

Yumi Yi v Junho Bok Lee

2022 NY Slip Op 32467(U)

January 14, 2022

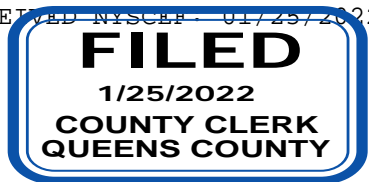
Supreme Court, Queens County

Docket Number: Index No. 716759 2019

Judge: Peter J. O'Donoghue

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

YUMI YI and SEUNG HWAN LEE,

Plaintiff
-against-

JUNHO BOK LEE, M.D., et. al.

Index
Number 716759 2019
Motion
Date August 11, 2021

Motion Seq. No. 3

X

The following papers read on this motion by defendants Steve Yun Kim, M.D. and Steve Y. Kim, M.D., P.C., for an order granting summary judgment dismissing the complaint in its entirety and in the alternative for an order granting summary judgment dismissing the causes of action for lack of informed consent, negligent hiring and retention, and the derivative cause of action.

Papers
Numbered

Notice of Motion-Affirmations- Affidavit-Exhibits-
Memorandum of Law-Affidavit of Service..... EF 54-79
Opposing Affirmation- Affidavit- Exhibits-Memorandum of Law. EF 99-110
Reply Affirmation-Affidavit of Service..... EF 125-126

Upon the foregoing papers this motion is determined as follows :

“Medical malpractice actions require proof that the defendant physician deviated or departed from the accepted community standards of practice, and that such deviation ... was a proximate cause of the plaintiff's injuries” (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 950 [2d Dept 2020] [internal quotation marks omitted]). “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries’ ” (*Mehtvin v Ravi*, 180 AD3d 661, 662 [2d Dept 2020], quoting *Lesniak v Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept 2015]; see *Ruiz v Opsha*, 192 AD3d 1055[2d Dept 2021]). Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact “

‘regarding the element or elements on which the defendant has made its prima facie showing’” (*Ruiz v Opsha*, 192 AD3d at 1056, quoting *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995 [2d Dept 2017] [internal quotation marks omitted]).

Contrary to the Kim defendants’ contention, this Court may properly consider the affidavit of the plaintiff’s expert, notwithstanding that it is sworn to and notarized in Pennsylvania and not accompanied by a certificate of conformity as required by CPLR 2309(c). Such a defect is not fatal and defendants have failed to demonstrate that they have been prejudiced by the failure to submit a certificate of conformity (*see* CPLR 2001; *Williams v Light*, 196 AD3d 668 [2d Dept 2011]; *Christiana Trust v McCobb*, 187 AD3d 981, 983, [2d Dept 2020]; *Seiden v Sonstein*, 127 AD3d 1158, 1161–1162 [2d Dept 2015]; *Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]).

Defendants Steve Yun Kim, M.D. and Steve Yun Kim, M.D., P.C. have established, prima facie, their entitlement to judgment as a matter of law dismissing the cause of action alleging medical malpractice. Defendants have submitted an expert affirmation of a physician licensed to practice medicine in the State of New York and a board certified in pulmonary medicine and internal medicine. He states that his training includes the diagnosis of possible etiologies for coughs, including allergies and rhinitis, and that he is familiar with many aspects of the standard of care for an ENT specialist, including the non-surgical evaluation and care with respect to said complaints and conditions as they overlap with issues treated in pulmonary medicine. He opines to a reasonable degree of medical certainty that the care and treatment rendered by Dr. Kim and his P.C. was in accordance with acceptable medical practice and that it was not a proximate cause of the plaintiff’s alleged injuries.

In opposition to this prima facie showing, the plaintiff has raised triable issues of fact. The plaintiff’s expert, a name redacted physician licensed to practice medicine in the State of Pennsylvania, and board certified in internal medicine, pulmonary diseases and critical care medicine, states in an affidavit that as a clinically active pulmonologist, her or she is familiar with and has routinely treated patients such as the plaintiff Ms. Yi, who present with cystic lung disease and/or associated symptomatology, including but not limited to abnormal chest radiology scan and history of coughing, and that based upon his or her education, experience, knowledge, training and research, he or she is familiar with the applicable standards of good and accepted medical practice as it relates to the treatment of Ms. Yi by defendants Junho Bok Lee, M.D. and Steve Yun Kim, M.D. and their respective medical practices. Plaintiff’s expert states that the standards of care at issue include the standards related to the diagnostic work-up of a symptomatic patient with radiographic indications of cystic lung disease, referral of a patient for pulmonary evaluation, pulmonary function tests and issue biopsy of the lungs and appropriate timing of such referral, and management and treatment of lung diseases depending on their specific pathological type. He or she opines,

in pertinent part, that as part of the plaintiff's physical examination on June 5, 2017, defendant Kim performed chest auscultation and heard a "crackles" in Ms. Yi's lungs, and that Kim deviated from the standards of care by failing to promptly consider pulmonary disease as the cause of Ms. Yi's condition; by concluding that Yi's chest x-ray was "normal" when it patently was not and conveying this conclusion to Ms. Yi as well as defendant Lee; by failing to timely refer Ms. Yi for pulmonary evaluation, pulmonary function tests and a lung biopsy to determine the etiology of her lung disease when his treatment plan failed to resolve her condition; and by failing to properly communicate with Dr. Lee and Ms. Li concerning the nature of her condition and abnormal chest scan.

Plaintiffs' expert further opines that Dr. Kim, in addition to his role as an ENT specialist, has a general obligation as a physician to consider other etiologies for Ms. Yi, concerning and severe symptoms were not explained by the testing he performed, to communicate with Ms. Yi as well as the referring physician defendant Lee about his assessments that highlighted the need for an immediate pulmonary evaluation and to order a pulmonary referral with the urgency warranted by the circumstances. Plaintiff's expert opines that said departures from the standards of care were a proximate cause of the plaintiff's injuries.

Contrary to defendants' assertions, plaintiff in opposition to the within motion for summary judgment has not raised a new theories of liability. The bill of particulars is not limited to the diagnosis and treatment of LAM disease, and alleges, among other things, that pertinent part, that Kim defendants departed from good and acceptable standards of care in the treatment, management advise and services rendered to Ms. Yi by failing to timely and appropriately diagnose and develop differential diagnosis; failing to perform biopsies; by failing to obtain or properly consider the prior imaging studies, scans and reports that the referring physician co-defendant Dr. Junho Bok Lee had ordered; and by failing to refer Ms. Yi to a specialist, including a pulmonologist.

" 'Summary judgment is not appropriate in a medical malpractice action where, as here, the parties adduce conflicting medical expert opinions' " (*Williams v Light*, 196 AD3d 668, 669-70 [2d Dept 2021] quoting, *Joynes v Donatelli*, 190 AD3d 845, 847 [2d Dept 2021], quoting *Castillo v Surasi*, 181 AD3d 786, 789 [2d Dept 2020]; see *Kovacac v Griffin*, 170 AD3d 1143, 1144 [2d Dept 2019]). "Such credibility issues can only be resolved by a jury" (*Feinberg v Feit*, 23 AD3d 517, 519[2d Dept 2005]).

Therefore, that branch of the defendants' motion which seeks to dismiss the complaint in its entirety is denied, as triable issues of fact exists, including but not limited to whether Dr. Steve Kim and his P.C. departed from the acceptable standard of care by failing to properly to consider pulmonary disease as the cause of Ms. Yi's condition; by failing to

timely refer Ms. Yi for pulmonary evaluation, pulmonary function tests and a lung biopsy to determine the etiology of her lung disease when his treatment plan failed to resolve her condition; and by failing to properly communicate with Dr. Lee and Ms. Li concerning the nature of her condition; and if so, whether said departure(s) was (were) a substantial factor(s) in causing the plaintiff's injuries, which may require a resolution at trial.

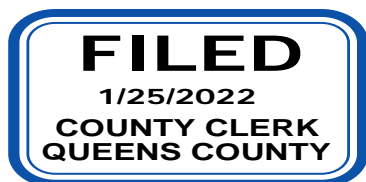
That branch of the defendants' motion which seeks to dismiss the cause of action for lack of informed consent, is granted. Plaintiffs' do not oppose this branch of the motion. Although Dr. Kim used scopes to examine Ms. Yi's nasal cavity and throat and members of his staff performed allergy tests, plaintiffs do not claim that said procedures were negligently performed or that they led to any injury. This cause of action therefore is dismissed (*see generally Brady v Westchester County Health Corp.*, 78 AD3d 1097 [2d Dept 2010]).

That branch of the motion which seeks to dismiss the cause of action for negligent hiring and retention, is granted. Plaintiffs' do not oppose this branch of the motion. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]; *see Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 741-42 [2d Dept 2017]; *Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; *see also Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213, 213 ([1st Dept 1998]). Here, defendants have established prima facie that the P.C.'s medical assistants only performed allergy testing at Dr. Kim's direction, and that they acting within the scope of their employment. While an exception exists to said general principle where the plaintiff seeks punitive damages from the employer "based on alleged gross negligence in the hiring or retention of the employee" (*Talavera v Arbit*, 18 AD3d at 738), that exception is inapplicable here, as plaintiffs do not allege gross negligence in the hiring or retention of defendant's employees, and does not seek to recover punitive damages with respect to this cause of action.

That branch of the motion which seeks to dismiss the derivative cause of action by Seung Hwan Lee is granted. Plaintiffs do not oppose this branch of the motion. A "cause of action for loss of consortium does not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage" (*Anderson v Eli Lilly & Co.*, 79 NY2d 797, 798 [1991]; *see Holmes v Maimonides Med. Ctr.*, 95 AD3d 831, 831-32 [2d Dept 2012]; *Briggs v Butterfield Mem. Hosp.*, 104 AD2d 626 [2d Dept 1984]). Here, plaintiffs allege that the dates of the alleged malpractice on the part of Dr. Steve Yun Kim and his P.C. took place between May 25, 2017 and July 19, 2017. Ms. Yi testified that she considered her treatment by Dr. Kim to have concluded as of July 19, 2017, and that she has no plans to return to him. The documentary evidence submitted herein consisting of a copy of the plaintiffs' marriage

certificates establishes that they were married at the Office of the City Clerk in Kew Gardens, New York on August 27, 2018. Accordingly, Seung Hwan Lee cannot recover on his loss of consortium claim for any malpractice allegedly committed that occurred prior to August 27, 2018 (*see Anderson v Eli Lilly & Co.*, 79 NY2d at 798; *Holmes v Maimonides Med. Ctr.*, 95 AD3d at 831-32; *Briggs v Butterfield Mem. Hosp.*, 104 AD2d at 626).

Dated: January 14, 2022




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Hon. Peter J. O'Donoghue, J.S.C.