| **Lopez v Micalizzi** |
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| 2021 NY Slip Op 33595(U) |
| March 23, 2021 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 616688/2019 |
| Judge: George Nolan |
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Short Form Order

Index No. 616688/2019

SUPREME COURT – STATE OF NEW YORK
PART 55 - SUFFOLK COUNTY

**PRESENT:**
Hon. George Nolan
Justice Supreme Court

JOVANY LOPEZ, as Administrator for the Estate of DULCE LOPEZ, deceased, and JOVANY LOPEZ, individually,

Plaintiff,

-against-

GERALD J. MICALIZZI, M.D., MEDICAL ARTS RADIOLOGICAL GROUP, P.C., UNIVERSAL FAMILY MEDICAL CARE, P.C., and ERIKA HIBY, M.D.,

Defendants.

Mot. Seq. No. 001-MG
Mot. Seq. No. 002-MG
Orig. Return Date: 10/22/2020
Mot. Submit Date: 12/17/2020

**PLAINTIFF'S ATTORNEY**
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Upon the e-filed documents numbered 38 through 56 and 64 through 75, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

***ORDERED*** that the following motions are consolidated solely for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

***ORDERED*** that the motion (motion sequence no. 001) by defendant, Gerald J. Micalizzi M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims asserted against him is granted; and it is further

***ORDERED*** that the motion (motion sequence no. 002) by defendant, Medical Arts Radiological Group, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims asserted against it is granted.

In this medical malpractice action, Jovany Lopez, as Administrator for the Estate of Dulce Lopez, deceased, and Jovany Lopez, individually, seeks damages for negligence, lack of informed consent and wrongful death of Dulce Lopez ("decedent") due to the alleged negligent departures from the good and accepted standards of care by the defendants during their care and treatment of the decedent. It is alleged that defendants were negligent in failing to diagnose decedent's brain cancer.

This action was commenced by filing a summons and complaint on August 23, 2019. Defendant Gerald J. Micalizzi, M.D., answered on September 30, 2019 and defendant Medical Arts Radiological Group, P.C., ("Medical Arts") answered on October 16, 2019.

The defendants seek summary judgment dismissing the complaint on the ground that they were not negligent and did not depart from good and accepted medical standards during their care and treatment of the decedent, and did not proximately cause any injury claimed by her.

The claims against Dr. Micalizzi and Medical Arts arise out of an alleged failure to diagnose brain cancer. On September 8, 2017, the decedent complained to her primary care physician, Dr. Hiby, of dizziness with associated weakness in the bilateral lower extremities. Dr. Hiby referred decedent to Medical Arts for a non-contrast MRI of the brain. The decedent's brain MRI without contrast was performed on September 29, 2017 at Medical Arts. Dr. Micalizzi's interpretation was "sinus disease, otherwise unremarkable." Approximately seven months later, the decedent was diagnosed with metastatic mucinous carinoma of unknown primary origin. Thereafter, on June 23, 2018, decedent underwent an MRI of the brain with and without contrast performed at Stony Brook University Hospital. The MRI with contrast revealed a cancerous mass in decedent's brain. It is alleged that defendants failed to diagnose decedent's cancer by *inter alia* failing to recommend and perform an MRI with contrast.

The moving defendants allege they did not depart from the appropriate radiological standards of care and that the September 20, 2017 MRI scan was properly and correctly interpreted by Dr. Micalizzi and the MRI held without contrast pursuant to Dr. Hiby's referral. Thus the moving defendants seek an order granting summary judgment dismissing the complaint and all cross-claims against them.

To make a *prima facie* showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see* ***Roques v Noble***, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; ***Ward v Engel***, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see* ***Garbowski v Hudson Val. Hosp. Ctr.***, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a *prima facie* case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Kelley v Kingsbrook Jewish Med. Ctr.***, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; ***Fiorentino v TEC Holdings, LLC***, 78 AD3d 766, 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see* ***Bhim v Dourmashkin***, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Schichman v Yasmer***, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

In support of his motion (motion sequence no. 001), Gerald J. Micalizzi, M.D. submits, *inter alia*, an attorney's affirmation; copies of the summons and complaint and his answer; plaintiff's verified bill of particulars; the decedent's certified medical records from Universal Family Medical Care, P.C./Dr. Ericka Hiby; certified medical records from Medical Arts including a report of the MRI performed on September 20, 2017; report of the MRI performed at Stony Brook University Hospital on June 23, 3018; and the expert affirmation of Adam Hoffman, M.D.

Adam Hoffman, M.D. avers he is a physician licensed to practice medicine in the State of New York and is board-certified in diagnostic radiology. He states that based upon his review of the

medical records as set forth in his affirmation, it is his opinion within a reasonable degree of medical certainty that Dr. Micalizzi complied with good and accepted standards of radiological medicine and did not depart from these standards in the care and treatment of the decedent. It is Dr. Hoffman's opinion that Dr. Micalizzi's interpretation of plaintiff's September 20, 2017 MRI of the brain was proper and not the proximate cause of decedent's death.

Dr. Hoffman states that based on his review of the MRI of the brain performed on September 20, 2017, Dr. Micalizzi made the correct diagnosis of sinus disease in accordance with accepted practice and that the MRI did not reveal any abnormal growths in decedent's brain, including tumors. There was no evidence of malignant or cancerous process or anything suspicious on the study of September 20, 2017 that might warrant further investigation. Dr. Hoffman also reviewed the MRI of the brain performed on June 23, 2018 at Stony Brook University Hospital and opined that these findings were consistent with metastatic cancer and were not present on the September 20, 2017 MRI. Dr. Hoffman concluded that Dr. Micalizzi's interpretation of the MRI of the brain conformed with good and accepted radiological practice and that as radiologist Dr. Micalizzi did not have a duty to recommend or order further testing.

In support of its motion (motion sequence no. 002), Medical Arts submits, *inter alia*, an attorney's affirmation; a copy of the summons and complaint, its answer, plaintiff's verified bills of particulars; certified medical records of Universal Family Medical Care, P.C./Dr. Ericka Hiby; certified medical records from Medical Arts Radiology Group; decedent's death certificate and the expert affirmation of Adam Silvers, M.D.

Adam Silvers, M.D. avers that he is a physician licensed to practice medicine in the State of New York and is board-certified in diagnostic radiology. He states that based upon his review of the medical records as set forth in his affirmation, it is his opinion within a reasonable degree of medical certainty that the care provided by Medical Arts was in keeping with the standards of good an accepted radiologic practice and further, that the alleged failure to provide care was not the proximate cause of decedent's death.

Dr. Silvers states that he reviewed the film performed at Medical Arts and opined that thethe film was of diagnostic quality, the images complete, the findings appropriately documented and the film properly interpreted. Further, that there was no evidence of any malignant or cancerous process or anything suspicious on the September 20, 2017 MRI film. Dr. Silvers also reviewed the MRI film done at Stony Brook Hospital on June 23, 2018 and noted that the findings were consistent with metastatic disease and that none of these findings were present on the earlier MRI film. Dr. Silvers concluded that Medical Arts rendered radiologic services within good and accepted standards of care and that the radiologist and facility's roles is limited to ensuring the study ordered by the referring physician is performed.

"Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient" (***Chulla v***

***DiStefano***, 242 AD2d 657, 658, 662 NYS2d 570 [2d Dept 1997]; *see* ***Markley v Albany Med. Center Hosp.***, 163 AD2d 639, 640, 558 NYS2d 688 [3d Dept 1990]). "[T]he question of whether a physician owes a duty to the plaintiff is a question for the court, and is 'not an appropriate subject for expert opinion' " (***Burns v Goyal***, 145 AD3d 952, 44 NYS3d 180 [2d Dept 2016], quoting ***Burtman v Brown***, 97 AD3d 156, 161, 945 NYS2d 673 [1st Dept 2012]).

The submissions reflect that the decedent's non-contrast MRI was ordered by Dr. Hiby. Dr. Micalizzi and Medical Arts assumed the limited role of taking images and interpreting and documenting their findings pursuant to the direction of the decedent's primary care physician. Neither Medical Arts nor Dr. Micalizzi assumed a general duty of care to schedule or urge further testing, or diagnose the decedent's medical conditions (*see* ***Wasserman v Staten Is. Radiological Assoc.***, 2 AD3d 713, 714, 770 NYS2d 108 [2d Dept 2003]; ***Giberson v Panter***, 286 AD2d 217, 729 NYS2d 29 [1st Dept 2001]).Moreover, the defendants established, *prima facie*, that their duty of care as radiologist and radiological facility did not extend to the alleged departures in failing to discover the decedent's brain cancer. Their submissions demonstrated, *inter alia*, that the decedent remained under the care of her primary care physician, who had referred the decedent to the defendants and that defendants' role was limited to the single imaging (*see* ***Chin v Long Is. Coll. Hosp.***, 119 AD3d 833, 834, 990 NYS2d 543 [2d Dept 2014]; ***Zeldin v Michaelis***, 105 AD3d 641, 641–642, 963 NYS2d 650 [1st Dept 2013]; ***Yasin v Manhattan Eye, Ear & Throat Hosp.***, 254 AD2d 281, 282, 678 NYS2d 112 [2d Dept 1998]).

Defendants established a *prima facie* case of entitlement to summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment Dr. Micalizzi and Medical Arts staff rendered to plaintiff (*see* ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). In their affirmations, both Dr. Hoffman and Dr. Silvers opined within a reasonable degree of medical certainty that the medical treatment provided by defendants to decedent in regards to the allegations surrounding decedent's brain cancer diagnosis and treatment at all times was appropriate and in accordance with the accepted standards of care. Both expert affirmations also concluded that defendants' care did not proximately cause or contribute to decedent's brain metastasis.

In opposition "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Deutsch v Chaglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Plaintiff submits an attorney affirmation and the affidavit of S. Robert Hurwitz, M.D[1] who opines that the failure to perform a brain MRI with contrast was a substantial cause in failing to diagnose the decedent's malignant brain tumor. Further that defendants are "treating physicians" and that "good and accepted practice would

[1]The plaintiff has submitted an unredacted expert affirmation pursuant to (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]) which this court has reviewed and found to be identical to the affidavit contained in plaintiff's opposing papers.

have demanded that the September 20, 2017 MRI be performed with contrast." Notably, Dr. Hurwitz does not compare the two MRI images. Dr. Hurwitz' affidavit and plaintiff's attorney's affirmation fail to raise any triable issues of fact as to whether Dr. Micalizzi and Medical Arts departed or deviated from good and accepted medical practice in their treatment of plaintiff or whether such departure or deviation was a competent cause of decedent's injuries (***Donnelly v Parikh***, 150 AD3d 820, 823, 55 NYS3d 274, 278 [2d Dept 2017]). Moreover, the expert's opinion that defendants assumed a duty to discover the decedent's brain cancer was a bare legal conclusion that is unsupported by the record and insufficient to raise a triable issue of fact (*see* ***Burns v Goyal***, 145 AD3d 952, 44 NYS3d 180 [2d Dept 2016]; ***Leigh v Kyle***, 143 AD3d 779, 39 NYS3d 45 [2d Dept 2016]; ***Olgun v Cipolla***, 82 AD3d 1186, 1187, 920 NYS2d 175 [2d Dept 2011]).

Based upon the foregoing, defendants Dr. Micalizzi and Medical Arts are granted summary judgment dismissing plaintiff's complaint and all cross-claims against them.

The compliance conference presently scheduled to be held before the undersigned on March 25, 2021 is adjourned to April 21, 2021.

The foregoing constitutes the decision and Order of the Court.

ENTER

Date: March 23, 2021
Riverhead, New York

HON. GEORGE NOLAN, J.S.C.

___ **FINAL DISPOSITION** _x_ **NON-FINAL DISPOSITION**