Smalls v Finegold
2024 NY Slip Op 35309(U)
January 2, 2024
Supreme Court, Bronx County
Docket Number: Index No. 22564/2015E
Judge: Alicia Gerez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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SHAUNA SMALLS, as Administratrix of the Estate of BRIAN SMALLS, and SHAUNA JOHNSTON-SMALLS, Individually,

Plaintiff(s),

- against –

JONATHAN FINEGOLD, M.D., JENIFER JOHNSON, M.D., GEORGE PRACKUP, M.D., RONALD DENNET, M.D., DIANA JOY, D.O., RATHINDRA BANIK, M.D., ALAN BERNSTEIN, M.D., STEPHEN BHARUCHA, M.D., WESTMED MEDICAL GROUP, P.C., and LAWRENCE HOSPITAL CENTER,

Defendant(s).

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DECISION and ORDER
Index No. 22564/2015E

HON. ALICIA GEREZ

Defendants JONATHAN FINEGOLD, M.D., JENIFER JOHNSON, M.D., GEORGE PRACKUP, M.D., RONALD DENNETT, M.D[1]., DIANA JOY, D.O. and WESTMED MEDICAL GROUP, P.C. move for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing plaintiff's complaint against them. Upon review of the papers, together with the opposition submitted thereto; review of the Court file; and upon due deliberation, the motion is decided as follows.

Factual Background

Plaintiff commenced this malpractice action alleging, generally, that defendants deviated from good and accepted medical practice from November 2013 to April 2014 in failing to diagnose the plaintiff decedent's small bowel cancer.

[1] Dr. Ronald Dennett's name is misspelled in the caption and should read RONALD DENNETT, M.D.

In November of 2013, plaintiff decedent visited the WESTMED MEDICAL GROUP, P.C., ("Westmed") Urgent Care with generalized complaints of abdominal pain, decreased appetite, fatigue, diarrhea and the like. Decedent was examined by defendant JENIFER JOHNSON, M.D. ("Dr. Johnson"). At the time the decedent was 35 years old and weighed 330 pounds. Dr. Johnson ordered bloodwork and an ultrasound to which defendant GEORGE PRACKUP, M.D. ("Dr. Prackup") interpreted. Ultimately Dr. Johnson did not find the ultrasound to accurately explain the source of the decedent's pain and symptoms, documenting only a fatty liver and the need for decedent to see a gastroenterologist ("GI"). The lab work showed low iron levels, or anemia, and elevated ALT. Decedent was prescribed Omeprazole and referred back to his primary care doctor defendant RONALD DENNETT, M.D., ("Dr. Dennett") to further investigate decedent's anemia.

Decedent saw Dr. Dennett two months later on January 14, 2014, where he reported improved abdominal pain. Decedent also reported that belching remained present and that he had one incident of vomiting. Dr. Dennett also referred the decedent to defendant JONATHAN FINEGOLD, M.D., ("Dr. Finegold"), a GI.

The decedent was seen by defendant DIANA JOY, D.O., ("Dr. Joy") at the Westmed Urgent Care on March 20, 2014. At the visit, decedent complained of nausea, belching, headache, and multiple bouts of vomiting the night before. After a physical exam, Dr. Joy listed the differential diagnosises as possible bowel obstruction, gastroenteritis, gastritis, and acid reflux. Ultimately, decedent was diagnosed as having a stomach virus and advised to increase fluids alongside medication for nausea. Decedent was also told to follow up with his GI or primary care physician should his condition deteriorate.

Five days later, on March 25, 2014, decedent returned to the Westmed Urgent Care weighing 303 pounds. He was examinied by a non-party physician's assistant ("PA"). Decedent presented with vomiting for multiple days and a need to belch to relieve pressure in his stomach any time he

ate. The PA directed decedent to see Dr. Finegold the same day. After examing decedent, Dr. Finegold ordered labs and recommended an upper endoscopy and colonoscopy to take place on March 31, 2014.

On March 29, 2014, decedent presented to the emergency room at Lawrence Hospital with complaints of abdominal pain and vomiting. A CT scan was performed which was regarded as unremarkable.[2]

During the gastroscopy and colonoscopy on March 31, 2014, biopsies were taken which came back unremarkable. Decedent was advised to continue the Omeprazole and adhere to an anti-reflux diet. The results of the CT scan from Lawrence Hospital were not conveyed to Dr. Finegold until April 1, 2014.

Decedent continued to follow up with his primary care phyisican and an infectious disease specialist regarding his condition. Symptoms continued to wax and wane. A second opinion was sought from another GI, Dr. Stephen Bharucha. X-ray imaging was performed with no clear diagnosis. After a flare up of symptoms, Dr. Bharucha sent the decedent to the Emergency Room at Montefiore Medical Center ("Montefiore") on June 27, 2014.

While in the Emergency Room an abdominal and pelvic CT scan with contrast was performed where a small bowel obstruction was noted. After a referral to Dr. Yang, a GI within Montefiore, a double balloon enteroscopy was completed. During the July 1, 2014, enteroscopy done by Dr. Yang a mass was found in the proximal to mid jejunum causing the small bowel obstruction. Dr. Yang took multiple biopsies during the procedure and recommended further testing. On July 3, 2014, decedent underwent surgery at Montefiore to remove the mass. Pathology from the procedure

[2] Lawrence Hospital Center and Dr. Bernstein (interpreting doctor of the CT performed at Lawrence) are no longer parties to this action. Lawrence Hospital Center was discontinued via Stipulation dated September 14, 2023, and Dr. Bernstein by Decision and Order dated June 29, 2023.

revealed invasive adenocarcinoma moderately differentiated invading into subserosal mucosal tissue. Three of nineteen lymph nodes showed metastatic disease.

After two years of chemotherapy, decedent succumbed to his rare cancer on September 1, 2016.

Legal Standard

"A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries" (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3[1st Dept. 2015] [citation omitted]). If a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Pullman v. Silverman*, 125 AD3d 562, 562 [1st Dept. 2015], *aff'd* 28 NY3d 1060 [2016]; s*ee Scalisi v. Oberlander*, 96 AD3d 106, 120 [1st Dept. 2012].)

Where defendant has made a *prima facie* showing of entitlement to judgment as a matter of law by submitting medical records and the affirmation of an expert demonstrating that the defendants did not depart from accepted medical practice (*See e.g. Kristal R. v. Nichter*, 115 AD3d 409, 411[1st Dept. 2014]), the burden thus shifts to the plaintiff to demonstrate otherwise. A plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New*

York Downtown Hosp., 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439[1st Dept. 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729[1st Dept. 2012]).

Discussion

At the outset it must be noted that plaintiff failed to oppose defendant's motion for summary judgment for Dr. Finegold, Dr. Prackup, and Dr. Joy. As such, summary judgment is aptly granted to the forementioned defendants and the remainder of defendants in this action, Dr. Johnson, Dr. Dennett, and Westmed will be discussed in furtherance below.[3]

A. Defendants' *Prima Facie* Showing

In support of defendants' motion for summary judgment they submit the affirmations of a Board-certified radiology expert[4], a Board-certified gastroenterology expert, and a Board-certified internal medicine expert. The defendants' experts uniformly opine, within a reasonable degree of medical certainty, that defendants did not depart from accepted practice during decedent's treatment with the defendants and highlight the lack of causation.

i. Defendant Dr. Johnson

Dr. Feingold, a board-certified physician in internal medicine opines that all care Dr. Johnson provided to the decedent on November 23, 2013, was entirely appropriate. The expert explains that as Dr. Johnson only saw the decedent once during an urgent care visit, her evaluation, work-up, and recommendation for follow-up with his primary care physician was within the standard of care. Dr. Feingold states that when the physical exam was performed on decedent there was no indication of

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[3] This action has been discontinued as to Rathindra Banik, M.D., Alan Bernstein, M.D., and Stephen Bharucha, M.D.

[4] Defendants' expert radiologist is not addressed herein as the claims against Dr. Prackup regarding interpretation of an abdominal ultrasound were unopposed and summary judgment was granted in his favor accordingly.

obstruction in the small bowel, both partial and complete. Dr. Feingold also found the testing ordered by Dr. Johnson to be not only adequate but exhaustive, having ordered urineanalysis, a stool sample, varying blood panels, and an abdominal ultrasound. Dr. Johnson also prescribed Omeprazole to treat a variety of gastric complaints. Additionally, the expert explains that it was within an appropriate timeframe to recommend a follow up with decedent's primary care phyisican within a week as the anemia discovered in the lab results did not require emergency attention.

ii. Defendant Dr. Dennett

Dr. Dennett saw the decedent seven weeks after seeing Dr. Johnson, January 14, 2014, and then again on April 2, 2014. Dr. Feingold explains that the lag in time from seeing Dr. Johnson in urgent care to following up with Dr. Dennett can only be attributed to the decedent alone as the obligation to schedule and attend appointments belongs solely to the patient.

Dr. Feingold unequivocally states that Dr. Dennett's evaluation, work-up, possible diagnoses, recommendations for diet modifications and medications, and the referral to a GI on January 14, 2014, was entirely appropriate. Particularly, the expert notes that the physical exam performed was normal and not consistent with an obstruction in the small bowel. Additionally, the expert rejects any contention that Dr. Dennett's exam was affected by the decedent's body habitus. Further, the expert notes that there was no indication to order radiological studies at this January visit and such a referral is more appropriately made from a specialist such as a GI.

Decedent saw Dr. Dennett for a second time on April 2, 2014, wherein a physical examination was performed. The expert found Dr. Dennett's assessment appropriate with no indication of complete or partial bowel obstruction. In consideration of the decedent's symptoms, Dr. Dennett recommended an intake of fiber and to report back to his office. The expert found this course of action within the standard of care as decedent was under the care of a GI. Further, the expert explains that although decedent alerted Dr. Dennett to his CT scan from Lawrence Hospital, it was within the

standard of care for a primary care phyisican to refrain from ordering further imaging and to rely on the specialists who signed off and recommended treatment from an infectious disease specialist.

iii. Defendant Westmed

As is discussed earlier, decedent received care at Westmed by both his primary care physician, Dr. Dennett, and Dr. Johnson in urgent care. Defendant's have produced a third expert, Dr. Mark A. Korsten, M.D., FACP, board-certified in internal medicine and gastroenterology who largely comments on the care provided by Dr. Finegold who is not longer a party to this action. However, Dr. Korsten does comment on care provided by Westmed doctors generally, opining that decedent's symptoms were reported to improve at various visits which is inconsistent with small bowel cancer. Additionally, the expert notes that small bowel cancer would not be a differential diagnosis. Dr. Korsten rejects plaintiff's theory that a small bowel obstruction existed on November 23, 2014 - meaning decedent's cancer was likely metastatic at that time. In Dr. Korsten's opinion, if this scenario were to be true, decedent would have had the same exact course of treatment and an earlier diagnosis would not have changed the outcome or avoided any treatment. This expert also observes that decedent was particularly young for this type of rare cancer which can mimic more common diagnoses.

B. Plaintiff's Opposition

In opposition, plaintiff submits four expert affirmations in support of their claims. First, the board-certified family medicine expert Michael Zionts, M.D. ("Dr. Zionts") refers to the care provided by Dr. Johnson on November 23, 2013, as a departure from the standard of care in that she failed to rule out other causes for the decedent's symptoms as something severe such as small bowel cancer. In particular, the expert states that it was a departure from the standard of care when the decedent was not sent directly to a GI on an urgent basis, resulting in a delay in his cancer diagnosis.

The expert contends that an urgent care doctor does not need to send a patient back to a primary care physician when they can send them directly to a specialist when indicated such as here.

Next, plaintiff submits the expert affirmation of Meyer N. Solny, M.D., ("Dr. Solny") board-certified in gastroenterology and internal medicine wherein Dr. Solny opines that the decedent's malignant small bowel mass was present by the November 23, 2013, urgent care visit, and causing decedent's symptoms. The expert points to decedent's interactions with Dr. Johnson and Dr. Dennett, opining that had either doctor sent decedent for an urgent GI consult, decedent's cancer would have been detected sooner with the possibility of detection prior to reaching metastatic disease. The expert claims that decedent's presenting symptoms on November 23, 2013, in combination with presumed iron deficiency amenia required an urgent GI work-up to rule out bowel cancer.

In further opposition, plaintiff provides the expert affirmation of Robert Gelfand, M.D., ("Dr. Gelfand"), board-certified in internal medicine, hematology and medical oncology. Dr. Gelfand also contributes a failure to work up the decedent's small bowel cancer as a substantial delay in the diagnosis of decedent's cancer, tumor removal, and treatment for cancer. The expert opines that iron deficiency anemia was a strong sign that decedent needed a work up for cancer in November of 2013, including an upper and lower endoscopy, and if the results returned were negative, a capsule endoscopy of the small bowel which would have detected the cancer in the jejunum. In this expert's opinion, had decedent's cancer been detected in February of 2014, the cancer would have been stage I or II, with an excellent prognosis for survival.

Finally, plaintiff proffers the expert affirmation of Richard J. Pels, M.D. ("Dr. Pels"), board-certified in internal medicine. Dr. Pels notes that the November 23, 2013, urgent care bloodwork showed a finding of iron deficiency anemia which was not seen in decedent's 2012 lab results. According to Dr. Pels this is "presumptively indicative of cancer of the bowel" and it was a departure for Dr. Dennett to not review these results and immediately send decedent for a consult with a GI

both after the November visit at urgent care and also at decedent's January 14, 2014, office visit. Although Dr. Dennett did send decedent to the GI, albeit not urgently, Dr. Pels finds that the delay prevented an earlier diagnosis.

Conclusion

Here, defendants' submission of medical records, deposition testimony, and expert affirmations establish a *prima facie* showing of entitlement to summary judgment. To be sure, defendants's expert in internal medicine, Dr. Feingold found all treatment rendered by Dr. Dennett and Dr. Johnson to be entirely appropriate. Dr. Feingold further found that the onus was on decedent to follow up with his primary phyisican, Dr. Dennett, after his urgent care visit in November as it was included in his discharge papers as well as testified to by decedent's wife. As Dr. Feingold noted in his expert report, the fact that decedent did not return to Westmed for another seven weeks on January 14, 2014, was decedent's responsibility.

In opposition, plaintiff has failed to raise a triable issue of fact. A plaintiff's expert's opinion must demonstrate "the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 307, 833 N.Y.S.2d 89 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 A.D.3d 439, 886 N.Y.S.2d 883 [1st Dept. 2009]). Foremost, all of plaintiff's experts seem to ignore that plaintiff was referred to his primary physician to follow-up within one week of the iron deficiency finding. Notwithstanding, plaintiff's experts fail to explain why decedent's iron deficiency anemia warranted an immediate referral to a GI in light of Dr. Feingold's opinion that iron deficiency anemia can often be from nutritional deficiencies which is not grave in nature. Plaintiff's experts' statements that iron deficiency anemia is indicative of

bowel cancer is entirely conclusory and speculative in the scope of the allegations set forth in this matter. Particularly as the claims in this matter have been narrowed to one urgent care visit in November and two follow up appointments in January and April with Drs. Johnson and Dennett respectively.

The remaining arguments are found to be without merit.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is GRANTED; and it is further

ORDERED that the Clerk of the Court, Bronx County, is directed to enter judgment in favor of defendants.

This is the Decision and Order of the Court.

ENTER

Dated: 1/2/24

Alicia Gerez, A.J.S.C.