SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS:

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CHE ROLLINS, as Administrator of the Estate of ANITA ROLLINS,

Plaintiff,

-against-

BERNARD RIMPEL, MD, MAGANIAL MISTRY, MD, MICHAEL LACQUA, MD, WINNIFRED LAMARRE, MD, PREFERRED HEALTH PARTNERS, PREFERRED HEALTH PARTNERS, d/b/a CENTRAL BROOKLYN MEDICAL GROUP EMPIRE CENTER, ADVANTAGE CARE PHYSICIANS, PC, THE BROOKLYN HOSPITAL CENTER, AJIT BELLIAPPA, MD and DOSHI DIAGNOSTIC IMAGING SERVICES,

Defendants.

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DECISION AND ORDER
Index No. 510082/2017
Motion Sequence 10

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 192 – 203; 207, 208-210; 211.

Defendants ADVANTAGECARE PHYSICIANS, P.C., ADVANTAGECARE PHYSICIANS, P.C. s/h/a PREFERRED HEALTH PARTNERS, and PREFERRED HEALTH PARTNERS d/b/a CENTRAL BROOKLYN MEDICAL GROUP EMPIRE CENTER (hereinafter collectively "ACP") move this court for an order granting summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's complaint in its entirety on the grounds that ACP by and through its employees, agents and staff, rendered appropriate care and treatment, within accepted standards of medical care to decedent ANITA ROLLINS during all times alleged, and that there is no causal connection between the allegations and injuries.

In this action sounding in medical malpractice and wrongful death, Plaintiff CHE ROLLINS, as Administrator of the Estate of ANITA ROLLINS, claims, *inter alia*, that ACP physicians departed from the standard of care on multiple dates by not timely or adequately following up on an elevated antigen finding. Plaintiff further claims that these failures caused the diagnosis and treatment of Ms. Rollins' recurrence to be delayed by four months, thereby depriving her of timely treatment, diminishing her opportunity for life-extending treatment, and the possibility of a cure. Plaintiff claims that these failures proximately caused the delay in diagnosis of her stage IV cancer and her death.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist, and the movant is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.* 68 N.Y.2d 320, 324 (1986). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The elements of proof required in a medical malpractice action are (1) deviation or departure from accepted practice and (2) evidence that such departure was the proximate cause of injury or damage. *Lopes v. Lenox Hill Hospital*, 172 A.D.3d 699, 702 (2d Dept. 2019) citing *Stukas v. Streiter*, 83 AD3d 18, 23 (2d Dept. 2011); see *Hollingsworth v. Mercy Med. Ctr.*, 161 AD3d 831, 832 (2d Dept 2018), *Gaspard v. Aronoff*, 153 AD3d 795, 796 (2d dept. 2017) "In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, 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" *Stukas* at 24, citing *Alvarez*, supra, at 324. "In a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not" that the defendant's deviation was a substantial factor in causing the injury. *Goldberg v. Horowitz*, 73 AD3d 691, 694 (2d Dept. 2010) citing *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 (2d Dept. 2005) [internal quotation marks omitted]; *see Alicea v Ligouri*, 54 AD3d 784, 785 (2d Dept. 2008); *Flaherty v Fromberg*, 46 AD3d 743, 745 (2d Dept. 2007); *Bunea v Cahaly*, 37 AD3d 389, 390-391 (2d Dept. 2007); *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 (2d Dept. 1998). Case law is clear that "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman* supra, at 562.

Plaintiff was a 49-year-old female with a past medical history of left breast cancer (09/17/2013) and 4 cycles of chemotherapy (03/26/2014-05/28/2014). She had a surgical history of left breast mastectomy with reconstruction (11/08/2013). On February 4, 2015, Ms. Rollins had a follow-up visit with Maganlal Mistry, M.D. for left breast pain. She was assessed with malignant neoplasm of the breast, unspecified site. Among other bloodwork, Dr Mistry ordered Cancer Antigen test 27-29 which were elevated. On February 13, 2015, Ms. Rollins had a mildly elevated

tumor marker and had an abnormal breast MRI at the implant site. The elevated tumor marker CA27-29 was not addressed, but it was repeated upon the subsequent visit.

On 03/04/2015, Ms. Rollins had another follow-up visit with Maganlal Mistry, M.D. and was assessed with post-mastectomy lymphedema syndrome. Dr. Mistry recommended an MRI of the spine. Dr. Mistry ordered Cancer Antigen 27-29, BMP, and calcium which showed an elevated level of CA27-29 (89), platelet 410. The continued rise of CA27-29 was not addressed. On 03/25/2015, Ms. Rollins' chest CT with contrast showed fluid in the left chest wall. Dr. Mistry referred her to General Surgery and to Pulmonary Medicine.

On 04/20/2015, Ms. Rollins was seen by Eva Rubin, M.D. referred by Dr. Mistry. Dr. Rubin recommended to follow-up closely and advised CT chest in 3 months and a pulmonary function test. On 05/27/2015, Ms. Rollins' chest CT showed re-accumulation of the upper chest wall seroma, left pleural effusion with atelectatic changes, and right lung nodule. She underwent CT-guided placement of a drainage catheter. On 05/29/2015, based on the results of Ms. Rollins' chest CT, PE protocol CT was suggested due to the history of chest pain and hemoptysis and a continued follow-up was recommended.

On 06/22/2015, Ms. Rollins was assessed by Harvey Dosik, M.D. for metastatic breast cancer. On 6/26/2015 Dr. Keshava observed an increase in fluid in Ms. Rollin’s left lung by X-ray, but the patient was not willing for further fluid removal. The labs showed a significantly elevated CA27-29, and she had a poor prognosis tumor. On 6/28/2015, Ms. Rollins’ CT Positron Emission Tomography (PET) scan showed a fluid collection in the left chest wall and the rim of this collection was mildly hypermetabolic.

On or about June of 2015 Ms. Rollins was diagnosed with stage IV breast cancer that had metastasized to the lung.

Defendants’ expert MARLEEN I. MEYERS, M.D. states in her affirmation in support of the instant motion, “that ACP, and by and through its employees, agents, and staff, acted in accordance with good and accepted medical practices, at all times, in the care and treatment of decedent.” She further states “that regardless of when the chemotherapy was started, due to the aggressive type of cancer that decedent had, the outcome would have been the same … .” Dr. Meyers additionally states that, “[a] PET/CT or fluorodeoxyglucose (FDG) PET/CT would not have added any additional information to the findings of the MRI and CT scan,” and that “an earlier MRI and CT or a PET/CT or FDG/PET CT would not have changed the outcome… .”

Specifically, Dr. Meyers indicated that on February 4, 2015, the patient returned to Dr. Mistry, who appropriately noted the findings of a December 2014 MRI. Dr. Meyers also states, "[b]reast examination revealed no palpable mass on the right; Ms. Rollins had inflammation behind the left breast implant and was advised to see the surgeon who did the implant." Dr. Mistry ordered indicated blood testing, including CA27-29 tumor marker testing. On February 13, 2015, Dr. Mistry spoke with Ms. Rollins via telephone, noted an increase in her tumor markers and that she had the implant removed the day prior. Dr. Mistry advised Ms. Rollins to send him the pathology report and discharge summary. Dr. Meyers indicates that any alleged delay in starting chemotherapy was a result of Ms. Rollins obtaining multiple opinions. Ms. Rollins was administered four different types of chemotherapy, none of which had any effect. Dr. Meyers opines that Ms. Rollins was shown to be chemotherapy refractory, meaning she did not respond to chemotherapy. Based on the submissions and affidavit of Dr. Meyers, Defendants established *prima facie* that the ACP physicians did not deviate or depart from accepted medical practice and that the actions of the ACP physicians were not the proximate cause of the decedent's injuries and death.

However, in opposition, Plaintiff raises a triable issue of material fact concerning whether Dr. Mistry failed to appropriately recommend FDG PET/CT on Ms. Rollins, and whether that failure proximately caused Ms. Rollins' injuries and death. Plaintiff's expert, MARK LEVIN, M.D. states, "that there were several departures in the care and treatment rendered by the physicians at ACP … in connection with the treatment of ANITA ROLLINS," and that "these acts and omissions in care proximately caused and contributed to her delayed diagnosis of recurrent breast cancer and ultimate wrongful death."

According to Dr. Levin, on February 4, 2015, and February 13, 2015, "Dr. Mistry failed to appropriately recommend FDG PET/CT in the setting of elevated tumor markers and punctate parenchymal and subpleural nodules/irregularities in the left lung." Dr. Levin describes FDG PET/CT imaging as an accurate modality screen for breast cancer recurrence that is more sensitive than a conventional imaging workup, and adds, "[g]iven Ms. Rollins' history, an FDG PET/CT was required immediately for as timely a diagnosis as possible and immediate initiation of treatment." Dr. Levin explains that "[p]hysical findings are not reliable in the presence of implants," that a closer follow-up was required by Dr. Mistry, and that "[r]outine imaging is technically limited in patients who have prosthetic implants … ." Dr. Levin also states, "[g]iven

this history, and particularly the history of the implant, the standard of care required close follow-up with the oncologist." An FDG PET/CT was never performed on Ms. Rollins.

According to Dr. Levin, the four-month delay in diagnosing Ms. Rollins with stage IV metastatic breast cancer allowed the cancer to accrue new mutations, spread, and develop chemotherapy resistance. It is Dr. Levin's opinion that this caused Ms. Rollins a diminished prognosis and lifespan, and also deprived her of the benefits of early treatment and opportunity for a cure.

Dr. Meyers and Dr. Levin have submitted conflicting expert affirmations leaving a conflict of medical opinion which raises a triable issue of fact. See *McIntyre v. East Nassau Medical Group*, 275 AD2d 398 (2d Dept. 2000); *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177 (1st Dept. 1974); see also *Viti v. Franklin General Hospital*, 190 AD2d 790 (2d Dept. 1993); *Taype v City of New York*, 82 AD2d 648 (2d Dept. 1981). Contrary to defendants' position, the affirmation of plaintiff's expert is detailed and not speculative or conclusory. Accordingly, Defendants' motion is DENIED.

For the first time in their reply, the moving Defendants also seem to seek dismissal of claims for vicarious liability for specifically named doctors which was not in the notice of motion, in the affirmation of support of the motion, or in the memorandum of law. As such the court will not consider such request as part of the instant motion.

This constitutes the decision and order of the Court.

Dated: January 26, 2023

ENTER.

Hon. Consuelo Mallafre Melendez,
J.S.C.