

Heafy v Gutman

2021 NY Slip Op 33624(U)

January 20, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 617201/2016

Judge: William G. Ford

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SHORT FORM ORDER

INDEX No. 617201/2016
CAL. No. 201902048MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

P R E S E N T :

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 3/16/20 (002 & 003)
ADJ. DATE 11/5/20
Mot. Seq. # 002 MotD
Mot. Seq. # 003 MD

-----X
NANCY HEAFY,

Plaintiff,

-against-

FREDERICK GUTMAN, M.D., STEVEN WEST, M.D., and STONY BROOK UNIVERSITY RADIOLOGY FACULTY PRACTICE CORPORATION,

Defendants.
-----X

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Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendants Steven West, D.O., and Stony Brook University Radiology Faculty Practice Corporation, dated February 12, 2020; Notice of Motion and supporting papers by defendant Frederick Gutman, M.D., dated February 20, 2020; Answering Affidavits and supporting papers by plaintiff, dated September 21, 2020; Replying Affidavits and supporting papers by defendants Steven West, D.O., and Stony Brook University Radiology Faculty Practice Corporation, dated November 3, 2020; Replying Affidavits and supporting papers by defendant Frederick Gutman, M.D., dated November 5, 2020; it is,

ORDERED that the motion (seq. 002) by defendants Steven West, D.O., and Stony Brook University Radiology Faculty Practice Corporation, and the motion (seq. 003) by defendant Frederick Gutman, M.D., are consolidated for purposes of this determination; and it is

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ORDERED that the motion by defendants Steven West, D.O., and Stony Brook University Radiology Faculty Practice Corporation, for summary judgment dismissing the complaint against them is granted solely to the extent provided herein, and is otherwise denied; and it is further

ORDERED that the motion defendant Frederick Gutman, M.D., for summary judgment dismissing the complaint against him is denied.

This action was commenced by plaintiff Nancy Heafy to recover damages for injuries she allegedly sustained from August 24, 2015 through September 15, 2015, due to the medical malpractice of defendants, while a patient at Stony Brook University Hospital Medical Center in Stony Brook, New York. By her bill of particulars, plaintiff alleges, as to defendant Steven West, D.O., and, vicariously, defendant Stony Brook University Radiology Faculty Practice Corporation, that they misinterpreted plaintiff's MRI scans, and failed to diagnose plaintiff's pre-existing hemorrhagic infarcts, which led to her receiving unnecessary treatment for leptomeningeal cancer. As to defendant Frederick Gutman, M.D., plaintiff alleges that he, inter alia, administered unnecessary treatment, performed unnecessary surgery, failed to diagnose her pre-existing hemorrhagic infarcts, and improperly placed an Ommaya reservoir. Plaintiff also asserts causes of action for lack of informed consent.

Defendants Steven West, D.O., and Stony Brook University Radiology Faculty Practice Corporation, (collectively, the West defendants) now move for summary judgment in their favor, arguing that their treatment of plaintiff was at all times within the standard of care, that their acts or omissions were not a proximate cause of plaintiff's alleged injuries, and that a claim for lack of informed consent is not appropriate in these circumstances. In support of their motion, the West defendants submit, among other things, transcripts of the parties' deposition testimony, certified copies of plaintiff's medical records, and an expert affidavit of Mark Novick, M.D.

Defendant Frederick Gutman, M.D., also moves for summary judgment in his favor, arguing that he installed plaintiff's Ommaya reservoir at the request of her oncological team, that it was not his duty to confirm plaintiff's diagnosis prior to surgery, and, thus, he did not deviate from the standard of care. In support of his motion, Dr. Gutman submits, among other things, transcripts of the parties' deposition testimony, and certified copies of plaintiff's medical records.

It is undisputed that plaintiff was diagnosed with acute myelocytic leukemia (AML) in December of 2014. She had two prior bouts of cancer approximately 25 years earlier. The first was uterine cancer, which was entirely resolved through the performance of a hysterectomy. Then, approximately seven months later, she was diagnosed with breast cancer, which required a lumpectomy and 28 radiation treatments to resolve. She began treatment for her leukemia in January 2015 with nonparty Michael Schuster, M.D., an oncologist. Dr. Schuster prescribed chemotherapy, which she underwent on an inpatient basis at Stony Brook University Hospital Medical Center (SBUHMC). While undergoing chemotherapy at SBUHMC, she began experiencing irregularities in the vision in both of her eyes. On August 25, 2015, plaintiff underwent an MRI examination of her brain, which showed abnormalities. Believing cancer had spread to plaintiff's brain, plaintiff's oncological team requested Dr. Gutman place an Ommaya reservoir in her head, which would facilitate the administration of chemotherapy directly to the affected regions. On August 28, 2015, cerebrospinal fluid was extracted from plaintiff for cytology

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testing. On August 30, 2015, Dr. Gutman surgically installed an Ommaya reservoir, prior to the results of plaintiff's cytology becoming available. Following the placement of the Ommaya reservoir, plaintiff was administered a chemotherapy via the device on September 6, 2015. However, such treatments were discontinued shortly thereafter, as it was discovered that the cytological studies of her spinal fluid revealed no malignant cells present. She was discharged from SBUMHC on September 12, 2015.

Dr. Frederick Gutman testified that he is a neurosurgeon licensed to practice in New York, that he is board certified in neurological surgery, and that he is an associate professor of neurosurgery at Stony Brook University. He stated that he is employed by the "Faculty Practice Plan" and the State of New York. Dr. Gutman testified that while has little or no independent memory of treating plaintiff, his records indicate that he first met her on August 28 or 29, 2015, when he was summoned by Dr. Huda Salman from plaintiff's "oncology team" for a neurosurgery consultation regarding the potential placement of an Ommaya reservoir. Dr. Gutman explained that an Ommaya reservoir is a perforated tube that goes through a patient's skull and into a ventricle in his or her brain. Attached to the perforated tube is a reservoir that remains on top of the patient's skull, but beneath the scalp. He indicated that the purpose of an Ommaya reservoir is to provide access to the patient's spinal fluid, so that intrathecal chemotherapy medication can be introduced thereto. Asked to explain what his understanding of why an Ommaya reservoir was requested in plaintiff's case, he testified that plaintiff "was receiving chemotherapy for a diagnosis of intrathecal spread" of her leukemia.

Dr. Gutman testified that prior to performing the surgical placement of the Ommaya reservoir, he would have performed a brief physical examination of plaintiff and reviewed her most MRI report, dated August 25, 2015, which was prepared by Dr. Steven West. Asked whether he reviewed the MRI films of plaintiff's brain upon which the report was based, he stated that "by [his] usual practice, [he] absolutely would have," but does not specifically recall doing that in this case. Dr. Gutman indicated that Dr. West's MRI report recorded that plaintiff had "leptomeningeal enhancement which could imply involvement of tumor." However, Dr. Gutman denied ordering, or reviewing, a cytology report prior to performing surgery. Shown a cytology report, which the Court notes was "reported" September 2, 2015, regarding a sample taken August 28, 2015, indicating that no malignancy was present in plaintiff's spinal fluid, he testified, in essence, that while that specific specimen was free of malignancy, it would not serve as definitive evidence of a complete lack of malignant cells. Dr. Gutman stated that he relied upon the conclusions of plaintiff's oncologists regarding the need for an Ommaya reservoir, and did not independently confirm her diagnosis. However, he conceded that had he known of plaintiff's negative cytology result prior to installing the Ommaya reservoir, he would have "done further review" with plaintiff's oncology team and, had they discovered that her cancer had not spread to her brain, he would have aborted the procedure.

Dr. Gutman testified that on August 29, 2015, prior to her surgery, he performed a cursory examination of plaintiff's mental status and explained the rationale behind placing an Ommaya reservoir, as well as the alternatives. He stated that he would have informed plaintiff of the potential risks involved, which included "hemorrhages, brain injury, infection, seizure, as well as the general risks of anesthesia," then obtained her signature on the consent form. Dr. Gutman indicated that plaintiff's Ommaya reservoir placement surgery was performed the following day, and was uneventful, except for "a small amount of bleeding along the catheter track," which was remedied by electrocautery. He also

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testified that he took a sample of plaintiff's spinal fluid during the operation and that later analysis of that sample revealed no malignancy. Dr. Gutman indicated that plaintiff was examined on the night of August 30, 2015, and again on August 31, 2015, at which time plaintiff reported experiencing weakness in her left side and increased sleepiness, which indicated a possible stroke.

Dr. Steven West testified that he is a neuroradiologist licensed to practice medicine in New York, and is employed by the State of New York and by "CPMP." He stated that he reviewed MRI films of plaintiff's brain on August 25, 2015 and drafted a report documenting the conclusions he drew therefrom. Dr. West indicated that immediately prior to interpreting her August 25, 2015 MRI films, he reviewed images from an earlier CT scan of plaintiff's brain. He testified that the short medical history that accompanied plaintiff's MRI films noted that she had a "[h]istory of AML and symptoms of amaurosis fugax," which is visual phenomenon described by patients "as a shade coming down over the eyes," or transient visual loss. Dr. West stated that plaintiff's MRI films revealed an anomaly in her brain consistent with either a subacute stroke or a neoplasm, which is a tumor, but explained that it is difficult to differentiate the two. He indicated that in an attempt "to make a more accurate diagnosis," he instructed the resident assisting him, Dr. Uzair Sarmast, to place a telephone call to the physician who ordered the MRI scan, Dr. Schuster. Dr. West testified that he witnessed Dr. Sarmast's side of the conversation with Dr. Schuster over the telephone, and that, in sum and substance, Dr. Schuster confirmed that plaintiff had not experienced any symptoms of a stroke, such as left-side weakness or sensory deficits, only amaurosis fugax. Based upon Dr. Schuster's representations, plaintiff's history of AML, and the inability of the MRI films to provide additional differentiation, Dr. West determined that the observed anomaly in plaintiff's brain was "concerning for leukemic involvement."

Dr. Mark Novick submits an affidavit on behalf of the West defendants, wherein he states that he is licensed to practice medicine in Florida, is board certified in radiology, and that he has been a practicing radiologist for more than 30 years. Dr. Novick indicates that in preparation for rendering an opinion in this matter, he reviewed the pleadings, transcripts of the parties' deposition testimony, plaintiff's certified SBUHMC records, and Dr. Gutman's records pertaining to plaintiff. He states that, based upon her medical records and the deposition testimony, plaintiff was administered chemotherapy treatments for her AML between February 11, 2015, and July 16, 2015. In August of 2015, plaintiff complained of vision changes, which prompted Dr. Schuster to order an MRI scan of her brain, with the instruction to "assess Amurosis Fugax." The MRI scan was conducted with, and without, IV contrast on August 25, 2015, and the resultant images were analyzed by Dr. West, who also compared them to images obtained by a CT scan on April 30, 2015. Dr. Novick avers that Dr. West "visualized abnormal enhancements, at the posterior frontal lobe and portions of the parietal and occipital lobes," which supported a differential diagnosis of subacute stroke or, given plaintiff's multiple cancer diagnoses, a tumor. Dr. West sought further information from Dr. Schuster, who denied plaintiff had experienced any signs of stroke which, in relation to the MRI findings, would manifest as left side weakness of left side sensory deficits.

Dr. Novick opines, to a reasonable degree of medical and radiologic certainty, that "there were no departures from the standard of care" by the West defendants. Specifically, he states that plaintiff's August 25, 2015, MRI films were correctly interpreted and that, based upon his own review of such films, there are "three areas of abnormality which resemble leukemic infiltrates." Dr. Novick further

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opines that because the areas of abnormality “have good circulation,” exhibit a “lack of cerebral edema,” and their “infiltrative pattern resembles a leukemic process,” they point away from a diagnosis of stroke. He avers that Dr. West’s consultation with Dr. Schuster, seeking additional clinical information, was appropriate. Further, he opines that given an absence of stroke symptoms, the next step, prior to the implantation of an Ommaya reservoir, should have been the confirmation, by plaintiff’s oncological team using cytology, of malignant cells in plaintiff’s cerebrospinal fluid. In conclusion, Dr. Novick opines that Dr. West’s role in plaintiff’s care ceased upon his drafting of the MRI report, and that it was plaintiff’s oncological team, including Dr. Schuster, who determined, based upon its own independent review of the MRI films, plaintiff’s treatment plan going forward.

A party moving for summary judgment “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 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

A defendant seeking summary judgment in a medical malpractice action “must make a prima facie showing either that there was no departure from the accepted community standards of medical care, or that his or her acts were not a proximate cause of the plaintiff’s injuries” (*Pinnock v Mercy Med. Ctr.*, 180 AD3d 1088, 119 NYS3d 559 [2d Dept 2020]). Once the defendant has made such a showing, “the plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, but only as to those elements on which the defendant met the prima facie burden” (*Keane v Dayani*, 178 AD3d 797, 798, 114 NYS3d 93 [2d Dept 2019]). Generally, conflicting expert affirmations require that the ultimate determination of the action be by a trier of fact (*see Lefkowitz v Kelly*, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]).

“To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury” (*Gilmore v Mihail*, 174 AD3d 686, 688, 105 NYS3d 504 [2d Dept 2019] [quotation marks and citations omitted]).

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The West defendants established a prima facie case of entitlement to summary judgment in their favor (*see generally Alvarez v Prospect Hosp., supra*). Through the deposition testimony and the expert affirmation submitted, they demonstrated, prima facie, that Dr. West's interpretation of plaintiff's August 25, 2015 MRI films was within the standard of care. Dr. West, as well as the West defendants' expert, represented that the abnormalities observed in plaintiff's brain were indicative of two potential conditions. Following consultation with plaintiff's treating oncologist, and considering plaintiff's apparent lack of stroke symptoms, Dr. West exercised his professional judgment in raising the "concern" in his MRI report of potential spread of cancer to plaintiff's brain. Further, they established that the reading of MRI films was not a procedure for which informed consent needed to be obtained, as no "affirmative violation of the plaintiff's physical integrity" occurred (*Samer v Desai*, 179 AD3d 860, 864, 116 NYS3d 377 [2d Dept 2020]). The burden then shifted to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

Dr. Gutman, however, failed to establish a prima facie case of entitlement to summary judgment in his favor. Dr. Gutman's motion, having been made more than 120 days after the filing of the note of issue, is untimely (*see CPLR 3212 [a]; Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). However, assuming, arguendo, that such motion was deemed timely and was determined on its merits in the interest of judicial economy, the outcome would be unchanged. Dr. Gutman submitted no expert affirmation in support of his arguments, nor by his testimony did he establish that he had no duty to confirm the infiltration of cancer into plaintiff's brain, by obtaining cytology results prior to operating thereupon. Nor did Dr. Gutman demonstrate why he did not delay implantation of the Ommaya reservoir until such time as plaintiff's cytology and flow cytometry results were reported on September 2, 2015, and September 3, 2015. As to plaintiff's cause of action alleging lack of informed consent, Dr. Gutman failed to establish that plaintiff's execution of a consent form, which plaintiff acknowledged in her testimony, "complied with the prevailing standard for such disclosures applicable to reasonable practitioners performing the same type of procedure, and failed to assert that a reasonably prudent person in the plaintiff's position would not have declined to undergo the procedure if he or she had been fully informed" (*Kadanoff v Whitlow*, ___ AD3d ___, 2020 NY Slip Op 08052 [2d Dept 2020]). In light of plaintiff's testimony that she met Dr. Gutman for the first time on the morning of her surgery and that he did not inform her of the purpose, risks, or alternatives to the surgery, a triable issue remains. Accordingly, the motion by defendant Frederick Gutman, M.D., for summary judgment dismissing the complaint against him is denied.

In opposition, plaintiffs argue that the expert affidavit submitted on behalf of the West defendants is speculative because their expert relied upon incomplete or incorrect information. Specifically, plaintiff avers that Dr. West never personally spoke to Dr. Schuster, and never personally confirmed that plaintiff was not experiencing symptoms of a stroke. Plaintiff further argues that even if the West defendants had confirmed plaintiff was not suffering symptoms of a stroke, the possibility of a stroke being responsible for the abnormality seen in plaintiff's MRI should have been noted in the MRI report. In essence, plaintiff avers that Dr. West acted outside the scope of his role as radiologist by focusing on one diagnosis, ultimately proven wrong, to the exclusion of another. Plaintiff submits, among other things, transcripts of defendants' deposition testimony, an expert affirmation of Jordan Haber, M.D., an expert affirmation of Richard Lechtenberg, M.D., and various medical records.

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In his affirmation, Dr. Jordan Haber states that he is licensed to practice medicine in New York, and that he is board certified in radiology. He opines, based upon his review of, among other things, plaintiff's CT scans, MRI scans, the transcripts of Dr. West and Dr. Gutman's deposition testimony, and the expert affidavit of Dr. Novick, that while "it is conceivable that changes of the leptomeninges and cortices of [plaintiff's] right frontal parietal and occipital lobes can be affected with leukemic implants . . . the possibility exists that the aforesaid changes also may be entirely attributable to multiple ischemic cortical infarctions which should have been further explored." Dr. Haber indicates that Dr. West "departed from good and accepted radiological practice when he specifically excluded the possibility of a hemorrhagic infarction." In conclusion, Dr. Haber opines that Dr. West should have included all possible causes of the brain abnormalities he observed, rather than narrowing the focus of his report. He states that Dr. West's omission of possible hemorrhagic infarction from his MRI report caused Dr. Gutman to rely on solely on such report and not confirm plaintiff's diagnosis prior to implantation of the Ommaya reservoir.

Initially, the Court notes that plaintiff has not submitted arguments or evidence raising a triable issues on her claims regarding the West defendants' alleged failure to obtain informed consent. Accordingly, that cause of action is dismissed as to them. However, through the expert affirmation of Dr. Haber, plaintiff has raised a triable issue as to Dr. West's interpretation of plaintiff's August 25, 2015 MRI films, as well as the manner in which he drafted the MRI report derived therefrom. Specifically, a question of fact remains as to whether Dr. West should have recorded in his MRI report the possibility of subacute infarction, in addition to a possible neoplasm, as explanations of the brain abnormalities observed. The Court cannot say at this juncture, as a matter of law, that Dr. West's actions did not contribute to, or serve as a causal link in a chain of events resulting in plaintiff's alleged injuries. Accordingly, the West defendants' motion for summary judgment dismissing plaintiff's claims of medical malpractice are denied.

Dated: January 20, 2021
 Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION