

Rachimi v Sacher

2023 NY Slip Op 30186(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 805199/2015

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

-----X

LORRAINE RACHIMI,

Plaintiff,

- v -

HOWARD L. SACHER, DO, ST. FRANCIS HOSPITAL, AND
COLUMBIA UNIVERSITY MEDICAL CENTER,

Defendants.

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INDEX NO. 805199/2015

MOTION DATE 02/03/2020

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 251, 252, 253

were read on this motion to/for JUDGMENT - SUMMARY.

In this medical malpractice action, defendant Howard L. Sacher, D.O. ("Sacher"), moves for summary judgment dismissing the plaintiff's complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

THE INSTANT MOTION

Plaintiff, Lorraine Rachimi, commenced the within action based on medical treatment rendered by defendant Sacher, a cardiologist. Plaintiff alleges in her complaint that defendant deviated from the standard of care in the care and treatment of the plaintiff by, inter alia, failing to properly diagnose pulmonary hypertension, pulmonary emboli and thromboembolic pulmonary hypertension in a timely manner, failing to order appropriate testing, including a VQ scan or a CT scan with pulmonary emboli protocol, and lack of informed consent.

Defendant contends that the complaint should be dismissed pursuant to CPLR 3212, and asserts that defendant did not deviate from good and standard medical practice in the care and

treatment of plaintiff. Defendant also moves for dismissal of plaintiff's lack of informed consent claim. In support of his motion for summary judgment defendant submits the affirmation of Stanley Schneller, M.D. ("Schneller"), a board-certified Internist, with a subspecialty board in Cardiovascular Disease

Plaintiff, in opposition, submits the affirmation of Kim A. Klancke, M.D. ("Klancke"), a physician board certified in Internal Medicine, Cardiovascular Disease and Advanced Cardiovascular Life Support. Klancke asserts that Sacher departed from good and accepted medical standards by failing to timely and properly diagnose, evaluate, monitor and treat plaintiff's condition and failed to inform plaintiff of the testing necessary to diagnose pulmonary emboli, including VQ scans, and the importance of early testing to diagnose and treat pulmonary hypertension to avoid irreversible progression of plaintiff's condition.

DISCUSSION

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 2-, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24), or by establishing that the plaintiff was not injured by such treatment (see *McGuigan v Centereach Mgt. Group, Inc.*,

94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy this burden, a defendant must present expert opinion 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 Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]).

Once defendant establishes prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

Defendant has established through Schneller's expert affirmation that he did not deviate from the standard of good and accepted medical care in treating plaintiff, and, thus, is entitled to summary judgment as a matter of law. Specifically, defendant's expert opined that, based upon a review of plaintiff's medical records from the time she commenced treatment with defendant in 2013 to her final visit in 2014, Sacher properly evaluated plaintiff, properly performed a cardiac work-up, and properly interpreted the results of diagnostic testing. [T]he opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). As such, Schneller cites plaintiff's office visits to defendant throughout 2013 and 2014 wherein care and treatment were rendered as follows:

- On September 23, 2013, a stress echocardiography was performed, and defendant recommended a right heart catheterization and follow up with a pulmonologist;
- On October 7, 2013, plaintiff returned to Sacher's office with the same complaints of shortness of breath and fatigue, and Sacher ordered a venous ultrasound of the lower extremities, which was negative for deep vein thrombus, and referred plaintiff to non-party pulmonologist Dr. Schreiber based on the results of a stress echocardiogram, which indicated elevated pulmonary pressure during peak exercise;
- On October 11, 2013, an appointment was scheduled for a pulmonary consult with Dr. Schreiber, and on October 16, 2013, a CT angiogram was done to assess for pulmonary embolism, which was negative.
- On October 21, 2013, plaintiff returned to Sacher's office with complaints of continued fatigue and defendant noted that plaintiff was being evaluated by pulmonologist, Dr. Evan D. Sorett. An abdominal ultrasound was performed, which revealed atherosclerotic disease;
- On November 4, 2013, plaintiff returned to Sacher's office with unchanged symptoms. A lower extremity arterial ultrasound showed mildly calcified vessels. Sacher noted that a CT ordered by Dr. Sorett revealed a thymoma, which was to be addressed by a cardiothoracic surgeon;
- On November 8, 2013, Dr. Sorett informed Sacher of a November 1, 2013, office visit by the plaintiff during which she complained of malaise and mild dyspnea. Dr. Sorett indicated that plaintiff's main pulmonary pressure was below the threshold believed to be diagnostic of pulmonary hypertension. Plaintiff was noted

to be obese, and Sorett attributed plaintiff's dyspnea to anxiety, stress, and deconditioning;

- Plaintiff returned to Sacher's office on April 7, 2014 and June 30, 2014, with various complaints that included headaches, ringing in the ears, sinus problems, difficulty sleeping, continued dyspnea, and according to Dr. Sorett, mild pulmonary hypertension. At the June 30, 2014 visit, Sacher encouraged the plaintiff to lose weight and to speak with Dr. Sorett about medication for pulmonary hypertension;
- On August 1, 2014, plaintiff presented to Sacher's office for pre-op cardiac clearance requested by cardiothoracic surgeon Dr. Lawrence Durban. Dr. Durban related the plaintiff's complaints of dyspnea to pulmonary hypertension. The plaintiff informed Sacher that her condition was the same. A nuclear stress test demonstrated mild anterior wall ischemia, and an echocardiogram was consistent with the prior examination;
- On September 9, 2014, plaintiff presented to Sacher's office with continued complaints of fatigue and lack of energy, and Sacher recommended further cardiac catheterization, which was performed by Dr. Shlofmitz on September 18, 2014, and found to be normal. On September 29, 2014, during plaintiff's last visit with Sacher, she again complained of fatigue and tiredness, and Sacher referred the plaintiff to a psychopharmacologist, an endocrinologist and pulmonologist Dr. Sorett. Sacher performed a stress echocardiogram, which showed no evidence of inducible ischemia.

According to defendant's expert, Sacher referred plaintiff to the Pulmonary Hypertension Center at Columbia University Medical Center, at plaintiff's request, for a second opinion, based

on plaintiff's worsening symptoms of extreme fatigue and dyspnea. Plaintiff was examined by non-party cardiologist Dr. Berman-Rosenzweig on November 25, 2014, and a VQ scan and cardiac catheterization was performed, which revealed bilateral disease that might be consistent with CTEPH, and bilateral pulmonary emboli. Schneller concluded to a reasonable degree of medical certainty, that "in the presence of the continuity of care for pulmonary hypertension by Dr. Sorett initially, and subsequently by Dr. Berman-Rosenzweig, there is absolutely no causal connection between the patient's condition upon presentation to Dr. Sacher, and any progression of her disease."

While defendant has established entitlement to summary judgment as to plaintiff's medical malpractice claim, plaintiff, in opposition, rebutted defendant's prima facie showing through the affirmation of her medical expert, Klancke, who based upon a review of the pleadings, medical records, deposition testimony, and Sacher's summary judgment submissions, opined that Sacher departed from good and accepted medical standards by failing to timely and properly diagnose, evaluate, monitor and treat plaintiff's condition. Klancke further opined that a complete differential diagnosis was not developed, appropriate testing was not performed, and the potential diagnosis of multiple pulmonary emboli was not considered. Additionally, Klancke opined plaintiff's symptoms required immediate evaluation with functional testing to exclude life threatening conditions, and that such testing was improperly delayed for months. Klancke further opined, within a reasonable degree of medical certainty, that Sacher's departures caused plaintiff to have untreated pulmonary emboli, progressive pulmonary hypertension, and CTEPH, with no chance of a cure.

Defendant has also established prima facie entitlement to summary judgment regarding plaintiff's lack of informed consent claim. It is well settled to establish a cause of action based on lack of informed consent, plaintiffs are required to prove:

(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.

(*Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; see *Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; Public Health Law § 2805-d[1]).

Schneller opined, within a reasonable degree of medical certainty, that plaintiff's claim of lack of informed consent was inapplicable to the stress tests since he appropriately obtained a general consent as such tests are non-invasive. For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). Further Schneller opined that it was not Sacher's responsibility to obtain plaintiff's consent for the cardiac catheterization procedures, as he was not involved in the procedures, and in any event, copies of the informed consent for such procedures are contained in plaintiff's medical records of St Francis Hospital.

It is well settled that a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (see *Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

A review of plaintiff’s submissions also establishes that plaintiff has rebutted defendant’s prima facie showing regarding the claim of lack of informed consent since Klancke opined, within a reasonable degree of medical certainty, that had plaintiff been informed of the necessary testing, plaintiff’s condition would have been timely diagnosed and treated.

Based on the foregoing, the Court finds that plaintiff has raised a triable issue of fact regarding plaintiff’s claims arising from medical malpractice based on defendant’s failure to timely and properly diagnose pulmonary hypertension, pulmonary emboli and CTEPH, and lack of informed consent, which precludes a grant of defendant’s summary judgment motion.

Accordingly, it is hereby,

ORDERED, that the summary judgment motion of defendant Howard L. Sacher, D.O. is denied; and it is further

ORDERED, that an in-person settlement conference is scheduled for February 14, 2023, at 11:00 am, Part 6, 60 Centre Street, Room 351.

This constitutes the Decision and Order of the Court.

1/13/23
DATE


KATHY J. KING, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE