Keltz v Havryliuk
2012 NY Slip Op 30188(U)
January 25, 2012
Supreme Court, New York County
Docket Number: 106384/09
Judge: Alice Schlesinger
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[* 1]

SCANNED ON 1/27/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER, Justice — PART IA PART 16

Index Number : 106384/2009
KELTZ, LINDA
vs.
HAVRYLIUK, YELENA
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

Motion to/for ______

No(s). ______
No(s). ______
No(s). ______

~~Upon the foregoing papers, it is ordered that this motion is~~

Defendant's motion for summary judgment is granted and the action is dismissed

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JAN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JAN 25 2012

[signature], J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

---X

LINDA KELTZ and MICHAEL S. KELTZ,

Plaintiffs,

-against-

YELENA HAVRYLIUK, MD,

Defendant.

---X

FILED

JAN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Index No. 106384/09
Motion Seq. No. 003

SCHLESINGER, J.

Before the Court in this medical malpractice action is a motion by the defendant Dr. Yelena Havryliuk, a gynecologist, for summary judgment. The doctor, after multiple discussions with her patient, the plaintiff Linda Keltz, performed a hysteroscopic resection for a large uterine fibroid in Mrs. Keltz's uterus on February 19, 2009. In the course of that procedure, the defendant perforated the uterus and bowel. Since this perforation was promptly recognized by Dr. Havryliuk, she called in non-party surgeons Dr. Mary Ann Hopkins and Dr. Marsha Harris to do the repairs. Mrs. Keltz then spent a longer time in the hospital, to February 24, than had been anticipated, and later after discharge, she developed a wound infection.

It is on the basis of these events that plaintiff charges Dr. Havryliuk with malpractice in choosing to do this procedure, a hysteroscopy, rather than a more intrusive surgery, a hysterectomy. The latter involves a total removal of the uterus while the procedure here performed is done without an abdominal incision and involves removing the fibroid or part of it from the uterus but essentially leaving or trying to leave the uterus itself intact.

Despite a whole panoply of claims against the doctor originally, including one involving lack of informed consent, the thrust of the allegation as expressed in opposition

to the defendant's motion is that this choice, to do a hysteroscopy rather than a hysterectomy, was wrong because the fibroid was simply too large. Since the fibroid was so large, the claim is that the lesser procedure was contraindicated and was more likely to cause the complications that did occur. Consistent with this claim is the position that if a hysterectomy had been done, such complications, more likely than not, would not have happened.

Dr. Havryliuk supports her motion with an affidavit from Dr. Jay Goldberg, a board certified Obstetrician-Gynecologist. He practices in Philadelphia, Pennsylvania and is a Professor of Obstetrics and Gynecology at Thomas Jefferson University Hospital. He has reviewed all the relevant medical and court papers. He relies on these papers and on his own years of training and experience in opining with a reasonable degree of medical certainty that Dr. Havryliuk "rendered proper and appropriate medical care to plaintiff in all respects" (¶ 3). Also, in this introductory part of his affidavit, he states that "uterine and bowel perforation are known and accepted risks and complications of a hysteroscopic resection of an uterine fibroid, and that these complications can and did occur in the absence of any negligence, based upon all the evidence" (¶3).

Dr. Goldberg then reviews the initial examinations of Mrs. Keltz by the defendant on September 10, 2008, where the patient complained of continued vaginal bleeding. She had been treated for this condition by her prior, long-time gynecologist, Dr. Debrovner, in May, but he had since retired. He had at that time photographed a 2 x 2 cm submucosal uterine fibroid.

Dr. Havryliuk arranged for Mrs. Keltz to have a second sonogram of her uterus, which took place on October 1, 2008. That sonogram showed a normal uterus measuring

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7.4 x 5.7 x 5.2 cm. However, the measurement of the submucosal fibroid, significant for this motion, had increased to 2.6 x 3.0 x 2.6 cm.[1]

Dr. Goldberg then clearly opines that the removal of this size fibroid did not require the "much more invasive and complex procedure" of a hysterectomy, though that was an option. He says a "hysteroscopic resection of the fibroid was an appropriate alternative for this patient" (¶9). Further, he elaborates on the central point in contention by stating the following at (¶10):

> Dr. Havryliuk documented in her Operative report her finding that Mrs. Keltz's approximately 3 cm fibroid occupied more than 50% of her uterus. It is my opinion that the size of the fibroid was not a contraindication for performing a hysteroscopic resection, and this procedure was not contraindicated due to the size of the fibroid, contrary to plaintiff's claims. It was an appropriate choice of procedure because a patient who undergoes a hysteroscopic resection of a uterine fibroid has a significantly lower risk of suffering a serious complication compared with

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[1]It is also worthy of note that in Dr. Havryliuk's deposition of March 25, 2010 (pp 70-71, l 19 -11) where plaintiff's counsel asked her the significance of the myoma occupying 50% of the uterus, which was the case here, she said:

> The way I describe the submucosal fibroids, I try to describe not only their size but how much they're in the cavity. Because sometimes, certain fibroids can be partially in the cavity, partially in the muscle of the uterus. If they're in the muscle of the uterus, those are the ones we really do not resect. We only try to resect only the intracavity portions of the fibroids.

She then was asked whether that meant that here fifty percent of the fibroid was not embedded in the wall and she responded: "At least fifty percent of that fibroid was not embedded in the wall. It was inside the cavity." Then in response to the question (l 10): "Does that make it resectable?" She answered, "Yes".

> undergoing a hysterectomy. This includes the risk of perforation of surrounding organs, than a patient who undergoes a hysterectomy. Nevertheless, perforation of the uterus and bowel are known risks of both procedures. Moreover, the recovery time for a patient who undergoes a hysteroscopic resection is typically significantly less than for a patient who undergoes a hysterectomy.

Dr. Goldberg then opines that Mrs. Keltz was properly and appropriately informed as to the risks, benefits and alternatives to this procedure, that she was aware of her options and chose to have a hysteroscopy rather than have a hysterectomy or do nothing. He then reviews the surgery, the post-surgical care, all of which was appropriate, as well as the discharge on February 24 when the patient "was doing well and was in no acute distress" (¶21). With regard to the wound infection, which later developed after her discharge and was resolved by June 15, 2010, this was also a known and accepted risk of this procedure which can occur "in the absence of any negligence or medical malpractice" (¶24).

I find that Dr. Goldberg does make out a prima facie case that Dr. Havryliuk was not negligent, specifically by her selection of a hysteroscopic resection of this size fibroid. I note that in the first instance, counsel for the plaintiff in opposition suggests that Dr. Goldberg's opinions are too conclusory for the Court to rely on them and lack scientific data to corroborate those opinions. But I disagree. Dr. Goldberg has the credentials and experience to opine here that the size of the fibroid was not such as to have made this procedure contraindicated. Therefore, plaintiff has to meet the burden, which has now shifted, and attempt to refute Dr. Goldberg's opinions or at least show that issues of fact exist. She does try to do that by submitting, as Exhibit A, an affidavit from Dr. Alan Friedman also a physician board certified in Obstetrics and Gynecology.

Dr. Friedman also has reviewed the relevant records and begins his statement of opinions in paragraph 6, which sounds very much like a plaintiff's Bill of Particulars in the manner in which it lists a multitude of ways in which the defendant Dr. Havryliuk committed malpractice. However, he does include in this list that the defendant failed to recognize that a fibroid "was too large to remove via a hysteroscopy and that the Plaintiff should have undergone an abdominal hysterectomy." That is what the opposition exclusively consists of.

This doctor then reviews the changing size of the fibroid as shown by the two sonograms in 2008, but he seems to have gotten some of the relevant facts wrong, and these are extremely relevant facts. He states (at ¶8):

> In addition to the aforesaid [where he gives the size of the uterus and enlargement of the fibroid] and as is corroborated by the Defendant and the Defendant's Expert, the size of the Plaintiff's fibroid was over 3 cm and occupied more than 50% of the Plaintiff's uterus.

While he is accurate about the percentage, neither Dr. Goldberg nor Dr. Havryliuk ever said that the Plaintiff's fibroid was over 3 cm. But Dr. Friedman seems to base his opinion on this error because he then says that it is his opinion to a reasonable degree of medical certainty that given the information in the medical records and in Dr. Goldberg's affidavit, the choice of procedure used by the defendant to remove the fibroid was contraindicated.

But even if the fibroid were in fact slightly larger and did measure 3 cm or more, Dr. Friedman's affidavit would still fail. I say that because all he does, paragraph after paragraph, is what counsel for plaintiff accuses Dr. Goldberg of doing, that is, giving general conclusory opinions without satisfactory explanations.

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So, for example, in ¶11, Dr. Friedman states: "A fibroid that is over 3 cm should not be removed via a hysteroscopy due to the inherent risk associated with perforating the uterus and its surrounding tissues and organs (which actually occurred in this matter)". This opinion of course repeats the one he expressed in ¶9 but more significantly, it fails to explain what is the "inherent risk" to which he refers. In other words, what is the connection between a large fibroid, one over 3 cm, and the way it was resected in affecting the likelihood of the perforation of other organs. Of course, we all know by a review of the events of February 19 that the perforations did occur. But certainly Dr. Friedman cannot be saying that because such a thing happened, there must have been negligence in the procedure chosen. That is not only bad science, it is bad logic as well.

Unfortunately for the plaintiff, Dr. Friedman continues in the same manner. He says that: "The risks of perforation associated with the removal of a fibroid of this size via hysteroscopy greatly outweigh the risks associated with a hysterectomy" (¶11). But he fails to explain why this is the case or how he reached this conclusion and how he supports it.

In the next paragraph, he opines that "the fact that the fibroid had large blood vessels and actually occupied more than 50% of the uterus [these facts are accurate] made the performance of a hysteroscopy completely contraindicated in this case." But that is all he says. He makes no attempt to support or explain this opinion. Paragraphs 13 and 14 and the remainder of the affidavit (17 paragraphs in all) continue the same failures or are irrelevant to the singular issue here.

In defendant's Reply, counsel points out the inaccuracy of the "fact" relied upon by Dr. Friedman, that the fibroid here was over 3 cm. This formed the basis for the claim that the procedure was contraindicated. Therefore, "plaintiffs' expert's theory is fatally flawed" (¶5) and his entire opinion "collapses upon itself" (¶14).

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Further, the argument is made that Dr. Friedman's opinions are conclusory and do not succeed in rebutting defendant's prima facie case on this motion. I find I must agree. As stated earlier, plaintiff contests the motion solely on the alleged contraindication of the hysteroscopy under these circumstances and the related failure to tell Mrs. Keltz this fact. But Dr. Friedman's "fact" upon which he bases his opinion is wrong. But equally important, even if the predicate were not wrong, Dr. Friedman simply fails to explain what about the hysteroscopy was contraindicated vis-a-vis a large sized fibroid. Dr. Goldberg in the first instance clearly opines that size is not determinative or indicative of a bad result. Dr. Havryliuk agrees and explains that other factors are more important, such as where the fibroid is located and whether it is embedded in the uterine muscle. But these opinions are not challenged in a meaningful or significant way.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment is granted and the action is dismissed and the Clerk is directed to enter judgment in favor of the defendant Yelena Havryliuk, M.D.

Dated: January 25, 2012

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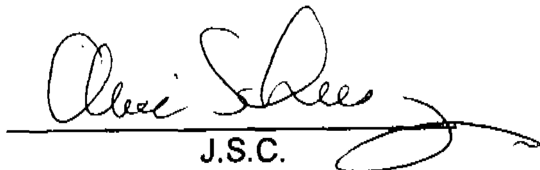

J.S.C.

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