

Guido v Fielding

2018 NY Slip Op 33873(U)

December 20, 2018

Supreme Court, Bronx County

Docket Number: 0302654/2011

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 23

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GUIDO, MARIA

Index No. 0302654/2011

-against-

Hon. JOSEPH CAPELLA,

FIELDING, GEORGE M.D.
-----X

Justice Supreme Court

The following papers numbered 1 to 3 Read on this motion, (Seq. No. 4) for
SUMMARY JUDGMENT DEFENDANT, noticed on **August 22 2018**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>(1)</u>
Answering Affidavit and Exhibits	No(s). <u>(2)</u>
Replying Affidavit and Exhibits	No(s). <u>(3)</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the memorandum decision annexed hereto.*

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 12/20/18

Hon. _____
JOSEPH CAPELLA, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23**

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MARIA GUIDO AND EDWIN GUIDO,

Index No.: 302654/11

Plaintiffs,

Decision/Order

-against-

GEORGE FIELDING, M.D., CHRISTINE REN-FIELDING,
M.D., GASPAR ROSARIO, N.P., SASHA STILES, M.D.,
RANDA HAMADEH, M.D., NYU LANGONE MEDICAL
CENTER, NYU SCHOOL OF MEDICINE, and NYU
SURGICAL ASSOCIATES,

Defendants.

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PAPERS	NUMBERED
Notice of Motion and Affidavit Annexed -----	1
Answering Affidavit and Exhibits -----	2
Replying Affidavit and Exhibits -----	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DECIDED AS FOLLOWS:

By notice of motion defendants, George Fielding, M.D. (Dr. Fielding), Christine Ren-Fielding, M.D. (Dr. Ren), Gaspar Rosario, N.P. (NP Rosario), Sasha Stiles, M.D. (Dr. Stiles), NYU Langone Medical Center and NYU School of Medicine, move for summary judgment (CPLR 3212) and dismissal of plaintiffs' complaint. At the outset, the instant motion is granted without opposition with respect to Dr. Ren, NP Rosario and Dr. Stiles, and this action is dismissed as against those defendants. Claims for negligent hiring/credentialing, which were not opposed by plaintiff, are deemed abandoned (*Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

This is an action based on claims of medical malpractice, and a derivative claim for loss of services, brought in connection to plaintiff Maria Guido's (Mrs. Guido) Lap-Band surgery which took place on August 17, 2009. The complaint alleges causes of action for failure to obtain informed consent, inappropriate placement of the first port during the Lap Band procedure on August 17, 2009, and failure to diagnose and repair a small bowel perforation intraoperatively on August 17, 2009. Mrs. Guido alleges that

Dr. Fielding's negligence caused her to suffer a perforated small intestine, bowel leakage, post-operative infection, multiple surgeries, subsequent hernias and pain.

The defendants' motion for summary judgment is supported by, *inter alia*, the affirmation of Dr. Shikora, a specialist in bariatric surgery who reviewed the pleadings, deposition testimony and medical records from all of Mrs. Guido's medical providers. Dr. Shikora opines that the three consent related documents contained in the medical records coupled with deposition testimony establish, to a reasonable degree of medical certainty, that Mrs. Guido's informed consent for the Lap Band procedure was properly obtained. Dr. Shikora indicates that Dr. Fielding did not deviate from the standard of care in attempting to initially use a laparoscopic approach and then, once it was intraoperatively discovered that the adhesions were too dense, convert to an open procedure. He opines that, in using this technique, Dr. Fielding demonstrated proper and appropriate appreciation for Mrs. Guido's history of abdominal surgeries. And this approach afforded Dr. Fielding direct visualization for lysing and dividing adhesions, and was specifically formulated to reduce the risks associated with Mrs. Guido's surgical history.

Dr. Shikora opines that bowel perforation is a known and accepted risk of any abdominal surgery and can occur even in the absence of negligence. This expert indicates that Dr. Fielding actually exceeded the standard of care by inspecting and palpating the bowel despite a lack of intraoperative indications of a bowel perforation. He offers that it was not a deviation for Dr. Fielding to not discover an injury to the small bowel during a proper inspection as the perforation could have developed later. Based on the foregoing, defendants have made a prima facie showing of their entitlement to summary judgment on the informed consent and medical malpractice claims. (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1 [1st Dept 2015].) The burden now shifts to plaintiffs to come forward with admissible proof to demonstrate that Dr. Fielding did in fact commit medical malpractice and that the malpractice was the proximate cause of plaintiff's injuries (*Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]).

In support of their opposition, plaintiffs offer an expert affirmation from a board certified general surgeon. The expert states that based on Mrs. Guido's testimony, Dr. Fielding departed from what a reasonable medical practitioner would disclose when he failed to inform Mrs. Guido that, given her surgical history, performing the procedure laparoscopically via the umbilicus placed her at an increased risk for bowel perforation. Additionally, as per Dr. Fielding's deposition, he chose not to inform Mrs. Guido that as an alternative to doing the procedure laparoscopically via the umbilicus, the port could be inserted at the ninth intercostal space or the surgery could be performed open from the outset. According to the expert, having been informed of all the risks and alternatives, a reasonably prudent person in Mrs. Guido's position would not have agreed to the procedure laparoscopically via the umbilicus; and Dr. Fielding's failure to obtain informed consent caused Mrs. Guido to undergo the procedure in this manner and suffer the injuries alleged. Given the aforementioned, plaintiffs have raised a question of fact through their expert's affirmation as to the informed consent claim (*Motichka v Cody*, 279 AD2d 310 [1st Dept 2001]).

Next, plaintiffs' expert claims that during the laparoscopic approach Dr. Fielding perforated Mrs. Guido's bowel, and that Dr. Fielding departed from good and accepted standards by attempting a laparoscopic approach via the umbilicus on a patient with a history of prior abdominal surgeries and, therefore, likely dense adhesions. The presence of adhesions requires more force to insert the laparoscopic tools, and blocks a surgeon's view of the field, thereby increasing the likelihood of causing an inadvertent injury to the bowel. Where, as here, opposing experts disagree on material issues of fact, those issues must be resolved by the trier of fact, thereby precluding summary judgment on the issue of attempting a laparoscopic approach via the umbilicus (*Frye v Montefiore*, 70 AD3d 15 [1st Dept 2009]).

Plaintiffs' expert affirms that Dr. Fielding departed from the standard of care by failing to inspect the bowel or, if he did inspect the bowel, properly inspect it, identify the perforation and repair it intraoperatively. In reply, Dr. Shikora maintains that during the

operation there were no signs of a perforation, but that Dr. Fielding nonetheless properly inspected and palpated the bowel and did not discover any injury. Dr. Shikora argues that plaintiffs' expert failed to offer any evidence to support that the perforation existed or was even discoverable intraoperatively. Plaintiffs' expert does not address Dr. Shikora's conclusion that Mrs. Guido exhibited no symptoms that should have caused Dr. Fielding to suspect a perforation. (*Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012].) Accordingly, defendants' motion for summary judgment is granted only to the extent of dismissing plaintiffs' cause of action for the failure to diagnose and repair the perforation intraoperatively on August 17, 2009.

Defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. This constitutes the decision and order of this court.

December 20, 2018
Dated



Hon. Joseph E. Capella, J.S.C.