Griffin v Gaing

2025 NY Slip Op 34348(U)

November 7, 2025

Supreme Court, New York County

Docket Number: Index No. 805133/2020

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING — *Justice* — PART 06

INDEX NO. 805133/2020
MOTION DATE 08/08/2023
MOTION SEQ. NO. 001

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DOUGLAS GRIFFIN and SHEILA GRIFFIN,

Plaintiffs,

- v -

BYRON GAING, EMILY COPEL, MITCHELL LOCKE, NORTHWELL HEALTH, INC., NORTHWELL REICHERT FAMILY IMAGING AT HUNTINGTON, NORTHSHORE UNIVERSITY HOSPITAL, NORTHWELL HEALTH - GOHEALTH URGENT CARE, ACCESS CLINICAL PARTNERS, LLC d/b/a GOHEALTH URGENT CARE, NYU LANGONE HEALTH SYSTEM, and NYU SCHOOL OF MEDICINE,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

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

Upon the foregoing documents, and oral arguments having been heard, Defendants Mitchell Locke, M.D. (“s/h/a Mitchell Locke”) (“Dr. Locke”), NYU Langone Health System (“NYU Langone”), and NYU Grossman School of Medicine (“s/h/a NYU School of Medicine”) (“NYU Grossman”), move for summary judgment on the ground that no material issues of fact exist and that Defendants are entitled to judgment against Plaintiffs.

Plaintiffs oppose the motion.

BACKGROUND

On February 16, 2018, the injured Plaintiff Douglas Griffin (“Plaintiff”), then 48 years old, presented to Defendant Access Clinical Partners, LLC d/b/a Go Health Urgent Care (“ACP”)[1] with

[1] The claims against Defendant ACP have been discontinued by stipulation (NYSCEF Document No. 35 and 36).

abdominal pain. Defendant Dr. Emily Copel examined Plaintiff and ordered a CT scan of his abdomen and pelvis. The scan, performed at Defendant Northwell Reichert Family Imaging at Huntington ("Northwell Reichert"), was interpreted by Defendant radiologist Dr. Byron Gaing, who found no sign of any urgent bowel issues, general inflammation, or serious disease in the abdomen or pelvis, specifically ruling out acute diverticulitis.

On May 14, 2018, plaintiff presented to Defendant gastroenterologist Dr. Locke with complaints of, *inter alia*, lower abdominal pain, constipation, and a family history of "colon polyps (father) without colitis or colon cancer." Dr. Locke noted the presence of abdominal pain that improves after a bowel movement, along with mucus in the stool and excessive stomach rumbling (borborygmi), suggestive of a functional bowel syndrome, such as irritable bowel syndrome (IBS). Dr. Locke recommended, among other things, that plaintiff keep a food diary, take a daily probiotic, and use IBgard or FDgard as needed.

Plaintiff returned to Dr. Locke for a follow-up appointment on June 7, 2018, stating that he is taking IBgard daily with resolution of complaints. At that time, Dr. Locke diagnosed plaintiff with IBS and constipation and advised that he continue taking IBgrad daily and follow up for any recurrent complaints.

Plaintiff returned to Dr. Locke again on March 26, 2019, reporting an episode of rectal bleeding. On that date, Dr. Locke recommended a colonoscopy, which was performed on June 14, 2019, by nonparty Dr. Frank Girardi. The colonoscopy detected a mass, and plaintiff was thereafter diagnosed with stage III colon cancer, and underwent a surgery and chemotherapy.

On May 29, 2020, Plaintiff and his wife, suing derivatively, commenced this medical malpractice action against Dr. Gaing, Dr. Copel, Dr. Locke, Northwell Health, Inc., Northwell Reichert, Northshore University Hospital, Northwell Health- Gohealth Urgent Care, ACP, NYU Langone and NYU Grossman, alleging, *inter alia*, that Defendants failed to diagnose colon cancer

in the distal transverse colon; failed to independently review the February 16, 2018 CT of the abdomen and pelvis and visualize a mass on this study; failed to review imaging with a radiologist; failed to workup signs and symptoms of abdominal pain, rectal bleeding and constipation; made an incorrect diagnosis; failed to look for occult bleeding; failed to perform a colonoscopy and order additional imaging studies. Plaintiff also alleges that Dr. Locke should have diagnosed Plaintiff's cancer when he presented for treatment between May 14, 2018 and March 26, 2019, and that he suffered a loss of a better chance for cure of his cancer resulting in a worse prognosis.

The complaint asserts three causes of action: (1) medical malpractice; (2) lack of informed consent; and (3) a derivative claim for loss of consortium asserted by plaintiff's wife.

Dr. Locke, NYU Langone and NYU Grossman ("the Moving Defendants") interposed their answers on August 3, 2020, September 1, 2020, and September 23, 2020, respectively, and now move for summary judgment.

SUMMARY JUDGMENT AS TO MEDICAL MALPRACTICE

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice, and by establishing that the Plaintiff was not injured by such treatment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Joyner-Pack v Sykes*, 54 AD3d 727 [2d

Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]).

In support of their motion, the Moving Defendants submit the expert affidavit of Dr. Loren Laine ("Dr. Laine"), a board-certified Gastroenterologist, who opines to a reasonable degree of medical certainty that Dr. Locke did not depart from acceptable standards of medical care while treating the Plaintiff and, therefore, did not cause the Plaintiff's alleged injuries. Specifically, Dr. Laine opines that the colon cancer screening guidelines in 2018 did not require Dr. Locke to offer or perform screening for colon cancer when Plaintiff presented to Dr. Locke on May 14, 2018 or June 7, 2018. Dr. Laine further opines that the diagnosis and workup for colon cancer was not medically indicated based upon the Plaintiff's complaint and Dr. Locke's findings during his May 14, 2018 and June 7, 2018 examination. According to Dr. Laine, increased suspicion for colon cancer include rectal bleeding, unintentional weight loss, and anemia and Plaintiff did not have any of these symptoms when he saw Dr. Locke on these visits. Dr. Laine further notes that during these visits, Dr. Locke performed a physical examination of Plaintiff consistent with the applicable standard of care and Plaintiff did not report experiencing any rectal bleeding. His reported symptoms, "the negative [CT scan] of the abdomen and pelvis[,] and negative findings on exam[,] supported [Dr. Locke's] conclusion that the diagnosis was IBS." Finally, Dr. Laine indicates that other tests were unnecessary because the Plaintiff's labs showed no anemia (with normal hemoglobin and hematocrit), and fecal occult blood testing was not required by the standard of care as the Plaintiff had no indications for colon cancer screening based on his age, race, and family history.

Regarding the single episode of rectal bleeding cited in Plaintiff's complaint, Dr. Laine opined that it was consistent with the standard of care for Dr. Locke to recommend a colonoscopy to evaluate for colon cancer since it was a new symptom that required work-up. In this regard, Dr.

Laine states that Dr. Locke's treatment was not a proximate cause of the injuries alleged, noting that Plaintiff waited two months to undergo a colonoscopy after Dr. Locke advised him to do so, thereby preventing the diagnosis of his cancer two months sooner.

Based on the expert affidavit of Dr. Laine, the Court finds that the Moving Defendants have established prima facie entitlement to summary judgment as a matter of law as to Plaintiff's claim of alleged malpractice against Dr. Locke.

Once this prima facie showing is made, the burden shifts to the plaintiff to raise a triable issue of fact, which requires the plaintiff to proffer evidence sufficient to demonstrate that a genuine issue exists regarding the causal connection between the defendant's alleged negligence and the decedent's death (*see Roques v Noble*, 73 AD3d 204, 206; *Obregon v NY & Presbyt. Hosp.*, 2012 NY Slip Op 30681[U] [Sup Ct, NY County 2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

In opposition, Plaintiffs submit the expert affirmation of a board-certified Gastroenterologist,[2] who opines, within a reasonable degree of medical certainty, that Dr. Locke departed from standards of good and accepted medical and gastroenterological standards in his evaluation of Plaintiff in three ways. First, Expert A opines that the standard of care required Dr. Locke to perform bloodwork measuring the amount of hemoglobin in Plaintiff's blood, a low amount of which would be indicative of anemia. Such a finding would raise concerns regarding internal bleeding, which would, in turn, increase the index of suspicion for colon cancer and prompt further testing to rule out colon cancer. Second, Expert A opines that the relevant standard of care required Dr. Locke to conduct fecal occult blood testing capable of detecting microscopic amounts of blood in stool because the presence of such blood would be an indication of colon

[2] Plaintiff redacts the name of her expert pursuant to CPLR 3101(d). Plaintiff's expert is hereinafter referred to as Expert A.

cancer, which would have mandated the performance of a sigmoidoscopy or colonoscopy. Plaintiffs' expert highlights that the diagnosis reached by Dr. Locke required that such tests be performed in order to rule out occult blood in the stool. Third, Plaintiffs' expert opines that Dr. Locke departed from the standard of care by failing to timely perform a colonoscopy. Specifically, Expert A opines that, given the Plaintiff's symptoms, which included ongoing abdominal pain, constipation, changed bowel habits, and borborygmi, along with a first-degree relative who had colon polyps, a diagnostic colonoscopy was required to rule out colorectal cancer before settling on an IBS diagnosis.

Expert A concludes that the cancer was already present when the Plaintiff first presented to Dr. Locke, based on the Plaintiff 's symptoms in 2018 and the subsequent diagnosis of invasive, stage III, lymph node positive colon cancer one year later. The expert asserts that if a complete diagnostic evaluation and colonoscopy had been performed in 2018, the cancer would have been diagnosed at a less advanced stage and, with reasonable medical certainty, could have been surgically removed for a cure, allowing the Plaintiff to avoid chemotherapy and achieve a significantly better prognosis. Instead, when the malignancy was operated on in July 2019, it had advanced and involved the lymph nodes, moving beyond the stage of surgical cure, making Dr. Locke's deviations from the standard of care a substantial factor in depriving the Plaintiff of a better outcome.

The Court finds that Plaintiff has raised triable issues of fact as to the treatment and care based on Expert A's affirmation, as to whether Dr. Locke departed from the applicable standard of care by failing to timely perform certain testing, which resulted in Plaintiff's delayed diagnosis and decreased Plaintiff's chances of a better outcome (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11 NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65

AD3d 610 [2d Dept 2009]). "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; *see Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

Since Plaintiff has raised triable issues of fact against Dr. Locke, an employee of NYU Grossman, summary judgment is precluded as to NYU Grossman. When triable issues of fact exist as to the care and treatment by a physician-employee, and whether such treatment proximately caused a plaintiff's alleged injuries, dismissal is not warranted for vicarious liability claim(s) against the employer-hospital *(see Sessa v Peconic Bay Medical Center*, 200 AD3d 1085 [2d Dept 2021]; *Klippel v Rubinstein*, 300 AD2d 448 [2d Dept 2002]; *Rivera v County of Suffolk*, 290 AD2d 430 [2d Dept 2002]; *Mduba v Benedictine Hosp.*, 52 AD2d 450 [3d Dept 1976]).

As to NYU Langone, it is undisputed that NYU Langone Health System is an administrative entity, does not provide patient care, and did not employ any clinicians or physicians, including Dr. Locke. Accordingly, NYU Langone cannot be found vicariously responsible for Dr. Locke, and Plaintiff's complaint is dismissed regarding NYU Langone (see *Thomas v Hermoso*, 110 AD3d 984 [2d Dept 2013]; *Marrero v Bestcare, Inc.*, 2020 NY Slip Op 31154[U] [Sup Ct, Bronx County 2020] [dismissing the plaintiff's malpractice claims against the defendant Montefiore Health System, Inc., finding that the plaintiff had failed to establish that Montefiore had rendered any medical care or treatment to establish a physician-patient relationship, and noting that plaintiff had failed to demonstrate that the health care system had any relations with the patient for the purposes of rendering medical treatment in any capacity]).

As to plaintiffs' cause of action for loss of consortium, dismissal is precluded since it is derivative of the injured spouse's right to recover damages for any injuries sustained as a result of the defendants' alleged malpractice (see *Liff v Schildkrout*, 49 NY2d 622 [1980]).

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

As to the branch of Defendant's motion seeking summary judgment regarding Plaintiff's lack of informed consent claim, it is well settled that "the right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non[1]emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law §2805-d[2]).

Here, Plaintiffs do not possess a valid lack of informed consent claim pursuant to Public Health Law Section 2805-d since Plaintiff's argument involves the failure to timely diagnose and not the affirmative violation of his physical integrity in the absence of informed consent. "A failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'..." (*Janeczko v Russell*, 46 AD3d 324, 848 NYS2d 44 [1st Dept 2007]).

Thus, Plaintiffs' lack of informed consent cause of action is dismissed as a matter of law.

Based on the foregoing, it is hereby

ORDERED that the Moving Defendants' motion for summary judgment is granted to the extent of dismissing the cause of action for lack of informed consent; and it is further

ORDERED that the complaint is dismissed as to NYU Langone Health System; and it is further

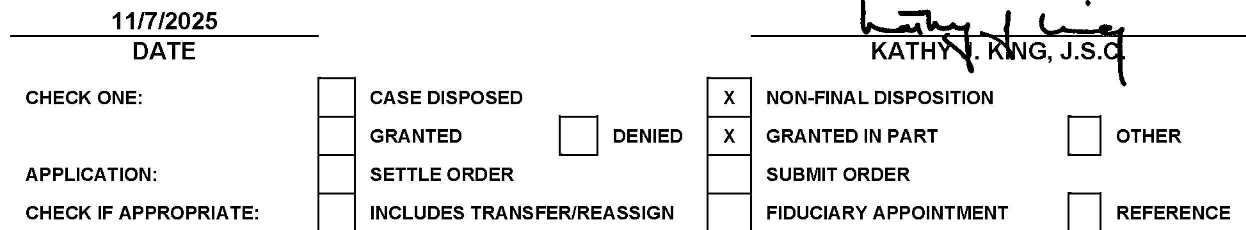
ORDERED that the motion is denied in all other respects; and it is further

ORDERED that within twenty (20) days of the date of this Order, the moving Defendants shall serve a copy of this Order upon the County Clerk and the Clerk of the General Clerk's Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the "EFiling" page on the court's website, and, to comply with those procedures, the moving Defendant shall (1) upload this Order to the NYSCEF system under document title "SERVICE ON SUPREME COURT CLERK (GENL CLERK)W/COPY OF ORDER," and (2) separately file and upload the notice required by CPLR 8019(c) a completed Form EF-22, along with a copy of this Order under document title "NOTICE TO COUNTY CLERK CPLR 8019(C);" and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with this Order; and it is further

ORDERED that the Moving Defendants are to serve a copy of this order upon the Plaintiff with notice of entry within twenty (20) days of entry of this order.

This constitutes the Decision and Order of the Court.


11/7/2025
DATE

KATHY J. KING, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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