Reynoso v Sachdev
2023 NY Slip Op 35290(U)
November 10, 2023
Supreme Court, Queens County
Docket Number: Index No. 706944/2021
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MILORD DAVID REYNOSO, as Administrator of the Estate of MARLENE CEPEDA,

Plaintiff,

-against-

KARINA SACHDEV, M.D., LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C. d/b/a LENOX HILL RADIOLOGY ASSOCIATES, P.C. d/b/a LENOX HILL RADIOLOGY, LENOX HILL RADIOLOGY IPA, INC., d/b/a LENOX HILL RADIOLOGY and LENOX HILL RADIOLOGY MANAGEMENT, LLC, d/b/a LENOX HILL RADIOLOGY,

Defendants.

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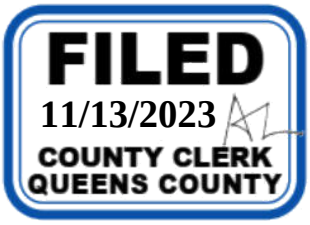
Part MDP
Motion Date: May 31, 2023

Sequence No. 2



The following papers numbered EF-52 through EF-78 read on this motion by defendants for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	EF52-EF72
Affirmation in Opposition, Exhibits	EF73-EF76
Reply Affirmation, Exhibits	EF77-EF78

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendants' motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is denied, as there are issues of fact whether defendant Dr. Sachdev departed from the accepted standard of care when interpreting and reporting her findings from plaintiff decedent's abdominal ultrasound. (*See Buch v. Tenner*, 204 A.D.3d 634 [2d Dept. 2022].) Plaintiff commenced this action for medical malpractice and wrongful death against defendants who allegedly failed to timely diagnose plaintiff decedent's pancreatic cancer, resulting in injuries and death. Plaintiff filed the Summons and Complaint on March 25, 2021, and issue was joined on May 6, 2021.

Defendants argue that summary judgment is warranted, as they did not depart from good and accepted medical care, and their acts or omissions did not proximately cause plaintiff decedent's injuries and death. They present the pleadings, plaintiff decedent's medical records, parties' deposition testimony, and the expert affirmation Michael D. Setton, D.O., in support of their motion. Defendants argue that Dr. Sachdev's treatment was at all times appropriate and within the standard of care, and she did not fail to diagnose pancreatic cancer. They also argue that Dr. Sachdev properly and correctly interpreted plaintiff decedent's abdominal ultrasound on April 3, 2019 at co-defendant Lenox Hill Hospital. Defendants presented the medical records and Dr. Sachdev testified that the indication for the abdominal ultrasound was to look for liver disease and she found an unremarkable ultrasound of the abdomen without any indication of cancer or metastasis.

Defendants presented the affirmation of Dr. Setton in support of their motion. Dr. Setton affirmed he is a licensed physician in New York who is board certified in Radiology. He reviewed the pleadings, plaintiff decedent's medical records and the parties' deposition testimony in support of his opinions. Dr. Setton opined within a reasonable degree of medical certainty that defendants acted appropriately and did not depart from the accepted standards of medical and radiological practice in their care and treatment of plaintiff decedent. He also opined within a reasonable degree of medical certainty that Dr. Sachdev did not fail to diagnose plaintiff decedent's pancreatic cancer, and she properly and correctly interpreted an abdominal ultrasound performed on April 3, 2019 at Lenox Hill Radiology. Dr. Setton opined within a reasonable degree of medical certainty that Dr. Sachdev's finding in the tail of the pancreas is standard, as he argued that in 90% of ultrasounds, part of the pancreas tail will be obscured by gas. He also opined within a reasonable degree of medical certainty that the April 3, 2019 ultrasound was normal and no cancer or lesion depicted, and therefore there was no reason for Dr. Sachdev to order further studies.

Dr. Setton opined that Dr. Sachdev appropriately recommended clinical follow-up, but opined it was the responsibility of the clinicians to refer plaintiff decedent for further imaging, biopsy or a referral to a specialist. Based upon the evidence presented, Dr. Setton opined within a reasonable degree of medical certainty that defendants did not depart from good and accepted medical and radiological care, and none of their actions or inactions proximately caused plaintiff decedent's injuries.

Plaintiff opposed the motion, arguing that defendants' evidence is not in admissible form and should not be considered. He argues that the medical records are not certified and are not translated from Spanish into English, and therefore should not be considered. Plaintiff also argues that defendants' motion is deficient as it did not include a Statement of Material Facts. He also

argues that defendants' expert Dr. Setton is not credible, as he is a radiologist working for defendant Lenox Hill Hospital. Plaintiff argues that there are issues of fact with regard to Dr. Sachdev's interpretation of the abdominal ultrasound that preclude a finding of summary judgment.

Plaintiff presents the expert affirmation of Jordan Haber, M.D. in support of his motion. Dr. Haber affirmed he is a licensed physician in New York who is board certified by the American Board of Radiology. He reviewed the pleadings, plaintiff decedent's medical records and imaging, deposition testimony of the parties and Dr. Setton's affirmation in rendering his opinions. He noted that Dr. Sachdev testified she is an employee of Lenox Hill Hospital and she was given a limited amount of information regarding plaintiff decedent when reviewing the April 3, 2019 imaging. Dr. Sachdev further testified she was informed that plaintiff decedent had a history of liver disease and the ultrasound was for screening purposes to survey the abdomen for abnormalities for signs of liver cancer.

Dr. Haber opined within a reasonable degree of medical certainty that Dr. Sachdev misread the abdominal ultrasound imaging of the pancreas, as she failed to comment that the pancreas was suspicious for a lesion or mass, and failed to advise that further diagnostic imaging was necessary. He further opined that these actions and inactions were a departure from the standard of radiological care and caused plaintiff decedent's untimely workup, cancer diagnosis and injuries. Dr. Haber argued that even if the ultrasound was meant to screen for liver disease, Dr. Sachdev had a duty and obligation to review and analyze all areas of plaintiff decedent's body in the image, including the pancreas, and he opined that Dr. Sachdev improperly and erroneously interpreted and described her findings. Dr. Haber contested Dr. Setton's affirmation, and argued that Dr. Setton did not specifically state that bowel gas obscured the pancreas tail. Rather, Dr. Haber opined that bowel gas did not obscure the pancreas' tail, that the tail of the pancreas was not obscured, and shown on imaging to be enlarged, and was abnormal and suspicious and required further diagnostic imaging. He opined within a reasonable degree of medical certainty that Dr. Sachdev departed from radiological standards, and said departure directly caused and contributed to plaintiff decedent's untimely diagnosed pancreas tumor, cancer, and the damages that flow from.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of

any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. (*Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020].)

A plaintiff who alleges medical malpractice because of a failure to timely diagnose a condition must show that the departures from the standard of care delayed diagnosis and decreased the chances of a better outcome or increased the injury. (*Paglinawan v. Ing-Yann Jeng*, 211 A.D.3d 743, 745 [2d Dept. 2022].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety. (*D'Elia v. Menorah Home & Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 850 [2d Dept. 2008].)

Defendants presented a prima facie case of entitlement to summary judgment, based upon the deposition testimony, plaintiff decedent's medical records and expert affirmation. (*See Donnelly v. Parikh*, 150 A.D.3d 820 [2d Dept. 2017].) They demonstrated prima facie that Dr. Sachdev properly interpreted the abdominal ultrasound and reported her findings within the standard of radiological care. Dr. Setton established that the failure to see the pancreas tail in the

imaging could be a result of bowel gas, which is common in 90% of ultrasounds, and not a departure from the standard of care. They also established that Dr. Sachdev did not have a duty to order, direct or request further diagnostic imaging for plaintiff decedent. Defendants further demonstrated that Dr. Sachdev did not depart from the standard of care, and her acts or omissions did not proximately cause plaintiff decedent's delay in diagnosis, cancer or death.

Plaintiff raised a triable issue of fact, solely as to whether defendant Dr. Sachdev departed from the accepted standard of radiological care in interpreting and reporting her findings from the abdominal ultrasound, and whether the departure was a proximate cause of plaintiff decedent's delay in diagnosis and subsequent injuries. However, plaintiff failed to raise a triable issue of fact with regard to whether Dr. Sachdev had a responsibility to direct further testing, as Dr. Sachdev was not plaintiff decedent's doctor, and had no duty beyond accurately and appropriately interpreting the ultrasound and reporting the findings.

Accordingly, defendants' motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is denied. The parties shall appear for a pretrial conference on Wednesday, December 6, 2023 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: November 10, 2023

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.