

Leary v Parkmed NYC
2023 NY Slip Op 34005(U)
November 9, 2023
Supreme Court, New York County
Docket Number: Index No. 805377/2019
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH N. MCMAHON **PART** **30M**

Justice

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MEGAN LEARY,

Plaintiff,

- v -

PARKMED NYC, ROBERT BERG, DR. TARANEH
SHIRAZIAN, NYU LANGONE JOAN H. TISCH CENTER
FOR WOMEN'S HEALTH

Defendant.

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INDEX NO. 805377/2019

MOTION DATE 10/19/2023,
10/19/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 106, 108, 110, 112, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 135, 136

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 109, 111, 113, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 137, 138, 139

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion for summary judgment of the defendant Parkmed NYC, LLC, s/h/a Parkmed NYC (hereinafter "PARKMED") (Mot. Seq. No. 001) is denied, and the motions for summary judgment of the defendants Taraneh Shirazian, M.D. s/h/a Dr. Taraneh Shirazian and NYU Langone Joan H. Tisch Center for Women's Health¹ (Mot. Seq. No. 002) are granted. Accordingly, the complaint is severed and dismissed as against the defendants Dr. Shirazian and NYU Langone Joan H. Tisch Center for Women's Health (hereinafter "NYU").

This matter arises out of alleged medical malpractice rendered to the 31-year-old plaintiff, Megan Leary, between December 7, 2018, and January 14, 2019, in connection with the

¹ Defendant Robert Berg, M.D. did not move for summary judgment.

diagnosis and treatment of an ectopic pregnancy. Plaintiff claims that because of defendants' malpractice she sustained a rupture of her right fallopian tube which resulted in further surgical procedures and an ongoing issue with infertility.

FACTUAL BACKGROUND

On December 3, 2018, plaintiff presented to PARKMED with concerns of a missed period, a positive pregnancy test, and an inclination to electively terminate the pregnancy. She was seen by Dr. Michael Molaei who performed a complete physical examination along with a transabdominal sonogram and transvaginal color sonogram Doppler with spectral analysis. There was no evidence of intrauterine gestation on the imaging, and Dr. Molaei determined that further evaluation was necessary to rule out an ectopic pregnancy. Labs were drawn to assess plaintiff's hCG level. On December 4, 2018, PARKMED telephoned plaintiff to inform that her hCG level returned elevated to 1106. She was instructed to return to PARKMED on December 7, 2018.

At the December 7, 2018, visit plaintiff was seen by Dr. Anton Bogdanov, who also performed an examination in which plaintiff denied complaints of abdominal pain, abnormal vaginal bleeding, pelvic pain, or vaginal discharge. She had no fever, loss of appetite, weakness, weight loss, weight gain, shortness of breath, or dizziness. The imaging at this visit confirmed a right sided ectopic pregnancy, which was assessed as a gestational size of 5 weeks. Plaintiff was informed of the imaging results and was again given ectopic precautions (*i.e.*, to go directly to the ER with any signs or symptoms of abdominal pain, light headedness, shoulder pain, severe pelvic cramping, or heavy bleeding). Dr. Bogdanov also reviewed treatment options which included laparoscopic surgery or administration of a Methotrexate injection. Plaintiff chose the Methotrexate option and was informed that labs were required to assess her hepatic and renal function levels before the injection could be given. Blood was drawn at PARKMED on

December 7th, and plaintiff was told to return the next day for review of the labs and the Methotrexate injection. At some point after she left the office, plaintiff called PARKMED to advise that she intended to go to the ER for abdominal pain. Ultimately, Ms. Leary did not go to the ER, having decided that her discomfort was from constipation.

Plaintiff returned to PARKMED on December 8, 2018, and was again seen by Dr. Bogdanov. A transvaginal ultrasound revealed “a right ectopic with free fluid in the posterior cul-de-sac area and a small gestational sac with a yolk sac,” suggesting pregnancy of less than 6 weeks. The imaging of right lower quadrant free fluid and hemoperitoneum were suspicious for a ruptured right ectopic pregnancy, and Dr. Bogdanov emergently transferred plaintiff to the nearby NYU for further management.

At NYU, plaintiff consented for a diagnostic laparoscopy with a possible right salpingectomy, possible left salpingectomy, possible oophorectomy, and possible open procedure under general anesthesia. The defendant, Dr. Berg, a private attending, performed the laparoscopic procedure and confirmed the hemoperitoneum upon insertion of the laparoscope into the abdomen. The records reflect that 200 ccs of blood and clots were suctioned, and the right fallopian tube was irrigated and appeared intact with no identifiable mass or pregnancy in the tube. Dr. Berg then performed a chromotubation with methylene blue to ensure that the fallopian tubes were patent with no defects. The right tube was not occluded (as dye easily passed through it), but the left tube was occluded with no spillage of dye from the tube. A salpingectomy was not performed, and plaintiff was released from the hospital that evening.

Plaintiff was instructed to return to Dr. Berg on December 10th to repeat hCG level testing to determine whether Methotrexate was necessary. If the levels continued to trend downward, then she would not need a Methotrexate injection. Rather than return to Dr. Berg on

December 10, 2018, however, plaintiff presented without appointment to her “regular” OB/GYN, the defendant Dr. Shirazian, whom she previously saw once for an annual exam in June of 2018². Dr. Shirazian performed an abdominal exam, which was normal and drew labs for hCG. She advised plaintiff to return to her treating surgeon, Dr. Berg, within the week.

Plaintiff’s hCG, was 1742 on December 10th, and 1561 on December 11th. Aside from one office visit and labs drawn on December 10, 2018, and December 11, 2018, plaintiff had no personal contact with Dr. Shirazian.

Plaintiff returned to Dr. Berg on December 20, 2018, for a post-operative visit, at which time her labs were again drawn to assess her hCG. Plaintiff testified that she made several calls to Dr. Berg’s office between December 20, 2018, and December 27, 2018, to discuss her increasing abdominal pain and discomfort, as well as some vaginal bleeding. She plaintiff spoke with Dr. Berg over the phone on December 27th and was informed that her hCG had increased to **2925**. Dr. Berg immediately referred plaintiff to a radiologist for a transvaginal sonogram which revealed an adnexal mass, measuring 2 x 1.5 cm, with features of a tubal hematoma, presumably from a tubal pregnancy.

On December 27th plaintiff presented to NYP-Cornell, where Dr. Wu performed a laparoscopy, right salpingectomy and left ovarian cystectomy.

APPLICABLE LAW AND DISCUSSION

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d

² Plaintiff claims that she could not reach Dr. Berg’s office for an appointment for December 10th.

320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of its motion, defendant PARKMED submits, *inter alia*, the expert affirmation of board-certified OB/GYN Dr. Marc Engelbert (*see* NYSCEF Doc. No. 64), who opines to a reasonable degree of medical certainty that Ms. Leary received appropriate treatment and care at PARKMED, and that no act or omission by PARKMED was a cause of any of her alleged injuries. Notably, Dr. Engelbert does not address whether the confirmation of an ectopic pregnancy on December 7, 2018, warranted immediate transfer to the hospital. This expert merely reiterates that plaintiff could not receive the Methotrexate injection absent analysis of her liver and kidney function: *i.e.*, “[t]he standard of care requires that liver and kidney function levels be tested before Methotrexate administration [and] [t]he appropriate lab work was drawn here, on December 7th” (*id.*, para. 64).

In support of her motion, defendant Dr. Shirazian submits the expert affirmation of OB/GYN Victor R. Klein, M.D. (*see* NYSCEF Doc. No. 86) who opines to a reasonable degree of medical certainty that “the medical care and treatment rendered to plaintiff by Dr. Shirazian at the NYU Women’s Center between December 10, 2018 and December 31, 2018 was at all times in accordance with good and accepted medical practice [and did not] cause or contribute to any injury claimed by plaintiff” (*id.*, para. 3). Specifically, Dr. Klein points out that Dr. Shirazian had “no involvement whatsoever in the treatment rendered to plaintiff by PARKMED,” was not involved with the treatment she received at NYU, and “had no obligation to proceed with any additional treatment of plaintiff on December 10, 2018, as her findings upon physical

examination showed no abnormalities nor did plaintiff express any concerning complaints” (*id.*, para 25).

In support of its motion, the NYU submits the July 28, 2023, affidavit of its Director of Insurance for NYU Langone Health, Michael Browdy, (*see* NYSCEF Doc. No. 87), who explains that “NYU Langone Joan H. Tisch Center for Women’s Health” is not a legal entity, nor was it a legal entity in December of 2018 (*id.*, para. 2); that Dr. Shirazian was at all relevant times an employee of NYU Grossman School of Medicine (not a named defendant), and that Dr. Berg was a private attending physician at the time of the alleged malpractice (*id.*, para. 4).

“The affirmations of defendants’ experts were sufficient to meet defendants’ *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff’s alleged injuries” (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]). “An expert’s opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert’s opinion is without probative force” (*Pascocello v. Jibone*, 161 AD3d 516 at 516 [1st Dept. 2018]; [internal citations omitted]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, defendants have made *prima facie* showing of entitlement to judgment dismissing the complaint. The complaint at the outset must be dismissed as against NYU, as it is not a legal entity nor any defendants' employer.

In opposition to the motions, plaintiff submits the redacted expert affirmation of an OB/GYN (*see* NYSCEF Doc. No. 116), who is unequivocal that PARKMED departed from the standard of care by negligently failing to send plaintiff to the hospital on December 7th for same day testing and immediate injection of Methotrexate, based upon the confirmation of her ectopic pregnancy and greatly increased hCG level.

As for Dr. Shirazian, plaintiff's expert finds that this defendant "was a substantial contributing factor in [plaintiff's] second...fallopian tube rupture (*id.*, para. 21), and that Dr. Shirazian departed from the standard of care by "not taking proper steps to care for Megan" by, *i.e.*, looking at the December 8, 2018, operative report, or accessing plaintiff's records via NYU's MyChart.

Plaintiff's expert affirmation raises triable issues of fact sufficient to defeat summary judgment on behalf of PARKMED. "The medical experts' conflicting opinions raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). As such, the motion for summary judgment by PARKMED is denied. Plaintiff has failed to raise a triable issue of fact in opposition to the motion made by Dr. Shirazian and NYU. It is undisputed that plaintiff's contact with Dr. Shirazian included one unannounced office visit and two lab draws which showed a downward trend in her hCG levels.

Plaintiff has not opposed that branch of the motion concerning NYU.

Accordingly, it is

ORDERED that the motion for summary judgment of the defendant, PARKMED, is in all respects denied; and it is further

ORDERED that the motion for summary judgment of the defendants Dr. Shirazian and NYU are granted, and the complaint is severed and dismissed as to these defendants; and it is further

ORDERED that any and all additional claims for relief are denied; and it is further

ORDERED that the Clerk enter judgment in favor of the defendants dismissing the complaint; and it is further

ORDERED that the parties appear for a virtual conference via Microsoft Teams on **January 8, 2024 at 12:00 noon.**

<u>11/9/2023</u>			
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ DENIED	☒ NON-FINAL DISPOSITION
	☐ GRANTED		☒ GRANTED IN PART
APPLICATION:	☐ SETTLE ORDER		☐ OTHER
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

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