

Zauderer v Zwanger & Pesiri Radiology Group LLP
2021 NY Slip Op 33543(U)
June 16, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 2278/2019
Judge: George Nolan
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SHORT FORM ORDER

INDEX No. 2278/2019
CAL. No. 202001066MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 4/30/21
ADJ. DATE 5/6/21
Mot. Seq. # 001 MD

-----X
CHERYL ZAUDERER,

Plaintiff,

- against -

ZWANGER & PESIRI RADIOLOGY GROUP
LLP and MICHELLE ROTBLAT, M.D.,

Defendants.
-----X

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Attorney for Plaintiff
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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 filed by defendants, on March 19, 2021 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers filed by plaintiff, on April 22, 2021 ; Replying Affidavits and supporting papers filed by defendants, on May 5, 2021 ; Other ; it is

ORDERED that the motion by defendants Zwanger & Pesiri Radiology Group, LLP, and Michelle Rotblat, M.D., for summary judgment dismissing the complaint is denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Cheryl Zauderer by defendant Michelle Rotblat, M.D., and her employer, defendant Zwanger & Pesiri Radiology Group, LLP (Zwanger Pesiri). Plaintiff alleges, inter alia, that Dr. Rotblat departed from good and accepted medical practice by failing to properly interpret a CT scan, which was performed at a Zwanger Pesiri office, on November 15, 2016. Plaintiff alleges that Dr. Rotblat's failure to properly interpret her CT scan led to a delay in the diagnosis of sinonasal cancer. Plaintiff further alleges that Zwanger Pesiri is liable for the negligence of Dr. Rotblat as her employer.

The facts of the case, subject to some dispute, can be summarized as follows: Plaintiff had a history of cough, congestion, and allergies, and was treated by her husband and otolaryngologist, Dr.

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Jeffrey Zauderer. In approximately October 2016, plaintiff was suffering from persistent symptoms, and Dr. Zauderer prescribed two courses of antibiotics and oral steroids, with no improvement. Dr. Zauderer also performed a nasal endoscopy, and testified that he visualized a nasal polyp. On October 29, 2016, plaintiff presented to the emergency department of North Shore University Hospital Manhasset with complaints of cough, congestion, chest pressure, and difficulty breathing. She was evaluated, diagnosed with non-specific chest pain, and discharged with instruction to follow up with her primary care physician in 24 to 48 hours.

On November 11, 2016, plaintiff was referred by Dr. Zauderer to pulmonologist, Dr. Ernest Vomero, for evaluation of her protracted cough. Dr. Vomero performed a physical exam, noted her pulmonary function was normal, and prescribed a CT scan of her sinuses. Dr. Vomero's notes indicate that his impression was a viral or infectious etiology, chronic sinusitis, postnasal drip, seasonal allergies, and rhinitis. On November 15, plaintiff presented to a Zwanger Pesiri facility for a CT scan of her maxillofacial sinuses without contrast. Plaintiff reported to Zwanger Pesiri a history of decreased smell, postnasal drip, and acute frontal sinusitis. The following day, Dr. Rotblat interpreted the study. She documented her impression as severe right frontal and minimal left frontal sinus disease with occlusion of the frontoethmoidal junctions, mild right minimal left ethmoid sinus disease, mild secretions in the lateral left sphenoid sinus, mild right minimal left maxillary sinus disease, and right nasal polyp. She documented findings that included, among other things, complete opacification of the right frontal sinus, and opacification of the anterior right ethmoid sinus. On November 17, Dr. Vomero communicated the results of the CT scan to plaintiff, indicating the opacification of her right frontal sinus, and evidence of sinusitis in the ethmoid, sphenoid, and maxillary sinuses. Dr. Vomero also spoke with Dr. Zauderer the same day. Plaintiff reported that she was feeling better.

In February 2018, plaintiff began complaining of congestion and progressively worsening allergies, and a feeling of "packing" in her nose. In October 2018, Dr. Zauderer performed a second nasal endoscopy at home, and testified that he observed the same right polyp. In February 2019, Dr. Zauderer performed a third nasal endoscopy, and testified he observed that the polyp had shrunk from the last time he observed it, and that beyond the polyp he could now observe a smooth, tan mass. He testified he referred plaintiff to Dr. Patrick Colley for evaluation. On February 27, 2019, plaintiff underwent a CT scan at New York Eye and Ear Infirmary at Mount Sinai, and the results of the CT scan showed an opacification of the right nasal cavity, with erosion of the perpendicular plate by a growth abutting the cribriform plate in the olfactory recess. Dr. Colley evaluated the plaintiff on the same day, and he performed a nasal endoscopy and a biopsy of the polyp and the tan mass. Plaintiff was subsequently diagnosed with a low-grade olfactory neuroblastoma.

Dr. Rotblat and Zwanger Pesiri now move for summary judgment dismissing the complaint, arguing that Dr. Rotblat did not deviate or depart from the applicable standard of care in the treatment she provided to plaintiff, or that if there was a deviation or departure from the standard of care, that such deviation was not the proximate cause of plaintiff's alleged injuries. In support of their motion, Dr. Rosblat and Zwanger Pesiri submit, inter alia, the affirmations of Robert D. Zimmerman, M.D., and Seth Lieberman, M.D., plaintiff's certified medical records from North Shore University Hospital Manhasset, and Dr. Vomero, plaintiff's uncertified medical records from Zwanger Pesiri, NYU Langone, and New York Eye and Ear Infirmary of Mount Sinai, and the transcripts of the deposition testimony of plaintiff,

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Dr. Rosblat, and Dr. Zauderer. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Dr. Rosblat deviated or departed from the applicable standard of care, and with respect to whether those deviations were the proximate cause of plaintiff's alleged injuries. Plaintiff submits, inter alia, the affirmation of Karen Weingarten, M.D.

Initially, the Court notes that while defendants have submitted uncertified copies of plaintiff's medical records, plaintiffs do not challenge their admissibility and reference their contents in opposition. Since there is no prejudice to any substantial right of the plaintiffs by the lack of certification, the records will be considered admissible (*Matter of Robert E. Havell Revocable Trust v Zoning Bd. of Appeals of Vil. of Monroe*, 127 AD3d 1095, 8 NYS3d 353 [2d Dept 2015]; see CPLR 2001).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment, and a breach of this duty constitutes medical malpractice (see *Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 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 her injuries (see *Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]).

To establish his or her 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 the plaintiff was not injured as a result (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 33 NYS3d 369 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]). If such a showing is made, the burden then shifts to the plaintiff to submit evidentiary facts or materials in rebuttal, but only as to those elements on which the defendant met his or her prima facie burden (see *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]; *Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter*, *supra*). Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact in a medical malpractice action (see *Wagner v Parker*, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2d Dept 2017]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2d Dept 2017]).

Dr. Rosblat and Zwanger Pesiri have established, prima facie, entitlement to summary judgment dismissing the complaint. Defendants submit the affirmation of Robert D. Zimmerman, M.D., who avers that he is licensed to practice medicine in New York, and that he is board certified in diagnostic radiology, with a sub-certification in neuroradiology. Dr. Zimmerman opines, within a reasonable

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degree of medical certainty, that Dr. Rotblat satisfied the standard of care in her treatment of plaintiff, and that she correctly and appropriately reported the findings of plaintiff's November 15, 2016 CT scan. He opines that Dr. Rotblat appropriately reported complete opacification of plaintiff's right frontal sinus with occlusion of the frontoethmoidal junction; opacification of the anterior right ethmoid sinus and minimal posterior mucosal thickening; and opacification and expansion of the right superior nasal cavity. Dr. Zimmerman opines that the contents of Dr. Rotblat's report communicates severe, unilateral sinus disease and expansion of the right superior nasal cavity that requires further evaluation. Dr. Zimmerman further opines that Dr. Rotblat and the staff of Zwanger Pesiri appropriately communicated the results of plaintiff's CT scan to her referring physician, Dr. Vomero, as Dr. Vomero's records indicate that he communicated the results of the study to plaintiff on November 17. Dr. Zimmerman opines that it would be reasonable for a neuroradiologist, such as Dr. Rotblat, to expect that a patient's managing physician would review the report of a radiological study and understand the significance of the results, and that it is not the role of the radiologist, such as Dr. Rotblat, to instruct a clinician, such as Dr. Vomero or Dr. Zauderer, how to conduct a further evaluation.

Defendants also submit the affirmation of Seth Lieberman, M.D., who avers that he is licensed to practice medicine in New York, and that he is board certified in otolaryngology. Dr. Lieberman opines, within a reasonable degree of medical certainty, that the care and treatment provided by Dr. Rotblat and Zwanger Pesiri was within the accepted standards of radiological care, and that there were no acts or omissions on the part of defendants that were the proximate cause of plaintiff's alleged injuries. Dr. Lieberman opines that it is the role of a radiologist in interpreting a CT scan of the nasal sinuses to report the findings to the ordering clinician, so that that physician can correlate the findings with the patient's presentation and develop a plan for further evaluation. Dr. Lieberman opines that Dr. Rotblat correctly and appropriately interpreted the results of plaintiff's November 15 CT scan, and that Dr. Rotblat's report indicated a concern for a malignant process, specifically a neoplasm. Dr. Lieberman opines that a CT scan would not be able to differentiate between a malignant or a benign process and further opines that any clinician ordering a CT scan of the nasal sinuses should have been aware that a further work up, including a biopsy or referral to another ENT, would be necessary based on the findings of the CT, as reported by Dr. Rotblat, and that it is not the role of the radiologist to make recommendations for further evaluations. Dr. Lieberman opines that based upon the results of the CT examination, Dr. Zauderer, as plaintiff's treating physician, should have ordered an MRI of the plaintiff's sinuses. Dr. Lieberman opines that the proximate cause of any alleged failure to diagnose plaintiff's cancer was Dr. Zauderer's failure to review plaintiff's CT imaging and/or Dr. Rotblat's report, and his failure to perform a further work-up, including tissue sampling and/or MRI.

Dr. Rotblat and Zwanger Pesiri having met their prima facie burden on the motion for summary judgment dismissing the complaint as asserted against them, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stiso v Berlin*, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; *Stukas v Streiter*, *supra*). Plaintiff submits the affirmation of Karen Weingarten, M.D., who avers that she is licensed to practice medicine in New York, and that she is board certified in diagnostic radiology, with a sub-certification in neuroradiology. Dr. Weingarten opines, within a reasonable degree of medical certainty, that Dr. Rotblat deviated from the applicable standard of care in her interpretation of plaintiff's CT scan, and that her failure to alert plaintiff's clinicians to the significance of the CT findings was the proximate cause of

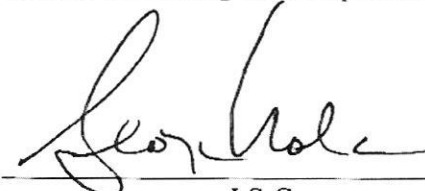
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plaintiff's injuries. Dr. Weingarten opines that there are three distinct conditions that would be present on a CT scan that indicate the presence of a malignant tumor in the sinuses: the epicenter of the mass being in one olfactory recess; widening, expansion, or remodeling of the olfactory recess; and extension of the lesion into the cribiform plate. Dr. Weingarten opines that whenever these characteristics are present on a scan, the standard of care requires that the neuroradiologist identify them as such in the findings and impression section of their report, to document the suspicious nature of the findings, and to recommend an MRI and/or a biopsy to further evaluate the lesion. Dr. Weingarten states that neuroradiologists, such as Dr. Rotblat, have specialized knowledge of the sinuses, skull, and neuro-tissue, and that it is the role of a neuroradiologist to use their specialized knowledge to assist clinicians to identify potentially dangerous conditions, and to recommend additional studies when indicated. Dr. Weingarten opines that Dr. Rotblat's failure to include these findings in her report was a departure from the standard of care for neuroradiological practice, and that this failure was a proximate cause of plaintiff's delay in diagnosis for two years and three months. She states that, in her opinion, Dr. Rotblat's report was unlikely to alert a pulmonologist, such as Dr. Vomero, that a malignant tumor was in her differential diagnosis. Dr. Weingarten opines that this delay in diagnosis allowed the malignant tumor to progress, and involve the dura covering of plaintiff's brain in 2019. Further, Dr. Weingarten opines that it was a departure from the standard of care for Dr. Rosblat to diagnose plaintiff's right superior nasal cavity opacity as a polyp, because the use of the term "polyp" would lead most clinicians to consider it a benign lesion, not a potential malignancy.

Plaintiff has submitted evidence sufficient to raise triable issues of fact, as the opinion of her expert describes the applicable standard of care under the circumstances, explains how Dr. Rotblat deviated or departed from such standards, and concludes that these departures were competent causes of plaintiff's alleged injuries (*see Smith v Mollica*, 158 AD3d 656, 70 NYS3d 234 [2d Dept 2018]; *Omane v Sambaziotis*, 150 AD3d 1126, 55 NYS3d 345 [2d Dept 2017]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). As plaintiff and defendants have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, and as to the proximate cause of plaintiff's alleged injuries, an order granting summary judgment is not appropriate (*see Lefkowitz v Kelly*, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; *Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]).

Accordingly, the motion by defendants for summary judgment dismissing the complaint as asserted against them is denied.

Dated: June 16, 2021



J.S.C.
HON GEORGE NOLAN

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