Flanzraich v Gleyzer
2023 NY Slip Op 33987(U)
November 8, 2023
Supreme Court, Kings County
Docket Number: Index No. 511502/2019
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of November 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
---X
PAULA FLANZRAICH,

Plaintiff,

-against-

MIKHAIL GLEYZER, D.O., MIKHAIL GLEYZER OSTEOPATHIC FAMILY MEDICINE, P.C., and GARY L. OSTROW, D.O., P.C.,

Defendants.
---X

DECISION & ORDER

Index No. 511502/2019
Mo. Seq. 1

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 31 – 33, 34 – 61, 63, 64 – 84, 85

Defendants Mikhail Gleyzer, D.O., Mikhail Gleyzer Osteopathic Family Medicine, P.C., (combined hereinafter "Defendants'), and Gary Ostrow, D.O., P.C. move pursuant to CPLR § 3212 for summary judgment and dismissal of the Plaintiff's complaint with prejudice. Plaintiff Paula Flanzraich (hereinafter "Plaintiff") opposes Defendant's motion.

Plaintiff alleges medical malpractice against Defendants for failing to diagnose early-stage follicular lymphoma between 2008 - 2010, and for failing to investigate Plaintiff's ongoing symptoms between 2010 and 2017, when Plaintiff was thereafter diagnosed with advanced follicular lymphoma.

Defendant Gary Ostrow, D.O., P.C. established his prima facie showing for summary judgment, and Plaintiff does not oppose this branch of the motion. Therefore, the request for summary judgment as to Dr. Ostrow is granted. See, *144 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 761-62 [2nd Dept 2019].

In evaluating a summary judgment motion in a medical malpractice case, the Court applies the burden shifting process set forth by the Appellate Division:

> "The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. When moving for summary judgment, a defendant provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden. 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 [a] defendant['s]… summary judgment motion. Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record." *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898-899 [2d Dept 2023] (internal citations, brackets, and quotation marks omitted).

Defendant and Plaintiff both put forth a family medicine expert to opine as to the duty and breach elements of the medical malpractice claim; each also puts forth an oncology expert to opine on the issues of causation and injury thereof.

"A defendant moving for summary judgment in a medical malpractice action 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) [whether] such a departure was a proximate cause of the plaintiff's injuries." *McHale v Sweet*, 217 AD3d 666, 667 [2d Dept 2023] (internal citations, quotations and references omitted). Here, Defendant met his prima facie burden of

entitlement to summary judgment, by submitting the affidavit of a family medicine expert who opined that Defendant did not deviate or depart from the acceptable practice of family medicine, and an oncology expert who opined that even if there was breach thereof, Plaintiff was not caused to suffer any injury.

Defendant's expert witness, family medicine physician Dr. Brian T. Moynihan, opined that Defendant's acts and omissions were in conformity with the standard of care for a family medicine physician. Dr. Moynihan opined that since Defendant did not document that Plaintiff was having night sweats, especially "drenching" night sweats, it is unlikely that Plaintiff had actually reported night sweats to Defendant. Moreover, Dr. Moynihan opined that Defendant completed an exhaustive and comprehensive evaluation for Plaintiff's lymphadenopathy and elevated Erythrocyte Sedimentation Rate (hereinafter "ESR"), by obtaining bloodwork, PET scans, referrals to multiple specialists (rheumatology, internal medicine, hematology/oncology), a fine needle aspiration of an inguinal lymph node, an excisional lymph node biopsy, a bone marrow biopsy, and more, such that "there [were] no further tests that could've been done… sometimes a condition can only be described as 'unexplained.'" Additionally, Defendant had no obligation to reconcile any discrepancy between the flow cytometry results from the lymph node FNA and, in retrospect, the false negative lymph node biopsy read by a non-party pathologist. Finally, Dr. Moynihan opined that it was appropriate for Defendant to rely on the conclusion of the non-party hematologist/oncologist consultant in determining the presence or absence of malignancy.

Defendant's oncology expert witness, Robert S. Weiner, M.D., opined that Defendant implemented a reasonable course of action in referring Plaintiff to the non-party hematologist/oncologist, especially in light of the lymph node biopsy that was initially reported as negative (but on reevaluation several years later, was found to actually be follicular lymphoma) but with concerning FNA results; according to Dr. Weiner, the hematologist/oncologist was "in a far greater position" to reconcile the discrepant results, and that Defendant was "right to rely" on the specialist. Dr. Weiner concludes that there was no "opportunity for a better outcome," as "the recognized treatment for [stage 1 follicular lymphoma] is to 'wait and watch' until the condition becomes symptomatic and then begin treatment, which is exactly what happened anyway." Therefore, Defendants have established their prima facie entitlement to judgment as a matter of law dismissing the complaint.

"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" *Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]. Here, Plaintiff's expert witness opinions, as well as other disputed facts, do establish the existence of disputed material issues of fact. *Zuckerman v New York*, 49 NY2d 557 [1980].

Plaintiff submits the expert witness opinion of Dr. David Nidorf, who is board-certified in both family medicine and emergency medicine. Dr. Nidorf opined that Plaintiff's ESR was found to be "markedly elevated" between 2010 and 2017, for which Defendant originally diagnosed an autoimmune condition called polymyalgia rheumatica, which in the setting of ongoing symptoms, including, chronic and generalized fatigue, malaise, and weakness, was not accurate; Defendant later improperly diagnosed Plaintiff with chronic fatigue syndrome, for which Defendant prescribed vitamin infusions and hormonal treatments. Dr. Nidorf states that between 2010 and 2017, Defendant did not "refer her for a comprehensive evaluation by Oncology or refer [Plaintiff] for any additional diagnostic tests she had not already undergone, for the purpose of ruling out the potential diagnosis of lymphoma. While he had referred her for evaluations by internal medicine, rheumatology and also for a hematology evaluation by [non-party hematologist/oncologist], this evaluation was limited to a bone marrow biopsy which failed to rule out all of the potential malignancies that [Defendant] testified he was considering in the differential diagnosis between 2009 and 2010…" Plaintiff's expert stated that Defendant "departed from good and accepted medical practice, as he failed to ascertain the cause of her persistently elevated [ESR], as well as her persistent complaints of generalized fatigue, weakness and night sweats, and failed to take the steps necessary in order to rule out lymphoma from the differential diagnosis… This would be done by ordering an oncology consult, to have the patient undergo further testing to identify the actual cause of this non-specific finding… This required more than the hematology evaluation that [Defendant] ordered, but rather, a more comprehensive workup by an Oncologist was indicated." Furthermore, Plaintiff's expert opined that Defendant failed to reconcile the conflicting pathology results, mistakenly relying on the incorrectly read excisional lymph node biopsy to rule out lymphoma. Plaintiff's expert concludes by stating "Indeed, [Plaintiff's] elevated [ESRs] were not a mysterious or unexplained finding. They were simply caused by a lymphoma diagnosis that [Defendant] failed to rule out of the differential diagnosis by making the necessary and indicated

referral to an oncologist for a consultation, and further testing, to determine the actual cause of this finding."

Plaintiff submits the expert witness opinion of Dr. Mark Levin, who is board certified in oncology. Dr. Levin opined that Plaintiff's acts and omissions were a "substantial factor in causing the claimed injuries." Namely, Dr. Levin opined that in light of the testing from 2008 and 2009, which conclusively demonstrated that Plaintiff definitively had stage 1 follicular lymphoma at the time, Plaintiff could have received radiation therapy, chemoimmunotherapy, combined radiation and chemoimmunotherapy, or watchful waiting. Relying on excerpts from the May 2023 guidelines from the National Comprehensive Cancer Network on Follicular Lymphoma (grade 1-2), and an Australian study published in 2019, Plaintiff's expert opined that "approximately one half of Stage 1 follicular lymphoma patients who are treated early with radiation therapy alone, are actually cured by this treatment, as they go into long term remission… [E]arly stage follicular lymphoma patients like [Plaintiff] was from 2008 through at least 2010, have the real possibility of being cured, if their diagnosis is caught early enough." As a result, Plaintiff "would have been given the option by an oncologist, to undergo radiation therapy as a treatment of her early-stage follicular lymphoma. This would have provided her with approximately a 50% chance of curing her condition. Localized, early-stage follicular lymphoma has a 5-year relative survival rate of 97%, but that decreases to 87% with lymphomas which have spread to distant areas, such as bone marrow."

As discussed below, although Defendant makes a prima facie showing of entitlement to summary judgment as a matter of law, Plaintiff presents sufficient evidence to demonstrate the existence of triable issues of fact as to both the departure, causation, and injury elements of the medical malpractice claim, and thus summary judgment is denied. "[W]here a defendant physician makes a prima facie showing that there was no departure from good and accepted medical practice, as well as an independent showing that any departure that may have occurred was not a proximate cause of the plaintiff's injuries, the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element." *Stukas v Streiter*, 83 AD3d 18, 25 [2d Dept 2011].

Defendant's experts opine that the standard of care was met as when Defendant referred the Plaintiff to the non-party hematologist/oncologist. Plaintiff's expert, Dr. Nidorf, states that since lymphoma was not completely ruled out, and since Plaintiff had ongoing symptoms for years

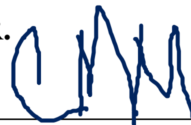
that could have been concerning for lymphoma, Defendant departed from the standard of care by failing to reevaluate the original negative diagnosis. The expert basis this also, in part, on the persistently elevated Sed rates. Parties also dispute whether the standard calls for Defendant, as a family medicine doctor, o reconcile conflicting pathology results. The experts also dispute whether the Plaintiff was caused to suffer any recognized and compensable injury. Defendant's oncology/hematology expert opined that had the lymphoma actually been diagnosed in 2009, the appropriate course of action was watchful waiting until symptomatic; in contrast, Plaintiff's oncology expert opined that Plaintiff had a reasonable chance of being "cured" of her lymphoma with a course of radiation therapy in 2009. The parties also engage in a factual dispute as to whether Plaintiff reported having ongoing night sweats to Defendant between 2010 – 2017. Defendant's handwritten medical records are generally illegible, but Plaintiff testified in her deposition that she had in fact reported to Defendant ongoing night sweats for years.

"In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" (*Templeton v Papathomas*, 208 AD3d at 1270-1271 [internal quotation marks omitted]; *see Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2017]). *McHale v Sweet,* supra at 668. The parties have adduced conflicting, non-conclusory, non-speculative medical expert opinions, which can only be resolved by a jury. *See Senatore v Epstein*, 128 AD3d 794 [2d Dept 2015]); *Feinberg v Feit*, 23 AD3d 517 [2d Dept 2005]; *McHale v Sweet*, supra.

Therefore, the portion of Defendant's motion seeking summary judgment on behalf of Gary Ostrow, D.O., P.C. is GRANTED, and the complaint is dismissed as to him; the Clerk is directed to enter judgment in favor of Gary Ostrow, D.O., P.C.

The portion of Defendant's motion for summary judgment on behalf of Mikhail Gleyzer, D.O., Mikhail Gleyzer Osteopathic Family Medicine, P.C., is DENIED.

This constitutes the decision and order of the court. [1]

ENTER. 

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

[1] This decision was drafted with the assistance of legal intern Alexander Weller, MD, Brooklyn Law School.