare condition, he states there are no established guidelines for treatment. There is also no cure for DIPNECH. Dr. Fein avers that DIPNECH is definitively diagnosed by a lung biopsy. Dr. Fein states that it was the pulmonologists' role to determine the etiology of the plaintiff's chronic cough and pulmonary nodules, perform the diagnostic tests and ultimately determine whether to order a biopsy.

According to Dr. Fein, Dr. Jacobs first treated the plaintiff on November 24, 2015. The plaintiff had a documented dry cough for 4 years, a history of shortness of breath and GERD. Dr. Jacobs noted that a previous CT scan revealed multiple pulmonary nodules and ordered a CT scan of the chest and immediately referred the plaintiff to pulmonary specialist, the co-defendant, Andrew Needleman, M.D. Dr. Fein stated that Dr. Jacobs did not order a lung biopsy because it is beyond the scope of his practice as a primary care physician. Dr. Fein opines that the standard of care mandated that Dr. Jacobs make a referral and defer to Dr. Needleman, who was best able to diagnose and treat the plaintiff. Dr. Jacobs saw the plaintiff several times between June 2016 and May 2018, during which time the plaintiff was under the care of Dr. Needleman and the co-defendant, Richard Merrill, M.D.

Dr. Fein opines that Dr. Jacobs provided medical treatment to the plaintiff within the standard of care. He immediately referred the plaintiff to a pulmonologist on the first visit. The plaintiff was under the constant and consistent care of a pulmonologist during the time she was treated by Dr. Jacobs. Dr. Jacobs did not deviate from standards of care by deferring to the pulmonologists since they were the specialists who would determine whether a biopsy was required.

The defendants Health Quest Medical Practice, P.C. (Health Quest) and Richard Merrill, D.O., sued herein as Richard Merrill, M.D., move for summary judgment dismissing the complaint. They argue that the care and treatment rendered was within the accepted standard of medical care, the lack of informed consent claim must be dismissed and there are no triable issues of fact on the claim for negligent hiring.

Health Quest and Dr. Merrill submit an expert affirmation of Steve H. Salzman, M.D., who is board certified in internal medicine, pulmonary diseases and critical care medicine and sleep medicine. Dr. Salzman states that DIPNECH is a rare form of lung disease and that most pulmonologists practicing today have not diagnosed or treated

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DIPNECH. He further states that there is no reliable peer reviewed proof that early diagnosis or treatment improves a patient's course or prognosis. Dr. Salzman avers that the standard of care was to follow lung nodules with periodic CT scan imaging in order to monitor for interval changes in size. A significant increase in size is concerning for malignancy and would trigger investigation, including the performance of a biopsy. Dr. Salzman states that Dr. Merrill followed the standard of care by requesting prior CT scans and ordering his own CT scans on July 12, 2017 and November 21, 2017. There was no significant change or growth in the size or volume of nodules between the July 12th and November 21st scans. Dr. Salzman opines that Dr. Merrill ordered appropriate medications to treat the plaintiff's chronic cough. Dr. Salzman states that the lung nodules only grew from 7mm to 9 mm during Dr. Merrill's treatment of the plaintiff. Dr. Salzman states that a needle biopsy cannot be performed on nodules that are smaller than 1 cm, and the only option was to request a surgical biopsy, which requires a general anesthetic.

Dr. Salzman opines that there is no scientific reliable evidence that any alleged delay in diagnosing DIPNECH increased the plaintiff's risk of developing a malignancy or altered her life expectancy or prognosis. Dr. Salzman opines, with a reasonable degree of medical certainty, that Health Quest and Dr. Merrill acted in accordance with good and accepted standards of medical practice in rendering care and treatment to the plaintiff, and none of the alleged deviations were substantial factors in causing her injury.

The defendant, Andrew Needelman, M.D., moves for summary judgment dismissing the complaint. Dr. Needelman argues that his treatment of the plaintiff for 8 months was within the accepted standard of pulmonary care. Dr. Needelman argues that he properly treated the plaintiff's chronic cough by ordering, reviewing and interpreting pulmonary tests, sleep studies and CPAP studies. He also appropriately ordered CT scans, and no change in size or suspicion of malignancy were noted.

Dr. Needelman submits an expert affirmation of Edwin Neil Schachter, M.D., who is board certified in internal medicine, critical care and pulmonary medicine. Dr. Schachter opines with a reasonable degree of medical certainty that Dr. Needelman's treatment of the plaintiff's chronic cough was within the standard of care. Dr. Needelman's treatment did not cause any growth or malignancy of the plaintiff's pulmonary nodules. Dr. Schachter states that a PET scan and biopsy was not indicated until the pulmonary nodules grew to 1 cm in size, which did not happen until two years after Dr. Needelman's last treatment. Dr. Needelman's treatment did not cause any change in the plaintiff's prognosis or decreased life expectancy. With respect to the claim for lack of informed consent, no invasive procedure was performed by Dr. Needelman.

In opposition, the plaintiff argues that issues of fact exist. The plaintiff submits an expert affirmation of a board-certified doctor in internal medicine with a subspecialty of pulmonary diseases. The plaintiff's expert opines with a reasonable degree of medical certainty that Dr. Jacobs and Dr. Merrill departed from good and accepted standards of medical care with regard to the plaintiff's treatment. The expert states that Dr. Jacobs and Dr. Merrill did not properly evaluate, diagnose or treat the plaintiff's condition. The

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plaintiff's expert states that the plaintiff's clinical symptoms, complaints, medical history and radiological findings of pulmonary nodules which had grown in size were consistent with several serious non-malignant and malignant pulmonary diseases, including DIPNECH. The failure to consider or evaluate the plaintiff for this condition was a substantial departure from the standard of care, which likely contributed to worsening symptoms, the growth of the pulmonary nodules and a worsened prognosis.

Discussion

"In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dep't 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dep't 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dep't 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, the defendants made a prima facie showing of entitlement to summary judgment by demonstrating through expert opinion that they did not deviate from the accepted standards of medical practice or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Reustle v Petraco*, 155 AD3d 658 [2d Dept 2017]). However, in opposition, the plaintiff's expert affidavit raised triable issues of fact as to whether Dr. Jacobs and Dr. Merrill departed from good and accepted medical practice and whether such departure was a proximate cause of the plaintiff's injuries (see *Reustle v Petraco*, 155 AD3d 658).

However, while the plaintiff's expert refers to Dr. Needelman, who co-managed the plaintiff's treatment from January 2016 to July 2016, the expert fails to assert any opinion that Dr. Needelman deviated from the accepted standards of medical practice or that any alleged departure was a proximate cause of the plaintiff's injuries.

The parties' remaining contentions have been considered by the Court and found to be without merit.

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Accordingly, it is

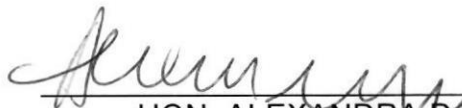
ORDERED that the motion of the defendants Caremount Medical, P.C. and Steven Jacobs, M.D. for summary judgment dismissing the complaint is DENIED (motion seq. 1); and it is further

ORDERED that the motion of the defendants Health Quest Medical Practice, P.C. and Richard Merrill, M.D. for summary judgment dismissing the complaint is DENIED (motion seq. 2); and it is further

ORDERED that the motion of the defendant Andrew Needleman, M.D. for summary judgment dismissing the complaint is GRANTED, and the complaint is DISMISSED insofar as asserted against him (motion seq. 3).

Counsels for all parties are directed to appear in the **Settlement Conference Part, Room 1600**, at a date and time to be provided.

Dated: White Plains, New York
September 29, 2021



HON. ALEXANDRA D. MURPHY, J.S.C.

H: CIVIL ALPHABETICAL MASTER/Morales v. Caremount Medical, PC