

**Graham v Pecker**

2023 NY Slip Op 33304(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805154/2019

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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MARK GRAHAM, VICTORIA GRAHAM,

Plaintiff,

- v -

MARK PECKER, WEILL CORNELL MEDICINE, THE NEW YORK AND PRESBYTERIAN HOSPITAL

Defendant.

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INDEX NO. 805154/2019

MOTION DATE 05/11/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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 SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing papers in this medical malpractice action, defendants Mark Pecker, MD ("Dr. Pecker"), Cornell University s/h/a Weill Cornell Medicine ("Cornell"), and the New York and Presbyterian Hospital ("NYPH") and collectively, the Defendants), move for summary judgment dismissing all claims, with prejudice, in the plaintiff's complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

Defendants Cornell and NYPH owned and operated a health care facility that provided medical care to the plaintiff Mark Graham. Defendant Dr. Pecker was an employee of defendant Cornell and the Primary Care physician of plaintiff from January 2016 and through April 9, 2019. Plaintiff's claims in this case concern an alleged failure to perform prostate cancer screening at office visits with Dr. Pecker from January 2016 through April 9, 2019.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (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*, 2-, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24), or by establishing that the plaintiff was not injured by such treatment (*see 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 at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]).

Once defendant establishes prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

In support of their motion for summary judgment, defendants submit the affirmation of Dr. Elias G. Sakalis, a physician board-certified Internal Medicine. Dr. Sakalis' opinion is

based on his education, training, and experience as a practicing Internist, as well as his review of the Bills of Particulars, the relevant medical records of the patient, the deposition testimony taken in this matter, as well as the relevant guidelines and literature.

Dr. Sakalis explained that the vast majority of Internists and Primary Care physicians in the United States, including Dr. Sakalis and Dr. Pecker, rely upon the United States Preventative Services Task Force Guidelines (the “USPSTF Guidelines”) for guidance on prostate cancer screening. The USPSTF Guidelines were created by the USPSTF Committee, an independent panel comprised of international experts who promote evidence-based medicine and make recommendations on preventative care services. The USPSTF Guidelines in particular discuss whether “PSA testing” should be performed. “PSA” or “prostate-specific antigen” is a protein produced by normal, as well as malignant, cells of the prostate gland. (Id.) The PSA test can detect high levels of PSA, which may indicate the presence of prostate cancer. At the time of the plaintiff’s office visits with Dr. Pecker on January 29, 2016, December 9, 2016, and September 14, 2017, prostate-specific antigen (“PSA testing”) was not indicated and Dr. Pecker did not perform PSA testing. The 2012 “USPSTF” Guidelines were in effect during the time of these visits, and indicated that the benefits of PSA-based screening for prostate cancer did not outweigh the harms, and recommended against PSA testing. Dr. Sakalis found that it was appropriate for Dr. Pecker not to perform PSA testing during these visits since the plaintiff’s complaints upon physical examination indicated no findings concerning prostate cancer. Similarly, the 2012 USPSTF Guidelines were still in effect when the plaintiff was seen in Dr. Pecker’s office by Nurse Practitioner Marion on February 14, 2018, for flu-like complaints. As such, Dr. Sakalis found that it was appropriate for PSA testing not to have been performed.

Dr. Sakalis also finds that the 2018 USPSTF guidelines were in effect at the time of plaintiff's office visits on December 28, 2018, February 19, 2019, and April 9, 2019. The 2018 Guidelines did not recommend PSA testing either, but instead suggested that a clinician discuss with the patient the benefits and harms of PSA testing, and then determine whether to perform PSA testing based upon the patient's values and preferences.

Notwithstanding plaintiff's diagnosis of metastatic cancer in March 2019, Dr. Sakalis found that it is almost certain that plaintiff had advanced prostate cancer at the time of his December 2018 visit, and plaintiff's diagnosis would not have changed even if a PSA test had been performed.

Based on his review of the record cited herein, Dr. Sakalis opines, to a reasonable degree of medical certainty, that Dr. Pecker rendered appropriate medical care to plaintiff, and appropriately performed prostate cancer screening in accordance with the USPSTF guidelines, and there was no departure leading to a failure to timely diagnose plaintiff's prostate cancer.

In the case at bar, the Court finds that defendants failed to establish their entitlement to summary judgment as a matter of law. Dr. Sakalis' opinion that the 2012 USPSTF guideline imposed no duty upon him to raise or discuss PSA testing unless the patient himself raised the issue, lacks legal merit since the guidelines are not a standard of care to be adhered to by a medical practitioner. "Generally, the standard of care for physicians is one established by the medical profession itself" (*Spensieri v Lasky*, 94 NY2d 231, 238 [1999]; see *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255 [1968]). Further, it is well settled that guidelines are a factor to be considered with respect to the standard of care, but they are "recommendations regarding treatment, and...compliance with Guidelines [does] not, in and of itself, constitute good and accepted medical practice" (*Halls v Kiyici*, 104 AD3d 502, 504 [1st Dept 2013]). Similarly,

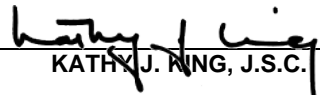
defendants' reliance on the 2018 guidelines for plaintiff's office visits on December 28, 2018, February 19, 2019, and April 9, 2019, are legally insufficient to establish entitlement to judgment as a matter of law.

Since defendants failed to establish summary judgment as a matter of law, the burden did not shift to plaintiff to rebut defendants' prima facie showing.

Accordingly, it is hereby

**ORDERED**, that defendants' motion seeking to dismiss plaintiff's complaint, pursuant to CPLR 3212, is denied in its entirety.

This constitutes the Decision and Order of the Court.

<u>9/21/2023</u> DATE	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED	 KATHY J. KING, J.S.C.	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE
CHECK ONE:					
APPLICATION:					
CHECK IF APPROPRIATE:					