Fleishman v Abraham
2024 NY Slip Op 35299(U)
March 11, 2024
Supreme Court, Nassau County
Docket Number: Index No. 615234/2021
Judge: Lisa A. Cairo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. LISA A. CAIRO, J.S.C.

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JESSICA FLEISHMAN,

Plaintiff(s),

-against-

SUSAN ABRAHAM, MD, PATRICIA KELLY, MD, TERAH STIELL, PA, NORTH SHORE UNIVERSITY HOSPITAL, NORTHWELL HEALTH PHYSICIAN PARTNERS, INC., ZWANGER & PESIRI RADIOLOGY NHPP, LLP and SQUARE CARE MEDICAL NHPP, LLP

Defendant(s).

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TRIAL/IAS PART 25

DECISION AND ORDER ON MOTION

INDEX No. 615234/2021

Motion Seq. No. 1

The following papers were read on this motion	DOCS NUMBERED
Notice of Motion, Affidavits, Affirmations, Exhibits, Memos.....	70-103
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Defendants Dr. Susan Abraham's and North Shore University Hospital's motion (sequence # 001), pursuant to CPLR 3212, for an Order granting summary judgment in favor of and dismissing all claims against Movants is granted as detailed herein.

BACKGROUND

This is a medical malpractice action in which Plaintiff alleges that Defendants failed to timely diagnose breast cancer.

Plaintiff Jessica Fleishman felt a new lump in her left breast on the first day of her period in October 2018. On October 16, 2018, Mrs. Fleishman reported the left breast mass to her internist, Dr. Abraham. Dr. Abraham performed a physical examination of Mrs. Fleishman's breast and documented that she felt breast nodules at 4, 5, 7 and 9 o'clock in her left breast. There were no masses in her right breast. Dr. Abraham referred Plaintiff for a mammogram and sonogram.

Dr. Abraham received the results of the mammogram and sonogram and called Mrs. Fleishman on October 17, 2018, to advise her that the results were normal, and she should follow up with her gynecologist by the end of the year. Mrs. Fleishman returned to Dr. Abraham's office

two months later, on December 12, 2018, for an upper respiratory infection. Mrs. Fleishman made no complaints about her breast and Dr. Abraham did not inquire about her breast or perform a breast examination at that time. Nor did Dr. Abraham inquire whether Plaintiff had seen her gynecologist or had an appointment with the gynecologist as had been recommended on October 17, 2018.

On February 19, 2019, Mrs. Fleishman called Dr. Abraham and informed her that she had nipple discharge. Dr. Abraham instructed Plaintiff to follow up with her gynecologist and if unable to do so, she should follow up with Dr. Abraham. Dr. Abraham did not communicate with Mrs. Fleishman's gynecologist. Mrs. Fleishman saw her gynecologist, Co-Defendant P.A. Terah Stiell, on February 21, 2019. P.A. Stiell performed a breast exam and noted "cystic changes in the upper outer quadrant and at 3 o'clock, no nipple discharge expressed during exam."

At P.A. Stiell's instruction, Mrs. Fleishman underwent another sonogram on February 26, 2019, that was interpreted as normal. On February 28, 2019, P.A. Stiell sent Plaintiff a message through the patient portal messaging system informing her that her sonogram and blood work were normal. P.A. Stiell instructed her to follow up with a breast surgeon to be safe. P.A. Stiell gave Plaintiff the names of two breast surgeons. Dr. Abraham saw Mrs. Fleishman again in July 2019 and January 2020, at neither time was Plaintiff's breast condition discussed.

On February 29, 2020, Mrs. Fleishman presented to P.A. Stiell for her annual gynecological examination and asked P.A. Stiell to examine her breast again because she felt the lump had gotten larger. Although her notes indicate that nothing abnormal was found, P.A. Stiell instructed Plaintiff to have breast imaging done as soon as possible and see a breast surgeon. On March 3, 2020, Mrs. Fleishman had a bilateral diagnostic digital mammogram and breast ultrasound that was suspicious for breast cancer. On March 5, 2020, Mrs. Fleishman had a biopsy of her left breast which revealed moderately differentiated invasive ductal carcinoma and ductal carcinoma in situ.

On March 17, 2020, when seen by oncologist Dr. Mark Hoffman, Mrs. Fleishman had a 3 cm irregular solid mass at 3 o'clock 8cm from the nipple of the left breast along with a second suspicious mass at 4 o'clock. Pathology revealed a moderately differentiated invasive ductal carcinoma SBR 6/9 nuclear grade 2 along with ductal carcinoma in situ, estrogen receptor positive, progesterone receptor positive and HER2 negative.

Mrs. Fleishman then sought a second opinion from Memorial Sloan Kettering the following week. At MSK, Mrs. Fleishman ultimately chose to undergo a bilateral mastectomy. The pathology revealed that her left breast had multifocal disease with 6 cancerous tumors of the left breast. Two of her four sentinel lymph nodes were positive with micro-metastatic disease. One out of six axillary lymph nodes were positive with micro-metastatic disease. Her clinical diagnosis was Stage IIB breast cancer. Following her double mastectomy, Mrs. Fleishman underwent eight rounds of chemotherapy followed by radiation therapy.

Plaintiff alleges medical malpractice in that Dr. Abraham and North Shore University Hospital failed to timely diagnose her breast cancer which resulted in a delay in treatment of seventeen months, and that the delay diminished her chances of survival.

Defendants Dr. Abraham and North Shore University Hospital now move for summary judgment to dismiss Plaintiff's case as against them.

DISCUSSION

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." (*Arocho v. Kruger*, 110 AD3d 749 [2d Dept 2013]).

"Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient." (*Donnelly v. Parikh*, 150 AD3d 820 [2d Dept. 2017]).

Defendants Dr. Abraham and North Shore University Hospital established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmations of Dr. Preston L. Winters, a physician board certified in internal medicine, and Dr. Marleen Meyers, a physician board certified in both internal medicine and oncology. (*See Stukas v. Streiter*, 83 AD3d 18 [2d Dept. 2011]; *see also Joyner-Pack v. Sykes*, 54 AD3d 727 [2d Dept. 2008]).

In support of Defendants' motion, Dr. Winters opined that

> Referral by an internist to a specialist to evaluate, assess and manage a specific body system or organ, so that the patient is managed by a medical provider better equipped to address these specific ailments, comports with the standard of care... Internist Dr. Abraham appropriately relied upon the radiologist's interpretation of the diagnostic imaging studies as negative and benign, in accord with accepted standards of care... Dr. Abraham's recommendation and plan for the patient to have a repeat breast examination by the end of the year by her patient's GYN, who had performed the patient's clinical breast examinations over prior years and was familiar with her fibrocystic breasts, and given that the presenting concern occurred around the patient's menstrual cycle when transient breast findings are not uncommon, is fully in accord with accepted standards of care. Standards of internal medicine care did not require internist Dr. Abraham to recommend further or other testing or consults in October 2018. Ms. Fleishman testified that she understood that her GYN would be following and managing her breast complaints after October 2018, and testified that she relied upon her GYN for further breast management. And when Ms. Fleishman developed a new breast symptom, nipple discharge, in February 2019, she was assessed and evaluated by her GYN.

Dr. Winters further opined that

> The plan for a repeat breast exam during a period when the patient was not at or around her menstrual cycle, by her own GYN who was

> familiar with her fibrocystic breasts having examined them over the past several years, is fully in accordance with accepted standards of care. No further, other, or different management was warranted by Dr. Abraham in October 2018. Standard of care does not require internist Dr. Abraham to have referred the patient to a breast surgeon or for biopsy as of October 2018; rather, referral to her GYN for repeat breast examination and further breast management is fully in conformance with accepted standards of care. Dr. Abraham reasonably deferred to and relied upon the interpretation of the imaging studies by the radiologist and deferred management of the patient's breast issues to a GYN specialist, whose practice is focused on two areas, the breast and pelvis. Dr. Abraham was told that there was no concerning radiographic findings at the area of palpable concern by a radiologist who was trained in the specialized area of interpretation of breast imaging studies. An internist is not trained in interpreting breast imaging, and therefore reasonably relies upon the radiologist's report in accord with accepted standards of care.

Dr. Winters continued that

> When the patient advised Dr. Abraham of breast discharge a few months later, in February 2019, it was in conformance with accepted standards of care for internist Dr. Abraham to refer the patient back to her GYN who had performed several breast exams and specializes in breast evaluation, while remaining available if she could not be seen. The patient followed Dr. Abraham's advice, and was evaluated by her GYN PA Stiell two days later. Internist Dr. Abraham acted in accord with standards of care, referring the patient to and deferring to the patient's GYN for breast work-up and to direct breast management. No further, other or different management or consultation was required. Referral to the patient's long-term GYN was fully in accord with accepted standards of internal medicine care. Standard of care does not require internist Dr. Abraham to have referred the patient to a breast surgeon or for biopsy as of February 2019; rather, referral to her GYN to evaluate and to direct her breast management is fully in conformance with accepted standards of care.

Dr. Winters concluded that

> it was reasonable, and in conformance with accepted standards of internal medicine practice and medical care for Dr. Abraham to have referred and deferred the breast management to the patient's GYN. A GYN is the specialist through training and expertise to manage breast complaints and establish a course of treatment. Plaintiff was under the care of GYN PA Stiell during the entire time she treated with Dr. Abraham. The GYN exercised her independent medical

> judgments regarding Ms. Fleishman's breast management. This GYN monitored plaintiff's breast signs and symptoms, ordered testing, and recommended a breast surgery consult, including providing the patient with the names of 2 breast surgeons. And at no time did GYN PA Stiell refer the patient back to internist Dr. Abraham for breast management.

Also, in support of Defendants' motion, Dr. Meyers opined

> that Dr. Abraham adhered to accepted standards of care, with ordering of breast imaging for palpable breast nodules and referral to her gynecologist for further breast evaluation and management. It is further my opinion that there were no deviations from accepted standards of care by Dr. Abraham that proximately caused injury to Ms. Fleishman.

Dr. Meyers elaborated

> that claims suggesting that the alleged delay in diagnosis led to the plaintiff having to undergo bilateral mastectomies lacks merit because the plaintiff was diagnosed with cancer limited to the left breast, with the right breast surgery completely prophylactic. In my experience, many women diagnosed with breast cancer choose to have bilateral prophylactic mastectomy which greatly reduces the chance of a future breast cancer diagnosis. The timing and stage of diagnosis did not result in the patient requiring a bilateral mastectomy.

"Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden." (*Reid v. Soults*, 138 AD3d 1087 [2d Dept. 2016]); *see also Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

"In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury. General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment." (*Yankus v. Kelly*, 72 AD3d 1068 [2d Dept. 2010]).

Plaintiff opposed summary judgment and submitted an Affirmation from a doctor board certified in Internal Medicine, Hematology, and Oncology. The name of Plaintiff's Expert was redacted from the Affirmation efiled in Opposition to the motion.

"A redacted physician's affirmation should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify

the expert by name and does not tender an unredacted affirmation for in camera review. Such an affirmation is insufficient to raise a triable issue of fact." (*Richter v. Menocal*, 216 AD3d 823 [2d Dept. 2023]).

Plaintiff did not provide an unredacted copy of their Expert's Affirmation to the Court.

Caselaw is clear that a redacted Affirmation may not be considered, and it is incumbent on Plaintiff to ensure that opposition is in proper evidentiary form. It is not the Court's responsibility to follow up with parties to correct deficiencies in their submissions or to remind parties to provide evidence in admissible form.

Plaintiff's opposition to Defendants' motion is insufficient to raise a question of fact without a proper expert affidavit to refute the opinions of Defendants' experts, which establish prima facie entitlement to summary judgment. (*See Robert Lancia v. Good Samaritan Hosp.*, 201 AD3d 913 [2d Dept. 2022]; *see also Losak v. St. James Rehab. & Healthcare Ctr.*, 199 AD3d 671 [2d Dept. 2021]).

ORDERED that Defendants Dr. Susan Abraham and North Shore University Hospital's motion, pursuant to CPLR 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendants is granted; and it is further

ORDERED that all of Plaintiff's causes of action asserted against Defendants Dr. Susan Abraham and North Shore University Hospital are severed and dismissed; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
March 11, 2024

ENTER:

HON. LISA A. CAIRO, J. S. C.

ENTERED
Mar 15 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE