

Orenstein v Lefkowitz
2023 NY Slip Op 30366(U)
January 25, 2023
Supreme Court, New York County
Docket Number: Index No. 805298/2018
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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YARON ORENSTEIN,

Plaintiff,

- v -

ROBERT LEFKOWITZ, AZADEH NAMAKYDOUST,
SAMUEL SINGER, MEMORIAL SLOAN KETTERING
CANCER CENTER

Defendant.

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INDEX NO. 805298/2018
MOTION DATE 01/18/2023
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion for summary judgment by defendants Robert Lefkowitz, M.D., Samuel Singer, M.D., and Memorial Sloan Kettering Cancer Center is granted to the extent that the complaint is severed and dismissed as against the defendant oncologist/surgeon, Dr. Singer. Also severed and dismissed are plaintiff's Third and Fourth Causes of Action... The balance of the motion is denied. Accordingly, the only defendants remaining in this case are Memorial Sloan Kettering Cancer Center ("MSK") for vicarious responsibility only, and Dr. Lefkowitz for medical malpractice and the wrongful death (Fifth Cause of Action) of plaintiff's decedent, Rachel Orenstein.

Plaintiff alleges that a May 31, 2016 chest CT scan was misinterpreted by radiologist Dr. Lefkowitz because a right lower lobe lung nodule was not reported as suspicious for cancer and,

1 Plaintiff's Third Cause of Action is for failure to furnish decedent with informed consent, and the Fourth Cause of Action is against MSK for negligent hiring and credentialing.

2 A Stipulation of Discontinuance was executed on January 26, 2022 in favor of the defendant Azadeh Namakydoust, M.D. (see NYSCEF Doc. No. 46).

as a result, diagnosis and treatment for the 71 year-old decedent's lung cancer was delayed for eight months.

FACTUAL BACKGROUND

On June 5, 2014 Rachel Orenstein presented to the Emergency Department of Staten Island University Hospital with shortness of breath. She was admitted to the hospital and treated for pneumonia. On June 6, 2014 decedent underwent a chest CT scan which revealed ill-defined bilateral ground-glass opacities which appeared to be infectious/inflammatory, and notably, the incidental finding of a 7 x 5 cm mass within the abdomen. An abdominal CT scan reported that the mass was concerning for liposarcoma.

On June 26, 2014 decedent presented to defendant oncologist, Dr. Singer at MSK for consultation regarding her diagnosis of retroperitoneal liposarcoma. Dr. Singer planned to surgically resect the liposarcoma after decedent recovered from pneumonia. An August 7, 2014 chest CT scan taken to evaluate whether the pneumonia had resolved, identified findings in the lungs that probably represented "chronic infectious/inflammatory findings associated with chronic bronchitis and atypical mycobacterial process." It was noted that "the possibility that any of the small residual nodules represent metastases would be difficult to exclude" and correlation on subsequent chest CT scans was recommended.

Decedent planned to undergo surgical resection of the liposarcoma but suffered perforated diverticulitis which required prompt surgery in November of 2014.

Decedent underwent the resected liposarcoma and reverse colostomy surgery on June 22, 2015, which was performed by Dr. Singer. At her November 19, 2015 follow up, she underwent a baseline CT scan of the chest, abdomen, and pelvis (unremarkable) with a plan to have repeat CT scan imaging every six months.

On May 31, 2016 decedent had her six-month follow-up chest CT scan read by Dr. Lefkowitz which showed multiple bilateral pulmonary nodules that were unchanged and consistent with a chronic inflammatory/infectious process. A previously identified nodule in the left lower lobe had decreased in size and measured 1.2 cm x 1.0 cm. There was no evidence of recurrent liposarcoma.

Six months later, decedent returned to MSK for her repeat chest, abdomen and pelvis CT scan. Dr. Lefkowitz interpreted the chest as follows: “most of the previously identified clustered, tree-in-bud nodules in both lungs are unchanged and consistent with a chronic inflammatory process.” However, a new right 3.2 cm x 1.5 cm lower lobe spiculated mass abutting the pleural surface was identified and noted by Dr. Lefkowitz as suspicious for primary lung cancer. Dr. Lefkowitz also identified several new nodules in both lungs as suspicious for metastatic disease. He called Dr. Singer that day to report the findings.

A tissue biopsy performed on February 7, 2017 confirmed primary, non-small cell lung cancer that was determined to be Stage IV.

Mrs. Orenstein received one dose of palliative immunotherapy but was unable to tolerate further treatment. She died on May 9, 2017.

MOTION FOR SUMMARY JUDGMENT AND EXPERT OPINIONS

Defendants move for summary judgment relying in part on the expert affirmations of radiologist, Georgeann McGuinness, M.D. (*see* NYSCEF Doc. No. 51) and surgical oncologist, Charles C. Conte, M.D. (*see* NYSCEF Doc. No. 52).

Dr. McGuinness opines that Dr. Lefkowitz properly interpreted the May 31, 2016 chest CT scan in accordance with the radiological standards of care, and further, that any alleged

failure to report the right lower lobe lung nodule as suspicious was not a proximate cause decedent's injuries and untimely death.

Dr. McGuinness notes that decedent's imaging studies from 2014 to 2016 consistently showed multiple nodules in both lungs that had the appearance of infectious/inflammatory processes associated with her underlying lung diseases of pneumonia and chronic bronchitis. According to the expert, when Dr. Lefkowitz read the May 31, 2016 CT scan: (1) the 1.4 cm x 0.6 cm nodule did not appear to be an irregular or spiculated mass, indicative of cancer; (2) biopsy of that nodule was not warranted because even if suspicious, the standard of care is to monitor the nodule on follow up imaging, and (3) Dr. Lefkowitz properly identified the change in the nodule on the January 31, 2017 CT scan, which showed a discrete, likely cancerous mass in the right lower lobe with metastatic spread, demonstrating very rapid growth, and promptly reported it to Dr. Singer.

Dr. Conte opines that Dr. Singer adhered to the applicable oncological standard of care, and that none of Dr. Singer's actions were a proximate cause of any of the injuries alleged.

The Court notes at the outset that in opposition to the motion, neither of plaintiff's experts have attested that Dr. Singer departed from the standard of care while he monitored the decedent for possible recurrent liposarcoma. Dr. Singer testified that if there was a conflict in interpretation of the CT scans, he would call the radiologist to discuss the conflict (*see* NYSCEF Doc. No. 61, p.54, lines 13-16 to 55) and would rely upon the radiologist's interpretation. Accordingly, summary judgment must be awarded to Dr. Singer because there is no evidence that he departed from the standard of care.

In opposition to the motion of Dr. Lefkowitz and MSK, plaintiff attaches, *inter alia*, the redacted affirmation of a radiologist (*see* NYSCEF Doc. No. 72), and affidavit of an oncologist/hematologist (*see* NYSCEF Doc. No. 73).

Plaintiff's radiology expert opines, regarding the May 31, 2016 and January 31, 2017 chest CT scans, that Dr. Lefkowitz (1) negligently failed to report a significant suspicious finding in the right lower lobe on May 31, 2016; (2) did not accurately report what the May 31, 2016 CT scan demonstrated; (3) failed to call the ordering doctor to recommend appropriate follow-up and/or biopsy, and (4) negligently misled the referring doctor that the mass in the right lower lobe was new on the January 31, 2017 CT scan, when in fact it was evident and missed by Dr. Lefkowitz in his interpretation of the CT scan six months earlier.

Plaintiff's oncology expert also finds "within a reasonable degree of medical certainty, that Dr. Lefkowitz negligently failed to report on a significant suspicious finding" on May 31, 2016. According to this expert, the images from the May 31, 2016 CT scan show a "pleural based lobulated mass in the posterior axillary line of the right lower lobe, which was reconfirmed on the coronal and sagittal imaging, measuring 2.0 x .07 cm, and, since the May 31, 2016 film there was interval growth of that mass to 3.5 x 3.9 x 3.0 cm." Plaintiff's oncologist concludes that Dr. Lefkowitz' failure to properly report and communicate on the May 31, 2016 CT scan resulted in an eight-month delay in diagnosis during which the mass increased in size so that by January of 2017 and there was diagnostic evidence of metastatic disease, and "the delay was a substantial factor in the delay of critically needed medical care."

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 defendant Dr. Lefkowitz has made a *prima facie* showing of entitlement to summary judgment dismissing the complaint, plaintiff has successfully raised triable issues of fact sufficient to defeat the motion through the opinions of the experts that the mass on the right lower lobe was suspicious and evident on the May 31, 2016 chest CT scan. Given the opinion of plaintiff's experts that the mass was readily observable and that a delay in treatment contributed to its growth and spread, summary judgment must be denied to Dr. Lefkowitz.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent that the Complaint is dismissed against Dr. Singer; and it is further

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

ORDERED that the Clerk enter judgment dismissing the Complaint against Samuel Singer, M.D.; and it is further

ORDERED that the parties appear for a virtual pre-trial conference via Microsoft Teams on April 3, 2023 at 10:45 a.m.

1/25/2023
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

Hon. Judith N. McMahon

HON. JUDITH N. MCMAHON

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