

Welch v Queens-Long Is. Med. Group, P.C.
2015 NY Slip Op 31635(U)
August 28, 2015
Supreme Court, Suffolk County
Docket Number: 10-35043
Judge: Jerry Garguilo
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CAL No. 15-00283MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-15-15

ADJ. DATE _____

Mot. Seq. #001- MG

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Plaintiff,

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- against -

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QUEENS-LONG ISLAND MEDICAL GROUP,
P.C., BHARATHI KAMINENI, M.D., HAROLD
GRAFSTEIN, M.D., and JATINDER SINGH,
M.D.,

Defendants.
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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other 19-21 (affirmation and stipulation of discontinuance); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendant Harold Grafstein, M.D. for summary judgment dismissing the complaint as against him is granted.

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This is a medical malpractice action for alleged negligent treatment that occurred during a course of treatment from approximately June 2007 continuing to approximately September 2008, and for lack of informed consent. Plaintiff first began her treatment with defendant Harold Grafstein, M.D., (“Dr. Grafstein”), a Board Certified Obstetrician and Gynecologist, on April 14, 2008 when she saw him for an initial annual gynecological visit. She continued to receive treatment from him through July 2008 for irregular uterine bleeding and then returned in January 2009 for evaluation of elective removal of her ovaries. She was diagnosed in July 2008 with breast cancer in her right breast. Plaintiff alleges that, among other things, Dr. Grafstein failed to timely diagnose her cancer.

Defendant Grafstein now moves for summary judgment dismissing the first cause of action for negligent treatment against him on the grounds that he appropriately evaluated and treated plaintiff; that there is no merit to the allegation that he failed to timely diagnose breast cancer; and that his appropriate treatment was not a proximate cause of plaintiff’s alleged injuries. In addition, he moves for summary judgment dismissing the second cause of action for lack of informed consent on the ground that there is no claim that any procedure caused an injury to plaintiff. In support of his motion, Dr. Grafstein submits the affirmation of his expert Carol A. Livoti, M.D.; the summons and complaint; his answer; the original and amended bills of particulars with respect to Dr. Grafstein; the deposition transcripts of Dr. Grafstein, plaintiff, and Bharathi Kamineni, M.D.; and plaintiff’s medical records from Queens-Long Island Medical Group, P.C.

“A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, prima facie, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff’s injury” (*Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 945, 5 NYS3d 162 [2d Dept 2015]; see *Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 649, 996 NYS2d 155 [2d Dept 2014]; *Berthen v Bania*, 121 AD3d 732, 732, 994 NYS2d 359 [2d Dept 2014]; see also *Niedra v Mt. Sinai Hosp.*, 129 AD3d 801, 11 NYS3d 636, 638 [2d Dept 2015]; *Harris v Saint Joseph’s Med. Ctr.*, 128 AD3d 1010, 1012, 9 NYS3d 667 [2d Dept 2015]). “Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden” (*Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902, 947 NYS2d 148 [2d Dept 2012] [citations omitted]; see also *Niedra v Mt. Sinai Hosp.*, *supra*; *Harris v Saint Joseph’s Med. Ctr.*, *supra*).

Plaintiff testified at her deposition that she began treating at Queens-Long Island Medical Center in 2007; that her primary physician was Dr. Kamineni; and that she began seeing a gynecologist, Dr. Grafstein, in 2008. When she first saw Dr. Kamineni in June 2007, plaintiff mentioned to her that she had been going to another medical group and that her mammograms had revealed something “foreign” but that they took no action other than ordering more mammograms or sonograms. According to plaintiff, Dr. Kamineni ordered a mammogram in December 2007, told her the results, then ordered a sonogram for January 2008, and also informed her of the results. Plaintiff did not recall whether or not she mentioned her breast complaints to Dr. Grafstein when she first saw him in mid-2008. However, she admitted that the first time that she saw Dr. Grafstein she had no physical complaints. Plaintiff underwent a mammogram and a sonogram in June 2008, both of which were ordered by Dr. Kamineni. After said tests, Dr. Kamineni told her that they were going to do a biopsy. She remembered that the

biopsy was performed sometime between June and August 2008. When Dr. Kamenini received the biopsy results, she called plaintiff and told her that she had cancer and also told her that she was going to schedule an appointment for plaintiff to see a surgeon. Plaintiff had two surgeries in August 2008, a partial mastectomy and then a lymphectomy.

At his deposition, Dr. Grafstein testified that he first saw the 51-year-old plaintiff on April 14, 2008 for a routine gynecological visit and there is nothing in his notes from said date to indicate that she had any complaints. He obtained a medical history noting that her last PAP test was two years previous, and that her last mammogram was performed on January 2008. Plaintiff stated that she was "up-to-date" with her mammograms. Dr. Grafstein stated that he would not necessarily review the mammogram if he was told either that everything was alright or that a follow-up was scheduled. Plaintiff did not make any complaints to him about her breast during said first visit. He characterized the results of his examination as a normal gynecological examination. Dr. Grafstein next saw plaintiff on June 19, 2008 with complaints of heavy irregular menstrual bleeding. He made no notation of any complaints or discussions concerning plaintiff's breasts. Dr. Grafstein observed plaintiff's general appearance and performed an abdominal examination and pelvic examination, which were essentially normal. He then ordered a pelvic sonogram and recommended that plaintiff return for a scheduled endometrial biopsy. At the time, his diagnosis was perimenopause with dysfunctional uterine bleeding. Dr. Grafstein next saw plaintiff on July 7, 2008 for the scheduled endometrial biopsy. Plaintiff made no complaints and the results of his physical examination were essentially normal. She returned on July 31, 2008 to review the results of the biopsy. Dr. Grafstein noted that "[s]he has been recently diagnosed and currently being followed for breast cancer since our last visit." He next saw plaintiff on January 23, 2009 for evaluation of elective removal of her ovaries. He noted that she had been diagnosed with breast cancer. Dr. Grafstein referred her for testing of hormone levels and for a repeat pelvic sonogram. He only performed a breast examination during plaintiff's first visit in April 2008. Dr. Grafstein next saw plaintiff on February 13, 2009 for a follow-up of her sonogram and lab results. At the time, plaintiff had complaints of left leg pain and swelling.

By her affirmation, defendant's expert Dr. Livoti opines that when Dr. Grafstein first saw plaintiff on April 14, 2008, he appropriately recorded, reviewed and considered her medical and family history, including her latest pap smear and mammogram, active problems, that her mother had breast cancer, and that plaintiff had a cesarian section. She notes that at the time, plaintiff had no complaints, including no physical complaints concerning her breasts. In addition, Dr. Livoti opines that Dr. Grafstein appropriately performed physical, breast and pelvic examinations, that were all completed within accepted standards of medical care, and properly documented that the breast appeared normal, that palpation of the breast revealed no abnormalities, and that no breast mass was detected. She informs that Dr. Grafstein's notes from the initial visit reveal that he was aware that plaintiff was being followed by other physicians concerning her breasts and that she had recent breast imaging studies from December 2007 and January 2008. Dr. Livoti opines that based on the foregoing, accepted standards of care did not require Dr. Grafstein to take any further action concerning plaintiff's family history of breast cancer, her history of fibrocystic breasts, or her recent breast imaging studies, and did not require Dr. Grafstein to review the radiology reports of said recent imaging studies or to refer plaintiff for further evaluation or tests based on said reports. She also opines that accepted standards of medical care allowed Dr. Grafstein to defer to, and rely upon, the follow-up care and recommendations of the

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physicians who evaluated and treated plaintiff with respect to the December 2007 and January 2008 breast imaging studies.

According to Dr. Livoti, Dr. Grafstein appropriately discussed an endometrial biopsy with plaintiff on July 7, 2008, including the procedure's risks and benefits, and obtained plaintiff's informed consent. On June 19, 2008 and on July 7, 2008 when Dr. Grafstein performed an endometrial biopsy and an abdominal and pelvic examination, plaintiff made no complaints to him concerning her breasts, and he evaluated her and treated her specifically for uterine bleeding. Dr. Livoti opines that the fact that plaintiff had a mammogram and further breast imaging studies in June 2008 and a breast biopsy on July 9, 2008 demonstrates that plaintiff was being followed by other physicians, her primary care physician and radiologist, concerning her breasts and breast imaging studies and that there is no merit to the claim that any action or inaction by Dr. Grafstein delayed the diagnosis of breast cancer. Dr. Livoti further opines that based on the foregoing, accepted standards of care did not require Dr. Grafstein to take any action, including ordering or recommending testing or evaluation with respect to plaintiff's breasts in June 2008.

The results of an ultrasound guided needle biopsy of plaintiff's right breast on July 9, 2008 revealed positive findings and resulted in a diagnosis of invasive ductal carcinoma. Then, on July 10, 2008, plaintiff had a transabdominal and transvaginal ultrasound as ordered by Dr. Grafstein with essentially normal results and unrelated to plaintiff's breasts or diagnosis of breast cancer. Dr. Livoti opines that Dr. Grafstein appropriately advised plaintiff to monitor her menstrual cycle and return for further evaluation if there was any subsequent irregular bleeding and that there was no indication for Dr. Grafstein to take any action concerning plaintiff's breasts or her recent diagnosis of breast cancer.

Here, Dr. Grafstein satisfied his prima facie burden by establishing, through deposition testimony, medical records, and the detailed and specific affirmation of his expert, that he did not depart from good and accepted medical practice in his treatment of plaintiff (*see Cafaro v Ceka*, 120 AD3d 732, 991 NYS2d 350 [2d Dept 2014]; *Landry v Jakobowitz*, 68 AD3d 728, 730, 889 NYS2d 677 [2d Dept 2009]). He also established his entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent (*see Mitchell v Lograno*, 108 AD3d 689, 692-693, 970 NYS2d 58 [2d Dept 2013]).

Plaintiff does not oppose the motion. Instead, she submits the affirmation of her counsel together with a stipulation of discontinuance, dated June 29, 2015 and executed solely by counsel for plaintiff, indicating that the action is discontinued with prejudice as against Dr. Grafstein. None of the co-defendants have submitted any opposition to this motion.

Said stipulation of discontinuance constituted a release within the meaning of General Obligations Law § 15-108 (*see* General Obligations Law § 15-303; *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept 1998]; *Killeen v Reinhardt*, 71 AD2d 851, 853, 419 NYS2d 175 [2d Dept 1979]; *see also Tereshchenko v Lynn*, 36 AD3d 684, 685, 828 NYS2d 185 [2d Dept 2007]). The stipulation was intended to release Dr. Grafstein from the action (*see Hanna v Ford Motor Co.*, *supra*), and served to relieve him "from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules" (General Obligations Law § 15-108 [b] [emphasis

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added]; *see Rosado v Proctor & Schwartz*, 66 NY2d 21, 24, 494 NYS2d 851 [1985]). However, any verdict in favor of plaintiff and against the remaining defendants will be reduced in the amount of Dr. Grafstein's equitable share of the damages, if any (*see* General Obligations Law § 15-108 [a]; *Killeen v Reinhardt, supra* at 853, 419 NYS2d 175; *see also Tereshchenko v Lynn, supra*).

As there is no opposition to the summary judgment motion and plaintiff has proffered a stipulation to discontinue the action against the moving the defendant, the motion is granted (*see Fernandez v Elemam*, 25 AD3d 752, 809 NYS2d 513 [2d Dept 2006]).

Accordingly, the instant motion is granted and the complaint is dismissed as against defendant Harold Grafstein, M.D., with prejudice. The action is severed and continued as against the remaining defendants.

Dated: 8/28/15



J.S.C.
HON. JERRY GARGUILO

FINAL DISPOSITION NON-FINAL DISPOSITION