

Zemel v Tummings

2021 NY Slip Op 34193(U)

August 30, 2021

Supreme Court, Kings County

Docket Number: Index No. 510574/2018

Judge: Pamela L. Fisher

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 30th day of August 2021.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
MIRIAM ZEMEL,

Plaintiff,

DECISION/ORDER

- against -

Index No: 510574/2018

DOCTOR VINETTE TUMMINGS, DOCTOR DALI
MARDACHE,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	_____ 1, 2 _____
Opposing Affidavits (Affirmations) _____	_____ 3 _____
Reply Affidavits (Affirmations) _____	_____ 4 _____

Upon the foregoing papers in this medical malpractice action, defendant, Dali Mardach, M.D. s/h/a Doctor Dali Mardache, moves, pursuant to CPLR 3212, for summary judgment, dismissing plaintiff's complaint with prejudice, and directing the Clerk of the Court to enter judgment accordingly.

Plaintiff commenced this action by filing a summons and complaint on or about May 22, 2018 (Defendant's Affirmation in Support ¶ 3; Summons & Complaint, annexed as Exhibit A to defendant's motion papers). Issue was joined as to both defendants on or about June 20, 2018, and plaintiff served a bill of particulars as to both defendants on or about November 20, 2018 (Defendant's Affirmation in Support ¶¶ 4-5; Answers annexed as Exhibits B and C to defendant's motion papers; Verified Bill of Particulars annexed as Exhibit D to defendant's motion papers). Plaintiff served an amended bill of particulars on or about February 11, 2020, and a third amended bill of particulars was served on or

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about February 15, 2021 (Defendant's Affirmation in Support ¶ 6; Amended Verified Bill of Particulars, annexed as Exhibit D to defendant's motion papers; Third Amended Verified Bill of Particulars, annexed as Exhibit D to defendant's motion papers). In her complaint and bills of particulars, plaintiff alleges that Dr. Mardach departed from good and acceptable medical practice in her treatment of the plaintiff on August 26, 2017 by "misdiagnos[ing]" plaintiff with a urinary tract infection, neglecting to "consider the possibility or risk that she might be experiencing an ectopic pregnancy," "fail[ing] to refer [p]laintiff" to an "obstetrician-gynecologist," "fail[ing] to schedule an emergency trans-vaginal ultrasound," neglecting "to administer a pregnancy test," and "fail[ing] to immediately send [p]laintiff to a hospital or diagnostic center for emergency evaluation" (Plaintiff's Complaint ¶¶ 7, 18; Third Amended Verified Bill of Particulars ¶¶ 3, 6, 7). As a result of defendant's alleged malpractice, plaintiff claims to have sustained the following injuries: "delayed diagnosis, a burst fallopian tube, scarring, loss of a fallopian tube, ruptured ectopic pregnancy, loss of blood, laparotomy, left salpingectomy, fever, nausea, exacerbated scoliosis, blood clotting, temporary loss of mobility, pain, fear, embarrassment, emotional damages, reduced trust in doctors, [and] increased risk of inability to conceive" (*Id.* at ¶ 9).

The following facts are not in dispute. Plaintiff presented to Dr. Mardach, an internal medicine doctor, on August 26, 2017 (Statement of Material Facts in Support of Motion for Summary Judgment ¶ 3). This was her first and only appointment with Dr. Mardach (*Id.*). She reported that she had "experienced strong cramp-like pain to her lower abdominal area the prior evening," as well as "nausea and dysuria (painful urination)" (*Id.* at ¶¶ 3-4). She indicated that "the intensity of her pain subsided after about one hour" (*Id.* at ¶ 3). The medical records describe the abdominal pain as "pressure-like pelvic pain, which was non-radiating, and mild at a four out of 10," and state that "plaintiff denied any vomiting, vaginal discharge, hematuria (blood in urine), or dyspareunia (painful intercourse)" (*Id.* at ¶ 4). Plaintiff "had a history of recurrent" urinary tract infections (UTIs) "at the time of her treatment

with Dr. Mardach” (*Id.* at ¶ 5). Her previous UTIs had been treated with antibiotics, and “subsequently resolved” (*Id.*). At the time of her presentation to Dr. Mardach, plaintiff was “us[ing] an IUD for contraception,” that had been “inserted in January 2015” (*Id.*). Her menstrual cycle had ceased several years before (*Id.*). Dr. Mardach performed a “physical examination of [the] plaintiff, including an abdominal exam, and a pelvic exam” (*Id.* at ¶ 6). Dr. Mardach’s “findings on the abdominal exam included no bowel guarding, no flank tenderness, soft abdomen, suprapubic tenderness, positive bowel sounds in all four quadrants, and midline tenderness around the bladder” (*Id.*). The notes from the pelvic exam indicate that there was no “cervical motion tenderness,” “ovarian tenderness,” “adnexal tenderness,” or “abnormal discharge” (*Id.*). Dr. Mardach diagnosed the plaintiff “with pelvic pain secondary to a possible UTI,” and “administered an injection of Toradol for [her] pelvic pain” (*Id.* at ¶ 7). She also “prescribed a course of the broad-spectrum antibiotic Macrobid to treat plaintiff’s UTI” (*Id.*). Dr. Mardach told the plaintiff to “drink fluids and take Ibuprofen for her pain” (*Id.*). She also advised “plaintiff to present to the nearest emergency department if her symptoms worsened,” and “to seek further treatment if her symptoms did not improve over the following two days, either with her or with a gynecologist” (*Id.* at ¶ 8). Plaintiff’s symptoms improved while she was taking antibiotics (*Id.* at ¶ 9).

On September 6, 2017, plaintiff had an appointment with co-defendant Dr. Tummings, a gynecologist (*Id.* at ¶ 11). She made an appointment with Dr. Tummings after she noticed blood in her urine “on the last day of the course of antibiotics prescribed by Dr. Mardach” (*Id.*). The medical records from Dr. Tummings’s office state that the “plaintiff reported burning pain internally, achy feelings after urinating, vaginal discharge for the past two days, a slight bloody appearance to her urine, and spotting” (*Id.* at ¶ 12). Dr. Tummings noted that the plaintiff “denied” “pelvic pain” and “dyspareunia,” but she “reported that she had previously experienced burning and cramping pain, and vomiting two weeks” before (*Id.*). She also told Dr. Tummings that she had treated with Dr. Mardach,

and was diagnosed with a UTI, “for which she had completed the prescribed course of antibiotics” (*Id.*). Dr. Tummings “conducted a sterile vaginal exam,” which revealed “mild tenderness in the bladder area” (*Id.*). She diagnosed the plaintiff with “dysuria, hematuria, urinary urgency, and pelvic pain” (*Id.*). Dr. Tummings “ordered a pelvic sonogram, due to plaintiff’s complaints of pelvic pain” (*Id.*). Plaintiff “scheduled an appointment for a pelvic sonogram” for two weeks later (*Id.*).

On September 8, 2017, plaintiff “was attending a wedding rehearsal in rural Pennsylvania when she experienced abdominal pain, vomiting, and lost consciousness” (*Id.* at ¶ 13). The pain was “more severe” than the pain she originally experienced “prior to treating with Dr. Mardach” (*Id.*). She was transferred via ambulance to the “emergency department of a local hospital” (*Id.*). A sonogram was performed at the hospital, and she was “diagnosed with an ectopic pregnancy” (*Id.*). Hours later, she was taken to another hospital by helicopter, “as the local hospital did not have a surgeon who was equipped to treat her condition” (*Id.*). A left salpingectomy was performed, and plaintiff was discharged on September 11, 2017 (*Id.*).

In support of her motion for summary judgment, defendant submits an expert affirmation from Sanford R. Goldberg, M.D., a physician board certified in internal medicine and gastroenterology, contending that Dr. Mardach never deviated from the standard of care in her treatment of the plaintiff, and that no act or omission of hers proximately caused the plaintiff’s injuries (Defendant’s Expert Affirmation ¶¶ 1, 3, annexed as Exhibit J to defendant’s motion papers). Dr. Goldberg’s opinion is based on review of the medical records, bills of particulars, deposition transcripts, and his own training and experience in the fields of internal medicine and gastroenterology (*Id.* at ¶¶ 2-3). He opines that Dr. Mardach appropriately diagnosed the plaintiff with a UTI based on her “presentation on August 26, 2017,” “her history of chronic UTIs,” “the physical examination and findings consistent with a UTI,” and “her use of a Mirena IUD” (*Id.* at ¶¶ 11-12). Further, he claims that Ms. Zemel “actually had a urinary tract problem that was properly diagnosed and successfully treated by [Dr.] Mardach,” and that

on August 26, 2017, “she was asymptomatic for an ectopic pregnancy” (*Id.* at ¶ 15). Dr. Goldberg bases this conclusion on the fact that the plaintiff’s abdominal pain resolved within a day of taking the antibiotics prescribed by Dr. Mardach (*Id.* at ¶¶ 9, 14). He alleges that her pain would not have “gone away” if it had been caused by an ectopic pregnancy (*Id.* at ¶ 9). Further, he states that an “ectopic pregnancy may be asymptomatic, especially in the early stages,” and that the plaintiff did not depart from acceptable medical practice by failing to order a “sonogram” or a “pregnancy test, as there was no” indication that plaintiff “was pregnant or had an ectopic pregnancy” at the time of her visit to Dr. Mardach (*Id.* at ¶¶ 6, 12). He explains that the “symptoms of an ectopic pregnancy include first trimester vaginal bleeding and/or abdominal pain, usually located in the pelvic area, that is not crampy and may be sharp or dull, none of which [plaintiff] presented with at this visit” (*Id.* at ¶ 6). Dr. Goldberg concludes that Dr. Mardach did not proximately cause any of plaintiff’s injuries (*Id.* at ¶ 17).

In opposition to defendant’s motion for summary judgment, plaintiff submits expert affirmations from Dr. Paul Genecin, M.D., a physician board certified in internal medicine, and Dr. James Gerald Quirk, M.D., a physician board certified in obstetrics and gynecology (Genecin Expert Affirmation ¶ 1, annexed as Exhibit 4 to plaintiff’s opposition papers; Quirk Expert Affirmation ¶ 1, annexed as Exhibit 5 to plaintiff’s opposition papers). They opine that Dr. Mardach departed from acceptable medical practice in her treatment of the plaintiff on August 26, 2017, and that her departures proximately caused the plaintiff’s injuries (Genecin Expert Affirmation ¶¶ 2, 16; Quirk Expert Affirmation ¶ 2). Their opinions are based on review of the medical records, deposition transcripts, and Dr. Goldberg’s expert affirmation (Genecin Expert Affirmation ¶ 1; Quirk Expert Affirmation ¶ 1). Dr. Genecin contends that Dr. Mardach deviated from the standard of care by failing to order a “pregnancy test,” “urinalysis,” and “transvaginal ultrasound,” or refer plaintiff to an obstetrician-gynecologist (Genecin Expert Affirmation ¶ 2). He maintains that “life threatening conditions,” such as ectopic pregnancy must be ruled out as part of the differential diagnosis, when a

“woman of child-bearing age” complains of “lower abdominal or pelvic pain” (*Id.* at ¶¶ 4-5). Dr. Genecin disagrees with Dr. Goldberg’s opinion that the symptoms of an ectopic pregnancy do not “come and go,” and the pain is not “crampy” (*Id.* at ¶ 6). Further, he notes that a physical examination is not sufficient to rule out this condition; he alleges that a pregnancy test and transvaginal ultrasound are necessary to properly diagnose an ectopic pregnancy (*Id.*). Dr. Genecin explains that a pregnancy was possible even though plaintiff had an IUD, but that the risk of an ectopic pregnancy is much higher in women who have an IUD (*Id.* at ¶ 8). Therefore, “the standard of care for an internist evaluating a woman of child-bearing age with lower abdominal or pelvic pain who has an IUD in place” is “no different than for a woman without an IUD” (*Id.* at ¶ 9). Dr. Genecin suggests that ectopic pregnancy cannot be excluded based on the nature of the abdominal pain, as “there is no typical pain pattern in ectopic pregnancy; [it] can present with pain that is intermittent, cramping, variable in localization, and of any degree of severity” (*Id.* at ¶ 11). Dr. Genecin also claims that Dr. Mardach deviated from the standard of care by “failing to check a urinalysis (microscopic or dipstick)” before diagnosing the plaintiff with a UTI (*Id.* at ¶ 15). He concludes that the pain plaintiff experienced was from an ectopic pregnancy, and not a UTI, and that Dr. Mardach departed from acceptable medical practice by failing to perform tests to rule out one of these conditions (*Id.* at ¶ 16).

Dr. Quirk concurs with Dr. Genecin’s opinion that Dr. Mardach deviated from the standard of care in her treatment of the plaintiff on August 26, 2017 (Quirk Expert Affirmation ¶ 4). He agrees with Dr. Genecin that Ms. Zemel “had an ectopic pregnancy at the time she saw Dr. Mardach” based on her “serum hCG levels of 3004 on September 8, 2017,” the fact that “her pain from the night before had substantially diminished by the time she saw Dr. Mardach,” and “the variability of [her] pain” (*Id.* at ¶¶ 5, 6). Dr. Quirk maintains that “had Dr. Mardach followed the standard of care described in Dr. Genecin’s report,” plaintiff’s ectopic pregnancy would have been diagnosed (*Id.* at ¶ 10). Further, he claims that plaintiff’s ectopic pregnancy “would have been treated with Methotrexate,” “prevent[ing]

the need for surgical intervention,” and the loss of Ms. Zemel’s fallopian tube (*Id.* at ¶¶ 11-12). Dr. Quirk explains that Methotrexate is a “safe and effective” “treatment” for ectopic pregnancy, and has “no major side effects” (*Id.* at ¶ 13). Dr. Quirk alleges that this treatment was not contraindicated based on Ms. Zemel’s medical history (*Id.*). He concludes that Dr. Mardach’s “departures from the standard of care” “caused Ms. Zemel’s ectopic pregnancy to continue to grow until her fallopian tube burst, requiring emergency surgery” (*Id.* at ¶ 14).

In reply, defendant reiterates that she did not deviate from the standard of care in her treatment of the plaintiff, and that she did not proximately cause her injuries (Reply Affirmation ¶ 6). Defendant maintains that plaintiff’s expert opinions do not create a triable issue of fact, as they are conclusory, speculative, and based on hindsight reasoning (*Id.* at ¶¶ 6, 7, 20). Defendant also contends that Dr. Genecin’s conclusion that a pregnancy test and trans-vaginal ultrasound should be performed on any woman of child-bearing age who presents with abdominal pain, is “overbroad,” and “offered only to create an appearance of an issue of fact where none truly exists” (*Id.* at ¶¶ 11-12).

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant “deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a motion for summary judgment, defendant must “make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, the burden then shifts to the plaintiff to “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” (*Stukas*, 83 AD3d at 24). If the defendant “makes only a prima facie showing that he or she did not deviate or depart from accepted medical practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the

issue of proximate cause” (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are “unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician’s summary judgment motion” (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; “[s]uch credibility issues can only be resolved by a jury” (*Id.*).

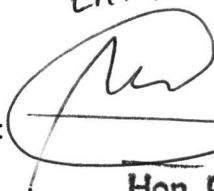
Here, defendant met her prima facie burden. Defendant’s expert, Dr. Goldberg, affirmed that the practice and procedures by the treating physician, were within acceptable standards of medical practice, and that no act or omission of hers proximately caused any injury to the plaintiff. Dr. Goldberg maintains that Dr. Mardach appropriately diagnosed the plaintiff with a urinary tract infection, based on her symptoms, history, and physical examination. He alleges that defendant did not deviate from acceptable medical practice by failing to perform a pregnancy test, trans-vaginal ultrasound, or refer plaintiff to a gynecologist, as plaintiff did not present with symptoms of an ectopic pregnancy. Dr. Goldberg’s affirmation constitutes competent evidence, in that it is based on the medical records, bills of particulars, and deposition transcripts.

In opposition, plaintiff produced affidavits of merit from two experts, Dr. Genecin and Dr. Quirk, attesting to departures from accepted standards of medical practice, and that these departures were a competent producing cause of the plaintiff’s injuries. Plaintiff’s expert opinions, based on review of the medical records, deposition transcripts, and Dr. Goldberg’s expert affirmation, raise triable issues of fact. Due to the conflicting expert reports, defendant’s motion for summary judgment is denied (*See Deutsch*, 71 AD3d at 719).

This constitutes the decision and order of the Court.

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Hon. Pamela L. Fisher, J.S.C.