

Pal v Lauer

2013 NY Slip Op 31294(U)

June 5, 2013

Sup Ct, NY County

Docket Number: 150038/09

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

Pal, Neelu M.D.

INDEX NO. 150038 | 09

- v -

MOTION DATE 4-30-13

Lauer, Simeon

MOTION SEQ. NO. 007

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 _____

No(s). 31-50
No(s). 64-78
No(s). 80

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

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
dated June 5, 2013

Dated: 6/13/13

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

- 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
COUNTY OF NEW YORK**

-----X
NEELU PAL, M.D.,

Plaintiff,

Index No. 150038/09

**Decision, Order, and
Judgment**

- against -

SIMEON LAUER, M.D., ALBERT HORNBLASS &
SIMEON A. LAUER, M.D.S., P.L.L.C., and
NEW YORK EYE & EAR INFIRMARY,

Defendants.

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

Defendants Simeon Lauer, M.D., Albert Hornblass & Simeon A. Lauer, M.D.S., P.L.L.C., and New York Eye & Ear Infirmary (Hospital) move for summary judgment on all claims pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiff Neelu Pal, who is appearing pro se, opposes the motion and cross-moves to reopen discovery.

This medical malpractice action arises out of eye surgery performed on Plaintiff in October 2006. Ms. Pal first consulted with Dr. Lauer on August 18, 2016. On examination, Dr. Lauer observed a nodular lesion in the patient's right eyelid and recommended a biopsy to rule out any malignancy.

Dr. Lauer told the patient that the biopsy would consist of a small incision over the mass and would involve excision of part or all of the mass, which would be submitted for pathological examination. On the day of surgery, October 5, 2006, Ms. Pal signed a consent form to "remove mass over right eye." The Operating Room Nursing Record identifies the procedure as

“EXCISION OF LID MASS.” The Pre-anesthetic Evaluation form listed the operation proposed as “excision of right lid mass/biopsy.” Dr. Lauer in fact performed a right lateral orbitotomy, which entailed incising the patient’s eyelid crease.

The patient was originally scheduled for a post-operative visit on October 16, 2006, but was seen on the 13th due to complaints of a “foreign body sensation.” The doctor observed corneal abrasion, which he characterized on a prescription note as “severe.” He did see Ms. Pal on the 16th as well, at which time she again complained of a “foreign body sensation.” She did not return for any further treatment with the Defendant.

Pal filed this summons and complaint against the Defendants in March 2009. She raises three causes of action, including medical negligence, lack of informed consent, and negligence against the Hospital. She alleges, among other injuries, that she suffers from dry eye and ptosis as a result of the procedure. She further claims that she had not been informed that she was to undergo an orbitotomy or excision for a lacrimal gland tumor. Following Plaintiff’s filing of the note of issue, Defendants moved for summary judgment on all claims. Pending that motion, Plaintiff’s counsel moved to withdraw. This Court granted counsel’s motion, and Plaintiff now appears pro se. She opposes Defendants’ motion for summary judgment, and cross-moves to reopen discovery.

In support of summary judgment, Defendants offer the affirmation of Rand Rodgers, M.D., a board-certified ophthalmologist, who is licensed to practice in New York. Dr. Rodgers opines that, based upon his review of the bills of particulars, medical records and the deposition

transcripts, Dr. Lauer did not depart from accepted medical practice and the standards of care applicable to ophthalmic surgery and did not cause Plaintiff's injuries. Dr. Rodgers opines that the procedure was performed "entirely appropriately." Addressing the issue of informed consent, he states that at the initial consultation "plaintiff was informed of the removal process which necessitated an incision across the crease of the eyelid to observe the gland in order to make a proper diagnosis and perform the biopsy." In his opinion the explanation of risks associated with the procedure was "within the standard of care." He adds that on the day of the surgery the doctor again "explained the risks associated with the procedure" The expert does not address the negligence claim against the Hospital, but the attorney affirmation characterizes it as "merely boilerplate allegations."

In opposition, the pro se Plaintiff cross-moves to reopen discovery. In preparing her opposition, she indicates that she did not have access to her legal file, which has been retained by her former attorney. She does offer her own affidavit, however, as well as excerpts from the medical records in this case. Addressing the merits of Defendants' motion, Plaintiff argues that there is a genuine issue of disputed fact regarding her claim of lack of informed consent. Plaintiff, who is herself a doctor, denies that she was ever informed that in agreeing to the biopsy the procedure would involve an orbitotomy, including incision of the eyelid crease. She points out that a New York State Surgical and Invasive Procedure Protocol requires that a written consent form state "the exact wording of the procedure to be performed as well as in layperson terms." In a brief reply, Defendants point out that Plaintiff has failed to offer any expert affidavit.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The 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 or expert opinion that fails to address a plaintiff's essential factual allegations are insufficient to establish prima facie

entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, plaintiff must then rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

Turning to Defendants' motion for summary judgment on Plaintiff's first cause of action, alleging medical negligence, this Court finds that summary judgment is warranted. Defendants' expert provides a detailed opinion based on the facts in this case to support the claim that Dr. Lauer's treatment was within standards of care. Moreover, Plaintiff failed to rebut that opinion with any expert opinion of her own, and, indeed, focuses her opposition on the second cause of action, the lack of informed consent claim.

In cross-moving to reopen discovery, Plaintiff makes no showing to support what additional discovery is warranted. Accordingly that motion is denied. As for any discovery that has already been obtained but that Plaintiff does not have access to based on her claim that her attorney is retaining her legal file, Plaintiff does not show what materials are needed to rebut Defendants' prima facie showing that there was no departure from standards of care.

Claims of lack of informed consent are statutorily defined. Pub. Health § 2805-d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. Id. § 2805-d(1). Causes of action for lack of informed consent are limited to

non-emergency procedures or other treatment and include diagnostic procedures that involve invasion or disruption to bodily integrity. Id. § 2805-d(2). To establish lack of informed consent, a claimant must show that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis had the patient been fully informed, and the claimant must show that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. Id. § 2805-d(3). At the summary judgment stage of proceedings, a defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment, and "that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]" Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643 (2d Dep't 2009).

Based on this record, Defendants have failed to establish any prima facie claim that they are entitled to summary judgment on Plaintiff's claim of lack of informed consent. As an initial matter, this Court notes that in supporting their motion for summary judgment the Defendants failed to attach Plaintiff's deposition, which their own expert reviewed in preparation for this motion. Omitting material portions of the record precludes this Court from any finding that Defendants have shown that there are no genuine issues of material fact relating to that claim. Moreover, Dr. Lauer himself, in his deposition, which transcript has been provided to this Court, acknowledges that the lid crease incision is not noted in the preoperative documentation but disputes that it was not discussed.

Nor does this Court find Defendants' expert opinion persuasive on this claim. The expert does not mention any discussion of alternatives that were discussed between the patient and doctor. Moreover, there is no foundation shown for the expert's statements that the doctor related certain information to the patient. The expert does not opine that a reasonable person would not have declined to consent to the orbitotomy. At most, that claim is made by the defense attorney, referring more generally to a biopsy and stating it is "inconceivable that a reasonable person, especially a medical doctor would not consent to a surgical biopsy to remove a potentially life threatening cancerous tumor." Nowhere in either the attorney affirmations or the defense expert opinion does the term, "orbitotomy," appear. Similarly, none of the pre-operative documentation provided to the patient, including the consent form, contains any reference to orbitotomy. Given Defendants' failure to establish any prima facie case on the lack of informed consent claim, this Court needs not address whether Plaintiff rebutted that case.

Finally, this Court considers Defendants' claim that they are entitled to summary judgment on Plaintiff's third cause of action, alleging negligence against the Hospital. Defendants have failed to make a prima facie case on that claim. They devote one paragraph in the entirety of their filing to the issue, in which they conclusorily dismiss the allegations. That conclusory dismissal does not contain any citations to the record or legal authority, and, therefore, the claim that summary

judgment on the third cause of action is warranted has not been established. Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted to the extent of granting summary judgment to Defendants on Plaintiff's first cause of action, alleging medical negligence; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to all Defendants on all remaining claims; and it is further

ORDERED that Plaintiff's cross-motion to reopen discovery is denied; and it is further

ORDERED that the parties appear for a pretrial conference on June 25, 2013, at 9:30 am.

Date: June 5, 2013



JOAN B. LOBIS, J.S.C.