

Jean v Murphy

2013 NY Slip Op 32051(U)

August 22, 2013

Supreme Court, Suffolk County

Docket Number: 10-29446

Judge: Denise F. Molia

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INDEX No. 10-29446
CAL No. 12-02081MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 3-15-13
ADJ. DATE 7-12-13
Mot. Seq. # 002 - MD

-----X
AUGUSTINA ST. JEAN,

Plaintiff,

- against -

CLEADOUS W. MURPHY, M.D. and
CONTEMPORARY MEDICAL SERVICES, P.C.,

Defendants.
-----X

ROSENBERG, MINC, FALKOFF & WOLFF
Attorney for Plaintiff
122 East 42nd Street, Suite 3800
New York, New York 10168

SHAUB, AHMUTY, CITRIN & SPRATT, LLP
Attorney for Defendants
1983 Marcus Avenue
Lake Success, New York 11042

Upon the following papers numbered 1 to ___ read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14-18; Replying Affidavits and supporting papers 19-20; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (002) by defendants, Cleadous W. Murphy, M.D. and Contemporary Medical Services, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is denied.

In this medical malpractice action, the plaintiff, Augustina St. Jean, seeks damages for personal injuries she alleges to have suffered due to the alleged negligent departures from the good and accepted standards of medical care and practice by defendants Cleadous W. Murphy, M.D. and Contemporary Medical Services, P.C. On April 1, 2009, the defendant, Cleadous Murphy, M.D. performed a bilateral tubal ligation on the plaintiff at Southside Hospital on an ambulatory basis. On April 2, 2009, due to abdominal pain, an exploratory laparotomy was performed on the plaintiff by a surgeon, Dr. Marc Finkelstein, with Dr. Murphy assisting. The surgery revealed that the plaintiff's small bowel had been perforated, requiring a partial small bowel resection. It is alleged that the defendants negligently departed from the standard of care and treatment during the tubal ligation and negligently perforated her small intestine which required the partial small bowel resection.

RST

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this application, defendants have submitted, inter alia, an attorney’s affirmation; a statement of fact; the affirmation of defendants’ expert Dr. Harvey Marchbein; copies of the summons and complaint; answers with demands, and plaintiff’s verified bills of particulars and second supplemental verified bill of particulars; uncertified copies of defendants’ medical records which are not in admissible form; an uncertified copy of an operative report for surgery performed April 1, 2009; unauthenticated photos; a certified but unsigned copy of the transcript of the examination before trial of Cleadous W. Murphy dated July 18, 2012 which is considered (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); an uncertified copy of a discharge summary for plaintiff’s admission on April 2, 2009 through April 10, 2009 at North Shore University Hospital; and defendants’ memorandum of law. Medical records are required to be submitted in admissible form which requires that they be certified pursuant to CPLR 3212 and 4518 (*Friends of Animals v Associated Fur Mfrs., supra*). Expert testimony is limited to facts in evidence (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). None of medical records are in admissible form to be considered on a motion for summary judgment and are thus not in evidence. Additionally, only partial copies of the plaintiff’s hospital records have been submitted, raising factual issues as to the contents of those records not provided.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff’s injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept

1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Upon careful review and consideration of the evidentiary submissions, it is determined that even if the defendants' moving papers were in admissible form and legally sufficient, that the defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint.

Dr. Murphy testified to the extent that he became an employee of defendant Contemporary Medical Services, P.C. in 2006. His wife, Deborah Dupery-Murphy, M.D. is the principal of that corporation. Dr. Murphy testified that he is not board certified in obstetrics and gynecology, but practices in the field of obstetrics and gynecology and holds a position teaching residents at Southside Hospital in North Shore LIJ. Augustina St. Jean became his patient on July 30, 2008 relating to a pregnancy which he delivered on February 17, 2009. Her relevant surgical history was that she had an appendectomy, which he stated put her at risk for having pelvic adhesions. He performed a tubal ligation on her on April 1, 2009, after having discussed the risks and benefits of a tubal ligation on March 18, 2009. Dr. Murphy testified that the plaintiff requested a laparoscopic, rather than an open procedure for the tubal ligation. He continued that he advised her that she was at an increased risk of puncture of an abdominal organ due to the procedure being blind upon initial entry, as opposed to an open procedure, which still had a risk of perforating a pelvic organ due to the location of the adhesions. Had he performed an open procedure, he would have made about a six inch Pfannensteil incision.

Dr. Murphy testified that he recommended that she have an open procedure. Despite alternative methods or approaches to performing the procedure, given her history of prior surgical abdomen, the risks would not have decreased. He continued that there is an open procedure, and an open laparoscopic procedure involving a Hasson port, wherein a knife is used and a larger port is placed. He did not use the Hasson port for the plaintiff's procedure, and did not consider it because he wanted a small incision and he felt she would not have been happy with a larger incision. He performed the laparoscopic surgery and his operative note indicated that there were no complications. He could not recall how much scar tissue was present, but testified that he was able to see very well to perform the surgery which took forty minutes, which he stated was an average time. One incision was made in the umbilicus about one cm in length. A Versess needle was inserted after elevating the abdomen near the umbilicus. The needle was flushed with saline, then CO2 gas was insufflated into the abdomen to a level of about 15 ml of mercury, the needle was removed, a trocar was inserted blindly, and the operative scope with the camera was placed through the trocar. He took no additional steps to protect the internal organs as it is a blind procedure. The fallopian tubes were successfully ligated, he visualized the anatomy and looked for any obvious signs of injury. If he felt there was a bowel injury, he would have called a surgeon.

Dr. Murphy continued that the following morning on April 2, 2009, at 6:00 a.m., he received a telephone call from the plaintiff advising him that she was having pain, which had started the day before. He met her at the hospital and took her to surgery with Dr. Finkelstein, a general surgeon, whom he assisted. A twenty centimeter verticle incision was made. He observed the perforation of the bowel which was about a pinhole in size in the small bowel, which he said is nowhere near the fallopian tubes. He thought the perforation may have occurred from the Versess needle or the trocar. After surgery, he told the plaintiff that she had some scar tissue remaining from her appendectomy that was probably perforated as he entered her abdomen. She was discharged home on April 10, 2009. When he saw her on June 17, 2009, he felt that the incision was healed and that she was stable.

Augustina Burnette nee St. Jean testified to the extent that she has been a registered nurse since 2005. When she was sixteen years of age, she was hospitalized for an appendectomy in Dominique. She later moved to England, then came to the United States. She has three daughters and two prior abortions. Her last daughter was delivered February 17, 2009 by Dr. Murphy, who was her ob/gyn physician for that last pregnancy and delivery, and for the tubal ligation on April 1, 2009. She saw Dr. Murphy in March 2009 at which time they discussed tubal ligation. She stated that Dr. Murphy told her the procedure was so simple. It was a quick procedure, and if she was working the night shift, she would be able to pick up the shift after. No printed material was provided. Other than not getting pregnant, no benefits were discussed. She did not recall being advised of alternatives, or any risks, or anything going wrong. She had about three discussions with him about the surgery, a few minutes each time. The procedure was done on April 1, 2009 at Southside Hospital by Dr. Murphy after pre-testing a couple days before. Dr. Murphy told her he was going in with a small camera, the tubes would be clipped, and there were small sutures at the end of the surgery. She remembered going into the operating room and then waking up. Initially she had no discomfort, but after she was taken upstairs, she started feeling a general malaise, then she felt slightly weak and was given ice chips by the nurse. Dr. Murphy spoke to her husband over the phone and told him everything went well. She was discharged home. Later that evening at home she awoke with pain in her left lower abdomen, but she was still able to breast feed her baby. Later, the pain became more intense and began radiating to the other side. Percocet helped, but by about 4:00 a.m., it became was pretty bad, and later began radiating to her left shoulder. She called Dr. Murphy who advised her that he would meet her at the hospital emergency room. After the surgery, Dr. Murphy advised her that there was a lot of scarring from her appendectomy which could have been the cause of his not seeing clearly, or could have been in the way. Dr. Finkelstein advised her after the exploratory that she could develop scar tissue.

In her supporting affidavit, the plaintiff averred that she was never told by Dr. Murphy that he recommended an open procedure due to her prior abdominal surgery, and he never mentioned that if she opted for laparoscopic surgery, that she would be placing herself at an increased risk of harm to her internal organs. She continued that Dr. Murphy did not have any conversation with her about the possible risks or complications of a laparoscopic procedure, nor did he advise her that even with an open procedure that there would be a risk of perforating an internal organ due to the location of her adhesions. The plaintiff continued that it is pure speculation on Dr. Murphy's part that she did not want a scar, because during her pregnancy, she asked him about doing a cesarean delivery, and he advised her that it would be too risky due to the prior appendectomy. She further averred that she never told Dr. Murphy when she called him on the morning of April 2, 2009, that she had no pain upon discharge from the hospital the evening before. On the contrary, she told the nurse that discharged her that she was feeling weak. She never told the nurse she was fine just so she could go home.

Defendants' expert, Harvey Marchbein, M.D. affirmed that he is a physician licensed to practice medicine in New York State and that he is board certified in obstetrics and gynecology. He has been in practice for over 30 years and is currently in private practice. He set forth that he reviewed various medical records and documents, including records from Dr. Murphy's office, the records of Dr. Lum and Southside Hospital (which have not been provided to this court), and the parties deposition transcripts. It is Dr. Marchbein's opinion within a reasonable degree of medical certainty that the care and treatment provided by defendant Murphy to the plaintiff at all times comported with good and accepted practice and in no manner can be proximately related to any of the injuries claimed by the plaintiff.

Dr. Marchbein set forth the plaintiff's history, and indicated that although Dr. Murphy suggested that a laparotomy could be performed, that the plaintiff insisted upon a laparoscopy so that she might sooner return to work as a nurse. He indicated that Dr. Murphy exercised his professional judgment in conjunction with complying with her request which was well within the range of accepted medical standards. Dr. Marchbein noted that the operative report noted scar tissue or adhesions present on the pelvic sidewall with a small amount of fat due to a prior appendectomy, but the female pelvic anatomy was normal. Dr. Marchbein opined that Dr. Murphy elevated the anatomy appropriately, although he does not comment upon the remainder of the procedure concerning insertion of the Veress needle, insertion of the trocar, and the scope, leaving factual issues concerning his opinion with regard to whether the same were appropriately inserted within the accepted standard of care. She was discharge home the same day upon being stable.

Dr. Marchbein indicated that the plaintiff called Dr. Murphy the following morning at 6:00 a.m. advising that she had abdominal pain, and that she had pain the day before but did not tell anyone at the hospital. He continued that the plaintiff denied telling that to Dr. Murphy. Dr. Marchbein stated that lack of notification of the medical personnel is a serious issue which delayed the diagnosis, however, he does not opine that it goes to causation or departures. When Dr. Finkelstein performed the exploratory laparotomy, with Dr. Murphy assisting, a partial small bowel resection was needed to address the perforation in the small bowel. Surgery was completed without complications.

Dr. Marchbein opined that Dr. Murphy's record clearly documents that he discussed the risks of elective bilateral tubal ligation and that plaintiff had increased risk of perforation due to her prior surgical history including an appendectomy. Dr. Marchbein stated that although the plaintiff alleged that Dr. Murphy did not properly perform a bilateral tubal ligation on April 1, 2009, there were no departures from the standard of care, and that the untoward outcome occurred despite good surgical technique in accordance with the standard of care. Upon her presentation to Southside Hospital emergency room on April 2, 2009, the plaintiff was appropriately evaluated and surgery was performed to address the small bowel obstruction. Dr. Marchbein concluded that Dr. Murphy's treatment of the plaintiff was not a departure from the standard of care and did not contribute to any of the complaints the plaintiff now claims as damages in this action.

It is determined that Dr. Marchbein's affirmation is conclusory and unsupported by the necessary evidentiary proof. He fails to comment with any specificity as to the details of surgery, including the insertion of the Verees needle, the trocar and the scope, how it was performed, any attempts to avoid injury to the small bowel, or as to the proper inspection of the bowel upon completion of the tubal ligation. Although he stated that the risks were appropriately discussed with the plaintiff by Dr. Murphy, he does not set forth those risks or indicate that such risks could occur in the absence of negligence. Additionally, the

plaintiff's expert has submitted an affirmation which raises factual issues which preclude summary judgment from being granted in this action.

Plaintiff's expert is a physician duly licensed to practice medicine in New York State and has been board certified in obstetrics and medicine since 1967. Plaintiff's expert set forth his/her education, training, and work experience, including having performed more than 300 tubal ligations with both open and laparoscopic procedures. The plaintiff's expert has counseled patients concerning the advantages as well as the possible risks/complications of the open method versus the laparoscopic method. Plaintiff's expert set forth the materials and records reviewed, and opined within a reasonable degree of medical certainty that defendant Dr. Murphy departed from the standard of gynecological surgical care in the care and treatment of the plaintiff in March and April of 2009. It is noted, however, that the plaintiff has not submitted an unredacted copy of her expert's affidavit. A redacted version of an expert affidavit lacks evidentiary value (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). "In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection" (*Marano v Mercy Hospital, supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion. Thus, by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (*Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]). A copy of the affidavit with the expert's name and signature have not been provided to this court under separate cover. Accordingly, plaintiff's expert affidavit is not in admissible form. However, in considering the affidavit by plaintiff's expert, even though the burden has not shifted to the plaintiff to raise a factual issue, it is determined that the plaintiff's expert has raised factual issues which would preclude summary judgment had the defendants demonstrated prima facie entitlement to summary judgment.

The plaintiff's expert stated that Dr. Murphy advised the plaintiff during the course of her pregnancy that he would not perform a Cesarean section due to her surgical history which would make the Cesarean section too risky. In view of that knowledge, he should have entered into a detailed discussion with the plaintiff about the increased potential for injury to the internal organs inherent in such an approach (laparoscopy), given the possibility of multiple abdominal adhesions. The plaintiff's expert stated that the plaintiff testified that Dr. Murphy had no pre-surgical discussion with her about the possibility of anything going wrong with a laparoscopy, and the only discussion focused on the time factor for return to work. Thus, there are factual issues concerning whether or not the plaintiff was appropriately advised of the risks and complications associated with the laparoscopy.

The plaintiff's expert opined that the defendant did not take precautions to lessen the risk of visceral injury by doing an "open laparoscopy" using the technique introduced by Hasson, wherein a scapel is used to make a small incision in the skin under the umbilicus. Once the fascia is visualized, the surgeon grasps it with Kocher clamps and makes tension on the fascia, then uses a curved Mayo scissor to make an incision into the fascia. The abdomen is then cut through the peritoneum, making a hole into the abdomen so a metal sleeve (attached to the carbon dioxide machine) can be inserted so the surgeon can visualize the entry into the abdomen. This avoids the blind sticking of the Verees needle and trocar into the abdomen, and reduces risk of visceral injury to the plaintiff. The plaintiff's expert opined within a reasonable degree of medical certainty that the injury to the plaintiff's bowel was caused by either the Verees needle or the

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trocar, and that the laparoscopy was then the proximate cause of the bowel injury and subsequent need for bowel resection of a small portion of the plaintiff's bowel.

The plaintiff's expert further opined that upon completion of the laparoscopic procedure, the surgeon has a duty to use the telescope to look all around and check for injury, whether by recognizing bleeding or spillage of intestinal contents into the visualized field. The plaintiff's expert opined that Dr. Murphy was negligent in failing to have carefully and deliberately inspected the bowel for perforations. Had he noted the small bowel perforation, he would have been able to repair it by oversewing it immediately, eliminating the need for open surgery that was done the following day.

Based upon the foregoing, there are factual issues due to the conflicting experts' opinions which preclude summary judgment concerning whether the defendant should have elected to use the open laparoscopic procedure in light of plaintiff's surgical history making her more likely to have adhesions; whether the Verees needle and trocar were appropriately inserted to reduce or eliminate visceral injury; whether the plaintiff should have been informed of the open laparoscopic procedure as a method of lessening the risk of visceral injury; whether informed consent was correctly and appropriately given; whether the defendant appropriately inspected the bowel for injury or perforation after the tubal ligation was completed; and whether the small bowel resection and subsequent surgery could have been avoided

Accordingly, motion (002) by defendants for summary judgment dismissing the complaint is denied.

Dated: 8-22-13

Hon. Dennis F. Molta

 A.J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION