Henry v Staten Is. Univ. Hosp.

2011 NY Slip Op 33368(U)

December 7, 2011

Supreme Court, Nassau County

Docket Number: 11224/06

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DEBORAH HENRY and PAUL HENRY,

Plaintiffs,

-against-

STATEN ISLAND UNIVERSITY HOSPITAL, GIL LEVY, M.D., LYNN RAPP, M.D. and P. KAMALI, M.D.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 11224/06
Motion Seq. No.: 03 & 04

DECISION AND ORDER

Papers Read on this Motion:

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In motion sequence number three, the Defendants, Staten Island University Hospital and Gil Levy, M.D. in the above captioned medical malpractice action, for an order of this Court, pursuant to Rule §3212 of the CPLR, granting summary judgment in favor of these defendants dismissing the Plaintiffs' Verified Complaint. In motion sequence number four, defendant Lynn Rapp, M.D. moves for the same relief as the Staten Island defendants.

Initially, it is noted that the Defendant, P. Kamali, M.D., has been released from the instant action.

Based upon all the papers submitted for this Court's consideration, the Court makes the following findings of fact solely for the purpose of determining the hereinabove described motion and cross-motion.

The Plaintiff, Deborah Henry, first presented to the Defendant, Lynn Rapp, M.D., on November

18, 2002, for treatment regarding irregular periods and fibroids. Dr. Rapp referred the Plaintiff for a pelvic ultrasound, which was performed on November 29, 2002 and revealed an heterogeneously enlarged and retroflexed uterus with three distinct fibroids.

The Plaintiff returned to Dr. Rapp's office on July 25, 2003, at which time she complained of having bleeding after intercourse and irregular cycles every 18-31 days. Dr. Rapp noted that the Plaintiff had an 8 cm fibroid on the right side which seemed to be pushing into the cervical canal.

A repeat pelvic ultrasound, performed on August 29, 2003, indicated that the Plaintiff had an enlarged uterus with multiple fibroids and that her left ovary contained multiple cysts with one complex cyst. In addition, the Plaintiff's uterus was noted to have grown from 8.0 x 4.1 x 6.4 cm in November 2002, to 14.5 x 6.1 x 7.1 cm in August 2003. Each of the Plaintiff's fibroids was noted to be significantly larger than they had been in the previous study.

Thereafter the Plaintiff presented to Dr. Rapp on September 15, 2003 and October 14, 2003 wherein Dr. Rapp discussed with the Plaintiff the risks, benefits and complications of a total abdominal hysterectomy, a bilateral salpingo-oophorectomy (BSO) or a unilateral salpingo-oophorectomy (USO).

On January 22, 2004, the Plaintiff was admitted to the Defendant Staten Island University Hospital, by Dr. Rapp.

On January 22, 2004, the Plaintiff underwent a total abdominal hysterectomy with repair of cystotomy performed by Dr. Rapp at Staten Island University Hospital. Dr. Rapp was assisted during this procedure by the Defendant, P. Kamali, M.D., a resident at Staten Island University Hospital.

Prior to the start of surgery on January 22, 2004, a Foley Catheter was placed. Dr. Rapp made a pfannenstiel incision, which he carried down through the subcutaneous tissue to the fascia using electrocautery, and then extended bilaterally using Kelly clamps and electrocautery. He then grasped

the upper and lower aspects of the fascia with Kocher clamps, and then they were separated from the underlying rectus abdominis muscles. Thereafter, Dr. Rapp further separated the rectus abdominis muscles using blunt dissection. The peritoneum was entered into bluntly and further dissected and opened with Metzenbaum scissors.

Following the dissection and opening of the peritoneum, Dr. Rapp placed an O'Connor-O'Sullivan self-retaining retractor inside the Plaintiff's abdominal cavity and packed the bowel using moist lap pads. The Plaintiff was then placed in the Trendelenburg position and the upper and lower blades of the O'Connor-O'Sullivan retractor were applied, allowing for visualization of the uterus.

Upon visualization of the uterus, Dr. Rapp observed a large fibroid, measuring 9 centimeters, in the operative field, which he surgically removed.

Dr. Rapp then used two Kocher clamps to grasp the cornua of the uterus (the area where the fallopian tubes emerge from the uterus) for retraction. Round ligaments on both sides were then clamped, transected and suture ligated using 0 Vicryl. The anterior leaf of the broad ligament was incised along the uterus to the bladder reflection in the midline from both sides, and the bladder was then dissected gently from the lower uterine segment. Following this, Dr. Rapp sponge-sticked and sharply dissected the cervix.

Subsequently, the utero-ovarian ligaments, the uterine arteries and the uterosacral ligaments were transected and suture ligated with 0 Vicryl. Once this was done, the cervix and uterus were removed using electrocautery and the vaginal cuff angles were closed with figure-eight 0 Vicryl sutures. The remainder of the vaginal cuff was then closed using both running, locking sutures and figure-eight sutures.

After closing the vaginal cuff, Dr. Rapp observed blood in the Foley Catheter and consequently

he removed the O'Connor-O'Sullivan bladder retractor and examined the bladder. Upon examination, Dr. Rapp observed an approximately 2 centimeter rent on the posterior fundal dome of the bladder.

Dr. Rapp then called for a urogynecology consult and defendant Dr. Gil Levy scrubbed into surgery. Indigo Carmine was injected intravenously and the ureter jets were visualized in both the left and right side of the bladder. It was noted that the injury to the bladder did not compromise the entrance of the ureters onto the bladder. Dr. Levy closed the tear using Vicryl sutures.

After several days of post-operative care, the Plaintiff was discharged from Staten Island University Hospital on January 25, 2004 and instructed to follow up with Dr. Rapp.

The Plaintiff returned to Dr. Rapp's office on January 28, 2004 for a post-operative consultation and/or examination at which time she complained of diarrhea. Dr. Rapp examined the Plaintiff and found that she had a soft abdomen with no acute symptoms.

The Plaintiff presented to Dr. Levy for two office appointments on January 29, 2004 and February 4, 2004. On February 4, 2004, Dr. Levy removed the Foley Catheter and normal bladder function returned. That evening, the Plaintiff began passing gas through her vagina. The Plaintiff began passing stool through her vagina the next morning.

On February 6, 2004 the Plaintiff presented to Dr. Rapp who performed a physical examination of the Plaintiff. This examination did not reveal any evidence of breakdown or fistulous tract. Dr. Rapp referred the Plaintiff for a sonogram and told her to consult with colorectal surgeon, Dr. Frank Lacqua. At this examination the Plaintiff advised Dr. Rapp that she was having 10 bowel movements per day.

The Plaintiff presented to Dr. Lacqua on February 24, 2004. Dr. Lacqua referred the Plaintiff for a colonoscopy which was performed on February 27, 2004. The colonoscopy revealed non-specific

colitis and an opening to a rectal-vaginal fistula above the crypts anteriorly.

From March to June 2004, the Plaintiff treated with Dr. Lacqua for ulcerative colitis and symptoms related to the recto-vaginal fistula. Thereafter, Dr. Lacqua performed three attempted reparative surgeries on November 10, 2004, December 16, 2005 and July 21, 2006 which failed to correct the fistula.

An endoanal ultrasound performed on the Plaintiff on December 7, 2007 showed a small defection in the internal and external anal sphincter, likely representing a recto-vaginal fistula.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v Equitable Land Services, Inc.*, 207 AD2d 880, 881 (2d Dept. 1994):

> "It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue *(State Bank v McAuliffe*, 97 AD2d 607 [3rd Dept 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alverez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York supra*, at p. 562)."

CPLR Rule §3212(b) requires that for a Court to grant summary, in favor of a Defendant, the Court must determine as a matter of law that there is no merit to the Plaintiff's causes of action. Again, the evidence submitted in support of the instant motions must b e viewed in the light most favorable to the Plaintiffs herein *(Marine Midland Bank, N.A. v Dino & Arties Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Summary judgment shall be granted only when there are no issues of

material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law *(Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, [1979]).

In support of their motion for summary judgment, the Defendants, Staten Island University Hospital and Gil Leavy, M.D. have submitted the Affidavit of Howard G. Nathanson, M.D., a physician specializing in Obstetrics and Gynecology who has been licensed to practice medicine in the State of New York since 1973 and Board Certified in Obstetrics and Gynecology since 1973.

After a review of the medical records pertaining to the Plaintiff, Deborah Henry, maintained by the Defendant, Staten Island University Hospital during her January 22, 2004 to January 25, 2004 hospital admission, the medical records of the Defendant, Gil Leavy, M.D. and all of the pleadings herein, Dr. Nathanson states, *inter alia*:

> ". . . to a reasonable degree of medical certainty that the actions taken by **SIUH** and **Dr. Levy** was at all times medically reasonable and appropriate under the circumstances. There were no departures from the accepted standard of care committed by **SIUH** or **Dr. Levy** at any time during their treatment of the Plaintiff."

In support of his motion for summary judgment, the Defendant Lynn Rapp, M.D. has submitted the Affirmation of Robert F. Porges, M.D., a physician licensed by the State of New York and Board Certified in Obstetrics and Gynecology and Mark Dobriner, M.D., a physician licensed by the State of New York and Board Certified in both Surgery and Colon and Rectal Surgery.

Both physicians submit their hereinbelow opinions after their review of the medical records of the Plaintiff, Deborah Henry, the deposition testimony in this action and the Plaintiff's Verified Bill of Particulars.

Dr. Porges states in his Affirmation:

> ". . . it is my opinion to a reasonable degree of medical certainty that Dr. Rapp at

> all times acted in accordance with accepted standards of good medical practice in his treatment of Plaintiff DEBORAH HENRY. Moreover, Plaintiff's alleged injuries were not due to any departure from good and accepted medical practice by Dr. RAPP. All of my opinions set forth in this Affirmation are to a reasonable degree of medical certainty."

Dr. Dobriner states in his Affirmation:

> ". . . it is my opinion to a reasonable degree of medical certainty that at all times, Dr. RAPP acted in accordance with accepted standards of good medical practice in his treatment of Plaintiff DEBORAH HENRY. Further, none of the alleged injuries Plaintiff claims to have sustained resulted from the total abdominal hysterectomy performed by DR. RAPP. All of my opinions set forth in this Affirmation are to a reasonable degree of medical certainty."

In this medical malpractice action motion for summary judgment, the Defendant physician and a medical provider have the initial burden of establishing the absence of any departure from good and accepted medical practice *(Keevan v Rifkin*, 41 AD3d 661 [2d Dept 2007]).

A physician and a medical provider make a *prima facie* showing of entitlement to summary judgment in a medical malpractice action by the submission of medical expert's Affidavits/Affirmations which are based on medical records of the Plaintiff and upon the submission of same in support of their motion, the burden of proof shifts to the Plaintiff to demonstrate the existence of triable issues of fact (*Wicksman v Nassau County Healthcare Corporation*, 27 AD3d 644 [2d Dept 2006]; *Simms v North Shore University Hospital*, 192 AD2d 700 [2d Dept 1993]).

With respect to the Plaintiff's Second Cause of Action for Lack of Informed Consent, Section 2805-d of the Public Health Law states, in pertinent part:

> "i) Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonable foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

ii) For a cause of action therefore it must be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause, the injury or condition for which recovery is sought."

This Court's review of the oral deposition before trial of the Plaintiff, Deborah Henry, submitted in support of the motion and cross-motion, does not find any testimony by the Plaintiff that the Defendants herein failed to inform her of reasonably foreseeable risks associated with her medical treatments, hospitalization and surgical procedures or failed to disclose alternatives thereto.

There being no opposition submitted with respect to the instant motion and cross-motion, it is hereby

ORDERED, that the motions and cross-motion are herewith ***granted*** on default and the Plaintiff's Verified Complaint is herewith ***dismissed***.

This constitutes the Decision and Order of the Court.

DATED: December 7, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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