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| Lee v Curtin |
| 2021 NY Slip Op 30425(U) |
| February 11, 2021 |
| Supreme Court, New York County |
| Docket Number: 805108/2012 |
| Judge: Judith Reeves McMahon |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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CHRISTINE LEE, KENNETH LEE,

Plaintiff,

- v -

JOHN CURTIN, BEVERLY WANG, LORRAINE PAN,
DOROTA PAPLOLEK, NEW YORK UNIVERSITY MEDICAL
CENTER, NEW YORK UNIVERSITY LANGONE MEDICAL
CENTER

Defendant.

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INDEX NO. 805108/2012

MOTION DATE 02/10/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192

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

Defendants' motion for an Order, pursuant to C.P.L.R. § 3212, granting summary judgment on behalf of John P. Curtin, M.D. and NYU Langone Hospitals s/h/a New York University Medical Center and New York University Langone Medical Center ("NYU") and dismissing all claims against said Defendants is granted as detailed herein.

Plaintiffs allege Defendants were negligent in the performance of a radical hysterectomy with lymph node dissection on Plaintiff Decedent Christine K. Lee on February 8, 2010, including making an excessively large incision, failing to excise all of the cancerous tissue specifically at the anterior vaginal cuff due to the negligent placement of a Zepplin surgical clamp, failing to examine the surgical specimen to confirm the appropriate amount of tissue was removed, improperly interpreting the pathological specimen and determining that the margins were clear of cancerous cells, and failing to recommend adjuvant therapy, i.e., chemotherapy and/or radiation, post-operatively.

Plaintiffs also allege negligence in the post-operative period from February 8-11, 2010 including inter alia negligent transport of the Decedent from the PACU to the medical floor, failing to recognize the Decedent's allegedly poor post-operative condition, failing or delaying in ordering a complete blood count (CBC), failing to change a Foley Catheter and causing it to remain

indwelling for too long, and failing to make individualized care changes to the Decedent's treatment plan including administering a blood transfusion earlier and prescribing prophylactic medications including anti-coagulation medication and antibiotics. Following the Decedent's discharge, Plaintiffs allege that when the Decedent returned to the NYU Emergency Department (ED) on February 13, 2010, that NYU was also negligent in failing to return Decedent's phone call, causing an excessively long presentation to the ED, stationing Decedent too close to the door on a cold day and not providing "measures of comfort", and engaging in unnecessary tests. As a result of the aforementioned, Plaintiffs allege that Decedent was caused to experience pain and suffering, cancer recurrence, and ultimately her death on April 23, 2015.

This medical malpractice action was commenced by the filing of a Summons and Verified Complaint on or about May 23, 2012.

Issue was joined by service of Verified Answers on behalf of Movants on August 9, 2012. Plaintiffs served Verified Bills of Particulars as to Movants on October 5, 2012.

Prior to her death, Plaintiff Decedent testified at her deposition that her husband, Plaintiff Dr. Kenneth Lee, acted as her treating gynecologist following the couple's move to Huntingdon, PA in 1981, through to and including the time of her cancer diagnosis in 2010, following Dr. Curtin's February 1, 2010 surgery and through to and including the time to its subsequent recurrence.

Plaintiff Dr. Lee testified that his wife had no other treating gynecologist.

On August 17, 2016, Plaintiff Dr. Lee testified, in the presence of Justice Alice Schlesinger, that he either did not keep or lost the records of the treatment he provided his wife prior to 2010.

On November 9, 2016, Justice Schlesinger granted an application to dismiss this matter without prejudice.

On November 15, 2017, one year later, Plaintiff filed an Order to Show Cause to restore the action. On June 6, 2018, Justice Joan Madden issued a Decision and Order vacating the November 10, 2016 Order and restoring the matter to the Court's calendar and amending the caption to substitute the Estate of Christine K. Lee, for Decedent.

As part of Plaintiffs' November 2017 Order to Show Cause, Plaintiffs submitted an Affidavit of Merit from Dr. Richard Nemiroff.

Almost a year after this matter was restored to the Court's calendar, Plaintiff Dr. Lee proceeded as self-represented and served Supplemental Bills of Particulars as to Defendants on October 10, 2018.

On or about January 28, 2019, Plaintiff Dr. Kenneth Lee, was deposed. However, the deposition did not finish and was continued to completion on or about February 28, 2019.

On or about March 29, 2019, Defendant Dr. Curtin was deposed.

Plaintiffs discontinued with prejudice against Defendant Dorota Popolek, M.D., on or about January 7, 2020, and so Movants are the only remaining Defendants in this case.

Defendants now move for summary judgment to dismiss Plaintiffs' case as against them.

"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 alleged departure from accepted standards of medical practice. To defeat such a showing, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges general allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice." *Frye v. Montefiore Med. Ctr.*, 70 A.D.3d 15, 888 N.Y.S.2d 479 (N.Y.A.D. 1st Dept. 2009).

"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 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the affirmations of Dr. Gary L. Goldberg and Dr. Lora Hedrick Ellenson. *See Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 50 N.Y.S.3d 395 (N.Y.A.D. 1st Dept. 2017); *See also Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants' motion, Dr. Goldberg opined that, "It is my opinion, to a reasonable degree of medical certainty, that Dr. Curtin appropriately assessed the patient, properly discussed the treatment options, including surgery, with the patient and ordered/obtained the appropriate radiographic imaging."

Dr. Goldberg also opined that “it is my opinion that appropriate pre-operative imaging, including CT and PET scans were performed prior to the surgery...It is my opinion that there no other radiographic studies were indicated pre-operatively and that there is no causation relatable to any pre-operative imaging.”

Finally, Dr. Goldberg opined that, “it is my opinion that plaintiff’s allegations regarding the decedent being in the PACU for too long are without merit and the standard of PACU care put forth by plaintiff actually contradicts good and accepted medical practice.”

In support of Defendants’ motion, Dr. Ellenson opined that, “the medical records, the original pathology slides, pathology reports, and the deposition testimony establish that the care and treatment rendered to the decedent by the Defendants at all times comported with the standard of care.”

Dr. Ellenson further opined that, “It is my opinion that the plaintiff’s reliance on the 0.4 cm of anterior vaginal cuff as representative of the totality of the margin submitted is wholly misguided. As noted above, this measurement was taken after the tissue was resected and placed in formalin, both of which result in shrinkage of the tissue. Also, utilizing this measurement alone completely ignores the fact that an additional 2.8 cm of anterior vaginal cuff margin was also excised and assessed. Moreover, it is my opinion, based on my review of the slides and to a reasonable degree of medical certainty, that the continuity of the entire tumor as well as the soft tissue margin into the exocervix and vaginal cuff were represented in the slides.”

Finally, Dr. Ellenson concluded that, “the cancerous tumor was entirely excised, the boundaries/edges of the tissue were free of cancer cells, and thus, the margins were clear, and there was no evidence of lymphovascular involvement.”

“Once this showing has been made, 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. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Plaintiffs did oppose Defendants’ motion, but not submit an Affirmation from an expert as part of the opposition to Defendants’ motion. Plaintiffs did re-submit the Affidavit of Merit of Dr. Richard L. Nemiroff, which had been submitted along with Plaintiffs’ Order to Show Cause to restore this matter in November 2017, but that Affidavit was not responsive to this motion or the opinions of Defendants’ experts. In fact, that Affidavit of Merit pre-dates Plaintiffs’ Supplemental

Bill of Particulars, pre-dates the deposition of Plaintiff Dr. Lee, and pre-dates the deposition of Defendant Dr. Curtin.

In the Affidavit of Merit, Dr. Nemiroff stated that, “the physicians performing the surgery failed to meet and exercise the minimal standards of care, skill, diligence and/or judgment, and a lack of requisite skill and knowledge, ordinarily possessed by a physician, including an average physician, practicing surgical oncological gynecology and obstetrics, in New York City.” However, the Affidavit of Merit of Dr. Nemiroff does not address the issue of causation, nor did it address the opinions of Dr. Goldberg and Dr. Ellenson as the Affidavit of Merit was written almost three years prior to Defendants’ Experts’ opinions being written.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact. In a medical malpractice action, this burden is met by a medical expert’s demonstration that the defendant’s actions were a departure from the accepted standard of care in the medical community, and a proximate cause—i.e., a substantial factor—in bringing about the injury.” *Melendez v. Parkchester Med. Servs., P.C.*, 76 A.D.3d 927, 908 N.Y.S.2d 33 (N.Y.A.D. 1st Dept. 2010); *See also Yankus v. Kelly*, 72 A.D.3d 1068, 900 N.Y.S.2d 120 (N.Y.A.D. 2nd Dept. 2010).

“Generally, the opinion of a qualified expert that a plaintiff’s injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants. Additionally, a plaintiff’s expert’s opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered. However, 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.” *Foster-Sturup v. Long*, 95 A.D.3d 726, 945 N.Y.S.2d 246 (N.Y.A.D. 1st Dept. 2012); *See also DiLorenzo v. Zaso*, 148 A.D.3d 1111, 50 N.Y.S.3d 503 (N.Y.A.D. 2nd Dept. 2017).

Without expert testimony to address Dr. Goldberg’s and Dr. Ellenson’s opinions, Defendants’ motion must be granted.

It must be noted that the Supplemental Expert Affirmation submitted by Defendants on Reply was not read or considered by this Court in deciding this motion, as it is not permitted to introduce new evidence on reply.

ORDERED that Defendants Dr. Curtin and NYU's motion for summary judgment is granted; and it is further

ORDERED that Plaintiffs' allegations against Defendants John P. Curtin, M.D. and NYU Langone Hospitals s/h/a New York University Medical Center and New York University Langone Medical Center are 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.

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| <u>2/11/2021</u> DATE | <input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | S// <hr/> JUDITH REEVES MCMAHON, J.S.C. | <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |
| CHECK ONE: APPLICATION: CHECK IF APPROPRIATE: | | | |