Slyman v Stahl
2022 NY Slip Op 30416(U)
February 1, 2022
Supreme Court, New York County
Docket Number: Index No. 805021/2017
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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TERRANCE SLYMAN, MARIA SLYMAN,

Plaintiff,

- v -

PETER STAHL, JEFFREY NEWHOUSE, COLUMBIA UNIVERSITY MEDICAL CENTER UROLOGY

Defendant.

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INDEX NO. 805021/2017

MOTION DATE 06/17/2021, 06/17/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

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, 100

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, the motions by defendants Peter Stahl, M. D., the Trustees of Columbia University in the City of New York s/h/a/ “Columbia University Medical Center Urology” (hereinafter “NYP-Columbia”) (Mot. Seq. No. 001) and defendant Jeffrey Newhouse, M.D. (Mot. Seq. No. 002) for summary judgment pursuant to CPLR §3212 are granted and the complaint is dismissed.

This matter arises out of the defendants alleged failure to report, identify, diagnose, and treat transitional cell carcinoma of plaintiff’s right renal pelvis, between February of 2015 and July of 2016. Plaintiffs allege, *inter alia*, that the defendant radiologist, Dr. Jeffrey Newhouse, was negligent in characterizing a 2.1 cm “mass” or “lesion” located in the medulla of plaintiff’s right kidney as a spherical “cyst” on a June 25, 2015 CT urogram, resulting in a one-year delay in plaintiff’s diagnosis and treatment of cancer. Plaintiffs further allege that the defendant

urologist, Dr. Peter Stahl, failed, *inter alia,* to heed plaintiff's history of unexplained hematuria and atypical findings on cytology, and negligently diagnosed and treated plaintiff for benign prostatic hypertrophy ("BPH") when he should have been worked-up for the allegedly "typical symptoms" of transitional cell carcinoma (*see* NYSCEF Doc. No. 93, para 18). Plaintiffs claim that the doctors' and NYP-Columbia's[1] failures to adhere to urological and radiological standards of care ultimately allowed for the development of transitional cell carcinoma and metastatic disease, and that an earlier diagnosis would have given plaintiff a more optimal chance for treatment and cure. Plaintiff underwent a four-month course of chemotherapy followed by surgical removal of the right kidney, in December of 2016. He remains cancer-free to date.

Plaintiff initially began seeing Dr. Stahl in February of 2015 for symptoms related to erectile dysfunction. In June of 2015 plaintiff developed hematuria, which Dr. Stahl treated with Finasteride to shrink the prostate. Plaintiff's symptoms had resolved for a time, but by July of 2016 Dr. Stahl referred him to non-party urologist Dr. Matthew Rutman for continued intermittent hematuria.

At the outset, the Court notes the following undisputed facts: **(1)** In his June 25, 2015 CT urogram report, Dr. Newhouse concededly mischaracterized a 2.1 cm spherical lesion in the medulla of plaintiff's right kidney as a "cyst"[2] (*see* Deposition of Dr. Newhouse, pp. 25-26; NYSCEF Doc. No. 70); **(2)** the 2.1 cm spherical lesion was definitively diagnosed on surgical pathology to be a benign oncocytoma (*see* NYSCEF Doc. No. 89, p. 139); **(3)** plaintiff developed

[1] The allegations against NYP-Columbia are for vicarious liability as employer for both defendant doctors. There are no independent claims against NYP-Columbia.

[2] The June 25, 2015 CT urogram reads, in pertinent part: "bilateral renal cysts with the largest in the interpolar region of the right kidney measuring 1.5 cm".

"transitional cell carcinoma" (not "renal cell carcinoma" as claimed by plaintiffs) in the renal pelvis--a completely different anatomical structure from the medulla that held the lesion; **(4)** no evidence of transitional cell carcinoma or metastasis was present on the June 25, 2015 CT urogram; **(5)** the first evidence of plaintiff's cancer appeared on the July 20, 2016 CT urogram[3]; **(6)** on July 21, 2016 Dr. Newhouse authored an addendum to his July 20, 2016 report, reading: "[t]here is a 21 mm spherical lesion in the location of the medulla at the greater of the right kidney, which is invisible on the non-contrast images but which enhanced slightly…after contrast administration. This has not changed since the previous examination" (*see* Web Clinical Information System Records; Newhouse Exhibit M, p. 62; NYSCEF Doc. No. 62); **(7)** on December 12, 2016 Dr. Newhouse authored an addendum to his June 25, 2015 CT urogram report, reading: "the 2.1 cm spherical lesion in the right kidney described in the addendum to the report of the CT urogram of July 20, 2016 is present on this examination and has the same size and appearance as it does on the later CT urogram. It most likely represents a neoplasm; its stability suggests a slow-growing renal cell variety (papillary or chromophobe or oncocytoma)" (*id.*, p. 43) and **(8)** between June of 2015 and July of 2016 the lesion in the medulla remained stable in size.

Defendants move for summary judgment arguing, *inter alia*, that no cause of action exists for their alleged failure to refer plaintiff for follow-up--on a benign lesion--notwithstanding plaintiffs' speculation that further testing may have led to the diagnosis of an unrelated cancerous mass in a separate anatomical structure.

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[3] The July 20, 2016 CT urogram reported: "a 19 x 24 mm soft tissue mass within and infiltrating the right renal pelvis" and a "13 mm node immediately posterior to the inferior vena cava at the level of the right renal hilum [which] was not present on the prior [CT urogram study]." Under impression, defendant Dr. Newhouse recorded that the mass in the right renal pelvis was new since the prior exam and was most consistent with transitional cell carcinoma and that the retrocaval lymph node was probably metastasis (*see* Web Clinical Information System Records; Newhouse Exhibit M, p. 69; NYSCEF Doc. No. 62).

DR. NEWHOUSE'S MOTION FOR SUMMARY JUDGMENT (002)

Dr. Newhouse argues that the complaint against him should be dismissed because his timely and correct recognition of transitional cell carcinoma on the July 20, 2016 CT urogram led to plaintiff's prompt referral and successful treatment and, moreover, that his failure to use the word "lesion" instead of "cyst" was not a proximate cause of plaintiff's injuries, because (1) a radical removal or partial removal of plaintiff's right kidney for a small renal mass was not indicated and even if it was, surgery would not be performed without first ascertaining the pathology (which we now know was benign), and (2) even if the right kidney had been removed, plaintiff would likely have developed transitional cell carcinoma in the renal pelvis (*i.e.*, removal of plaintiff's kidney would not preclude the multiplication of cancerous cells in the lining of the ureter and bladder, the starting point for transitional cell carcinoma). Finally, to the extent that plaintiff attempts to raise a triable issue of fact that further study would have uncovered the unrelated cancer, Dr. Newhouse argues that such a claim is unavailing under *David v. Hutchinson*, 114 AD3d 412 [1st Dept. 2014], which holds that "the failure to investigate a condition that would have led to an incidental discovery of an unindicated condition, does not constitute malpractice."

In support of his motion for summary judgment, Dr. Newhouse offers, *inter alia*, the June 15, 2021 affidavit of a radiologist, Jonathan Berlin, M.D. (*see* Doc. No. 50), the June 15, 2021 affidavit of a urologist, David Chan, M.D. (*see* Doc. No. 51) and the June 15, 2021 affidavit of an oncologist, Dr. Toni Choueiri (*see* Doc. No. 52). All three experts make clear that Dr. Newhouse's omission or mischaracterization of the lesion as a cyst was inconsequential because the lesion was definitively diagnosed as a benign oncocytoma, and further, that

proximate cause is lacking because there is no correlation between a benign oncocytoma and transitional cell carcinoma.

Notably, at the conclusion of his radiological review, Dr. Berlin opines "to a reasonable degree of medical certainty" that (1) defendant's interpretation of the June 25, 2015 CT urogram had no impact on plaintiff's diagnosis of transitional cell carcinoma and/or metastasis, as "there is no evidence of…malignancy on the June 2015 study"; (2) the benign nature of the lesion undermines the claim that that Dr. Newhouse somehow contributed to plaintiff's injuries…"since there is no correlation between a benign oncocytoma and the development of malignancy in the renal pelvis"; (3) "the specific allegation that Dr. Newhouse failed to identify 'evidence of renal cell carcinoma' on the June 25, 2015 CT urogram is directly belied by the December 2016 surgical pathology findings, which indicate that there was never a diagnosis of renal cell carcinoma," thus rendering plaintiffs' claim (that defendants failed to diagnose plaintiff with renal cell carcinoma) with no basis in fact; (4) Dr. Newhouse "appropriately appreciated that the indication for the June 2015 CT urogram was Mr. Slyman's history of hematuria"; (5) Dr. Newhouse "properly interpreted the July 20, 2016 CT urogram" which found "the first radiological evidence of malignancy"; (6) Dr. Newhouse "properly identified and described two findings on the 2016 study that were not present on the 2015 CT urogram" (*e.g.*, the mass in the renal pelvis and the inflamed lymph node) and (7) even if the 2.1 cm lesion was reported in the June 2015 CT urogram report, "the standard of care does not mandate the specific method of follow-up or the specific time frame in which to complete the follow-up." Thus, while it is "likely" that Mr. Slyman would have been recommended to undergo ultrasound[4] for surveillance every six months," the July 2016 mass "would not have been detectible on ultrasound."

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[4] In paragraph 31 of his affidavit, Dr. Berlin explains that "referring [plaintiff] for a repeat CT urogram as initial follow-up…for a small renal lesion such as this would not be recommended by the urological literature, which

Urologist, Dr. Chan explains that had the lesion been identified and reported in 2015, the standard of care was to: (1) partially remove the kidney, (2) biopsy the lesion, or (3) undergo surveillance every six months, and none of these options furnish plaintiff with proximate cause (*i.e.*, removal of the kidney would not include removal of the renal pelvis, where the cancer was found, a biopsy would reveal the benign nature of the lesion, and surveillance by ultrasound would not have found the cancer in plaintiff's renal pelvis).

Oncologist, Dr. Choueiri opines that even if plaintiff was diagnosed with transitional cell carcinoma before it had metastasized, plaintiff would have undergone the same treatment. The oncological standard of care is to administer chemotherapy before surgery because transitional cell carcinoma is a high grade and muscle invasive disease. Dr. Choueiri concludes that no causal connection exists between the alleged negligent acts and omissions and plaintiff's injuries, because the transitional cell carcinoma was timely and properly diagnosed and treated, and plaintiff's outcome and prognosis would be the same regardless of when he was first diagnosed or when it first metastasized.

DR. STAHL'S AND NYP-COLUMBIA'S MOTION FOR SUMMARY JUDGMENT 001

Dr. Stahl maintains that his care and treatment of plaintiff was within the appropriate standard of care.

In support he offers, *inter alia,* the June 11, 2021 affirmation of urologist, Michael Droller, M.D. (*see* NYSCEF Doc. No 78), who concludes to a "reasonable degree of medical certainty that Dr. Stahl did not fail to diagnose cancer in the plaintiff, nor did he fail to treat that condition, of which there was no evidence...and [that] no act or omission by Dr. Stahl or NYP-Columbia caused or contributed to the onset, spread or worsening of plaintiff's disease process

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recommends reducing patients' unnecessary exposure to radiation such as by performing a repeat CT urogram within a six-month period particularly if doing so can be avoided" (*see* NYSCEF Doc. No. 50).

or prognosis, and as such, no act or omission on the part of Dr. Stahl or Columbia proximately caused plaintiff's injuries." Dr. Droller explains that Dr. Stahl's evaluation and/or work up of the plaintiff in June and July of 2015 was within the standard of care, since, *inter alia,* the cysto-urethroscopy, and urine studies were negative, the CT urogram had not revealed any remarkable findings, and the previously prescribed Finasteride had nearly resolved plaintiff's complaints of hematuria.

PLAINTIFFS' OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs argue, *inter alia*, that issues of fact preclude an award of summary judgment in favor of any of the defendants.

In opposition to the summary judgment motions, plaintiffs offer the redacted expert affirmations of a radiologist, a urologist, and an oncologist.

Plaintiff's radiological expert opines, relevant to the allegations of negligence against radiologist Dr. Newhouse, that the latter deviated from the standard of radiological care by failing to properly interpret the June 2015 CT urogram, causing a delay in diagnosis and further nodal involvement, and that "the failure to report a visible enhancing mass on the kidney of a patient with a history of hematuria is a gross deviation from the standard of care." Plaintiff's expert continues that the "very obvious enhancing mass in the kidney is a significant finding, and such evidence of malignancy should [have been] thoroughly investigated and regularly monitored, biopsied and/or surgically removed." The radiologist's opinion, rendered with a reasonable degree of medical certainty, is that if the kidney mass had been properly reported in June 2015, and the urologist been made aware of a potential malignancy in the [kidney] as the cause for the hematuria, further investigation (through additional testing, radiological and

otherwise), and frequent monitoring would have prevented the transitional cell carcinoma from invading the deeper tissues and metastasis" (*see* NYSCEF Doc. No. 95, para 21).

Plaintiff's urological expert (*see* NYSCEF Doc. No. 93) opines that Dr. Stahl and NYP-Columbia "deviated from the generally accepted standard of urological care in 2015 in failing and neglecting to properly evaluate [plaintiff], including further radiological studies, ureteroscopy, further cytology studies, and biopsy[5] based on [plaintiff's] clinical presentation in June, July and October of 2015" (*see* para 3). According to this urologist, the diagnosis of benign prostatic hyperplasia ("BPH") is a "catch-all" diagnosis which requires further testing to rule out cancer in the first place. Accordingly, plaintiff's clinical presentation "including cytology findings of atypical cluster of atypical urothelial cells, purportedly benign urothelial and squamous cells, inflammatory cells, red blood cells, as well as a history of hematuria, were highly suspicious for transitional cell carcinoma," and Dr. Stahl, by relying on inconclusive evidence and an incomplete workup, carelessly and mistakenly diagnosed plaintiff with BPH. Plaintiff's urology expert finds that Dr. Stahl's failure to appropriately investigate the signs and symptoms of transitional cell carcinoma resulted in it progressing to stage IV invasive high grade papillary urothelial carcinoma, depriving plaintiff of optimal treatment and possible cure. Due to these defendants' failures, plaintiff's cancer remained undiagnosed for a year, resulting in metastasis and a more dire prognosis. In the doctor's opinion, hematuria is the most common presenting symptom for transitional cell carcinoma, and this complaint alone should have raised Dr. Stahl's suspicion for cancer, and he should have made transitional cell carcinoma part of the immediate differential diagnosis. Plaintiff's expert sets forth why he disagrees that the results from the June 2015 cytology were "normal."

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[5] The exact anatomy for the proposed biopsy is not mentioned.

Plaintiff's oncology expert opines that the findings of the June 2015 cytology were not "normal" because they showed "rare, atypical urothelial cells, benign urothelial and squamous cells, inflammatory cells and many red blood cells" that warranted further testing to rule out transitional cell carcinoma before treating plaintiff for BPH. With plaintiff's persistent complaints of gross hematuria and the concerning cytology from June of 2015, this doctor would have required a biopsy of the ureters and renal pelvis (*see* para 24), as well as a retrograde pyelography to help diagnose cancer in the ureters or kidney. He concludes "with a reasonable degree of medical certainty that if not for Dr. Stahl's failure to heed the obvious signs and symptoms of urothelial cancer in June and July of 2015 and October of 2015, plaintiff's cancer could have been treated without chemotherapy" (*see* para. 27). As for Dr. Newhouse, plaintiff's expert opines that the radiologist's failure to identify the obvious and apparent renal mass on the June 2015 CT urogram caused a one-year delay in plaintiff's referral to an oncologist.

DISCUSSION

It has long been acknowledged that summary judgment deprives the litigant of his or her day in court and is considered a drastic remedy which should only be employed when there is no doubt as to the absence of a triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). To obtain summary judgment, a movant must establish its position "sufficiently to warrant the court as a matter of law in directing judgment in its favor (*Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979], *quoting* CPLR 3212[b]). The proponent of a summary judgment motion must initially make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any genuine material issues of fact from the case (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing

papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If a *prima facie* showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of a material issue of fact which requires a trial (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

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]). 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 its burden on the motion, the plaintiff must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendants that they were 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 (*see 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]). Plaintiff's experts 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]).

"In a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by defendant" (*Johnson v. Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2d Dept. 2005], *quoting Holton v. Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept. 1998]).

"As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of employment" (*Adams v. New York City Transit Auth.*, 88 NY2d 116, 119 [1996]). The rule extends to medical facilities, which can be vicariously liable for the negligence or malpractice of its employees including physicians (*Hill v. St. Clare's Hospital,* 67 NY2d 72 [1986]).

In applying the above principles, this court finds that the moving defendants Dr. Newhouse, Dr. Stahl and NYP-Columbia have established their *prima facie* entitlement to judgment as a matter of law through the submission of the detailed affidavits of Dr. Berlin, Dr. Chan, Dr. Droller and Dr. Chouieri, each of whom identified and addressed the medical departures alleged by plaintiff, and who referenced detailed and specific facts from the medical records, reports, and surgical pathology in support of their opinions that defendants adhered to a good and acceptable standard of care, and that the plaintiff's injuries were not proximately caused by the conduct of the defendant doctors or the defendant hospital.

In opposition, plaintiffs have failed to raise a triable issue of fact sufficient to defeat summary judgment. The opinions of plaintiffs' experts fail to rebut that: (1) cancer was only detected in plaintiff's right renal pelvis and not in the medulla; (2) no correlation exists between a benign oncocytoma and transitional cell carcinoma and (3) no correlation exists between the 2015 lesion and the cancerous mass found in 2016. While plaintiff argues that further testing may have uncovered his cancer a year before it was found, not one of plaintiff's experts identifies the anatomical location to perform a biopsy. Critically, as previously noted, it is not malpractice to fail to investigate a condition that may have or would have led to an incidental discovery of an unindicated condition (*see David v. Hutchinson,* 114 AD3d 412 [1st Dept. 2014]; internal citations omitted). Since plaintiffs are unable to establish a causal relationship between defendants' alleged negligence and plaintiffs' claimed injuries, summary judgment must be awarded to all defendants.

Accordingly, it is

ORDERED, that the motion for summary judgment pursuant to CPLR §3212 by defendants Peter J. Stahl, M.D and the Trustees of Columbia University in the City of New York s/h/a "Columbia University Medical Center Urology" is granted; and it is further

ORDERED, that the Complaint is dismissed in its entirety as to defendants Peter J. Stahl, M.D., and the Trustees of Columbia University in the City of New York s/h/a "Columbia University Medical Center Urology"; and it is further

ORDERED, that the motion for summary judgment pursuant to CPLR §3212 by defendant Jeffrey Newhouse, M.D. is granted; and it is further

ORDERED, that the Complaint is dismissed in its entirety as to defendant Jeffrey Newhouse, M.D.; and it is further

ORDERED, that the Clerk of the Court enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/1/2022
DATE

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

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE