Kahoud v Frissora
2022 NY Slip Op 30373(U)
January 21, 2022
Supreme Court, New York County
Docket Number: Index No. 805006/2016
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH MCMAHON** ***Justice*** **PART** **30M**

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DENISE KAHOUD,

Plaintiff,

- v -

CHRISTINE FRISSORA, NEW YORK PRESBYTERIAN HOSPITAL, WEILL MEDICAL COLLEGE

Defendant.

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INDEX NO. 805006/2016

MOTION DATE 06/30/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion of defendants Christine Frissora, M.D., and New York Presbyterian Hospital (s/h/a "New York Presbyterian Hospital, Cornell Campus") (hereinafter "defendants") for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint is granted to the extent that: (1) plaintiff's complaint against defendant New York Presbyterian Hospital (hereinafter "NYPH") is severed and dismissed; (2) plaintiff's second cause of action for damages arising from lack of informed consent is severed and dismissed and (3) all of plaintiff's claims that arise from medical care rendered prior to July 6, 2013 are severed and dismissed as time-barred pursuant to CPLR §214-a. The balance of defendants' summary judgment motion is denied.

This matter arises out of defendants' alleged failure to timely diagnose and treat plaintiff's stage III colon cancer[1] for which she underwent surgical resection on May 1, 2015,

[1] The January 6, 2016 complaint (NYSCEF Doc. No. 1) alleges two causes of action: (1) personal injuries caused by defendants' medical malpractice, and (2) personal injuries caused by defendants' failure to secure plaintiff's informed consent "for treatment or lack of treatment and diagnoses" (*see* para 33 of complaint).

followed by a four-month course of chemotherapy at Memorial Sloan Kettering Hospital (hereinafter "MSKH"). Plaintiff alleges, *inter alia*, that defendant Dr. Christine Frissora committed malpractice by failing to perform a colonoscopy in November of 2014, which was within the three- year standard she had previously set for this "high risk" plaintiff with a family history of colon cancer.

It appears conceded that the then fifty-one-year-old plaintiff was first seen by Dr. Frissora on January 22, 2007 at Weill Cornell Gastroenterology and Hepatology, for consultation and the scheduling of a screening colonoscopy due to plaintiff's family history of colon cancer.[2] Plaintiff's complaints during that initial visit (from which Dr. Frissora has no record or recollection [*see* Deposition of Dr. Frissora, pp. 20-23; NYSCEF Doc. No. 57]) were of, *inter alia*, chronic constipation and difficulty defecating (*see* Defendants' Material Statement of Facts; NYSCEF Doc. No. 67; Deposition of Plaintiff, pp. 23-24; [NYSCEF Doc. No. 56]). A colonoscopy was performed on February 16, 2007 at which time Dr. Frissora removed a "small [30 cm] hyperplastic polyp" (*see* NYSCEF Doc. No. 59, p. 2). The doctor's office notes reflect the recommendation to "repeat colonoscopy in 3 years due to family history of colon cancer (mother twice)" (*see* NYSCEF Doc. No. 59, p. 2). [3]

Dr. Frissora's notes regarding the September 12, 2011 visit reflect plaintiff's complaints of excessive gas and bloating, change in bowel patterns and abdominal pain (*see* NYSCEF Doc. No. 59, p. 14). Another colonoscopy was performed on September 30, 2011, during which the doctor removed a "sessile polyp" from the cecum, "5 mm in size" with "cold biopsy forceps"

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[2] In 2007 Dr. Frissora was also purportedly treating plaintiff's mother, who was first diagnosed with colon cancer at age 59 and had a recurrence at age 80, which caused her death.

[3] Plaintiff recalls undergoing a second colonoscopy performed by Dr. Frissora in or around 2009 (*see* Plaintiff's Deposition, p. 26, l. 8-p. 28, l. 25; NYSCEF Doc. No. 56), but the doctor denies this and has no office records pertaining to plaintiff for the four-and-one-half year period between February 16, 2007 and a subsequent visit on September 12, 2011 (*see* Dr. Frissora's Deposition, pp. 32-35; NYSCEF Doc. No. 57).

(*id.,* at p. 21). Defendant's written recommendation to "repeat colonoscopy in 3-5 years for surveillance based on pathology results" is reflected in the office notes.[4] A pathology report dated October 4, 2011 described the polyp as "tubular adenoma with serrated features" (*id.*, at p. 25). On October 7, 2011 plaintiff was told over the phone by Nurse Moody from defendant's office, that her colonoscopy results were "within normal limits" (*id.*, at p. 27).

Approximately three years later, on November 24, 2014, plaintiff returned to Dr. Frissora with complaints of, *inter alia,* upper abdominal pain and change in bowel patterns (*see* Office Notes dated 11/24/14; NYSCEF Doc. No. 75, pp. 28-34). During her deposition, plaintiff testified that in addition to what is reflected in the doctor's notes, she also complained of "abdominal, bloating excessive…sharp pains in my abdomen, that my stool was changing…it was darker" for the preceding six or seven weeks (*see* NYSCEF Doc. No. 74, p. 37, ll. 21-24). Plaintiff told the doctor that "I am here to get my colonoscopy, that I need one" [based on plaintiff's mother's recent death from colon cancer]; (*id.,* p. 39, ll. 1-12), to which the doctor replied there was "no need for a colonoscopy" (*id.,* p. 39, l. 10). Plaintiff explained that she was "in a lot of pain, was starting to lose weight, and…was not feeling well at all," and Dr. Frissora allegedly responded '[i]t is good you are losing weight I am going to give you a special soup to eat so that you can even lose more weight'" (*id.,* p. 39, ll. 18-20). Dr. Frissora ordered an abdominal ultrasound (*id.,* p. 40, ll 7-10) which was performed in February of 2015, and also instructed plaintiff to try Pepcid (*id.*, p. 44, ll 8-11). Plaintiff telephoned the office on February

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[4] Plaintiff recalls that in the recovery room following the September 2011 procedure, Dr. Frissora told her to return in three years instead of her usual two years (*see* Plaintiff's Deposition, p. 28, ll. 9-17; NYSCEF Doc. No. 56), but Dr. Frissora testified that upon receipt and review of the pathology she determined that plaintiff should return for a surveillance colonoscopy in five years (*see generally*, Dr. Frissora's Deposition, pp. 75-95; NYSCEF Doc. No. 57).

10, 2015 and learned that the results of the abdominal ultrasound were normal (*id.,* p. 46, ll 18-21; *see also* Office Note dated 2/10/15; NYSCEF Doc. No. 75, p. 34).

Office notes reflect that plaintiff returned to Dr. Frissora on March 23, 2015, this time with complaints of severe abdominal pain and constipation for the preceding six months (*see* NYSCEF Doc. No. 75, pp. 35-39). Plaintiff again requested a colonoscopy, but Dr. Frissora ordered a CT scan of the abdomen and pelvis, and planned to perform a colonoscopy six months later, in September of 2015 (*id.*, p. 37). The April 2, 2015 abdominal CT scan returned "suspicious for cecal/right colonic carcinoma with regional lymphadenopathy" (*id.*, pp. 49- 50). Plaintiff was advised of the likelihood of a "right colon mass" that same day (*id.,* p. 40 reflecting telephone call on April 2, 2015). Dr. Frissora performed an emergent colonoscopy on April 15, 2015, and the pathology returned the diagnosis of "invasive adenocarcinoma, moderately differentiated" (*id.,* pp 52-53). The last time plaintiff saw Dr. Frissora was April 15, 2015.

During the process of pre-operative screening, plaintiff's internist admitted her to the emergency department for severe anemia, a consequence of the growing tumor. On May 1, 2015, plaintiff underwent a right hemicoloectomy (removal of the entire right side of her colon) at MSKH.

Defendants move for summary judgment dismissing the complaint on the grounds, *inter alia,* that they met their standard of care in treating plaintiff and, alternatively, that even if they did not meet their standard of care, plaintiff is unable to prove that any alleged departures were the proximate cause of plaintiff's injuries, particularly because the two polyps were benign and did not warrant closer follow-up monitoring. Additionally, defendants seek dismissal of: (1) all claims of negligence pre-dating July 6, 2013 (*e.g.,* relative to the September 2011 colonoscopy) as untimely, and not falling within the continuous treatment exception to the statute of

limitations; (2) all claims against NYPH, since it was not Dr. Frissora's employer and cannot be held vicariously liable for the negligent acts of Dr. Frissora, and (3) plaintiff's claims for injuries arising from lack of informed consent.

In support of the motion defendants offer the June 29, 2021 affidavit of a gastroenterologist, Seth Gross, M.D. (*see* NYSCEF Doc. No. 50), who opines, after his review of the records, that "Dr. Frissora's care was at all times within accepted standards of medical care" (para. 26); that she "appropriately removed the [second] polyp [found in September of 2011] in five fragments with cold forceps" (para. 27); that she appropriately recommended a three to five year follow up despite plaintiff's strong family history of colon cancer, and that plaintiff's complaints of **upper** abdominal pain in November of 2014 warranted an ultrasound rather than a colonoscopy. Dr. Gross opines, *inter alia*, that "given plaintiff's complaints of upper abdominal symptoms, it is my opinion that regardless of whether plaintiff reported to Dr. Frissora that she had intentionally or unintentionally lost ten pounds, I do not believe that Dr. Frissora's management on November 24, 2014 deviated from accepted standards of medical practice" and further, that "there was no indication for Dr. Frissora to order a repeat colonoscopy on November 14, 2014" (para. 38).

Also attached is the June 28, 2021 affidavit of defendants' pathologist, Stephen Ward, M.D., (NYSCEF Doc. No. 51) who opines, relative to his review of the recuts of the September 30, 2011 polyp, that "this 0.5 cm lesion tissue represented a benign tubular adenoma" which does not meet the criteria for a sessile serrated adenoma polyp lesion. According to Dr. Ward, the pathology diagnosis of a benign finding set forth in plaintiff's September 30, 2011 colonoscopy report was accurate.

Finally, in his June 29, 2021 affidavit, oncologist Daniel A. Laheru, M.D. (NYSCEF Doc. No. 52) sets forth that "even assuming Dr. Frissora had performed a colonoscopy in October or November of 2014, it would not have changed plaintiff's outcome or ameliorated any of her alleged injuries" (*see* paras. 20-22) and further, "if plaintiff had been diagnosed with colon cancer in October or November of 2014 it would have been diagnosed as stage III-b, just as it was in April of 2015" (*see* para. 20), and plaintiff would have had the identical treatment in November of 2014 that she ultimately underwent following her diagnosis in April of 2015, including surgical resection and chemotherapy.

As for the balance of the motion, defendants maintain that neither screening colonoscopies nor surveillance colonoscopies fall under the continuous treatment exception to the two-year-six-month statute of limitations for medical malpractice cases, so that plaintiff's claimed injuries for malpractice which pre-date July 6, 2013 must be precluded at the time of trial.

In opposition to the motion, plaintiff argues that triable issues of fact preclude an award of summary judgment and, critically, that Dr. Frissora had set the standard for this particularly high-risk plaintiff to undergo a colonoscopy every three years, but then attempted to change the protocol on plaintiff--who had already had a suspicious polyp removed in 2011. In this regard plaintiff offers, *inter alia*, the detailed affidavit of her internal medicine and gastroenterology expert, Alan Jaffe, M.D., (NYSCEF Doc. No. 77), whose opinion focuses mainly on the negligence alleged during the November 24, 2014 office visit and thereafter. Dr. Jaffe points out that plaintiff's November 24, 2014 visit was the "three-year mark" and consistent with Dr. Frissora's own instructions, plaintiff, who was reporting "alarming symptoms" (*i.e.,* sharp pain in her abdomen, darker stools, unintentional weight loss), should have been scheduled for an

immediate colonoscopy (para. 18). Dr. Jaffe sets forth that defendants in this case departed from the standard of care in failing to: (1) illicit a complete and detailed family history [para.28][5] ; (2) perform basic and routine blood work at the first visit and every other visit for a surveillance patient [para. 30]; (3) accurately record all symptoms which plaintiff complained of to the doctor and her staff, and to act upon them, including the complaints of a change in pattern of defecating, color of stool and rectal bleeding [para. 31]; (4) consider plaintiff's unintentional weight loss [para. 32]; (5) provide informed consent [para. 33] and (6) have plaintiff return for a colonoscopy in 2013, since the 2011 polyp showed "low grad [sic] dysplasia and serrated features which is not a normal finding" [para. 34].

According to plaintiff's expert, Dr. Frissora "departed from the standard of care when she failed to have plaintiff return for a colonoscopy in 2013" [para. 34], particularly because the 0.5 cm sessile lesion located near the cecum that Dr. Frissora removed in 2011, was removed from the same part of the colon that the cancer was discovered in 2015. Dr. Jaffe opines that "this finding in this patient required that she return for another colonoscopy in two (2) years not three (3) or four (4), and at a minimum, Dr. Frissora should have followed her own instructions when she told plaintiff in 2011 to return in three (3) years." He concludes, *inter alia*, that "[t]his departure is responsible for the advancement of Ms. Kahoud's colon cancer from what would have been an earlier staged tumor or more likely a precancerous mass" [para. 34] and was "the proximate cause of plaintiff's condition becoming cancerous, which led to the extensive surgery, chemotherapy, psychological suffering and a potential for a shortened life" [para. 38].

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established

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5 The office notes of plaintiff's first office visit with Dr. Frissora reflect that a detailed family history was recorded.

sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party" (CPLR §3212[b]). A party seeking summary judgment must show that there are no material issues of fact that are in dispute and that it is entitled to judgment as a matter of law (*see Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept. 2007]). Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*id.*).

A defendant moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing that "in treating the plaintiff, there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" (*Roques v. Nobel*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Assunta v. Rubin*, 189 AD3d 1321, 1323 [2d Dept. 2020]). To satisfy the burden, defendant must present expert testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature (*see Joyner-Pack v. Sykes,* 54 AD3d 727, 729 [2d Dept. 2008]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Perre v. Vassar Bros. Hosp.*, 52 AD3d 670, 670 [2d Dept. 2008], *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once defendant has met his or her burden on the motion, the plaintiff must "submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant [and/or hospital] that it was not negligent in treating plaintiff, so as to demonstrate the existence of a triable issue of fact…general allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are

insufficient to defeat the summary judgment motion" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324-325 [1986]). Thus, in opposing the motion, plaintiff's expert "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v. Waisman*, 39 AD3d 303 [1st Dept. 2007], *quoting Ferrara v. South Shore Orthopedic Associates, P.C.*, 178 AD2d 364, 366 [1st Dept. 1991]). Moreover, plaintiff's expert must address and refute the specific assertions of defendants' experts with respect to negligence and causation (*see Janelle M. v. New York City Health & Hospitals Corp.*, 148 AD3d 519 [1st Dept. 2017]).

Here, defendants have established their *prima facie* entitlement to judgment as a matter of law by submitting Dr. Frissora's deposition, office records and reports and the detailed affidavits of three experts who opined that the diagnosis, care and treatment of plaintiff did not deviate from the accepted standard of medical care and that such treatment did not proximately cause the plaintiff's injuries (*see Wiater v. Lewis*, 197 AD3d 782 [2d Dept. 2021]).

In opposition, however plaintiff's gastroenterologist, Dr. Jaffe, has sufficiently rebutted defendants' *prima facie* showing and has demonstrated that an issue of fact exists as to whether Dr. Frissora departed from the standard of care and proximately caused plaintiff's alleged injuries.

In his affidavit, Dr. Jaffe explains why plaintiff's heightened (familial) risk of contracting colon cancer, together with the physical complaints she made during her November 24, 2014 office visit, required Dr. Frissora to schedule an emergent or at the very least a timely colonoscopy, in accordance with the defendant's own protocol. A triable issue of fact has been raised as to whether Dr. Frissora's failure in this regard diminished plaintiff's chance of a better outcome or increased her injuries. "Whether a diagnostic delay affected a patient's prognosis is

typically an issue that should be presented to a jury" (*Water v. Lewis*, 197 AD3d 782 [2d Dept. 2021]).

Accordingly, that branch of the motion for summary judgment by defendant, Christina Frissora, M.D., to dismiss plaintiff's first cause of action, for damages arising out of defendant Dr. Frissora's alleged medical malpractice must be denied.

However, defendants' motion for summary judgment is granted with respect to plaintiff's second cause of action, for injuries arising from lack of informed consent. "An element of a cause of action for lack of informed consent is "some unconsented to affirmative violation of the plaintiff's physical integrity" (*Hecht v. Kaplan,* 221 AD2d 100, 103 [1996]). Public Health Law 2805-d (3) states that "[f]or a cause of action therefor it must…be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed." Notably, "a failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that "involve[s] invasion or disruption of the integrity of the body" (*Janeczko v. Russel*, 46 AD3d 324 [1st Dept. 2007] [*internal citations omitted*]). Here, the basis of plaintiff's claim is that her colon cancer would have been found earlier had Dr. Frissora performed more frequent colonoscopies. Under the circumstances presented herein, plaintiff has no cause of action for damages arising from lack of informed consent. Accordingly, plaintiff's second cause of action is severed and dismissed.

So much of defendants' motion as seeks to dismiss plaintiff's claims that arose prior to July 6, 2013 is also granted. Regarding the issue of continuous treatment, the Court finds that defendants have shown *prima facie* that plaintiff's claims are time-barred by the statute of limitations under CPLR §214-a. Plaintiff admittedly did not seek treatment from defendant

between September of 2011 and November of 2014 (*see, e.g., O'Donnell v. Siegel*, 49 AD3d 415 [1st Dept. 2008]) and has accordingly failed to raise a triable issue of fact as to the applicability of the continuous treatment doctrine.

That branch of the motion for summary judgment to dismiss plaintiff's complaint against the defendant New York Presbyterian Hospital is granted in its entirety. For a hospital to be vicariously liable for the negligence of a physician, ordinarily an employment relationship, rather than mere affiliation is required (*see Hill v. St. Clare's Hosp.*, 67 NY2d 72 [1986]; *Topel v. Long Is. Jewish Med. Center,* 55 NY2d 682, 683-684 [1981]; *see also Collins v. Lenox Hill Hosp.*, 107 AD3d 473 [1st Dept. 2013]). Here it is conceded that no employment relationship existed between Dr. Frissora and NYPH, and that Dr. Frissora was employed by Weill Medical College, which never answered the complaint in this case. Accordingly, since there is no showing of Dr. Frissora's employment by the hospital, nor any showing that plaintiff sought care directly from the hospital rather than from the doctor herself (*see Hill v. St. Clare's Hosp.*, 67 NY2d at 80-81), the complaint against NYPH is dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant, New York Presbyterian Hospital, is granted and the complaint is severed and dismissed as to NYPH; and it is further

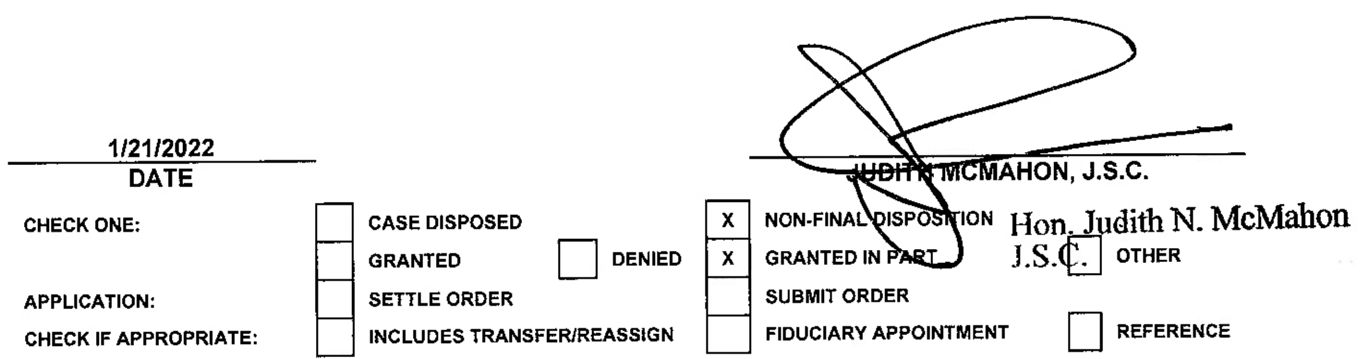
ORDERED that the motion for summary judgment by defendant, Christine Frissora M.D., is granted to the extent that plaintiff's cause of action for damages for lack of informed consent is severed and dismissed; and it is further

ORDERED that all of plaintiff's claims prior to July 6, 2013 are severed and dismissed; and it is further

ORDERED that the balance of the motion for summary judgment by defendant, Christine Frissora, M.D., to dismiss so much of plaintiff's complaint as seeks damages for injuries arising from alleged medical malpractice is denied; and it is further

ORDERED that counsel for plaintiff and moving defendants are required to appear for a Microsoft Teams Virtual Conference on April 6, 2022 at 12:30 p.m.

This is the Decision and Order of the Court.



1/21/2022
DATE

JUDITH MCMAHON, J.S.C.
Hon. Judith N. McMahon J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

APPLICATION: [ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE