

Sheiffer v Fox

2021 NY Slip Op 32363(U)

November 19, 2021

Supreme Court, New York County

Docket Number: Index No. 162180/2015

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

-----X

JAIME SHEIFFER,

Plaintiff,

- v -

NATHAN FOX, M.D., ADRIENNE BARASCH, M.D.,
SUSAN PESCI, M.D., SAMUEL BENDER, M.D.,
MICHAEL SILVERSTEIN, M.D., STEPHANIE MELKA,
M.D., NEIL GRAFSTEIN, M.D., CIARA MARLEY, M.D.,
PAUL CHOI, M.D., JERRY BLAIVAS, M.D., MATERNAL FETAL
MEDICINE ASSOCIATES, PLLC, THE MOUNT SINAI
HOSPITAL, NEW YORK UROLOGICAL ASSOCIATES, P.C.,
EAST RIVER IMAGING, P.C., and UROCENTER OF NEW
YORK,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 129, 131, 133, 142 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

**DECISION + ORDER ON
MOTION**

In this action to recover damages for medical malpractice, based on alleged departures from good and accepted medical practice and failure to obtain the plaintiff's informed consent, the defendants Paul Choi, M.D., and East River Imaging, P.C. (together the East River defendants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff does not oppose the motion. The motion is granted.

The facts of this dispute are set forth in some detail in this court's November 19, 2021 order disposing of MOTION SEQUENCE 002. In short, the plaintiff developed a vesicovaginal fistula in the months following a March 2014 cesarian section and an April 2014 bladder repair operation performed by the defendant Neil Grafstein, M.D. Although cystograms performed by

Grafstein were negative for the presence of any fistula, the plaintiff began to experience accidental urinations and eventually suffered from pain and discomfort in her abdomen. She presented to the defendants Ciara Marley, M.D., and New York Urological Associates, P.C. (together the NYUA defendants), on May 9, 2014, who conducted a physical examination and performed a methylene blue test to rule out dysplasia, or pre-cancerous lesions. The NYUA defendants referred the plaintiff to the East River defendants to conduct a CT urogram, which consisted of scans of the abdomen and pelvis, but did not conduct or refer the plaintiff to the East River defendants for a new CT cystogram. The abdominal and pelvic CT urogram, which the East River defendants conducted on May 10, 2010, was negative for any adverse conditions, and the East River defendants reported that conclusion to the NYUA defendants. The NYUA defendants thereafter conducted a cystogram, which they interpreted as negative for vesicovaginal fistula. On June 19, 2014, the plaintiff ultimately was diagnosed by Dr. Jaspreet Sandhu with vesicovaginal fistula, and underwent repair surgery on June 28, 2014.

In her bill of particulars as to the East River defendants, the plaintiff alleged that they departed from good and accepted medical practice by negligently interpreting the CT scan of the abdomen and pelvis performed on May 10, 2014, negligently failing to diagnose a vesicovaginal fistula, and negligently failing to recommend a CT cystogram. The plaintiff also set forth a boilerplate particularization of the East River defendants' alleged failure to obtain her informed consent to the CT scan, but did not particularize what risks and alternatives should have been communicated to her or how she was injured by any such failure.

In support of their motion, the East River defendants relied upon the pleadings, the bill of particulars, relevant medical and hospital records, relevant scans, the parties' deposition transcripts, the expert affirmation of board-certified radiologist Zina Ricci, M.D., who is licensed to practice medicine in New York, and the expert affirmation that had been submitted by the NYUA defendants by board-certified urologist Robert Waldbaum, M.D., in support of their summary judgment motion.

Dr. Ricci asserted that Choi properly performed and interpreted the CT urogram and that she agreed that there was no evidence on the scan of vesicovaginal fistula. She further asserted that the recommendation of other diagnostic tests for the presence of vesicovaginal fistula was beyond Choi's expertise, and beyond the procedure he was tasked with performing. As Dr. Ricci explained, this claim was premised

“on a misguided understanding of a radiologist's role in the context of providing medical care and treatment. A radiologist is a consultant whose role is to perform and interpret the radiology studies ordered by a referring physician. A radiologist typically does not perform physical examinations of patients and it is within the standard of care for a radiologist to rely on the physical examination of the clinician who referred the patient for the study. Furthermore, a radiologist is entitled to defer to the referring physician regarding the need for a particular radiology study. It is not the role of a radiologist to second-guess a referring doctor's order. It is within the standard of care to defer to the referring clinician as to whether any further diagnostic testing is indicated. As such, it is my opinion to a reasonable degree of medical certainty that there is no merit to plaintiff's claim that Dr. Choi and ERMI failed to recommend additional diagnostic testing, such as a CT cystogram.”

Dr. Ricci further concluded that the East River defendants did not deviate from good and accepted practice merely because they were not in possession of all of the plaintiff's prior medical records.

The East River defendants established their prima facie entitlement to judgment as a matter of law by demonstrating, with an expert opinion, that they did not depart from good and accepted medical practice (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). They also established, prima facie, that they cannot be held liable for failing to obtain the plaintiff's informed consent to the CT scan because the procedure did not “involve invasion or disruption of the integrity of the body” (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], *see Lewis v Rutkovsky*, 153 AD3d 450, 456 [1st Dept 2017]). Since the plaintiff declined to oppose the motion, the East

River defendants must be awarded summary judgment dismissing the complaint insofar as asserted against them.

Accordingly, it is

ORDERED that the motion of the defendants Paul Choi, M.D., and East River Imaging, P.C., for summary judgment dismissing the complaint insofar as asserted against them is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendants Paul Choi, M.D., and East River Imaging, P.C.

This constitutes the Decision and Order of the court.

11/19/2021
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE