Maywaram v McKellop
2023 NY Slip Op 35291(U)
November 17, 2023
Supreme Court, Queens County
Docket Number: Index No. 709608/2021
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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RAMRATTIE MAYWARAM,

Plaintiff,

-against-

JASON MCKELLOP, M.D., RONALD SCHWINGER, M.D., JAMES PARK, M.D., DORU ION BUZA, M.D., and NYU LANGONE RADIOLOGY-QUEENS MEDICAL IMAGING,

Defendants.

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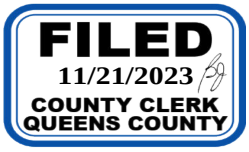
Index No. 709608/2021

Part MDP
Motion Date: June 21, 2023

Sequence No. 7



The following papers numbered EF-112 to EF-135 read on this motion by defendant DORU ION BUZA, M.D., for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	EF112-EF129
Affirmation in Opposition, Exhibits	EF130-EF133
Reply Affirmation	EF135

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

Defendant Doru Ion Buza, M.D.'s motion for summary judgment and dismissal of plaintiff's Complaint is granted, as Dr. Buza demonstrated that there are no triable issues of fact that would establish he departed from good and accepted standards of medical care and proximately caused plaintiff's injuries.

Plaintiff commenced this action for medical malpractice and lack of informed consent arising out of defendants' alleged failure to diagnose plaintiff's breast cancer between 2015 and 2019. Plaintiff filed the Summons and Complaint on April 27 2021, and issue was joined on May 24, 2021. It is noted that defendants Polina Kagan, M.D., Jason McKellop, M.D. and South Shore Women's Medical Associates, LLC were dismissed from the case by the Court Order of the Honorable Peter O'Donoghue dated June 21, 2023.

Defendant Dr. Buza argues that summary judgment should be granted and present the pleadings, parties' deposition testimony, plaintiff's medical records, and the affirmation of Sanford R. Goldberg, M.D. in support of his motion. He argues that the evidence shows there were no departures from acceptable standards of medical care that caused or contributed to plaintiff's injuries. The medical records show Dr. Buza became plaintiff's primary care physician in or around 2000, and noted plaintiff had a history of a cyst in her right breast axilla. Dr. Buza ordered a left breast ultrasound in 2001, which noted a nodule for which follow-up care was directed. The medical records show plaintiff was regularly treated by Dr. Buza for general medical complaints and well examinations from 2001 through 2015, and on November 3, 2015 plaintiff had a mammogram that was ordered by Dr. Buza. Plaintiff presented to Dr. Buza on November 14, 2015 with complaints of right axillary pain and swelling, and Dr. Buza recommended plaintiff see a breast surgeon. Plaintiff returned to Dr. Buza on December 10, 2015 and Dr. Buza noted the abnormal mammogram results and scheduled plaintiff for a biopsy with Dr. McKellop. Plaintiff returned to Dr. Boza on February 6, 2016 for blood work and follow up after the biopsy results were negative for cancer, and plaintiff returned to Dr. Buza on July 16, 2016 and November 5, 2016. Plaintiff visited Dr. Buza on June 1, 2019 regarding an abnormal urinalysis and again on October 15, 2019 with a complaint of a swollen lymph node in her neck, for which Dr. Buza referred plaintiff to an endocrinologist and surgeon. The medical records note that after imaging in December 2019, plaintiff was diagnosed with Stage IV breast cancer and underwent treatment. Based upon the above, Dr. Buza argues that there was no departure from good and accepted practice, as he was plaintiff's primary care physician and did not undertake a general duty to diagnose and treat plaintiff's gynecological condition. He further argues that he fulfilled his duty to plaintiff in ordering the breast imaging studies and recommending plaintiff see a breast surgeon. Defendant further argues that the lack of informed consent should be dismissed as Dr. Buza did not perform any test or procedure for which he needed to review the risks, benefits and alternatives to treatment.

Defendant Dr. Buza presents the affirmation of Dr. Goldberg in support of his motion. Dr. Goldberg attested that he is a licensed physician in New York and is Board Certified in Internal Medicine and Gastroenterology. Dr. Goldberg further attested that he reviewed the pleadings, parties' deposition testimony, and plaintiff's medical records in rendering his opinions. Dr. Goldberg opined within a reasonable degree of medical certainty that Dr. Buza did not depart from good and accepted medical practice in the care and treatment he rendered to plaintiff and did not proximately cause her injuries. Dr. Goldberg articulated plaintiff's medical history with respect to Dr. Buza, noting Dr. Buza became plaintiff's primary care physician in 2000 and based upon his custom and practice, did not perform breast examinations on female patients but rather would advise them to follow up with their gynecologists. Dr. Goldberg further attested that prior to plaintiff's first visit with Dr. Buza, she had a history of cyst resected in her right breast. Dr. Goldberg further attested that in 2001, Dr. Buza ordered a left breast ultrasound that revealed a nodule that was determined to probably be a solid fibroadenoma. Plaintiff was recommended for

a six-month follow up and her gynecologist at the time, Dr. Sekar, referred her to a surgeon for a possible biopsy. Dr. Goldberg further attested that in 2015, Dr. Buza ordered a mammogram for plaintiff and based upon the results and plaintiff's complaints of pain and swelling, Dr. Buza recommended plaintiff see a breast surgeon. Dr. Goldberg attested that based upon Dr. Buza's testimony, it was his custom and practice to not refer patients to particular specialists, but rather to refer patients to see a specific specialty. Dr. Goldberg further attested that after plaintiff underwent the mammogram in 2015, a biopsy was performed yielding benign results. Based upon Dr. Buza's testimony, he told plaintiff she still needed to follow up with a surgeon and undergo a follow-up mammogram.

Dr. Goldberg opined within a reasonable degree of medical certainty that Dr. Buza did not depart from good and accepted standards of medical practice and did not proximately cause plaintiff's injuries. Dr. Goldberg further opined within a reasonable degree of medical certainty that plaintiff's claim that Dr. Buza failed to refer her to a breast surgeon is without merit, as Dr. Buza advised plaintiff to follow up with a breast surgeon during her November 14, 2015 visit and again after the benign biopsy result was received. Dr. Goldberg further opined that even if Dr. Buza did not refer plaintiff to a breast surgeon, that would not have been a departure because the biopsy report and findings demonstrated the sample was benign and therefore there was no indication to refer plaintiff to a breast surgeon. Dr. Goldberg further opined that this is supported by plaintiff's following mammogram results in 2016 and 2017 wherein Dr. Schwinger and Dr. Park determined that the biopsied abnormality had disappeared. Dr. Goldberg also opined within a reasonable degree of medical certainty that Dr. Buza did not depart from good and accepted medical standards by failing to send plaintiff for a full gynecological workup following the 2015 biopsy results, as Dr. Buza recommended a breast surgery consultation. Additionally, Dr. Goldberg noted that Dr. Buza did not perform breast examinations which plaintiff was aware of during her fifteen-year treatment with Dr. Buza prior to 2015.

Dr. Goldberg further opined that had plaintiff gone for a full gynecological workup, it would not have changed the outcome because when she saw her gynecologist in 2016 and 2017, there was no cancer diagnosis or clinical findings suggestive of breast cancer. Dr. Goldberg also opined within a reasonable degree of medical certainty that Dr. Buza did not depart from good and accepted standards of medical care by not ordering a breast MRI following the 2015 biopsy results. Dr. Goldberg opined that there was no clinical indication warranting a breast MRI, and that if anyone was under a duty to recommend the MRI it was the radiologist, not Dr. Buza as a primary care physician. Dr. Goldberg further opined that had an MRI been performed, it would not have revealed cancer as the biopsied mass disappeared in the subsequent mammogram imaging. Dr. Goldberg further opined that any duty to follow up on recommendations based upon the 2017 and 2018 mammogram imaging was the duty of Dr. Kagan, the ordering physician and plaintiff's gynecologist at the time. Dr. Goldberg also opined that the mass biopsied in 2015 was not cancerous because it disappeared in the subsequent imaging and cancer spreads and gets bigger, it

does not disappear. Dr. Goldberg opined within a reasonable degree of medical certainty that the 2019 malignancy demonstrated an aggressive form of cancer that a patient would not have survived four years with if it was present in 2015 during Dr. Buza's treatment. Dr. Goldberg opined that more likely than not, the malignancy became radiologically detectable between plaintiff's 2018 and 2019 mammograms and not any time prior. Dr. Goldberg further opined that when the cancer was diagnosed in 2019, it was metastatic and not related to the mass that was biopsied in 2015. Based upon the foregoing, Dr. Goldberg opined within a reasonable degree of medical certainty that Dr. Buza did not depart from good and accepted standards of medical care and did not proximately cause plaintiff's injuries.

Plaintiff opposes defendant's motion and argues that defendant failed to eliminate all triable issues of fact with respect to whether Dr. Buza departed from good and accepted medical standards of care. Specifically, plaintiff argues that Dr. Buza departed from good and accepted medical standards of care by failing to inform plaintiff of her 2015 pathology and addended radiology report, failing to order follow-up tests, and failing to refer plaintiff to a breast surgeon.

Plaintiff presents the expert affirmation of a physician duly licensed to practice medicine in New York. Plaintiff's expert is Board Certified in Internal Medicine and Oncology. Plaintiff's expert attested that the opinions rendered are based upon the parties' deposition testimony, plaintiff's medical records, and Dr. Goldberg's affirmation. Plaintiff's expert opined within a reasonable degree of medical certainty that Dr. Buza "unequivocally" deviated from the generally accepted standard of care in internal medicine when he failed to inform plaintiff of her biopsy results and failed to recommend a follow up biopsy and/or consultation with a breast surgeon. Plaintiff's expert attested that the December 2015 findings were "unquestionably concerning" and required follow-up. Plaintiff's expert attested that an internal medicine physician is expected to inform the patient of any and all concerning findings on radiology and/or pathology and recommend the appropriate follow-up, which Dr. Buza failed to do in the instant action. Plaintiff's expert did not review plaintiff's mammogram imaging, but referred to plaintiff's radiology expert's affirmation submitted in opposition to co-defendants Dr. Schwinger, Dr. Park, and NYU's motion for summary judgment. Plaintiff's expert attested that based upon the radiology expert's identification of a stromal asymmetry in plaintiff's right breast upper outer quadrant in 2017 and 2018, additional follow up was required. Plaintiff's expert also opined that the asymmetry is consistent with a finding of necrotic tissue in 2015, as necrotic tissue can be present in the areas near a malignancy. Plaintiff's expert also opined that a delay in diagnosis of a malignancy in 2015, 2017, and 2018 more likely than not substantially deprived plaintiff of the optimum opportunity for cure and less aggressive cancer treatment.

Plaintiff's expert attested that he reviewed Dr. Goldberg's affirmation and "emphatically" rejected Dr. Goldberg's opinions. Plaintiff's expert attested that whether Dr. Buza referred plaintiff to a breast surgeon in November 2015 is irrelevant, because the relevant time period in

assessing Dr. Buza's actions is after the December 2015 biopsy. Plaintiff's expert also attested that Dr. Buza failed to order radiographic imaging of plaintiff's breasts in 2016 which was "inconceivable" in light of plaintiff's 2015 biopsy results, that it was irrelevant whether plaintiff was concurrently treating with a gynecologist, and that Dr. Goldberg did not address Dr. Buza's failure. Plaintiff's expert also rejected Dr. Goldberg's opinion that the dissipation of the mass in subsequent imaging is evidence that it was not cancerous. Plaintiff's expert opined that it is not uncommon for breast necrosis to decrease or disappear entirely because it is reabsorbed into the breast tissue, however, that is not evidence there was no underlying malignancy in 2015. Plaintiff's expert also disagreed with Dr. Goldberg's opinion that the 2019 cancer is unrelated to the 2015 mass because the necrotic tissue was likely related to a nearby malignancy. Plaintiff's expert also disagreed with Dr. Goldberg's opinion that plaintiff's cancer was too aggressive to have persisted since 2015, as cancer can mutate and become more aggressive if left untreated. Plaintiff's expert opined within a reasonable degree of medical certainty that Dr. Buza departed from good and accepted standards of medical care by failing to notify plaintiff of her 2015 biopsy results and failing to recommend follow up and/or a breast surgery consultation, and that Dr. Buza's departures proximately caused plaintiff's injuries. Based upon the foregoing, plaintiff argues that defendant Dr. Buza failed to eliminate all triable issues of act and is therefore not entitled to summary judgment.

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].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

> To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury." (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

Defendant Dr. Buza established prima facie that he did not depart from good and accepted standards of medical care and did not proximately cause plaintiff's injuries. Dr. Buza demonstrated through the parties' deposition testimony, plaintiff's medical records, and Dr. Goldberg's expert affirmation that Dr. Buza did not depart from accepted medical standards by failing to recommend a biopsy follow up. Rather, Dr. Buza testified that he advised plaintiff that despite the benign biopsy results in 2015, she should still follow up with a breast surgeon. Dr. Buza demonstrated that further follow up such as an MRI or full gynecological workup were not warranted because the biopsy results were benign. Dr. Buza further demonstrated that follow up would not have changed anything as plaintiff presented to her gynecologist in 2016 and 2017 and received care and treatment related to her condition. Dr. Buza also demonstrated through Dr. Goldberg's affirmation that there was no causal relationship between the 2015 mass and the 2019 cancer diagnosis. Finally, Dr. Buza demonstrated that he did not perform any treatment on plaintiff that would warrant a lack of informed consent claim. Based upon the foregoing, defendant Dr. Buza established a prima facie entitlement to summary judgment.

Plaintiff failed to raise a triable issue of fact with respect to whether Dr. Buza departed from good and accepted standards of medical care. Plaintiff's expert affirmation was insufficient to raise a triable issue of fact as it was vague and conclusory. (*See Longhi*, 187 A.D.3d 873, 878 [2d Dept. 2020]["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"].) Plaintiff's expert's opinion that Dr. Buza departed from good and accepted medical standards in failing to notify plaintiff of her biopsy results and recommend follow up is without merit, as it is contradicted by the medical records and deposition testimony. Dr. Buza's medical records demonstrate that on

November 14, 2015 he recommended plaintiff see a breast surgeon after obtaining her mammogram imaging results. Despite the lack of documentary evidence, Dr. Buza testified that he recommended plaintiff see a breast surgeon again *after* receiving the benign biopsy results. Contrary to plaintiff's expert's affirmation, plaintiff did not testify that Dr. Buza failed to make this recommendation, but rather testified that she could not remember. Therefore, plaintiff's testimony that she did not recall whether this happened is insufficient to rebut Dr. Buza's testimony that he recommended plaintiff follow up with a breast surgeon. Plaintiff's expert's opinion that the possibility of necrosis and the stromal asymmetry indicating nearby malignancy warranted further follow up is speculative. By the expert's own admission, plaintiff's expert did not review the imaging but rather relied on the expert radiologist's opinion regarding the mammogram imaging. Plaintiff's expert's opinion that Dr. Buza failed to order diagnostic imaging in 2016 and 2017 is also without merit as plaintiff was presenting to her gynecologist during that time and there is no evidence that plaintiff presented to Dr. Buza for an annual physical examination and Dr. Buza failed to order a relevant diagnostic exam. Therefore, plaintiff's expert's opinion is vague and lacks specificity sufficient to rebut defendant's prima facie case.

Accordingly, defendant Doru Ian Buza, M.D.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Plaintiff's Complaint is dismissed as to defendant Doru Ian Buza, M.D.

This constitutes the decision and Order of the Court.

Dated: November 17, 2023

FILED
11/21/2023
COUNTY CLERK
QUEENS COUNTY

Tracy Catapano-Fox

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