Sarkisov v Kozer
2022 NY Slip Op 34291(U)
December 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 518535/17
Judge: Ellen M. Spodek
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At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of December, 2022.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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LILIA SARKISOV,

Plaintiff,

-against-

LEONID KOZER, LEONID KOZER MEDICAL, P.C., MARTIN WEINSTOCK, THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC., GEORGE THOMAS and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants.

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DECISION AND ORDER

Index No. 518535/17

Mot. Seq. No. 4

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	94-116
Opposing Affirmations and Exhibits Annexed	121-129
Affirmation in Reply	135-136

Upon the foregoing papers in this action for medical malpractice, defendants Leonid Kozer (Dr. Kozer) and Leonid Kozer Medical, P.C. (LKM) move (in motion [mot.] sequence [seq.] number [no.] 4) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint as against them.

Background

Plaintiff, Lilia Sarkisov (plaintiff), a patient of cardiologist Dr. Kozer since 2009, went to his office to be examined in early 2016. Prior to this visit, plaintiff had a history of syncope (passing out/fainting) which occurred as many as two times per year beginning in 2011, and last occurred in October 2015. At the time of her visit, Dr. Kozer recommended

placement of an Internal Loop Recorder (ILR) to monitor plaintiff's heart. On March 7, 2016, plaintiff underwent an ILR implantation procedure at Methodist Hospital. Plaintiff was subsequently examined by Dr. Kozer on September 7, 2016. In Dr. Kozer's records dated September 7, 2016, he reported that the ILR showed "twelve episodes of pauses and 7 episodes of bradycardia" on August 26, 2016 and an episode on September 6, 2016. Dr. Kozer's records do not indicate that plaintiff experienced any bradycardic symptoms although there were bradycardic events indicated on the ILR recording. During plaintiff's September 7, 2016 visit, Dr. Kozer recommended permanent pacemaker (PPM) placement and scheduled surgery for her the next day.

On September 8, 2016, plaintiff underwent PPM placement surgery, which was performed by defendant Dr. Martin Weinstock (Dr. Weinstock) at New York Community Hospital of Brooklyn. The operative report reflects no complications during this surgery. On September 9, 2016, plaintiff reported significant chest pain. Dr. Kozer examined plaintiff that same day and ordered a CT scan, which revealed that both leads of the PPM had dislodged and caused right ventricular perforation. It was determined that the plaintiff needed immediate surgery to remove the first PPM. She was transferred to NY Presbyterian Weill Cornell Hospital (NY Presbyterian) for a second surgery. On September 12, 2016, plaintiff underwent a second surgery to remove the first PPM and the displaced leads. Plaintiff's second surgery was performed by defendant Dr. George Thomas (Dr. Thomas) at NY Presbyterian. Dr. Thomas removed the first PPM and wires, and then implanted a second PPM and wires at a different surgical site. Plaintiff was subsequently discharged to her home on September 13, 2016.

On September 19, 2016, plaintiff visited Dr. Kozer, who reported seeing no evidence of infection at the PPM site. When plaintiff returned for another visit with Dr. Kozer on October 5, 2016, Dr. Kozer's records reflect a two-day history of a wound infection at the surgical site. Plaintiff was admitted again to NY Presbyterian. On October 6, 2016, plaintiff underwent a third surgery performed by Dr. Thomas in which the PPM and wires were removed. On October 8, 2016, plaintiff was discharged without having undergone PPM reimplantation for cardiac rhythm management and without any recommendation to have one placed in the future. On October 9, 2016, plaintiff went to Maimonides Medical Center (not a party herein) with complaints of the surgical site becoming more painful. The surgical incision site was red and draining, and plaintiff had a fever of 101 degrees. After being admitted to the hospital, plaintiff underwent a CT scan which revealed an abscess of her left chest wall. On October 10, 2016, plaintiff underwent a fourth surgery in which the surgical incision site was opened, drained, and explored. The surgical post-op note stated, under operative information: "specimen foreign body". The operative findings also reflect that plaintiff had a large abscess of the left chest wall cavity and that there was "foreign body x2" removed. Plaintiff was discharged from the hospital almost two weeks later, on October 18, 2016. She alleges that she suffered serious injuries as a result of Dr. Kozer's recommendation that she have an unnecessary PPM implanted, and her subsequent surgeries related to the initial procedure.

The Parties' Contentions

Dr. Kozer/LKM

Dr. Kozer and LKM (collectively, defendants) argue that Dr. Kozer's recommendation that plaintiff have a pacemaker implanted in September 2016 was

appropriate and consistent with the applicable standard of care. Defendants argue that plaintiff's indication for pacemaker implantation was a Class I indication in accordance with the American College of Cardiology Foundation/American Heart Association's practice guidelines (ACC/AHA guidelines) in that plaintiff had documented symptomatic bradycardia. Further, defendants contend that even if plaintiff should not have been considered for a Class I indication, then, at the very least, plaintiff met the Class IIa indication for pacemaker implantation since she had a documented heart rate of less than 40 beats per minute with a clear association between significant symptoms consistent with bradycardia. In support of their motion, defendants submit the sworn expert affidavit of Dr. Joshua Stern (Dr. Stern), a board-certified doctor in internal medicine with sub-certifications in cardiovascular disease and clinical cardiac electrophysiology. Defendants argue that even if the court finds that Dr. Kozer departed from the standard of care in treating plaintiff, his actions were not the proximate cause of plaintiff's injuries. In this regard, they assert that Dr. Kozer was merely the referring physician, did not participate in plaintiff's surgeries, and cannot be held vicariously liable for the alleged malpractice of the specialists who performed her surgeries. As to plaintiff's claim for lack of informed consent, defendants argue that Dr. Kozer, as a referring physician, did not have a duty to obtain plaintiff's informed consent. In addition, defendants note that the plaintiff signed a consent form at the New York Community Hospital prior to her PPM placement surgery which relieves Dr. Kozer of any liability he might have had for failure to obtain informed consent.

Plaintiff's Opposition

Plaintiff argues that Dr. Kozer deviated from the ACC/AHA guidelines when he recommended that she have PPM implantation surgery without having performed a definitive correlation of ILR-reported bradycardic (low heart rate) events with any symptoms. Plaintiff points out that Dr. Kozer's records do not indicate that she showed any symptoms of bradycardia alongside the bradycardic events recorded by the ILR on August 26, 2016 and September 6, 2016, and therefore she did not meet the standard under the ACC/AHA guidelines for PPM placement. Plaintiff submits a sworn expert affidavit to buttress her argument. In the affidavit, plaintiff's expert argues that Dr. Kozer departed from the applicable standard of care on multiple occasions during his treatment of plaintiff in 2016, and that his actions were a substantial factor in causing her injuries. Plaintiff argues that she never would have had PPM placement surgery and the subsequent surgeries related to the initial PPM placement procedure but for the actions of Dr. Kozer, who she alleges failed to follow the ACC/AHA guidelines and misdiagnosed her, and vicariously, his employer, LKM. In addition, plaintiff notes that since October 2016, no cardiologist has recommended PPM placement surgery to her.

Dr. Kozer and LKM's Reply

In their reply, Dr. Kozer and LKM argue that plaintiff failed to submit any opposition to the branch of their summary judgment motion that seeks dismissal of her lack of informed consent claim, and therefore their motion should be granted as to this claim. Defendants also assert that plaintiff's expert misinterpreted the ACC/AHA guidelines when he/she argued that plaintiff did not qualify under Class IIa, and erroneously claimed that there is no evidence that plaintiff had a longstanding history of bradycardic symptoms

including syncope. In addition, defendants argue that plaintiff's expert's opinion is conclusory, not supported by the evidence, and is insufficient to defeat summary judgment. Further, they assert that Dr. Kozer, as the referring physician, cannot be found to have proximately caused plaintiff's injuries since he did not perform any of plaintiff's surgeries.

Discussion

In the medical-malpractice context, "[a] defendant moving for summary judgment . . . must demonstrate the absence of any material issues of fact with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, *or* (2) that such a departure was a proximate cause of the plaintiff's injuries" (*see Rosenthal v Alexander*, 180 AD3d 826, 827 [2d Dept 2020] [internal citations omitted]; *Yanchynska v Wertkin*, 178 AD3d 1122, 1123 [2d Dept 2019]). "When a defendant in a medical malpractice action demonstrates the absence of any material issues of fact with respect to at least one of those elements, summary judgment dismissing the action should eventuate unless the plaintiff raises a triable issue of fact in opposition" (*Schwartz v Partridge*, 179 AD3d 963, 964 [2d Dept 2020] [internal citations omitted]).

Here, Dr. Kozer and LKM have established a prima facie case of entitlement to summary judgment via their medical records and the affirmation of their medical expert, Dr. Stern. As part of their prima facie showing, Dr. Stern opined that plaintiff clearly presented, "at the very least," as a patient with a Class IIa indication for pacemaker implantation because she had a longstanding history of significant symptoms consistent with bradycardia, such as syncopal episodes which occurred multiple times per year for several years, and near syncope and dizziness. In addition, the ILR data that Dr. Kozer

reviewed on September 7, 2016, revealed that plaintiff had multiple episodes of documented sinus bradycardia with beats per minute in the 30s. Dr. Stern argued that for these reasons, even if there was no clear association between the plaintiff's significant symptoms consistent with bradycardia and the actual presence of bradycardia, under the Class IIa guidelines, PPM placement was indicated.

Dr. Stern further explained that plaintiff would have also been eligible for PPM under the Class I indication because she had sinus node dysfunction with documented symptomatic bradycardia. He pointed to Dr. Kozer's deposition testimony that on September 7, 2016, he and plaintiff discussed a recent near syncope that she had experienced. Dr. Stern opined that their discussion reasonably led Dr. Kozer to conclude that the plaintiff's bradycardic symptoms coincided with the ILR recorded bradycardic episode on August 26, 2016 when her heart rate went down to 37. Dr. Stern further opined that plaintiff also met the requirements under Class I for PPM placement in that plaintiff's use of the beta-blocker metoprolol, which she had been prescribed as treatment for her refractory angina and to improve her survival given the presence of congestive heart failure and coronary artery disease, would have necessitated pacemaker implantation because of the possibility that its use could contribute to bradycardia. Dr. Stern concluded that Dr. Kozer met the required standard of care at all times while treating plaintiff, and that because Dr. Kozer was not involved in any of the implantation/explantation procedures, his actions did not cause plaintiff's injuries.

In opposition to defendants' prima facie showing, plaintiff's expert, a board-certified physician in internal medicine, cardiovascular disease, and clinical cardiac electrophysiology, raises triable questions of fact as to the issues of deviation from the

standard of care and proximate cause. Plaintiff's expert opined that Dr. Kozer failed to follow the applicable guidelines by recommending a non-evidence based, invasive PPM placement surgery that was not indicated under the circumstances of plaintiff's case. In addition, he/she asserted that Dr. Kozer departed from standards of accepted practice due to improper surveillance, recordkeeping, and work-up of plaintiff. Plaintiff's expert opined that Dr. Kozer departed from the standard of care because he failed to comply with the guidelines' requirement of making a definitive correlation between ILR data of a bradycardic event and plaintiff's symptomology. According to plaintiff's expert, to perform this correlation, Dr. Kozer needed accurate information detailing plaintiff's symptoms, and when those symptoms occurred. He/she asserts that with the particular ILR device plaintiff used, neither Dr. Kozer nor plaintiff was able to learn the ILR's recording of an arrhythmia event until the next office visit, at which time the ILR data was downloaded and interpreted by Dr. Kozer. According to plaintiff's expert, if a bradycardic event was recorded by the ILR, several weeks could pass before the next office visit, when Dr. Kozer accessed the ILR data for interpretation. He/she asserts that there was no evidence that Dr. Kozer instructed plaintiff on the use of the Patient Activator that was packaged with the ILR she used. He contended that this would have allowed her to note the specific time of a symptomatic event, which would have triggered the ILR to record the heart rhythm at that time. Plaintiff's expert opined that Dr. Kozer knew or should have known of the need to instruct plaintiff to contemporaneously record detailed information of any symptomology experienced between office visits while undergoing ILR surveillance so that she could log the date, time, and details of any symptoms, including fainting, dizziness, or shortness of breath. He/she further opined that if Dr. Kozer had properly

instructed plaintiff to use the Patient Activator, he could have found a clear correlation between her documented symptoms and any ILR-recorded bradycardic events which the ACC/AHA guidelines require to diagnose a patient with symptomatic bradycardia. Plaintiff's expert explained that such a diagnosis enables the clinician to assign Class I, Class IIa, Class B, or Class III classification as defined by the ACC/AHA guidelines to then determine whether device-based implantation is indicated.

Plaintiff's expert also concluded that Dr. Kozer departed from the standard of care by failing to perform a differential diagnosis and to rule out whether plaintiff's medical therapy treatment and intermittent discontinuation of medicine were related to the sporadic bradycardia recorded in the ILR device before recommending she have PPM placement surgery. He/she also refuted Dr. Stern's analysis that plaintiff also qualified for PPM placement under Class I with respect to her use of metoprolol by pointing out that there is no indication of, and Dr. Kozer never diagnosed, plaintiff with symptomatic sinus bradycardia resulting from any drug therapy such as metoprolol. Plaintiff's expert opined that Dr. Kozer departed from the standard of care because he never considered whether the drug therapy regimen had any correlation to the ILR bradycardic events, and he made no effort to adjust the plaintiff's drug therapy regimen to see if symptoms improved before scheduling surgery. He/she also contended that Dr. Kozer's failure to consult specialists regarding the recorded ILR data, the patient's uncertain symptomology, and whether PPM placement was indicated was a departure from the standard of care, especially since Dr. Kozer had no training or experience in electrophysiology and did not possess any specialty in cardiac arrhythmia treatment by device-based therapy. Plaintiff's expert pointed out that Dr. Kozer only contacted the electrophysiologist, Dr. Weinstock, to schedule surgery to be

done the very next day after he recommended the PPM implantation, and Dr. Kozer's records show he failed to consult Dr. Weinstock about whether implantation was indicated given plaintiff's medical history and presentation.

In addition, plaintiff's expert disagreed with Dr. Stern's interpretation of the ACC/AHA guidelines, arguing that Class IIa does not apply to plaintiff's case because, by definition, there must be symptoms consistent with bradycardia, but without documentation of the actual presence of bradycardia. Plaintiff's expert opined that the many deviations by Dr. Kozer from the standard of care and good and accepted practices were a substantial factor in causing plaintiff to undergo four unnecessary surgeries which led to her injuries. Based upon the parties' submissions, the Court finds that plaintiff's expert's opinion conflicts with the opinion of Dr. Stern and raises questions of fact as to the applicable standard of care, the interpretation of the ACC/AHA guidelines, and whether Dr. Kozer and LKM proximately caused plaintiff's injuries. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Yanchynska,* 178 AD3d at 1123).

Furthermore, defendants' argument that Dr. Kozer cannot be held liable for causing plaintiff's injuries as a referring physician is without merit. "Although the mere referral of a patient by one physician to another does not generally render the referring physician liable for the negligence of the treating physician, joint liability may be imposed where the referring physician was involved in decisions regarding diagnosis and treatment to such an extent as to make them his or her own negligent acts" (*Mandel v New York County Public Adm'r*, 29 AD3d 869, 870-871 [2d Dept 2006]; *see also Datiz by Datiz v Shoob*, 71 NY2d 867, 868-869 [1988] ["there is evidence in the record from which the jury could have

concluded that defendant-the referring pediatrician-had been independently negligent in diagnosing the infant plaintiff's condition, and that this misdiagnosis constituted a proximate cause of plaintiff's injuries"]). Since plaintiff's expert has raised questions of fact concerning proximate cause, this is an issue for the jury to decide. Moreover, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Yanchynska,* 178 AD3d at 1123). Accordingly, Dr. Kozer and LKM's motion for summary judgment dismissing plaintiff's medical malpractice claim as against them is denied.

Lastly, since plaintiff failed to offer any opposition to that branch of Dr. Kozer and LKM's motion seeking to dismiss her lack of informed consent claim, said claim is hereby dismissed.

Conclusion

Accordingly, it is

ORDERED that the motion of Dr. Kozer and LKM (in mot. seq. no. 4) for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint in its entirety as asserted against them is granted *only to the extent* that plaintiff's lack of informed consent claim is dismissed as against said defendants; and it is further

ORDERED that the moving defendants' motion is otherwise denied.

This constitutes the decision and order of the Court.

ENTER,

HON. EILEEN M. SPODEK
J. S. C.

2022 DEC 19 AM 11:45
KINGS COUNTY CLERK
FILED