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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice

PART 6

Index Number : 800135/2010
SINGER, ELIZABETH
vs
RODRIGUEZ, JOSE A.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/15/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 27, were read on this motion to/for summary judgment:

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-14
Answering Affidavits — Exhibits _____ | No(s). x-mot 15-20
Replying Affidavits _____ | No(s). 21-26
reply x-mot 27

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

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

FILED

AUG 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/10/12

_____, J.S.C.
JOAN B. LOBIS

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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ELIZABETH SINGER,

Plaintiff,

Index No. 800135/10

-against-

Decision and Order

JOSE A. RODRIGUEZ, M.D.; RODRIGUEZ ORTHOPAEDICS, PLLC.; JONPAUL DIMAURO, M.D.; RAMAN R. THAKAR, M.D. and THE LENOX HILL HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendants Jose A. Rodriguez, M.D., Rodriguez Orthopaedics, PLLC, Jonpaul Dimauro, M.D., Raman R. Thakar, M.D., and The Lenox Hill Hospital ("LHH") move[1] for an order, pursuant to C.P.L.R. Rule 3212, granting them summary judgment. Plaintiff Elizabeth Singer opposes the motion and cross-moves, pursuant to C.P.L.R. Rule 3212(e), for an order granting her partial summary judgment as to the malpractice and lack of informed consent causes of action.

This action involves allegations of medical malpractice and lack of informed consent pertaining to a total hip replacement procedure. On September 13, 2009, plaintiff presented to the emergency department at LHH after a fall. Her medical history was significant for a right hemiarthroplasty (partial right hip replacement and insertion of bipolar prosthesis) and diagnosis of osteoporosis in 2004, after a similar fall. X-rays taken of plaintiff's right hip revealed a

[1] Plaintiff argues that defendants' papers are defective because they sought their summary judgment relief by motion, instead of by order to show cause, in violation of the court's Part Rules. Although the Part Rules require that dispositive motions be brought by order to show cause, the court declines to disregard the motion on this basis as plaintiff has not shown how she is prejudiced by this, and, indeed, was able to oppose the motion and cross-move.

periprosthetic fracture to her right lower extremity, i.e., she had refractured her hip. On September 16, 2009, Dr. Rodriguez performed an open reduction with internal fixation ("ORIF") and total right hip replacement with the assistance of Drs. Dimauro and Thakar. Upon his review of plaintiff's postoperative x-rays, Dr. Rodriguez observed that the femoral ball ("ball") was not properly positioned in the acetabular cup ("socket"), due to the presence of particulate matter. The next day, after repeat x-rays confirmed the findings, Dr. Rodriguez informed plaintiff that he would need to conduct an exploratory procedure to eliminate the separation. On September 18, 2009, plaintiff underwent the second surgery, during which Dr. Rodriguez found and removed small pieces of bone, a clot, and fatty tissue (measuring, in the aggregate, 3.5 centimeters by 2.8 centimeters by .5 centimeter) in the space between the ball and the socket. Dr. Rodriguez testified that the presence of particulate matter between the ball and socket occurred because plaintiff had a comminuted fracture with hundreds of resultant bone fragments. Dr. Rodriguez testified that, although he cleared and cleaned the socket, some fragments may have been hidden within the surrounding tissue and may have fallen into the surgical area at the moment he placed the ball into the socket. Dr. Rodriguez also testified that, during the procedure, there was a moment when the ball occluded his vision of the socket, which, he further stated, explained why he did not notice the particulate matter enter the socket.

In her bill of particulars, plaintiff alleges that defendants' negligence in failing to remove all particulate matter between the ball and socket during the September 16, 2009 procedure caused her to undergo two revision surgeries and caused her to have a limp and a leg length discrepancy. She also maintains that prior to the total hip replacement procedure, she was not informed of the risk of particulate matter remaining between the ball and socket.

Defendants now seek summary judgment as to all causes of action. As to Dr. Rodriguez's liability, defendants argue that no issues of fact exist that Dr. Rodriguez did not depart from the standard of care in performing plaintiff's surgery on September 16, 2009. Defendants submit an expert affirmation[2] from Elton Strauss, M.D., a physician licensed in New York State and board certified in orthopedic surgery, who opines with a reasonable degree of medical certainty that the care and treatment rendered by defendants was at all times within the relevant standards of medical practice and did not proximately cause plaintiff's alleged injuries. Dr. Strauss opines that in light of plaintiff's presentment with an injured right lower extremity, her history of a right hemiarthroplasty, and her periprosthetic fracture, the ORIF and total hip replacement were appropriate. He further opines that Dr. Rodriguez timely ordered post-operative x-rays of plaintiff's hip to assess the placement of the ball and socket, and upon review of plaintiff's x-rays (which revealed a gap between the ball and socket), Dr. Rodriguez appropriately recommended that plaintiff undergo a procedure to identify and remove the particulate matter. Dr. Strauss states that the presence of particulate matter is a known, but rare, risk, and that it is an anticipated byproduct of plaintiff's procedure. Dr. Strauss further opines that the presence of particulate matter between the ball and socket resulted from "the complicated surgery field which was exacerbated by the severe fracture that the patient sustained and her past surgical history."

As to Drs. Thakar's and Dimauro's liability, Dr. Strauss states that their role in

[2] Plaintiff argues that Dr. Strauss' expert affirmation should be deemed inadmissible because it does not contain the appropriate language that identifies it as an affirmation. Specifically, plaintiff argues that the affirmation does not contain the language "under the penalty of perjury," which is required for affirmations. In reply, defendants includes Dr. Strauss' affirmation, which contains the requisite language and cures the defect. As plaintiff alleges no prejudice, the court considers this to be de minimus error and will consider Dr. Strauss' affirmation.

plaintiff's surgery was limited to assisting Dr. Rodriguez, who performed all the significant aspects of the surgery. Defendants state that Dr. Dimauro, who was an orthopedic surgery resident during the relevant time, and Dr. Thakar, who was an orthopedic surgery fellow at that time, made no independent medical decisions in the treatment of plaintiff and participated in the surgery under the supervision of Dr. Rodriguez. Defendants also point out that plaintiff waived the deposition of these two defendants. As to LHH's vicarious liability, defendants argue that Dr. Rodriguez was a private attending physician and that LHH was purely the location of plaintiff's care and surgery.

As to informed consent, defendants point out that prior to the surgery, plaintiff signed a consent form indicating that she was informed that additional surgeries may be necessary to address unforeseen complications. Additionally, defendants state that Dr. Rodriguez engaged in a detailed conversation with plaintiff prior to the procedure, in which he discussed the common risks associated with the surgery; thus, defendants argue, plaintiff's informed consent was obtained.

In response, plaintiff opposes defendants' motion and cross-moves for summary judgment.[3] As to her medical malpractice cause of action, plaintiff seeks judgment in her favor under the doctrine of res ipsa loquitur, arguing that it is undisputed that the particulate matter was found in the operative site. Plaintiff also submits an affidavit from Robert H. Quinn, M.D., a physician licensed to practice medicine in New Mexico and board certified in orthopedic surgery. Dr. Quinn opines, with a reasonable degree of medical certainty, that the care and treatment rendered

[3] Although plaintiff cross-moves for "partial" summary judgment on the medical malpractice and informed consent causes of action, these are the only causes of action that she asserts in her complaint.

by defendants on September 16, 2009, deviated from acceptable standards of medical care and proximately caused plaintiff to return for another operation two days later. Dr. Quinn opines that the "standard of care dictates that it is the responsibility of the operating surgeon to insure, to the best of his/her ability, that placement of the hip prosthesis should be as optimal as possible prior to leaving the operating room." He sets forth that technological methods, such as x-rays, are readily available to minimize the possibility of particulate matter remaining in the surgical field.

As to informed consent, Dr. Quinn states that the conversation that Dr. Rodriguez had with plaintiff about anticipating a subsequent surgery is a theoretical discussion that occurs in every surgical case and generally refers to a necessary procedure due to an unforeseen event that could not have been reasonably recognized prior to leaving the operating room, i.e., something that would not have been easily avoidable or have been able to show up on a portable x-ray. Plaintiff also submits her own affidavit and states that Dr. Rodriguez did not warn her, in advance of the surgery, that there was a risk that bone fragments could fall into the operative site or that additional surgeries may be necessary. Plaintiff states that had he done so, she would have inquired as to whether any precautions could be taken to eliminate the risk, and depending on his answers, she may "very well have opted to have refused the procedure" or to have hired a different surgeon.

In reply and in opposition to plaintiff's cross-motion, defendants submit the expert affirmation of Dr. Strauss and Dr. Rodriguez's own affidavit. Defendants argue that Dr. Quinn never practiced orthopedic medicine in the New York Metropolitan area; that he has never performed a total hip replacement surgery; and that the standard of care about which he opines is inapplicable in New York State. Also, defendants contend that Dr. Quinn fails to state that a visual inspection was

insufficient to establish that there was proper alignment of the ball and socket before plaintiff was closed. Further, defendants argue that because the risk was rare, at less than one percent (1%), it is quantitatively immaterial.

"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 eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

In moving for summary judgment dismissal of a claim for lack of informed consent, a defendant must demonstrate the absence of any factual disputes as to (1) whether plaintiff was informed of the alternatives to, and the foreseeable risks and benefits of, the proposed procedure, and (2) whether a reasonably prudent patient would not have declined to undergo the proposed treatment had he or she been so fully informed. Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643-44 (1st Dep't 2009); Pub. Health L. § 2805-d. The alternatives and foreseeable risks and benefits are defined as

those which "a reasonable . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Pub. Health L. § 2805-d(1). If a defendant makes out of prima facie case on lack of informed consent, it is incumbent upon the plaintiff to raise an issue of fact that "the doctor failed to disclose a reasonably foreseeable risk; that a reasonable person, informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury." Orphan v. Pilnik, 66 A.D.3d 543, 544 (1st Dep't 2009) (citations omitted); Pub. Health L. § 2805-d.

As to Dr. Rodriguez's liability, the court finds that neither plaintiff nor defendants make out a prima facie entitlement to summary judgment on this issue. Defendants' expert's testimony is conclusory and merely states that the care plaintiff received at LHH was timely, appropriate, and within the standard of care. However, Dr. Strauss fails to articulate what the standard of care is, and he addresses neither the vision occlusion to which Dr. Rodriguez testified nor Dr. Rodriguez's own theory as to how the particulate matter became lodged between the ball and socket. As to plaintiff's claim that she is entitled to summary judgment, res ipsa loquitur is "an evidentiary rule allowing the jury to infer negligence from circumstances when the event would not ordinarily occur in the absence of negligence." Nesbit v. New York City Transit Auth., 170 A.D.2d 92, 99 (1st Dep't 1991) (citation omitted). To rely on the doctrine of res ipsa loquitur in a medical malpractice case, a plaintiff must show that "(1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendant[s'] exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff." Antoniato v. Long Island Jewish Med. Ctr., 58 A.D.3d 652, 654 (2d Dep't 2009). Res ipsa loquitur evidence "does not ordinarily or automatically entitle the plaintiff to summary judgment . . . , even if the

plaintiff's circumstantial evidence is unrefuted." Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006). "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." Id. Here, plaintiff fails to eliminate all issues of fact, particularly as to the first prong. Plaintiff's expert opines that there are technological methods that are readily available, including x-rays, that Dr. Rodriguez could have utilized to ensure proper hip placement. This opinion is vague and fails to satisfy the high burden for summary judgment on a res ipsa theory. Additionally, there is dispute as to whether the standard of care requires an intra-operative x-ray evaluation or simply a visual inspection of the operative site prior to closing the patient. Disputes between experts as to what satisfies the standard of care are matters that are best left for the jury. Rojas v. Palese, 94 A.D.3d 557, 558 (1st Dep't 2012). Also, defendants' assertion that Dr. Quinn possesses inadequate qualifications goes "to the weight and not the admissibility" of his testimony. Id. Accordingly, as disputed issues of fact exist, neither side is entitled to summary judgment.

As to the cause of action sounding in lack of informed consent, plaintiff and defendants again fail to make out a prima facie entitlement to summary judgment. Defendants maintain that they disclosed the common risks associated with the procedure and that plaintiff signed a consent form. However, the court finds unpersuasive defendants' argument that the contemplated corrective surgery contained in the consent form is of the kind that covers plaintiff's alleged injury. The consent form states that "unforeseen conditions may arise which necessitate procedures different from those contemplated." However, Dr. Rodriguez testified that plaintiff's alleged injury was foreseeable due to her presentment with a comminuted fracture. Defendants' expert also states that

particulate matter was a known risk, and an anticipated byproduct, of the procedure. In their motion in chief, defendants do not unequivocally demonstrate that plaintiff's alleged injury was not reasonably foreseeable or that a reasonably prudent person in plaintiff's position would not have declined the procedure had she been informed. As to the materiality of the risk, it is only in his opposition to plaintiff's cross motion that defendants' expert opines that such a risk, which results in less than 1% of similar operations, is quantitatively immaterial. Still, these contradictory statements do not remove all issues of fact. Accordingly, that portion of defendants' motion seeking to dismiss the lack of informed consent cause of action as to Dr. Rodriguez is denied.

Plaintiff states that she was not made aware of the risk of particulate matter remaining in the operative site, and that had she known, she may have refused the procedure depending on Dr. Rodriguez's response to follow-up questions she would have asked. However, these statements are vague and subjective, and plaintiff fails to articulate whether her subjective intentions were in accordance with the objective test of a reasonably prudent person that is required by the law. In addition, plaintiff does not state which questions she would have asked or the type of answers that would have compelled her to have withheld her consent. Accordingly, that portion of plaintiff's cross motion seeking summary judgment on the lack of informed consent cause of action is denied.

As to Drs. Thakar's and Dimauro's liability, defendants have made out a prima facie entitlement to summary judgment by establishing that Drs. Thakar and Dimauro acted as mere assistants to Dr. Rodriguez, with no decision-making authority. The court finds plaintiff's argument that she "need not determine which defendant was responsible for her alleged injury as long as she was under defendants' joint and exclusive control" to be insufficient to rebut these defendants' prima

facie case. That portion of defendants' motion seeking summary judgment as to Dr. Thakar and Dr. Dimauro is granted. As to LHH's vicarious liability, plaintiff does not oppose that branch of defendants' motion. That portion of defendants' motion seeking summary judgment as to LHH is also granted. Accordingly, it is hereby

ORDERED that the portion of defendants' motion seeking summary judgment as to Jonpaul Dimauro, M.D., Raman R. Thakar, M.D, and The Lenox Hill Hospital is granted, the action is dismissed as to these defendants, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants' motion seeking summary judgment as to Jose A. Rodriguez, M.D., and Rodriguez Orthopaedics, PLLC, on the medical malpractice and lack of informed consent causes of action is denied; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that the remaining parties shall appear for a pretrial conference on September 18, 2012, at 9:30 a.m.

Dated: August 10, 2012

ENTER:

JOAN B. LOBIS, J.S.C.