

Pierre-Canel v Eye Surgery & Aesthetics, P.C.
2018 NY Slip Op 31857(U)
June 21, 2018
Supreme Court, Kings County
Docket Number: 511200/2015
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of June, 2018.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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KETTELIE PIERRE-CANEL,

Plaintiff,

- against -

EYE SURGERY & AESTHETICS, P.C., and
NATALIE BORODOKER, M.D.,

Defendants.

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EYE SURGERY & AESTHETICS, P.C. and
NATALIE BORODOKER, M.D.,

Third-Party Plaintiffs,

- against -

N.Y.C. HEALTH AND HOSPITALS CORPORATION,
KINGS COUNTY HOSPITAL CENTER, JINLI LIU, M.D.,
AND TWISHA OZA, M.D.,

Third-Party Defendants.

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The following papers numbered 50-75 read herein:

Documents

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

Sur-Reply (Affirmation) _____

Other Papers _____

NYSCEF

94-114

121-122

123

Upon the foregoing papers defendants/third-party plaintiffs Eye Surgery & Aesthetics, P.C. and Natalie Borodoker, M.D. seek an order, pursuant to CPLR 3212, (1) granting summary judgment in their favor, (2) directing the County Clerk to enter judgment in their favor, (3) amending the caption to delete their names and (4) granting such other and further relief as the Court may deem just and proper (MS #3).

BACKGROUND

On September 25, 2013, plaintiff presented to Eye Surgery & Aesthetics, P.C. ("the P.C.") as a new patient, complaining of scratching and tearing of her left eye with yellow discharge. She disclosed that she had injured her left eye with her finger approximately seven years prior, and was treated with eye drops. Her medical history included, *inter alia*, type 2 diabetes, hypertension, anemia and allergies. On physical examination, Dr. Borodoker noted that plaintiff had a discoloration of the white of her left eye and a symblepharon¹, with thick scar tissue and pigment. She recommended that plaintiff's symblepharon be removed in stages and that a specimen be sent for a biopsy to rule out cancer in the left eye. To allow time for plaintiff to get her diabetes under control and obtain medical clearance from her primary care physician, Sharmeen Sultana, M.D., the removal and biopsy were scheduled for October 4, 2013. However, the procedure was cancelled because the plaintiff failed to timely obtain pre-operative clearance. Following this cancellation, plaintiff was scheduled for a February 1, 2014

¹ Adhesion of the eyelid to the eyeball.

follow-up visit with Dr. Borodoker. However, plaintiff failed to keep the February 1, 2014 appointment.

The plaintiff returned to Dr. Borodoker on June 19, 2014, complaining of itchy, red irritated and tearing eyes with swelling. Dr. Borodoker noted that these symptoms were consistent with allergies. Dr. Borodoker again recommended removal of the symblepharon with biopsy, after the plaintiff received pre-operative clearance. Plaintiff successfully obtained clearance from her hematologist, Dr. Gardith Joseph, on August 18, 2014. This was confirmed by Dr. Sultana, her primary care physician, on August 19, 2014. Plaintiff then returned to Dr. Borodoker on August 29, 2014 for a pre-operative appointment.

The plaintiff presented with the same complaints made at her June appointment. The symblepharon removal and biopsy procedure were scheduled for September 19, 2014 at the Brooklyn Eye Surgery center. However, plaintiff cancelled the procedure. Dr. Borodoker's surgical coordinator called the plaintiff and asked her to return to the office on September 22, 2014 for a follow-up visit. Plaintiff did not show for this follow-up appointment, and it was rescheduled for October 10, 2014. Plaintiff cancelled that appointment, which was rescheduled for October 18, 2014.

On October 18 the plaintiff presented with complaints of a three- to six-week history of increased swelling of her left eye. Dr. Borodoker's diagnosis was cellulitis, with chalazian²-like structures and he prescribed an antibiotic. Plaintiff returned to Dr.

² A lump in the upper or lower eyelid which could be infectious or inflammatory.

Borodoker on October 22, 2014 for follow-up and reported that she felt some improvement. At that visit, Dr. Borodoker drained fluid from plaintiff's left eye and discharged her with instructions to continue using the antibiotic and to return in two days.

Plaintiff returned on October 24, 2014, with complaints of persistent eye swelling despite her continued use of eye drops and antibiotics. Dr. Borodoker observed that plaintiff's condition was worsening, drained pus from her left eye, and referred her to New York Eye & Ear Infirmary ("the Infirmary") for urgent treatment and evaluation. Plaintiff did not go immediately to the Infirmary as instructed.

On October 27, 2014, Dr. Borodoker telephoned the plaintiff and learned that she had not gone to the Infirmary's Emergency Room. Dr. Borodoker informed the plaintiff, in both the October 27, 2014 telephone conversation and during a second telephone conversation on or about October 28, 2014, that her condition was serious and that she urgently needed treatment. When deposed, the plaintiff testified that Dr. Borodoker had advised her that her condition could be life-threatening. Dr. Borodoker did not see the plaintiff again.

On October 28, 2014, the plaintiff was seen at the emergency room at Kings County Hospital ("KCH"), complaining of swelling in her left eye. The treating physician diagnosed her with orbital cellulitis, and obtained an ophthalmology consultation. The ophthalmologist, Dr. Eitam Burstein, observed swelling in the plaintiff's left upper and lower eye lids, a subcutaneous mass and an active discharge. Dr. Burstein planned to drain the abscess, but the plaintiff refused the procedure. She

was instead given a prescription for antibiotics and instructed to return to the Kings County Hospital ophthalmology clinic the following day. On her October 29, 2014 ophthalmology visit, Dr. Burstein again noted swelling, a subcutaneous mass in her eyelid and discharge. Biopsies revealed a squamous papilloma.³

On a November 5, 2014 follow-up appointment, Dr. Burstein noted serious inflammation and scheduled plaintiff for an operation to remove the eyelid mass on November 12, 2014. Plaintiff did not receive pre-operative clearance until November 6, 2014. However, when she presented to KCH on November 12, 2014, she complained of chest pain, the eye operation was cancelled and she was referred to the emergency room. The plaintiff was discharged following an EKG which revealed normal results. She did not return to KCH. When deposed, plaintiff conceded that a KCH physician had advised her that she could have cancer.

On December 12, 2014, the plaintiff visited her primary care physician, Dr. Sultana, who noted that plaintiff was suffering from left eye pain and swelling, that eye surgery was on hold because of plaintiff's elevated blood-sugar, and that the plaintiff was non-compliant with her medications. Dr. Sultana referred the plaintiff to Dr. Jerry Weinberg, an ophthalmologist, who saw plaintiff on December 23, 2014 and referred her to Dr. Brian Herschorn, who saw her on December 31, 2014. Dr. Herschorn observed massive enlargement of plaintiff's left eyelid with closure and restrictive movements of her extraocular muscles. His impression was a malignant

³ A benign tumor (MedScape, <https://emedicine.medscape.com/article/1192618-overview> [last visited May 21, 2018]).

tumor of plaintiff's left orbital bone. He recommended a CT scan, which was performed on January 13, 2015 and revealed an aggressive form of lymphoma and advanced conjunctival melanoma.

The plaintiff next visited Dr. Herschorn on January 16, 2015, at which time he informed her that she had cancer and that her left eye had to be removed to prevent the cancer from spreading to her other eye. His plan was to perform the operation on February 9, 2015. However, on January 26, 2015, the plaintiff presented to Dr. Sultana for a pre-operative clearance and could not receive clearance due to her elevated blood sugar levels.

The plaintiff had a follow-up appointment with Dr. Herschorn on March 16, 2015 but missed the appointment. After several follow-up calls from Dr. Herschorn's office, she returned for a follow-up visit on April 28, 2015. At that time Dr. Herschorn noted a history of eye cancer in plaintiff's left eye, as diagnosed four months earlier, and performed another biopsy. On May 1, 2015, Dr. Herschorn advised the plaintiff of the pathology results and referred her to a physician at Memorial Sloan Kettering Cancer Center ("Sloan Kettering") for further treatment, which he co-managed.

Plaintiff was admitted to Sloan Kettering from May 26, 2015 through June 5, 2015, during which time she underwent surgery to remove her left eye and surrounding structures. Pathology testing of the removed specimens disclosed that the plaintiff had an invasive, moderately differentiated, squamous cell carcinoma arising from her left orbit and measuring five centimeters in its greatest dimension. The malignant tumor had invaded her skin, subcutaneous soft tissue, skeletal muscle and periorbital soft

tissue. There was evidence of squamous cell cancer in two of the eight removed lymph nodes, as well as evidence of metastatic squamous cell carcinoma in one of the three intraparotid lymph nodes. Thereafter, plaintiff underwent radiation and chemotherapy at Sloan Kettering Medical Center.

The plaintiff commenced this action on September 11, 2015 alleging medical malpractice and lack of informed consent. Her Bill of Particulars alleges, *inter alia*, that the defendants were negligent in failing to diagnose plaintiff's ocular cancer. The defendants joined issue on September 29, 2015. On February 3, 2017, the defendants filed a third-party complaint seeking indemnification and contribution by the N.Y.C. Health and Hospitals Corporation, Kings County Hospital Center, Jinli Liu, M.D., and Twisha Oza, M.D.

THE PARTIES' CONTENTIONS

Motion of Dr. Borodoker and Eye Surgery & Aesthetics, P.C.

In support of their motion, the defendants rely upon the affirmation of Dr. Norman Medow, a Board Certified ophthalmologist. Dr. Medow avers that he reviewed the Bills of Particulars, the parties' deposition testimony and the plaintiff's medical records. He opines that on each of the patient's visits with Dr. Borodoker between September 25, 2013 and October 24, 2014, Dr. Borodoker performed appropriate examinations and properly recommended the removal of the symblepharon and biopsy, under anesthesia pending pre-operative clearance. Accordingly, he

concludes that the care provided by Dr. Borodoker and the P.C. was within accepted standards of medical practice and was not the proximate cause of plaintiff's injuries.

Based upon his review of plaintiff's medical records, Dr. Medow addresses certain medical treatment plaintiff received prior to her treatment with Dr. Borodoker. As early as March of 2009, Dr. Adolphus Anosike, an optometrist, recorded that plaintiff had a pigment on her left lower eyelid and complained of blurry vision in that eye. On August 3, 2009, February 22, 2010, and April 26, 2010, Dr. Anosike noted pigment and an ulceration in plaintiff's left lower lid. He referred plaintiff to Dr. Michael Ehrenhaus, who recommended on several occasions⁴ that a biopsy be performed. However, the plaintiff declined to undergo one. When the plaintiff stopped treating with Dr. Ehrenhaus she returned to Dr. Anosike who also recommended a biopsy. However, the plaintiff continued to refuse one and was seen again by Dr. Anosike on December 23, 2012, and April 22, 2013, but continued to refuse surgery or a biopsy.

Dr. Medow opines that Dr. Borodoker's treatment was not a proximate cause of the plaintiff's injuries because the plaintiff's condition could have been diagnosed and treated as early as 2010 if she had followed the advice of the physicians who treated her prior to Dr. Borodoker. Her failure to follow their advice allowed her eye cancer to grow and metastasize.

⁴ The exact dates of Dr. Ehrenhaus's treatment are unknown because his records were allegedly destroyed in a fire. However, plaintiff's deposition testimony is consistent with Dr. Anosike's records reflecting the treatment rendered by Dr. Ehrenhaus.

Dr. Medow further opines that during plaintiff's first visit to Dr. Borodoker on September 25, 2013, Dr. Borodoker appropriately recommended that the symblepharon required removal in stages and would be sent for biopsy, pending a pre-operative clearance from plaintiff's primary care physician. However, through no fault of Dr. Borodoker, plaintiff did not obtain clearance. Dr. Medow opines that the standard of care required pre-operative clearance prior to the surgery contemplated by Dr. Borodoker, due to the plaintiff's existing conditions which included diabetes, high blood pressure and anemia, and because the procedure would require anesthesia.

Dr. Medow also notes that after the plaintiff failed to obtain clearance, Dr. Borodoker's office appropriately scheduled a February 1, 2014 follow-up appointment. However, the plaintiff failed to appear. Following plaintiff's June 19, 2014, and August 29, 2014 appointments, Dr. Borodoker attempted to proceed with a biopsy on September 19, 2014, but the plaintiff failed to appear for the procedure and missed her follow-up appointment scheduled for September 22, 2014. The plaintiff did return in October of 2014, and did not go to the Infirmary for emergency treatment on October 24, 2014 as directed by Dr. Borodoker,

Dr. Medow opines that the delays in diagnosis which occurred after the plaintiff left Dr. Borodoker's care were not attributable to any departures by Dr. Borodoker. He notes, for example, that although the plaintiff was advised by the KCH physicians, on October 28, 2014, that she may have cancer, the biopsy scheduled for November 12, 2014 was cancelled due to the plaintiff's other medical conditions.

Based upon the plaintiff's history of refusing to follow the recommendations of Doctors Anosike, Ehrenhaus, Borodoker and Herschorn, her missed appointments and failures to obtain pre-operative clearance, Dr. Medow concludes that the delays in diagnosis and treatment were not attributable to negligence on the part of Dr. Borodoker. Alternatively, Dr. Medow opines that the delays in diagnosis during Dr. Borodoker's treatment did not cause plaintiff's injuries because had the plaintiff undergone a biopsy when it was first recommended by Dr. Borodoker in September of 2013, the cancer was, already so advanced that removal of plaintiff's left eye would still have been necessary.

The Plaintiff's Opposition

In opposition the plaintiff relies upon the redacted affirmation⁵ of a Board Certified ophthalmologist. The plaintiff's expert opines that Dr. Borodoker's care departed from accepted standards of medical practice, resulting in a delayed diagnosis of the cancer in the plaintiff's left eye. The expert contends that Dr. Borodoker noted only a minimal risk of malignancy when she first treated the plaintiff, and diagnosed her as suffering from a symblepharon. The expert asserts that Dr. Borodoker's diagnosis of a symblepharon and her suspicion of an infectious cause of plaintiff's symptoms were inconsistent with her simultaneous order of a biopsy. The expert

⁵ Although the name of plaintiff's expert is redacted, plaintiff offered to provide the court with the unredacted original for in camera inspection, and the defendants made no objection to the redaction in their reply papers (*see Turi v Birk*, 118 AD3d 979, 980 [2d Dept 2014]).

opines that Dr. Borodoker should have referred the plaintiff for a follow-up examination.

The expert asserts that Dr. Borodoker's office did not make adequate attempts to schedule a biopsy. In particular, the expert opines that Dr. Borodoker could have performed a biopsy without a pre-operative clearance, as this is often done and is an acceptable medical practice. The expert contends that the defendants had an obligation to make every effort possible to establish contact with the plaintiff and to proceed with a biopsy, even if a pre-operative clearance could not be obtained.

The plaintiff's expert notes that at plaintiff's follow-up visits of June 19, 2014, August 29, 2014, October 18, 2014, and October 22, 2014, Dr. Borodoker again diagnosed her with symblepharon. He contends that the tissue obtained by Dr. Borodoker when she drained plaintiff's eye should have been submitted for pathological examination, and opines that such an examination, likely, would have alerted Dr. Borodoker to the likelihood of malignancy.

Plaintiff's expert also opines that Dr. Borodoker underestimated the seriousness of the plaintiff's condition and failed to convey to the plaintiff a sufficient sense of urgency. Instead, plaintiff's expert contends, the defendants are inappropriately trying to shift blame onto the plaintiff for the delay in diagnosis. Plaintiff's expert concludes that there was a significant delay in diagnosis before any biopsy was performed, and that if the plaintiff's condition had been diagnosed earlier, her cancer would have been localized to the conjunctival surface and could have been treated with local excision with adjunctive cryotherapy or with local chemotherapy. The expert notes that such

treatment would have prevented some of plaintiff's injuries, including the loss of her left eye and the disfigurement of her face.

Dr. Cavusoglu's Reply

In reply, defendants note that Dr. Medow thoroughly reviewed Dr. Borodoker's office notes concerning plaintiff and based upon his review Dr. Medow affirms that each of those visits fell within the accepted standards of medical care. The defendants argue that Dr. Sultana's medical records further indicate that surgery could not be performed because the plaintiff could not obtain pre-operative clearance. For example, Dr. Sultana, in an April 9, 2014 report, notes that the plaintiff would be scheduled for left eye surgery once her blood-sugar levels were controlled. After Dr. Borodoker's treatment ended, there were further delays in diagnosis and treatment because the plaintiff could not proceed with surgery at KCH in November 2014, and could not obtain clearance for surgery by Dr. Herschorn in December 2014. Dr. Sultana, in a December 12, 2014 note, documented a finding that plaintiff's surgery was on hold because of her elevated blood-sugar levels. Dr. Sultana's records also include a January 19, 2015 letter documenting that the plaintiff was scheduled for a left eye biopsy and surgery at the Infirmary in February 2015, but needed pre-operative clearance to proceed. A January 26, 2015 note reflects that plaintiff's surgery was again on hold because of her elevated blood-sugar levels. Thus, defendants conclude, the opinion of plaintiff's expert is conclusory in that he or she ignores the medical evidence that pre-operative clearance was mandatory and that the delays in the

diagnosis and treatment of plaintiff's cancer were attributable to plaintiff's ongoing difficulties with obtaining clearance.

DISCUSSION

To make a prima facie showing of entitlement to summary judgment in a medical malpractice case, a defendant must establish through medical records and a competent expert's affidavit that the defendant did not deviate or depart from accepted medical practice in the treatment of the plaintiff, or that the defendant's conduct was not the proximate cause of the plaintiff's injury (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 1006 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 719 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 742 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Mathias v Capuano*, 153 AD3d 698, 699 [2d Dept 2017]; *Ward v Engel*, 33 AD3d 790, 791 [2d Dept 2006]). Conclusory statements which do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 726 [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 692

[2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841-842 [2d Dept 2008]).

"In opposition, a plaintiff then must submit material or evidentiary facts to rebut the defendant's prima facie showing that [the defendant] was not negligent in treating the plaintiff" or that the defendant's conduct was not a proximate cause of the plaintiff's injury (*Dolan v Halpern*, 73 AD3d 1117, 1118-1119 [2d Dept 2010] [internal quotation marks omitted]). "[P]laintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826-827 [2d Dept 2016] [internal quotation marks omitted]). Furthermore, "general allegations of medical malpractice that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a ... defendant's motion for summary dismissal" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]).

It is well settled that summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert opinions, which present a credibility question requiring a jury's resolution (*see e.g. Loaiza v Lam*, 107 AD3d 951, 953 [2d Dept 2013]; *Dandrea v Hertz*, 23 AD3d 332, 333 [2d Dept 2005]). However, opinion evidence must be based on facts in the record or personally known to the witness. ... An expert cannot reach his [or her] conclusion by assuming material facts not supported by evidence" (*Abrams v Bute*, 138 AD3d 179, 195-196 [2d Dept 2016] [internal quotation marks and citations omitted], *lv denied* 28 NY3d 910 [2016]).

An expert affidavit that is conclusory or speculative is insufficient to raise a triable issue of fact where the expert fails to set forth any basis for his or her opinion and fails to address the specific assertions made by the defendant's expert (*see, e.g., Rivers v Birnbaum*, 102 AD3d 26, 45 [2d Dept 2012]; *see generally Senatore v Epstein*, 128 AD3d 794, 795 [2d Dept 2015]; *Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012]).

Here, the defendants have established their entitlement to judgment through the expert opinion of Dr. Medow who, relying upon plaintiff's medical records, demonstrates that neither Dr. Borodoker nor the P.C. departed from good and accepted medical practice in their treatment of plaintiff (*see generally Brinkley v Nassau Health Care*, 120 AD3d 1287, 1289 [2d Dept 2014]; *Lahara v Auteri*, 97 AD3d 799 [2d Dept 2012]). Specifically, Medow opines that Dr. Borodoker appropriately recommended that the plaintiff's symblepharon be removed in stages and be sent for a biopsy. Dr. Medow opines that the standard of care required pre-operative clearance prior to Dr. Borodoker's contemplated surgery because of the plaintiff's diabetes, high blood pressure and anemia. However, as Dr. Medow notes, through no fault of Dr. Borodoker, the plaintiff failed to obtain medical clearance.

The plaintiff, in opposition, fails to rebut the defendants' *prima facie* showing. The opinions of plaintiff's expert are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice and are, therefore, insufficient to defeat defendants' motion for summary judgment (*see generally Melendez*, 76 AD3d at 297; *Fileccia v Massapequa Gen. Hosp.*, 99 AD2d 796 [2d Dept 1984], *affd for reasons stated below* 63 NY2d 639 [1984]). Plaintiff's

expert fails to identify any facts in the record, or any other basis for his opinion that accepted standards of care would have allowed Dr. Borodoker to perform a biopsy on the plaintiff, notwithstanding plaintiff's elevated blood-sugar levels and her inability to secure pre-operative clearance (*see generally Burns v Goyal*, 145 AD3d 952, 955 [2d Dept 2016], *lv granted* 145 AD3d 952 [2017]; *Abrams*, 138 AD3d at 195-196; *Senatore*, 128 AD3d at 795; *Rivers*, 102 AD3d at 45; *Bendel*, 101 AD3d at 663). Moreover, the record, including plaintiff's medical records and the parties' deposition testimony, establish that Doctors Anosike, Ehrenhaus and Borodoker each made numerous attempts to schedule and perform a biopsy on the plaintiff, and that each physician made numerous attempts to contact the plaintiff when she failed to follow up or appear for her scheduled appointments. In addition, when plaintiff began to treat with Dr. Borodoker, she repeatedly failed to obtain a pre-operative clearance so that a biopsy could be performed.

"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. The question of whether a physician owes a duty to the plaintiff is a question for the court, and is not an appropriate subject for expert opinion" (*Donnelly v Parikh*, 150 AD3d 820, 822 [2d Dept 2017] [internal quotation marks, citations, and alterations omitted]; *see also Burtman v Brown*, 97 AD3d 156, 162-163 [1st Dept 2012]). Further, a doctor is "entitled to rely on the treatment rendered to [the patient] . . . by specialists better equipped to handle [the patient's] condition" (*Perez v Edwards*, 107 AD3d 565, 566 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]; *see also Yasin v Manhattan Eye*,

Ear & Throat Hosp., 254 AD2d 281, 282 [2d Dept 1998]). Here, defendants advised plaintiff that she needed to have a biopsy performed, referred her to her primary care physician to seek pre-operative clearance, and, when she presented with worsening symptoms on October 24, 2014, referred her to the Infirmary on an emergent basis for further evaluation.

Thus, the defendants acted within accepted standards of medical care in referring the plaintiff to specialists (*see Middleton v Fuks*, 69 AD3d 689, 690 [2d Dept 2010]; *Peters v Goldner*, 50 AD3d 350, 350-351 [1st Dept 2008], *lv denied* 11 NY3d 710 [2008]; *Musiaro v Clarkstown Med. Assoc., P.C.*, 2 AD3d 698, 698-699 [2d Dept 2003]). Following the referral to the Infirmary, defendants' responsibility to the plaintiff ended as her care had been transferred to another physician (*see Parrilla v Buccellato*, 95 AD3d 1091, 1093 [2d Dept 2012]; *Arias v Flushing Hosp. Med. Ctr.*, 300 AD2d 610, 611 [2d Dept 2002]). Defendants had no further, independent duty to assess the treatment rendered to plaintiff by subsequent physicians (*see generally Burtman*, 97 AD3d at 164; *Dombroski v Samaritan Hosp.*, 47 AD3d 80, 85 [3d Dept 2007]).

Additionally, plaintiff's medical records and her deposition testimony establish that she was timely and adequately informed of the necessity of a biopsy, but consistently refused to have one performed (*see Cintron v Montefiore Med. Ctr.*, 92 AD3d 540 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *Melnik-Mirzakhani v Tavdy*, 84 AD3d 1039, 1040 [2d Dept 2011]; *Paulch v Rudick*, 2011 NY Slip Op 31967[U], *16 [Sup Ct, NY County 2011]). In declining the recommendations of her

doctors, plaintiff accepted a substantial part of the risk of proceeding without prompt treatment (*see Charell v Gonzalez*, 251 AD2d 72, 73 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998]).

The third-party complaint of Dr. Borodoker and the P.C. against N.Y.C. Health and Hospitals Corporation, Kings County Hospital Center, Jinli Liu, M.D., and Twisha Oza, M.D., only seeks indemnification and contribution from the third-party defendants and, thus, is strictly derivative of plaintiff's claims against Dr. Borodoker and the P.C. Thus, as Dr. Borodoker and the P.C. are entitled to summary judgment, their claims against the third-party defendants must likewise be dismissed. Accordingly, it is:

ORDERED, that the motion of Eye Surgery & Aesthetics, P.C., and Natalie Borodoker, M.D. is granted and the complaint of plaintiff Kettelie Pierre-Canel is dismissed; and it is further

ORDERED, that the third-party complaint of Eye Surgery & Aesthetics, P.C., and Natalie Borodoker, M.D. against N.Y.C. Health and Hospitals Corporation, Kings County Hospital Center, Jinli Liu, M.D., and Twisha Oza, M.D. is dismissed as moot.

FILED

JUL 16 2018

KINGS COUNTY CLERK'S OFFICE

ENTER

J.S.C.

HON. GLORIA M. DABIRI
J.S.C.