SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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FRANCES P. GORMLEY,

Plaintiff,

- v -

ALISON ESTABROOK, M.D., MOUNT SINAI-ST. LUKE'S ROOSEVELT HOSPITAL, NEW YORK RADIOLOGY PARTNERS, WEST SIDE RADIOLOGY ASSOCIATES, P.C., RADNET, INC., STEVEN KAUFMAN, M.D., PETER IVAN MASLIN, D.O.,

Defendants.

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INDEX NO. 805236/2016

MOTION DATE 04/01/2024

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 258, 260, 261, 262, 263, 264, 266, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 307, 308, 309, 310, 311

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and violation of Public Health Law § 2404-c, the defendant Stephen Z. Kaufman, M.D., sued herein as Steven Kaufman, M.D., moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiff opposes the motion. For the same reasons as set forth in this court's May 9, 2024 decision and order determining Motion Sequence 007, referable to the summary judgment motion submitted by Kaufman's codefendants Alison Estabrook, M.D., and Mount Sinai-St. Luke's Roosevelt Hospital (together the Mount Sinai defendants), Kaufman's motion is granted to the extent that he is awarded summary judgment (a) dismissing, as time-barred, any and all medical malpractice claims asserted against him that were premised on his alleged departures from good practice occurring prior to December 8, 2013, which is the date two years and six months prior to the commencement of this action, (b) dismissing the lack of

informed consent cause of action insofar as asserted against him, and (c) dismissing the Public Health Law § 2404-c cause of action insofar as asserted against him. In addition to the reasons for dismissal of the Public Health Law § 2404-c cause of action articulated in this court's May 9, 2024 order, Kaufman further established, prima facie, that he in fact provided the plaintiff with the statutorily mandated notifications, in response to which the plaintiff failed to raise a triable issue of fact. The motion is otherwise denied, inasmuch as there are triable issues of fact as to whether Kaufman departed from good and accepted medical practice, between February 21, 2014 and March 25, 2015, by failing to recognize the presence of a suspicious mass on mammograms taken of the plaintiff's breast during her annual breast examinations on those dates, failing to document focal asymmetries that he did recognize, failing to order additional studies, and, thus, failing to report the presence of a mass suspicious for cancer to Estabrook, so that the plaintiff could timely be diagnosed with a malignant breast tumor. The plaintiff also raised triable issues of fact as to whether those departures caused or contributed to a diminution in her life expectancy and survivability rates, and an increase in her chance of the recurrence of cancer.

The facts of this dispute, and the legal standards applicable to summary judgment motions, expert witness opinions, medical malpractice claims, lack of informed consent claims, and claims sought to be asserted for violation of Public Health Law § 2404-c, were discussed in great detail in this court's May 9, 2024 decision and order resolving Motion Sequence 007. As relevant here, the crux of the plaintiff's medical malpractice claims against Kaufman is that, on January 28, 2013, February 21, 2014, and March 25, 2015, he departed from good and accepted radiological practice by misreading the plaintiff's mammogram imaging from her annual checkups and, thus, failed to observe both the presence of a mass in her right breast and its growth over that period of time; she further asserted that he departed from good and accepted practice by failing to order additional imaging studies. The plaintiff also alleged that these departures from good and accepted practice caused a delay in the diagnosis of breast

cancer, thus allowing the cancer to progress to Stage 2B before it was diagnosed and the malignancy was removed which, in turn, increased her chance of recurrent cancer and decreased her life expectancy and survivability. Inasmuch as the court is dismissing, as time-barred, any claim premised upon Kaufman's interpretation of the January 28, 2013 mammogram, it will focus upon Kaufman's claimed departures from accepted practice in connection with the February 21, 2014 and March 25, 2015 mammograms.

In support of his motion, Kaufman submitted, among other things, the transcript of his own deposition testimony, the expert affidavit of radiologist Susan Weinstein, M.D., and the expert affirmation of oncologist and hematologist Linda Vahdat, M.D., as well as a statement of uncontested facts and an attorney's affirmation.

As Dr. Weinstein explained it, upon a referral from Estabrook, the plaintiff underwent a bilateral screening mammogram on February 21, 2014. She asserted that the accepted standards of medical and radiological practice required Kaufman, as the consulting radiologist, to follow the orders of the referring physician. Dr. Weinstein further asserted that, since Estabrook's order was neither for a three-dimensional/tomosynthesis mammogram, nor for a screening ultrasound or other ultrasound, and nor for a diagnostic mammogram, unless there were some abnormal findings of concern seen on a screening mammogram, the radiologist "cannot go beyond the referring order." She averred that it was wholly within Estabrook's discretion as to whether any additional imaging studies should have been ordered and performed. In any event, Dr. Weinstein explained that Kaufman's facility did not have the capacity to perform such studies at the time. She further opined that the accepted standard of radiological practice is that a finding seen on consecutive mammograms is considered stable after two to three years. In this regard, she explained that the 2014 mammogram was the plaintiff's fifth mammogram in four years, with the focal asymmetry that Kaufman had observed on those annual mammograms having remained stable over that period of time and that, as

such, and in any event, "there was no need or medical indication to convert to a diagnostic mammogram/perform additional views, perform an ultrasound or recommend either."

Dr. Weinstein noted that Kaufman compared the February 21, 2014 mammogram with the January 20, 2010, January 26, 2011, January 27, 2012, and January 28, 2013 mammograms, and that his determination to make such comparisons went beyond the accepted standard of care for radiological practice, as a comparison with only the 2012 and 2013 scans would have been sufficient.

Dr. Weinstein opined that Kaufman properly and appropriately read and interpreted the February 21, 2014 mammogram, specifically with respect to his findings that the breast parenchymal pattern was heterogeneously dense, which could lower the sensitivity of mammography, and the presence of continued stable benign-appearing calcifications in both breasts, with no change from the January 28, 2013 study, no dominant mass or suspicious cluster of calcifications in either breast, and the presence of a stable benign-appearing intramammary lymph node in the upper-outer quadrant of the left breast. She agreed with his impression of "no mammographic evidence of malignancy and no change from the prior exam." Dr. Weinstein stated that the views on the scan were proper and complete for a screening mammogram, and that scanning for any additional views was not indicated. Dr. Weinstein averred that Kaufman obtained all necessary and proper measurements and views, and that, upon her own review of the scan, she concluded that Kaufman properly noted no architectural distortion, lesion, or other suspicious findings. She referred to Kaufman's deposition testimony, in which he stated that, although not set forth in the radiology report, he did note the presence of a visible, benign focal asymmetry on the mammogram, which, however, "was not an abnormal or concerning finding[ ] as it had been present for at least four years, since the 2010 study."

Dr. Weinstein further opined that it was not a departure from good radiological practice for Kaufman to decline to enumerate every single benign finding in his mammogram report, and that the report of the 2014 mammogram was within the accepted standards of medical and

radiological practice, particularly because, in any event, Kaufman properly reported the mammogram as BI-RADS 2, which referred to benign findings. Moreover, she explained that, in a letter dated February 24, 2014, the defendant West Side Radiology Associates, P.C. (West Side), the entity under which Kaufman practices medicine, informed the plaintiff that "the study was normal and the mammogram showed dense breast tissue, which can make it harder to find cancer on a mammogram and may also be associated with an increased risk of breast cancer," and that the letter further suggested plaintiff use this information "to communicate with her physician about breast cancer risks and to ask if more screening tests may be useful."

Dr. Weinstein rendered an almost identical opinion with respect to Kaufman's conduct in connection with the plaintiff's March 25, 2015 bilateral screening mammogram. In connection with the March 25, 2015 study, she agreed that Kaufman again correctly determined that there was no architectural distortion, lesion, or other suspicious findings, and that there was no need for him to memorialize, in writing, his finding of benign focal asymmetry, as this was not an abnormal finding or a finding of concern. Moreover, Dr. Weinstein noted that, after the March 25, 2015 scan, West Side sent the plaintiff a letter almost identical to the February 24, 2014 letter. She further noted that, in early 2015, the plaintiff requested Estabrook to order an ultrasound, in response to which Estabrook advised the plaintiff that she could undergo it in 2016, and that Estabrook in fact ordered that test in 2016. Dr. Weinstein reiterated that it was up to Estabrook, as the referring physician, to determine which scans would be appropriate to order, and that it was proper for Kaufman to defer to Estabrook's determinations in this regard.

In her affirmation, Dr. Vahdat opined that Kaufman did not cause, contribute to, or exacerbate the plaintiff's claimed injuries. She concluded that, even had the plaintiff's breast cancer was discovered and diagnosed at an earlier date, following the February 2014 or March 2015 mammograms, rather than in September 2015, the plaintiff would have required the exact same treatment, consisting of a lumpectomy with lymph node resection, re-excision, chemotherapy, radiation, and administration aromatase inhibitors. In this regard, she stated:

> "the tumor biology would have been the same, the treatment would have been the same, the claimed injuries would have been the same and the prognosis would have been the same if [the cancer was] discovered and diagnosed at an earlier date following the February 2014 or March 2015 mammograms."

Dr. Vahdat noted that the plaintiff opted to undergo elective bilateral breast reconstruction surgery in 2019, and concluded that this elective surgery would have been the same option if the cancer had been discovered and diagnosed at an earlier date, such as the dates of the February 2014 or March 2015 mammograms.

Dr. Vahdat explained that the biology of tumors provides useful information in the pathological investigation of determining growth, treatment, and prognosis. She noted that the plaintiff was ER/PR positive and HER2 negative, with a variable Ki-67 of 5% and 15%. As Dr. Vahdat described it,

> "[t]wo major groups of hormonal receptor positive tumors have been identified, known as luminal A and B intrinsic subtypes of breast cancer, utilizing the proliferation – related Ki-67 percentage as a cut-off along with the hormone receptor positive and HER2-negative disease. Luminal A is hormone-receptor positive, HER2 negative and has a low proliferation rate measured by Ki-67, which reflects how fast cancer cells grow. Luminal B is hormone-receptor positive, can be either positive/negative HER2 and has high levels of Ki-67, reflecting a quicker growing tumor.
>
> "Ki-67 reflects the proportion of cells dividing into new cells and the staining process measures the percentage of tumor cells positive for Ki-67. The more positive cells present, the greater the proportion of cells are actively dividing and forming new cells. Plaintiff had variable Ki-67 results: the breast biopsy showed Ki-67 of 15% (considered borderline high growth); and the breast lumpectomy was 5% (considered low growth). I agree with [the plaintiff's oncologist] Dr. [Shanu] Modi that the Ki-67 is considered a low score. It is my opinion that, within a reasonable degree of medical and oncological certainty, the Ki-67 score would have been the same if the tumor was discovered and diagnosed following the February 2014 and March 2015 mammograms.
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> "Plaintiff's tumor from the lumpectomy is luminal A – it is ER and PR positive, HER2 negative and has low levels of Ki-67. Luminal A tumors tend to be slow growing. Based upon the biology of plaintiff's breast tumor, it is my opinion that, within a reasonable degree of medical and oncological certainty, plaintiff's tumor was slow growing. This establishes plaintiff's diagnosis, treatment and prognosis would have been the same even if discovered and diagnosed earlier following the February 2014 or March 2015 mammograms."

Dr. Vahdat further noted that, in 2020, at Memorial Sloan Kettering Cancer Center (MSKCC), the plaintiff underwent a breast cancer index (BCI) test, which she characterized as a molecular, gene-expression-based test to evaluate whether an additional five years of aromatase inhibitor therapy is beneficial. She described it as a personalized risk assessment that tests tissue from the plaintiff's actual tumor from the lumpectomy. Dr. Vahdat noted that the BCI for the plaintiff, performed in July 2020, revealed a 16% risk of recurrence for years 5 through 10, that the plaintiff opted to continue the aromatase inhibitor therapy, and that the option to continue the therapy "would have been the same if the cancer was discovered and diagnosed earlier since the therapy use is based upon the biology of the tumor." As she framed it, "[t]he tumor biology remains the same, irrespective of when it is diagnosed," and that current guidelines recommend 10 years of hormonal therapy in the overall adjuvant therapy of breast cancer in any event.

With respect to the issues of the possibility of a recurrence of cancer, as well as the plaintiff's survivability and life expectancy, Dr. Vahdat explained that,

> "[i]t is now year 8 and plaintiff has not had any breast recurrence. The risk of tumor recurrence never goes down to zero. Plaintiff's current chance of late recurrence is less in the second 5 years compared to her first 5 years after diagnosis. According to the molecular based BCI test, her risk of recurrence is approximately 16% in years 5 to 10 after diagnosis. . . .[T]he BCI risk recurrence of 16% would have been the same if the cancer had been discovered and diagnosed at an earlier date following the February 2014 or March 2015 mammograms. This is because the risk of recurrence is based upon the biology of plaintiff's tumor and the biology does not change."

In opposition to the motion, the plaintiff relied upon Kaufman's submissions, and submitted the same expert affirmations of diagnostic radiologist Joan D. Goodman, M.D., and oncologist, hematologist, and internist Joseph Ramek, M.D., that he had submitted in opposition to the Mount Sinai defendants' summary judgment motion.

As relevant here, Dr. Goodman concluded that Kaufman's radiologic interpretations of the February 21, 2014 and March 25, 2015 mammogram studies departed from good and accepted medical practice because he failed to detect increased density, asymmetry, and architectural distortion on the upper outer quadrant of the right breast on the films from these

studies. She also noted that, in his review of the January 28, 2013 scan, Kaufman had failed to detect those conditions, which then were at an earlier stage of development, and that this asymmetry and architectural distortion were visibly larger on the February 21, 2014 and March 25, 2015 images.

Dr. Goodman agreed with Kaufman's assertion, in his September 17, 2015 diagnostic mammogram report, that the films from the January 28, 2013, February 21, 2014, and March 25, 2015 mammograms all demonstrated that "at the area of palpable concern in the superior right breast there is a focal asymmetry." Upon her own review of the films from these studies, Dr. Goodman also detected the presence of this focal asymmetry and architectural distortion at the area of palpable concern in the right breast. She expressly disagreed, however, with Kaufman's statement in the September 17, 2015 mammogram report that the architectural distortion that he had detected within this focal asymmetry was not present on prior studies. Rather, after reviewing all of West Side's films from 2013, 2014, and early 2015, Dr. Goodman detected this architectural distortion within the upper outer quadrant of the right breast. She asserted that "[t]he distortion was prominent enough on the films for me to be able to measure the area as follows: 1/28/2013: 6.3 cm (horizontal) x 5.5 cm (vertical), 2/21/2014: 6.9 cm (horizontal) x 5.9 cm (vertical), 3/25/2015: 7.3 cm (horizontal) x 6.5 cm (vertical), 9/17/2015: 8.1 cm (horizontal) x 6.5 cm (vertical)." As she explained it,

> "[t]hese findings indicate that the area of architectural distortion was not just present on the films from the 1/28/2013, 2/21/2014 and 3/25/2015 mammograms, but that the films demonstrate the consistent growth of that area of distortion. I also note, that on the 3/25/2015 films, the distortion appears to have consolidated, as it appears more dense on the images at that point."

Dr. Goodman opined that this growing area of architectural distortion represented radiographic evidence consistent with malignancy, and that additional testing was indicated after each of those mammograms. She concluded that it was departure from good and accepted medical practice for Kaufman to have failed to detect architectural distortion in the upper outer quadrant of the right breast on the February 21, 2014 and March 25, 2015 mammograms.

Contrary to Dr. Weinstein's opinion, Dr. Goodman explicitly asserted that it "was also a departure from good and accepted medical practice, *for the radiologists who read those films,* to have failed to order the additional imaging studies outlined above" (emphasis added). She explicitly disagreed that a radiologist such as Kaufman had no obligation to order additional scans upon finding tissue suspicious for malignancy in a breast. In this respect, she asserted that, "[a]t a bare minimum, these findings should have indicated that additional spot compression views of the right breast in the MLO [mediolateral oblique] and CC [craniocaudal] projections, should have been performed to rule out malignancy. If those additional spot compression views looked abnormal, a right breast sonogram also should have been performed, something that Ms. Gormley had not undergone at that point since April of 1999." Dr. Goodman opined that, had such spot compression views been ordered after the 2014 and early 2015 mammograms, those views would have detected the tumor that was present in the plaintiff's right breast, particularly in a patient such as the plaintiff, who was known to have dense breasts that were less sensitive to mammography.

Dr. Goodman further explained that Kaufman was the first radiologist to read the February 21, 2014 mammogram, that he compared the results to the previous mammogram obtained on January 28, 2013 and that, as such, he should have been aware that multiple imaging studies had by then detected an area of architectural distortion within an area of focal asymmetry in the upper outer quadrant of the right breast, a radiologic sign consistent with malignancy, and that this area of architectural distortion had grown during the 13 months since it was first visible on the mammography films. As she characterized it, "[t]hese were ominous findings that Dr. Kaufman failed to detect, and his failure to do so was a departure from the applicable standard of care, which requires a radiologist to detect and adequately respond to such radiologic findings."

Dr. Goodman asserted that the growth that the area of architectural distortion displayed between January 28, 2013 and the time that cancer finally was diagnosed in September 2015,

more than 2½ years later, was "reflective of the growth of the tumor that was causing the architectural distortion on the images." Based on her measurements of the area of distortion and calculations, Dr. Goodman concluded that the tumor grew, at a minimum, 2 cm in size during that time, and, based upon the 25%-30% magnification factor involved in mammography, likely would have been no more than 4½ centimeters on January 28, 2013. She explained that, "[a]s the measurements increased by larger amounts in between 2/21/2014 and 9/17/2015 (with the most growth happening between 3/25/2015 and 9/17/2015), this indicates that the tumor grew at a faster rate from 2/21/2014 forward, than it did prior to that time." Hence, Dr. Goodman concluded that the February 21, 2014 mammogram presented the plaintiff with her last chance to have any hope at all to avoid the outcome she had in this case, since a better prognosis depended entirely on a timely diagnosis in this case.

Dr. Goodman also faulted Kaufman for failing to document and memorialize the focal asymmetry that he found on both the 2014 or early 2015 mammogram reports, expressly disagreeing with Dr. Weinstein's opinion that "it was not a departure for Dr. Kaufman to not list every single benign finding in the mammogram report." Dr. Goodman thus asserted that Kaufman departed from the applicable standard of care in that regard because, had he included that finding in his reports, Estabrook would have---and Kaufman himself should have---recognized that "clarifying imaging studies were indicated" because, as Kaufman conceded at his deposition, such a finding could be caused by malignancy. Hence, she opined that Kaufman's "failure to document this finding and evaluate it by recommending further imaging studies after detecting it and knowing it had never been properly assessed, was an additional departure from good and accepted medical practice."

As set forth in detail in this court's May 9, 2024 decision and order deciding Motion Sequence 007, although Dr. Ramek agreed with Dr. Vahdet's opinion that the plaintiff would have required the same surgical, chemotherapy, radiation, and hormone suppressant treatment whether the cancer had been identified in early 2013 or late 2015, he expressly disagreed with

Dr. Vahdet's opinion that the delay subsequent to February 21, 2024 did not increase the likelihood of a recurrence of cancer and did not diminish the plaintiff's chances survivability or life expectancy. He asserted that the plaintiff's Oncotype score, "which is more essential for determining the likelihood of recurrence than is a Ki-67 score, came back as 22, indicating an intermediate chance of recurrence." More particularly, he asserted that, by failing timely to diagnose the cancer, the defendants, including Kaufman, deprived the plaintiff of the only chance that she had to "potentially avoid the growth spurt that this cancerous tumor demonstrated between the 3/25/2015 and 9/17/2015 mammograms," and that, hence, the delay in diagnosis was a substantial factor in causing the injuries that the plaintiff is claiming here, specifically, in causing her cancer staging to increase unnecessarily, diminishing the plaintiff's life expectancy and survivability rates, and increasing her chance of the recurrence of cancer.

In reply, Kaufman submitted an affirmation of his attorney, who characterized the plaintiff's experts' affirmations as conclusory and insufficient either to raise a triable issue of fact as to whether anything that Kaufman did or did not do departed from accepted radiological practice or caused or contributed to the plaintiff's claimed injuries. The attorney's affirmation also reiterated many of the legal arguments that the Mount Sinai defendants made in their summary judgment motion.

Applying the relevant legal standards, as set forth in this court's May 9, 2024 decision and order, the court concludes that, in opposition to Kaufman's prima facie showing to entitlement to judgment as a matter of law, the plaintiff raised triable issues of fact as to whether Kaufman departed from accepted radiological practice in reading and interpreting the February 21, 2014 and March 25, 2015 mammogram, in failing to memorialize the focal asymmetries that he conceded having visualized on those images, and in failing to recommend either to the plaintiff herself or to Estabrook that additional imaging studies should be performed. She also raised a triable issue of fact as to whether these departures caused or contributed to her claimed injuries, which are limited to an excessively rapid progression of the cancer, an

increased chance of the recurrence of cancer, and a diminished life expectancy and survivability rate. Hence, summary judgment must be denied as to Kaufman with respect to those claims of medical malpractice.

Accordingly, it is,

ORDERED that the motion of Stephen Z. Kaufman, M.D., sued herein as Steven Kaufman, M.D., for summary judgment dismissing the complaint insofar as asserted against him is granted to the extent of:

(a) dismissing, as time-barred, all medical malpractice claims asserted against him that are premised on his alleged departures from good and accepted medical practice occurring prior to December 8, 2013,

(b) dismissing the lack of informed consent cause of action insofar as asserted against him, and

(c) dismissing the Public Health Law § 2404-c cause of action insofar as asserted against him,

those claims and causes of action are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that all remaining parties shall appear for an initial pretrial settlement conference before the court, in Room 204 of 71 Thomas Street, New York, New York 10013, on June 25, 2024, at 11:00 a.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

5/10/2024
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE