

Aylon v Rezayat

2013 NY Slip Op 30027(U)

January 8, 2013

Sup Ct, NY County

Docket Number: 111317/08

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Helen e Aylon

INDEX NO. 111317/08

MOTION DATE 10-2-12

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

- v -

Combiz REZAYATI, ET AL.

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	<u>1-18</u>
_____	<u>19-20</u>
_____	<u>21</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 10 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/8/13

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X

HELENE AYLON,

Plaintiff,

Index No. 111317/08

-against-

Decision, Order and Judgment

COMBIZ REZAYAT, ROMAN NOWYGROD,
BRIAN EGAN, JULIA B. SOBOL, DANIEL H. KORT,
DEAN R. JONES, TOM HERZOG, CARMEL J.
COHEN, TEREZIA MANCZUR, RUSSELL BAKER,
"JOHN SMITH," JANE SMITH," "BOB SMITH,"
and "MARY SMITH" (the last four names being
fictitious, said persons being doctors, surgeons,
pathologists, nurses, interns, residents, technicians
and other medical personnel who assisted and were
employed by the New York Presbyterian Hospital/
Columbia University Medical Center, and assisted
with the care, surgery, examinations, diagnoses, and
treatment of plaintiff from July 31, 2006, until
October 3, 2006), and NEW YORK PRESBYTERIAN
HOSPITAL/COLUMBIA UNIVERSITY MEDICAL
CENTER,

Defendants.

-----X

FILED

JAN 10 2013

COURT CLERK'S OFFICE

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

Defendant Roman Nowygrod, M.D., moves for summary judgment pursuant to C.P.L.R. Rule 3212. Defendant New York Presbyterian Hospital moves in pertinent part for partial summary judgment under the same rule. This action has previously been discontinued against all other defendants except for Carmel J. Cohen, M.D. Plaintiff Helene Aylon opposes the motions, which for purposes of this decision, order and judgment are consolidated. For the reasons set forth below, Defendant Nowygrod's motion is granted in part and denied in part. New York Presbyterian Hospital's motion is granted in part and denied in part.

Plaintiff Helene Aylon was diagnosed with uterine cancer in 2006. On July 31, 2006, Ms. Aylon saw Dr. Carmel J. Cohen regarding possible surgery. Dr. Cohen obtained the patient's medical history, performed various diagnostic tests and recommended that Ms. Aylon have a hysterectomy among other procedures to treat the cancer.

Dr. Cohen operated on Ms. Aylon on August 9, 2006, at New York Presbyterian Hospital. During the course of the surgery, Plaintiff began to bleed excessively. Dr. Cohen and his team attempted to control the bleeding with clamps and pressure, and called for an emergency vascular surgery consultation. Dr. Cohen denies lacerating the patient's internal iliac veins or any vessels in the patient's left pelvis, claiming he did not operate in that area. He testified there was no point bleeding from the patient's right iliac veins. Dr. Jason Wright, who was attending in the Division of Gynecologic Oncology, responded to assist Dr. Cohen with the excessive bleeding. Dr. Wright testified that he observed only "oozing" in the obturator fossa prior to Dr. Nowygrod's arrival and there was no bleeding from the patient's internal iliac veins.

Within minutes, however, Defendant Dr. Roman Nowygrod, a vascular surgeon, responded to Dr. Cohen's request. He took over from Drs. Cohen and Wright. He testified that he did not recall where clamps were located or how many were present when he arrived. He proceeded to perform emergency vascular surgery. In operating on Ms. Aylon, Dr. Nowygrod testified that he used hand pressure against the patient's sacrum and pelvic bones; he removed the existing clamps and extended the abdominal incision to see the area better. He moved external iliac arteries with vesicle-loops. Dr. Nowygrod testified that he found the patient's internal and external iliac veins torn on both sides as well as deep in the posterior pelvis. Dr. Nowygrod used thumbtacks and hemolytic

agents to attempt to stop the bleeding, and clamped and ligated various vessels. The patient received fluid replacement and numerous blood transfusions. Ultimately her blood would not clot. Unable to stop fully the bleeding, Dr. Nowygrod packed Ms. Aylon's pelvis. The next day Dr. Nowygrod operated on her to improve circulation to her right leg, including performing a left femoral to right femoral bypass. On August 12, 2006, Dr. Nowygrod performed a follow up procedure on Ms. Aylon and operated on her twice again over the course of several months for additional follow up.

Ms. Aylon sued in July 2008. She alleges, in pertinent part, that Drs. Cohen and Nowygrod committed medical malpractice, that their conduct proximately caused her injuries, and that she lacked informed consent. Plaintiff did not learn of Dr. Wright's involvement in her August 9, 2006, surgery until after the statute of limitations had run, and he is not a party to this action.

Dr. Nowygrod now moves for summary judgment, claiming that no material issues of fact exist and that his treatment of Plaintiff was at all times within the standard of care. In support of his motion, he submits the expert opinion of William D. Suggs, M.D., a New York licensed, board certified vascular surgeon, who is Director of Vascular Services at White Plains Hospital. Dr. Suggs indicates that in preparing his opinion he reviewed the bills of particulars, deposition transcripts of the parties, hospital records, and office records of Dr. Nowygrod. He bases his opinion on that review as well as his training, experience, and expertise in the field of vascular surgery. He opines that Dr. Nowygrod did not negligently treat Plaintiff or cause or contribute to her alleged injuries. Dr. Suggs opines that Dr. Nowygrod properly performed the relevant procedures.

New York Presbyterian Hospital moves in pertinent part for partial summary

judgment on Plaintiff's claim of negligent hiring and supervision. The Hospital further seeks partial summary judgment against Plaintiff's claim of lack of informed consent and failure to obtain a proper medical history, and in its reply the Hospital asserts that it is not vicariously liable for any conduct of Dr. Wright.

Plaintiff opposes the motions. In support, she submits the expert opinion of a licensed New York physician who is board-certified in general and thoracic surgery and who has performed thousands of surgeries. Plaintiff's expert affirms that the expert has on many occasions attended patients suffering vascular injury resulting in sudden hemorrhaging, including pelvic hemorrhage. In preparing the affirmation, Plaintiff's expert reviewed the defense motions, including the affirmations of counsel and experts, as well as the documents relating to this action: bills of particulars, deposition transcripts, and medical records.

Plaintiff's expert opines that Defendant Nowygrod committed medical malpractice and that Defendant Nowygrod's actions caused Plaintiff's injuries. Plaintiff's expert contends that Dr. Nowygrod failed to take appropriate and necessary steps to limit the pulsatile flow of blood to Plaintiff's pelvis. The expert opines that Dr. Nowygrod failed to ligate rapidly the bilateral hypogastric arteries. Had that been done, the source of Plaintiff's bleeding could have been more rapidly identified, and Dr. Nowygrod could have repaired the defect. Were those efforts to have failed, the expert opined, the doctor could have more rapidly packed Plaintiff's pelvis without damaging circulation in Plaintiff's leg, and would have reduced the likelihood that Plaintiff would have needed transfusions and would have reduced the chances that her blood would stop clotting. The expert further opines that Dr. Nowygrod improperly ligated Plaintiff's external iliac artery,

rather than ligated the internal ones. That ligation of Plaintiff's external artery the expert claims compromised Plaintiff's lower extremity, which developed an occlusion that had to be treated by bypass surgery. The expert also opines that genuine issues of material fact exist whether Dr. Nowygrad tore any of Plaintiff's veins during surgery.

In reply, Dr. Nowygrad challenges Plaintiff's opposition. In pertinent part, Defendant Nowygrad contends that the record reflects that he did not ligate the right external iliac artery but rather clamped it. He argues that Plaintiff's expert's opinion is vague and conclusory and fails to raise issues of material fact.

"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). Expert medical testimony is required for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause. Roques, 73 A.D.3d at 206. If the movant makes a prima facie showing, the burden then shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted).

This Court first considers whether Dr. Nowygrod has established a prima facie showing that he is entitled to summary judgment. Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. An expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id.

This Court is satisfied that Dr. Nowygrod has met his prima facie showing. Indeed, Plaintiff’s opposition does not claim otherwise. The record reflects that Dr. Suggs possesses the knowledge and skills necessary to render his opinion reliable. His conclusions are supported by specific, extensive references to the medical records in this case, including depositions, operative reports, and medical notes, among others.

This Court next considers whether Plaintiff has rebutted Dr. Nowygrod’s showing. While the parties’ experts clash in their opinions, this Court finds that only some of the disagreements are meritorious. First, as Dr. Nowygrod points out, the record does not support Plaintiff’s claim that Dr. Nowygrod ligated Plaintiff’s external iliac artery. At most it shows that he clamped it. Plaintiff last amended her bill of particulars in July 2012, and the time for further

amendments to any bill of particulars has passed. Accordingly, Plaintiff is barred from pursuing any claim that Plaintiff's need for bypass surgery related to Dr. Nowygrod ligating or clamping that artery.

Second, this Court finds that Defendant Nowygrod is entitled to summary judgment on the issue of lack of informed consent. Plaintiff fails to address that issue in her opposition. This Court is persuaded that Defendant is entitled as a matter of law to the finding that Dr. Nowygrod did not have a duty to obtain informed consent prior to conducting emergency vascular surgery on August 9, 2006. See Pub. Health Law § 2805-d.2(a) (right of action to recover for medical malpractice based on lack of informed consent excludes emergency surgery). Furthermore Plaintiff has failed to rebut Dr. Nowygrod's claim that he properly obtained informed consents on the follow up procedures that he performed in this action.

Regarding all remaining issues in Defendant Nowygrod's motion, however, this Court finds that genuine issues of material fact remain whether Dr. Nowygrod committed malpractice and proximately caused Plaintiff's injuries. For example, in denying that any factual dispute exists whether Dr. Nowygrod tore any of Plaintiff's veins, Defendant Nowygrod fails to address those areas in the record cited by Plaintiff to support her claim. Instead, Defendant Nowygrod refers to another portion of the record, only underscoring that this issue remains for the jury to decide.

This Court next addresses the relief sought by Defendant New York Presbyterian Hospital. At oral argument on these motions on October 2, 2012, this Court in a separate decision and order granted summary judgment for Defendants, Daniel H. Kort and Combiz Rezayat, who

were residents assisting the attending physicians, Dr. Cohen and Dr. Nowygrad, in this case, and whose claims were included in the moving papers submitted along with the Hospital's. The remaining claims raised by the Hospital are addressed in turn.

The Hospital moves for summary judgment on Plaintiff's cause of action alleging negligent hiring and supervision. Plaintiff concedes in her opposing papers that she does not claim that the Hospital was independently negligent toward her; rather Plaintiff merely asserts that the Hospital is vicariously liable for the negligence of its employees. Accordingly, this Court finds that the Hospital is entitled to summary judgment on the cause of action alleging negligent hiring and supervision.

Next this Court considers whether the Hospital is entitled to summary judgment on Plaintiff's informed consent claim and her claim relating to whether a proper medical history was obtained in this case. The Hospital claims that these obligations as a matter of law relate to Dr. Cohen, as the attending physician. Plaintiff fails to rebut the Hospital's argument; accordingly, summary judgment is similarly appropriate on those claims. Fiorentino v. Wenger, 19 N.Y.2d 407, 415 (1967).

Lastly this Court considers the Hospital's claim in reply that it is not vicariously liable for any conduct by Dr. Wright, a non-party physician, in this case. Even though the statute of limitations has expired, precluding Plaintiff from pursuing that physician directly, that does not relieve Defendant Hospital from any potential vicarious liability. E.g., Trivedi v. Golub, 46 A.D.3d 542 (2d Dep't 2007) (negligent actor is not necessary party for vicarious liability claim).

Accordingly, it is

ORDERED that Defendant Nowygrod's summary judgment motion is granted on the issue of informed consent and any claim relating to ligation or clamping of Plaintiff's right external iliac artery causing Plaintiff's need for bypass surgery; the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that summary judgment is denied for Defendant Nowygrod in all other respects; and it is further

ORDERED that partial summary judgment is granted to Defendant New York Presbyterian Hospital on Plaintiff's claims of lack of informed consent and failure to obtain a proper medical history; the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that partial summary judgment is granted to Defendant New York Presbyterian Hospital on Plaintiff's claim of negligent hiring and supervision; the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties shall appear for a settlement conference pursuant to C.P.L.R. § 3409 on February 19, 2013, at 9:30 a.m.

Dated: January 8, 2013

FILED ENTER: *JBL*
 JAN 10 2013
 NEW YORK
 COUNTY CLERK'S OFFICE