

Egan v Izikson

2023 NY Slip Op 30223(U)

January 19, 2023

Supreme Court, New York County

Docket Number: Index No. 805065/2020

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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INDEX NO. 805065/2020

JOSEPH EGAN, LINDA LUCIANO,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALLAN IZIKSON, SHANE BAKER, SANDRA SACKS, ARTHUR TOLIS, CAMERON BRENNAN, EVAN MATROS, CRYSTAL RUN HEALTHCARE, MEMORIAL SLOAN KETTERING

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

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

Upon the foregoing documents, the motion for summary judgment of defendants Allan Izikson, M.D., Arthur Tolis, M.D., Sandra L. Sacks, M.D. and Crystal Run Healthcare LLP (hereinafter "Crystal Run") is granted to the extent that (1) the complaint is severed and dismissed as against Sandra L. Sacks, M.D.¹; (2) all claims relating to continuous treatment from "as early as 2016" (see Plaintiffs' May 10, 2022 Supplemental Verified Bill of Particulars; NYSCEF Doc. No. 34) are severed and dismissed, and (3) the Fourth Cause of Action against Crystal Run Healthcare for negligent hiring, supervision, and renewal of employment privileges is severed and dismissed. Plaintiffs previously discontinued their action against the defendants Cameron Brennan, M.D., Evan Matros, M.D., Memorial Sloan Kettering (see NYSCEF Doc. No. 21) and Shane Baker, M.D. (see NYSCEF Doc. No. 19). The balance of the motion, opposed by

¹ Plaintiffs concede in opposition to the motion and at oral argument to discontinue their case against Dr. Sacks.

plaintiffs, is denied. Accordingly, the only defendants remaining in this case are the primary care physician, Dr. Tolis, and the dermatologist, Dr. Izikson, for allegations of negligence, lack of informed consent (Third Cause of Action), and loss of services on behalf of Linda Luciano (Sixth Cause of Action), and the defendant, Crystal Run, for vicarious responsibility for the alleged malpractice of Drs. Tolis and Izikson.

This is a medical malpractice action in which plaintiffs allege that defendants failed to diagnose and treat basal cell carcinoma, a form of skin cancer, from June of 2018 through September of 2019. It is undisputed that plaintiff had a history of skin cancers. The cancer in this case was a rare type that formed under what appeared to be an epidermal inclusion cyst (“EIC”), located on the back of plaintiff’s neck. The benign cyst was concealing a large basaloid adnexal carcinoma, which because of its size and location required two complex surgeries at MSK. Plaintiff suffered damage to his facial nerve during the second surgery which was partially repaired, has endured protracted follow-up care, and allegedly suffers from metastasis of the cancer.

FACTUAL BACKGROUND

Plaintiff received his care and treatment at Crystal Run during the relevant time-period. Dr. Tolis was Mr. Egan’s primary care physician, and Dr. Izikson was his dermatologist. Dr. Sacks was the plastic surgeon who attempted to remove the EIC in July of 2019.

Plaintiff first came under the care of Dr. Tolis in 2008 after a hospitalization for pneumonia. Dr. Tolis’ regular exams included palpating the front of plaintiff’s neck to check for lymph nodes, but he did not routinely examine the back of the neck.

Dr. Izikson began treating plaintiff in 2014 for a lengthy history of skin cancers. The doctor initially performed full body scans but maintains that at plaintiff’s request he stopped

doing those in favor of concentrating on plaintiff's specific concerns. This is disputed by plaintiff.

On January 14, 2019, plaintiff saw his ophthalmologist at Crystal Run at which time the doctor noted that the exam could not be performed because plaintiff had a large cyst on the back of his neck which made positioning difficult. Plaintiff saw Dr. Tolis that same day, but there is no record of plaintiff complaining to Dr. Tolis about the cyst, or informing him of the canceled procedure with the ophthalmologist.

One month later, on February 19, 2019, plaintiff saw Dr. Izikson for drainage of the EIC that by now had become painful and inflamed over the preceding week. Dr. Izikson attests that this was his first notification of the cyst which, at 5 cm, he characterized as "medium to large." He drained the cyst and clinically confirmed from the excised contents that it was a cyst. The contents were not sent to pathology. The size of the cyst was "much diminished" at plaintiff's March and April 2019 follow up visits to Dr. Izikson.

On June 14, 2019, plaintiff saw plastic surgeon Dr. Sacks for "definitive excision to prevent recurrence" of the EIC. She performed the surgery on July 26, 2019 at which time she was surprised at the depth of the cyst and critically, that unlike an EIC, this "cyst" had no borders. The pathology returned "poorly differentiated basaloid carcinoma...deep within the derma without apparent connection to the skin surface" (*see* NYSCEF Doc. No. 58).

Plaintiff returned to Dr. Sacks on July 31, 2019 at which time he was advised of the results of the pathology. His final visit with Dr. Sacks was on August 28, 2019.

On September 1, 2019, Dr. Izikson referred plaintiff to a head and neck cancer specialist at MSK. He subsequently underwent surgical procedures on December 5, 2019 and December 12, 2019 for a tumor resection, and suffered a facial paralysis as a result of the surgeries at MSK.

MOTION FOR SUMMARY JUDGMENT AND EXPERT OPINIONS

In support of the motion, each defendant authors and submits their own expert affirmation. Dr. Izikson attests that while plaintiff became his patient in 2014, his first notice of the EIC was on February 19, 2019 (*see* NYSCEF Doc. No. 24) at which time he drained it. According to Dr. Izikson, the dermatological standard of care did not require that the cyst contents be submitted to pathology (*id.* para. 13) because in this case, the drained material was consistent with an EIC. “The cyst’s clinical appearance, its expressed contents during incision and drainage, and its predictable and expected clinical response to treatment were entirely consistent with an inflamed epidermal cyst...[and] when symptoms are consistent with a usual and typical diagnosis such as an EIC, the standard of care does not require a clinician to assume that another more dire process is in play in the absence of any unusual or unexplained symptoms inconsistent with the primary diagnosis” (*id.*, paras 20, 25).

In his affirmation in support of summary judgment (*see* NYSCEF Doc. No. 26), Dr. Tolis informs that his only involvement with the benign EIC was on July 11, 2019, when he provided medical clearance for the excision surgery performed by Dr. Sacks. Dr. Tolis maintains that he never treated or otherwise managed this EIC, or any of plaintiff’s other skin cancers. Dr. Tolis denies that plaintiff made him aware of the cyst on the back of his neck in 2016, as evidenced by his records which are silent as to the existence of the neck cyst until 2019.

In opposition to the motion plaintiffs submit the redacted affirmation of a dermatologist (*see* NYSCEF Doc. No. 50) who opines unequivocally that Dr. Izikson departed from the acceptable standard of care by: (1) failing to perform full body skin cancer checks between 2016 and 2019 despite plaintiff’s known history of skin cancers; (2) failing to obtain plaintiff’s informed consent before discontinuing the full body checks, and (3) failing to notice or

appreciate the significance of the neck mass between 2017 and 2019. Plaintiffs' expert opines that these departures were a substantial contributing factor in permitting the mass to grow and to spread into the surrounding tissue and structures (*id.*, para 3).

Plaintiffs' expert further opines that Dr. Tolis, deviated from the standard of care by failing to notice or appreciate the mass or heed plaintiff's request for treatment of it between 2017 and 2019, and concludes that this deviation was a substantial contributing factor in causing plaintiff's injury (*id.*). According to the expert: "any masses, lesions or skin conditions indicative of cancer that are readily observable to the dermatologist should be biopsied" (*id.*, para 31).

APPLICABLE LAW AND ANALYSIS

It has long been acknowledged that summary judgment deprives the litigant of his day in court and is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*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 material issues of fact which require a trial (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

A defendant physician 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]; *Stukas v. Streiter*, 83 AD3d 18, 24 [2d Dept. 2011]). To satisfy the burden, 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 (*id.*; *see also 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]).

In reviewing a defendant’s motion for summary judgment, the Court must accept plaintiff’s facts as true, and draw all reasonable inferences in the light most favorable to the plaintiff (*see Asabor v. Archdiocese of New York*, 102 AD3d 524 [1st Dept. 2013]; [*internal citations omitted*]). The standard for determining the motion is whether there are any genuine and material disputed issues of fact. Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable (*see Glick & Dolleck v. Tri-Pac Expert Corp.*, 22 NY2d 441 [1968]). Critically, **“it is not the court’s function on a motion for summary judgment to assess credibility”** (*Ferrante v. American Lung Assn.*, 90 NY2d 93 [1997]; [*emphasis supplied*]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict” (*Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 [1986]).

Once a defendant has met his or her burden on the motion, the plaintiff must “submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant-physician that he was 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 physician’s] summary judgment motion” (*Alvarez v. Prospect Hospital*, 68 NY 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 AD23d 303 [1st Dept. 2007], quoting *Ferrara v. South Shore Orthopedic Associates, P.C.*, 178 AD2d 364, 366 [1st Dept. 1991]). Moreover, plaintiff’s expert 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]).

Here, while defendants Dr. Izikson and Dr. Tolis have made a *prima facie* showing of entitlement to summary judgment dismissing the complaint, plaintiffs have successfully raised triable issues of fact sufficient to defeat the motion, such as but not limited to, whether Mr. Egan complained to Dr. Tolis and Dr. Izikson about the firm lump on the back of his neck prior to February 19, 2019, and whether Mr. Egan sought to discontinue total body checks is a decision for the jury, despite the absence of a notation to that effect in his medical records. Given plaintiff’s deposition testimony and the opinion of plaintiff’s expert that the neck mass was readily observable for more than a year (and potentially for many years) prior to its biopsy, and the defendants’ delay in treatment of the mass contributed to its growth and spread, summary judgment must be denied to Dr. Tolis and Dr. Izikson.

Likewise, Crystal Run as the employer of Dr. Tolis and Dr. Izikson is not entitled to summary judgment to the extent that it bears vicarious responsibility for these doctors' negligent conduct.

Accordingly, it is

ORDERED that the branch of the motion for summary judgment by defendant Dr. Sandra L. Sacks is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Dr. Sacks dismissing the Complaint; and it is further

ORDERED that the branch of the motion for summary judgment by defendant Crystal Run Healthcare is granted to the extent that plaintiffs' Fourth Cause of Action is dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment severing and dismissing plaintiffs' Fourth Cause of Action against the remaining defendants; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the parties appear in Part 40 on April 3, 2023 at 10:00 a.m. to select a trial date.

1/19/2023
DATE

Hon. Judith N. McMahon
J.S.C.

HON. JUDITH N. MCMAHON

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE