

Davis v Alarcon

2022 NY Slip Op 30741(U)

March 8, 2022

Supreme Court, New York County

Docket Number: Index No. 805042/2017

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 805042/2017

MICHAEL DAVIS and ALYSSA DAVIS,
Plaintiff,

MOTION DATE 11/15/2021

- v -

MOTION SEQ. NO. 009

GABRIEL ALARCON, D.O., COLUMBIA MEMORIAL FAMILY CARE-VALATIE, THE COLUMBIA MEMORIAL HOSPITAL, LISA GALATI, M.D., STEVEN PARNES, M.D., UNIVERSITY EAR NOSE & THROAT OF NORTHEASTERN NEW YORK, LLP, MICHAEL KORTBUS, M.D., HUDSON ENT, P.C., TODD DOYLE, M.D., NEW YORK ONCOLOGY HEMATOLOGY, P.C., ALBANY MEDICAL CENTER HOSPITAL, and MEMORIAL HOSPITAL FOR THE TREATMENT OF CANCER AND ALLIED DISEASES,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 338, 343, 348, 353, 354, and 363 (Motion 009)

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for medical malpractice based upon departures from good and accepted medical practice, and failure to obtain informed consent, the defendants Michael Kortbus, M.D., and Hudson ENT, P.C. (Hudson), together move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiffs expressly decline to oppose the motion. The motion is granted.

The underlying facts of this dispute are set forth in detail in this court's February 24, 2022 order disposing of Motion Sequence 005 and this court's March 7, 2022 order disposing of Motion Sequence 008. In short, the plaintiffs allege that the plaintiff Michael Davis (hereinafter the patient) presented to the defendant Gabriel Alarcon, D.O., at Columbia Memorial Hospital (CMH) with complaints that he had been suffering from hoarseness for four or five months. Alarcon referred plaintiff to Kortbus, an otolaryngologist (that is, an ear, nose, throat [ENT] physician), who examined the patient on May 20, 2015 at Hudson's offices. The patient

reiterated his complaints of slight throat soreness since January 2015, as well as slight pressure in his ears and snoring. Kortbus performed a flexible fiberoptic laryngoscopy, which identified a large fungating mass comprising the entire left vocal cord, and advised the patient of the need for a direct microlaryngoscopy (DML) with biopsy. Kortbus performed the DML with tumor stripping at CMH, which revealed the existence of left glottic squamous cell carcinoma. On June 1, 2015, the patient returned to Kortbus's office, denying the existence of any symptoms. Kortbus immediately referred plaintiff to Lisa Galati, M.D., a surgical oncologist, and recommended that the patient undergo a positron emission tomography (PET) scan and consult with a gastroenterologist.

The surgical oncologist performed a biopsy approximately one month after the patient first presented to Alarcon, diagnosing him with laryngeal cancer. The surgical oncologist referred the patient to a radiation oncologist, who administered radiation therapy over the next two months. The plaintiffs alleged that, notwithstanding the radiation therapy, the patient's cancer recurred two months after the completion of radiation therapy, necessitating a full laryngectomy and thyroidectomy.

With respect to Kortbus and Hudson, the plaintiffs alleged, in their bill of particulars, that they departed from good and accepted medical practice by failing to advise the patient or his family with respect to an appropriate protocol for radiation treatment, failing to consult with the named co-defendants, failing fully to inform and advise the patient as to the appropriate care necessary to treat his tumors, and failing to obtain his informed consent to various procedures. They further asserted that the movants failed timely and properly to diagnose and treat the patient's tumors and abscesses, failed to administer proper diagnostic tests, failed to administer proper medications at proper dosages, failed to warn him of the risks of treatment, and failed to refer him to other specialists for appropriate treatment. They plaintiffs also averred that the movants performed contraindicated procedures upon the patient.

In its February 24, 2022 and March 7, 2020 orders, the court explicated the legal standards applicable to motions for summary judgment in medical malpractice actions. Applying those standards here, the movants established, prima facie, that they did not depart from good and accepted medical care or hospital practices and that none of their medical interventions caused or contributed to the patient's injuries. Specifically, the movants relied upon Kortbus's own expert affidavit, and the expert affirmation of Michael Bergstein, M.D., a board-certified otolaryngologist. In his affidavit, Kortbus describes the patient's history, the specifics of his examination and testing of the patient, the results of the testing, and what he told the patient at his several visits. He further explained that, immediately upon obtaining test results, he referred the patient to a surgical oncologist. Kortbus opined that all of his examinations, testing, treatments, and referrals were within the standard of care, and that nothing that he did or failed to do caused or contributed to the patient's injuries. Dr. Bergstein opined that Kortbus fully comported with the standard of care by administering the proper diagnostic tests, reaching the correct diagnosis, promptly informing the patient of his condition and the need for further testing and treatment, and immediately referring the patient to a surgical oncologist. He further opined that Kortbus's care and treatment in no way caused or contributed to the patient's need for a total laryngectomy.

By expressly declining to oppose the motion, the plaintiffs failed to raise a triable issue of fact to rebut Memorial's showing. Hence, the motion must be granted.

In light of the foregoing, it is

ORDERED that the motion of the defendants Michael Kortbus, M.D., and Hudson ENT, P.C., for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Michael Kortbus, M.D., and Hudson ENT, P.C.; and it is further,

ORDERED the action is severed as against the defendants Michael Kortbus, M.D., and Hudson ENT, P.C.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Michael Kortbus, M.D., and Hudson ENT, P.C.

This constitutes the Decision and Order of the court.

3/8/2022
DATE


JOHN J. KEULEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE