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| Gadomski v Ficazzola |
| 2019 NY Slip Op 34771(U) |
| January 28, 2019 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 67534/2016 |
| Judge: Terry Jane Ruderman |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STEPHEN R. GADOMSKI and BELLE GADOMSKI,

Plaintiffs,

-against-

DECISION and ORDER
Sequence Nos. 1
Index No. 67534/2016

MICHAEL FICAZZOLA, M.D., GREATER N.Y. UROLOGY, GREATER NEW YORK UROLOGY, PLLC, ADVANCED UROLOGY CENTERS OF NEW YORK, ADVANCED UROLOGY CENTERS OF NEW YORK, a Division of INTEGRATED MEDICAL PROFESSIONALS PLLC and INTEGRATED MEDICAL PROFESSIONALS, PLLC,

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with defendants' motion pursuant to CPLR 3212 for summary judgment dismissing the complaint as all of the defendants:

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion, Affirmation, Exhibits A - L | 1 |
| Affirmation in Opposition, Exhibits A - G | 2 |
| Reply Affirmation | 3 |

This medical malpractice action alleges a failure to timely diagnose and treat prostate cancer in plaintiff Stephen Gadomski.¹

Plaintiff first presented to the office of defendant Michael Ficazzola, M.D. on September 28, 2005, having been referred due to an elevated PSA level of 4.55. Plaintiff also complained of

¹ Plaintiff Belle Gadomski's claims are solely derivative in nature; the references to "plaintiff" that follow will refer to plaintiff Stephen Gadomski.

urinary urgency and frequency. Dr. Ficazzola performed a prostate examination, which revealed no nodules, and was significant for prostatitis, for which the antibiotic Levaquin was prescribed. Plaintiff returned to Dr. Ficazzola on October 19, 2005, and reported that the medication had helped the urinary complaints.

Dr. Ficazzola performed repeat PSA tests on plaintiff in subsequent examinations, and three biopsies of the prostate was performed between July 30, 2008 and October 20, 2010. The results of each of those biopsies showed chronic inflammation, but no cancer.

Following a visit on January 14, 2011, Dr. Ficazzola ordered a saturation biopsy, due to a rise in plaintiff's PSA levels. The results found benign prostatic hyperplasia ("BPH"), and marked inflammation, and no cancer. On July 15, 2011, despite a further rise in plaintiff's PSA level, Ficazzola did not order another biopsy, since it appeared that the elevated PSA levels were due to non-cancerous conditions. On October 21, 2011, Dr. Ficazzola prescribed Avodart to shrink the prostate, relieve urinary symptoms and address the elevated PSA levels.

When plaintiff returned to Dr. Ficazzola on April 20, 2012, his PSA had gone down to 6.91. In the year that followed, his PSA continued to decrease while he was taking Avodart; on May 3, 2013 his PSA was 5.2. However, on November 15, 2013, his PSA level increased to 7.9, and it further increased to 8.6 as of December 27, 2013. At this point, Dr. Ficazzola recommended an MRI followed by a biopsy. An MRI was performed on January 6, 2014, and its finding included indications "of moderate suspicion for prostate cancer" and recommendations for core biopsies in the left apex and midperipheral zone. However, by the time Dr. Ficazzola had those results, plaintiff was in Hawaii, where he was planning to stay for three months.

According to plaintiff, when Dr. Ficazzola called to tell him the results of the MRI and

that a biopsy was necessary, plaintiff proposed either coming home early to have a biopsy performed, or having a biopsy performed in Hawaii. Plaintiff testified at his deposition that Dr. Ficazzola responded that it was not necessary to do either, and that the biopsy could be done when he returned in three months. According to plaintiff, at no time during their telephone conversation did Dr. Ficazzola inform him that there was any urgency to having the biopsy performed.

Dr. Ficazzola's recollection of the January 2014 telephone conversation was that plaintiff said he would be in Hawaii for three to four weeks, and he told plaintiff to schedule the biopsy when he returned from his vacation. The biopsy was first scheduled for April 25, 2014, at which time, because plaintiff was then suffering from the flu, it was rescheduled for May 30, 2014. This biopsy found cancer of the prostate in one core, reported to be a Gleason 8, which plaintiff's expert explains is an aggressive form of prostate cancer. At an office visit on June 11, 2014, Dr. Ficazzola discussed his treatment proposals with plaintiff.

Plaintiff then sought treatment at Memorial Sloan Kettering Cancer Center, where he saw Dr. Vincent Laudone on July 3, 2014, and underwent surgery on August 20, 2014 to remove the entire prostate. During that procedure it was found that there had been "significant extracapsular extension on the left side of the prostate." After plaintiff's PSA levels were found to be .58 on October 23, 2014 and .66 on December 16, 2014, his treating physicians determined that he would require adjuvant therapy and radiation therapy.

Plaintiff commenced this medical malpractice action on November 22, 2016, against Dr. Ficazzola, and the companies with whom he is or was associated.

In moving for summary judgment, defendants rely on the expert affirmation of Samir

Taneja, M.D., who asserts that Dr. Ficazzola's care and treatment of plaintiff was consistent with the applicable standard of care, that the delay before the May 30, 2014 biopsy was not attributable to any negligence by Dr. Ficazzola, and that plaintiff's treatment, prognosis and outcome did not likely change based on that delay.

In opposition, plaintiff submits the affirmation of his expert, who offers the opinion, to a reasonable degree of medical certainty, that Dr. Ficazzola departed from accepted standards in that once the abnormal MRI scan results were reported, and in view of plaintiff's rising PSA levels while he was taking Avodart, he failed to immediately inform plaintiff that a biopsy should be performed as soon as possible. While acknowledging Dr. Ficazzola's testimony that plaintiff said he would be away for several weeks, not several months, plaintiff's expert observes that there is no documentation in Dr. Ficazzola's chart that he ever told plaintiff that it was imperative that the biopsy be performed. The expert added that the rise in PSA while plaintiff was on Avodart indicated that this was potentially an aggressive form of prostate cancer, making it medically necessary for Dr. Ficazzola to advise plaintiff of the risks associated with a delay in having the biopsy performed. Further, the expert added that at the time that the biopsy was cancelled and rescheduled, Dr. Ficazzola should have impressed on plaintiff the need to have the biopsy performed as soon as possible, yet the doctor's chart contains no indication of any such conversation. As a result of these claimed departures, according to plaintiff's expert, the cancer spread outside of the prostate capsule into the surrounding tissue, necessitating additional forms of treatment, including radiation and adjuvant therapy, in addition to the prostatectomy, to ensure that all of the cancer cells were eradicated.

In reply, defendants argue that plaintiff's expert fails to establish that plaintiff would have

avoided the need for the subsequent treatment if the prostate surgery had been performed earlier; they also claim that plaintiff has not established how the extracapsular extension can be attributed to malpractice by Dr. Ficazzola.

Analysis

The elements of proof in a medical malpractice action are a deviation or departure from accepted practice, and evidence that the departure was a proximate cause of injury or damage (*see Thompson v Orner*, 36 AD3d 791 [2d Dept 2007]). On a motion for summary judgment, the defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice, or the absence of injury as a result of any alleged malpractice (*see Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). With the affirmation of Dr. Taneja, Dr. Ficazzola's deposition testimony and the submitted medical records, defendants have established a prima facie showing of either the absence of any departure from good and accepted medical practice, or the absence of injury as a result of any malpractice.

"A plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing" (*Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dept 2013] [internal quotation marks and citation omitted]). "Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]; *see also Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008] [citing *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]]).

While conclusory allegations, not supported by competent evidence, are insufficient to

defeat summary judgment (*see DiMitri v Monsour*, 302 AD2d 420, 421 [2d Dept 2003]), plaintiff's expert's opinion was no more or less conclusory than that of defendants' expert, Dr. Taneja. Both, upon review of plaintiff's medical records, focused on the delay between the January 6, 2014 MRI and the May 20, 2014 biopsy. Both offered their expert opinions as to whether the delay had a negative impact, either on the growth of the cancer, or the need for additional treatment beyond the prostatectomy. While Dr. Taneja opined that the treatment plaintiff needed was not altered by that delay, it was the opinion of plaintiff's expert that the extracapsular growth was attributable to the delay, and that due to that growth, additional treatment became necessary that would not have been needed had Dr. Ficazzola advised plaintiff of the risks associated with a delay in having the biopsy performed. According to Dr. Taneja, it was within the standard of care to have a patient such as plaintiff wait several months before undergoing a biopsy following the MRI report, while according to plaintiff's expert, the applicable standard of care required that Dr. Ficazzola to impress upon plaintiff the need for alacrity in scheduling the biopsy after the January 2014 MRI report. While defendants point out in their reply affirmation that the extracapsular extension of the cancer could have occurred during the delay between the May 30, 2014 biopsy and the August 20, 2014 surgery, this possibility does not negate the reasoning of plaintiff's expert; it affects the weight of the argument, not its admissibility. The same is true of the opinion of plaintiff's expert regarding whether adjuvant therapy would have been needed regardless of when the biopsy and subsequent prostatectomy were performed; its value is not eliminated based on Dr. Taneja's contrary opinion that the additional therapy would have been called for in any event, which he based on probability calculations.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on Tuesday, March 12, 2019 at 9:15 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 28, 2019


HON. TERRY JANE RUDERMAN, J.S.C.