

Castillo v Carolan
2014 NY Slip Op 32802(U)
April 3, 2014
Sup Ct, Westchester County
Docket Number: 51138/2011
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
BETSAIDA CASTILLO,

Plaintiff,

-against-

STEPHEN CAROLAN and RANJAN DASGUPTA,

Defendants.

-----X
CONNOLLY, J.

The following documents were read in connection with the defendant Dasgupta's and Carolan's separate motions for summary judgment and the plaintiff's cross motion:

Dasgupta's notice of motion, affirmation, memo of law, affidavit, exhibits	1-20
Plaintiff's affirmation in opposition to defendant Dasgupta	21-36
Dasgupta's reply affirmation	37
Carolan's notice of motion, affirmation, exhibits	38-54
Plaintiff's affirmation in opposition to defendant Carolan	55-70
Carolan's reply affirmation, exhibit	71-72
Plaintiff's notice of cross motion, affirmation, exhibits	73-76
Carolan's affirmation in opposition	77
Plaintiff's reply affirmation	78

The plaintiff commenced this action to recover damages for medical practice relating to an August 21, 2009 laparoscopic supracervical hysterectomy performed by the defendant doctors, Stephan Carolan and Ranjan Dasgupta. The plaintiff asserts a cause of action sounding in medical malpractice, and a second cause of action sounding in medical malpractice under a theory of a failure to obtain informed consent.¹

In her bill of particulars, the plaintiff alleges that the defendants deviated from the standard of care by failing to properly and timely perform the hysterectomy; in failing to avoid causing iatrogenic injury to the plaintiff's right uterus during the surgery; in failing to inspect the location

¹ By stipulation, a derivative cause of action asserted by the plaintiff's husband, Scott Toro, was discontinued with prejudice, and the caption was amended to delete him as a plaintiff.

of the patient's right uterus before using the laparoscopic instruments including the trocar and/or grasper; in failing to inspect and rule out injury to the plaintiff's urologic organs prior to completion of the surgery; in failing to properly monitor the patient post-operatively; in failing to properly and timely institute appropriate post-operative treatment; in failing to diagnose injury to the plaintiff's right uterus; in failing to refer or obtain necessary consultations regarding the plaintiff's post-operative complaints and condition; in failing to perform the necessary diagnostic tests to determine the true peri-operative and post-operative condition of the plaintiff (see Bill of Particulars as to Dasgupta ¶ 2; Bill of Particulars as to Carolan ¶¶ 1-2).

With respect to the plaintiff's informed consent cause of action, Dr. Carolan's demand for bill of particulars asked the plaintiff to state, among other things, "[w]hat additional information, if any, plaintiff[] claims the defendant should have provided the patient concerning the procedure and/or treatment" (see Carolan's demand for a bill of particulars ¶ 15[h]). In the plaintiff's bill of particulars, the plaintiff responded to this demand by stating: "Plaintiff declines to respond to this request pursuant to CPLR §4545 since the plaintiff is not, at this time, making any claim for special damages and the controlling Appellate Division law makes such disclosure irrelevant and unnecessary" (see Bill of Particulars as to Carolan ¶ 15). The Court notes that the plaintiff's response to this specific demand appears to be utterly in error and non-responsive insofar as it does not address Dr. Carolan's demand in any way.²

The defendants now separately move for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes and cross-moves for an order limiting and/or precluding the defendants from seeking the benefits of CPLR article 16 in the event that one of the defendants obtains summary judgment.

Dr. Dasgupta's motion is granted in part

Dr. Dasgupta met his *prima facie* burden for summary judgment dismissing the first cause of action. "The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Lau v Wan*, 93 AD3d 763, 765 [2d Dept 2012]). "A defendant physician moving for summary judgment in a medical malpractice action has the initial burden of establishing, *prima facie*, either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries" (*id.*). Dr. Dasgupta submitted the expert affirmation of Dr. Gary Mucciolo, who opined that neither surgeon deviated from the standard of care during the performance of the surgery. Dr. Mucciolo also opined that Dr. Dasgupta was managed by Dr. Carolan and, as would be expected of an assistant surgeon, Dr. Dasgupta did not exercise independent judgment in the treatment of the plaintiff.

² The plaintiff's response to ¶ 15 is duplicative of its response to ¶ 14 (relating to claims for special damages), which leads the Court to believe that plaintiff's counsel committed, at a minimum, a typographical error.

However, in opposition, the plaintiff raised a triable issue of fact. Once a defendant physician has met his or her *prima facie* burden for summary judgment, “the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the *prima facie* burden” (*Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 [2d Dept 2012] [citation omitted]). Here, the proof established that Dr. Carolan worked on the plaintiff’s left side while Dr. Dasgupta worked on her right side. The plaintiff’s injury was to her right uterter. The plaintiff submitted an expert affirmation opining that the defendants departed from the standard of care by “failing to drop [the plaintiff’s] bladder prior to skeletonizing and cauterizing the right side uterine vessels, thereby causing an injury to her right uterter” (see Plaintiff’s expert affirmation in opposition ¶ 13). Further, “the injury to [the plaintiff’s] right uterter was caused by the cutting and cauterizing of Dr. Dasgupta (who worked on [the plaintiff’s] right side)” (*id.* [emphasis added]). Accordingly, viewed in the light most favorable to the plaintiff, the evidence demonstrates that Dr. Dasgupta was not merely following Dr. Carolan’s supervision and orders, but that Dr. Dasgupta was independently and directly responsible for committing an act of malpractice during the surgery that proximately caused the plaintiff’s injury (*cf. Pol v. Our Lady of Mercy Med. Ctr.*, 51 AD3d 430, 431 [1st Dept 2008]; *Poter v Adams*, 104 AD3d 925, 927 [2d Dept 2013]).

With respect to the second cause of action sounding in lack of informed consent, Dr. Dasgupta met his *prima facie* burden for summary judgment by establishing that he was merely a surgical assistant who participated in the surgery and had no other contact with the plaintiff (see *Spinoza v Weinstein*, 168 AD2d 32, 40 [2d Dept 1991] [surgical assistant “had no duty to obtain [the plaintiff’s] informed consent to the surgical procedures”]; *see also Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 351 [1st Dept 1995]). In opposition, the plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, the informed consent cause of action must be dismissed insofar as asserted against Dr. Dasgupta.

Dr. Carolan’s motion is granted in part

Where a defendant doctor’s affidavit is sufficiently detailed, it may be used to establish his or her entitlement to summary judgment (see *Nyrell Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008] [“The defendants established, *prima facie*, their entitlement to summary judgment based on their affidavits which were detailed, specific, and factual in nature indicating that their treatment of the infant plaintiff did not depart from good and accepted medical practice”]; *Juba v Bachman*, 255 AD2d 492 [2d Dept 1998] [“the affidavit of the defendant doctor, in which he indicates that he did not deviate from accepted standards of medical care as to the remaining tooth, was sufficient to meet his burden as a proponent of a summary judgment motion”]). Here, Dr. Carolan’s affidavit was sufficiently detailed and factual in nature to meet his *prima facie* burden for summary judgment. Dr. Carolan avers that he discussed the risks of the procedure and the various surgical treatment options with the plaintiff, that he did not depart from the standard of care during the surgery itself, and that he did not proximately cause the plaintiff’s injuries. He further establishes that the plaintiff was in good condition upon her discharge from the hospital, and that his actions in responding to the plaintiff’s post-operative complaints conformed to the standard of care.

With respect to claims of malpractice relating to the surgery itself, the plaintiff raised triable issues of fact in opposition. The plaintiff's expert opined, among other things, that both surgeons breached the standard of care by failing to drop the plaintiff's bladder prior to skeletonizing and cauterizing the right side uterine vessels, causing injury to her right uterus (see Plaintiff's expert affirmation in opposition ¶ 13). The plaintiff's expert further opined that the doctors departed from the standard of care by cutting and cauterizing with a Gyrus Cautery, which did not allow them to see or know the extent of its reach (*id.* ¶ 16).

However, to the extent that the first cause of action alleges departures from the standard of care during post-operative care, the plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff's expert affirmation does not even offer an opinion as to the adequacy of the plaintiff's post-operative treatment, and thus fails to rebut Dr. Carolan's *prima facie* showing that the post-operative treatment conformed to the standard of care. Accordingly, Dr. Carolan is entitled to summary judgment dismissing so much of the first cause of action as seeks to recover damages relating to the plaintiff's post-operative care.³

With respect to the second cause of action sounding in lack of informed consent, the plaintiff's expert raised triable issues of fact. The plaintiff's expert opined that Dr. Carolan failed to apprise the plaintiff of the increased risks of uterine injury associated with a laparoscopic hysterectomy, compared to an abdominal or vaginal hysterectomy (see Plaintiff's expert affirmation in opposition ¶ 8). The plaintiff's expert states: "a laparoscopic hysterectomy is the most risky alternative to uterine fibroids, in terms of risk to adjacent structures," and that "a vaginal and/or abdominal hysterectomy involves much less risk to adjacent structures because the surgeon is able to use his sense of touch (helpful in determine the exact location of fibroids and whether they are pushing the uterus into different positions) and is given a much larger field of vision (as a laparoscopic procedure requires the use of a scope)" (*id.* ¶ 9). In the expert's opinion, had the plaintiff chosen one of these alternative procedures, which a reasonable patient would have purportedly done, she would have had an opportunity for a substantially better outcome (*id.* ¶ 10). The plaintiff's expert opines that Dr. Carolan's failure to convey this information to the plaintiff breached his duty to obtain her informed consent (*id.* ¶¶ 9-10).

Although Dr. Carolan correctly points out in reply that the plaintiff's bill of particulars is deficient with regard to the plaintiff's theory of lack of informed consent (see Bill of Particulars as to Carolan ¶ 15), the Court will not disregard the portions of the plaintiff's expert affirmation relating to informed consent on the ground that the plaintiff has improperly proffered a "new theory" in opposition to Dr. Carolan's motion. The entire motion, as it relates to the informed consent cause of action, is problematic in light of the plaintiff's inadequate bill of particulars. Typically, "[i]n pursuance of its *prima facie* burden of proof, the moving defendant is required to address the factual

³ This determination does not limit the plaintiff's entitlement to recover damages sustained during the post-operative period that were proximately caused by a deviation during the surgery or as a result of the failure to obtain informed consent (see e.g., PJI 2:305 ["Defendant is also liable for any aggravation of the injury and for any additional pain and suffering caused by any negligence or lack of skill of any doctor who treated the plaintiff for the original injury"]).

allegations set forth in the plaintiff's bill of particulars with reference to the moving defendant's alleged acts of negligence and the injuries suffered with competent medical proof" (*Cham v St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 1005 [2d Dept 2010]). Although the bill of particulars in this case sets forth no specifics regarding the informed consent cause of action, Dr. Carolan nevertheless discusses the issue of informed consent at length in his affidavit, and opines: "It is my further opinion to a reasonable degree of medical certainty that I conformed with the standard of care in advising the patient of the reasonably foreseeable risks and complications as well the benefits of the proposed surgery. As discussed above, the patient was given medical options, surgical options, and the option of having a procedure performed by an interventional radiologist" (Carolan affidavit ¶ 15). Nowhere in Dr. Carolan's initial moving papers did he address the deficiencies in the plaintiff's bill of particulars with regard to the informed consent cause of action—instead, he chose to address the merits of that cause of action.⁴

The question for the Court is, thus, whether the plaintiff may attempt to rebut Dr. Carolan's *prima facie* showing. Since an examination of the theory articulated by the plaintiff's expert reveals that the plaintiff has not proffered a "new theory," the Court finds that the expert's opinion should not be disregarded (*cf. Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007] ["Plaintiff's physician expert also improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability regarding the treatment of plaintiff's decedent that had not been set forth in the complaint or bills of particulars"]); *Golubov v Wolfson*, 22 AD3d 635 [2d Dept 2005]). The plaintiff's expert's opined that Dr. Carolan failed to discuss the relative risks of an abdominal or vaginal hysterectomy (i.e., an "open" procedure) compared with the risks associated with a laparoscopic hysterectomy, which she opted for. The plaintiff herself states in her affidavit that "Dr. Carolan never told me that my chances of injury were much greater during a laparoscopic hysterectomy, as opposed to an abdominal or vaginal hysterectomy" (Plaintiff's affidavit in opposition ¶ 6). This proof submitted in opposition to Dr. Carolan's motion is directly addressed to facts and opinions contained in Dr. Carolan's affidavit in support of his motion. For instance, Dr. Carolan avers that he discussed various options, including "myomectomy, hysterectomy, *an open procedure (laparotomy)*, as well as a laparoscopic procedure" (Carolan affidavit ¶ 12 [emphasis added]). Dr. Carolan also avers that he discussed "the risks of the proposed surgery with the patient" (*id.*). Thus, in opposing Dr. Carolan's motion, the plaintiff does not raise a "new theory" of liability, but one which is addressed to the proof contained in Dr. Carolan's motion. Notably, in Dr. Carolan's affidavit, he states that he discussed the risks of the proposed procedure, but he does not state that he disclosed the relative risks associated with the other surgical options, and even if his affidavit

⁴ Both parties could have been more proactive in addressing the deficiencies in the plaintiff's bill of particulars. Dr. Carolan could have, for example, moved for preclusion before the note of issue and certificate of readiness were filed (*see Contrarino v N. Shore Univ. Hosp.*, 13 AD3d 571 [2d Dept 2004]). Instead, Dr. Carolan has moved for summary judgment on the merits, but changes his approach in reply, arguing that the plaintiff is procedurally prohibited from offering an opinion on the issue of informed consent. Insofar as the bill of particulars does not particularize *any* allegations regarding her informed consent cause of action, accepting Dr. Carolan's argument made in reply would, by implication, require this Court to disregard *any* theory relating to the issue of informed consent raised by the plaintiff in opposition. Additionally, the plaintiff should be admonished for not having, at this stage of the action, moved or cross-moved to correct her bill of particulars.

could be broadly read to indicate that he did disclose those comparative risks, the plaintiff denies being so informed.

The purpose of the rule prohibiting a plaintiff from raising a new theory in opposition to a motion for summary judgment is to protect against surprise. Here, *Dr. Carolan cannot claim surprise from a theory addressed to opinions and facts contained in his own motion papers*. Moreover, a theory of informed consent was alleged in the complaint, Dr. Carolan was questioned at his deposition regarding informed consent (including his reasons for determining that the plaintiff was a good candidate for laparoscopic surgery as opposed to an alternative) (see Carolan deposition at 17-27), and Dr. Carolan specifically notes in his expert witness disclosure that his expert will testify “that it was appropriate for Dr. Carolan to discuss *numerous possible procedures with the plaintiff, and the efficacy of those procedures*” (Carolan’s expert witness disclosure ¶ 4). Accordingly, the Court finds that the plaintiff’s expert witness’s opinion should not be disregarded on the ground that it improperly raises a new theory of liability resulting in undue prejudice or surprise to Dr. Carolan (*cf. Golubov v Wolfson*, 22 AD3d 635, 636 [2d Dept 2005]).

The plaintiff’s cross motion is denied as academic

Since, in light of the foregoing determinations, both defendants remain in the action, the plaintiff’s motion to preclude the defendants from seeking to apportion their liability pursuant to CPLR article 16 is academic (see *Hendrickson v Philbor Motors*, 102 AD3d 251 [2d Dept 2012]).

Based upon the foregoing, it is hereby

ORDERED that the branch of the defendant Ranjan Dasgupta’s motion which is for summary judgment dismissing the second cause of action insofar as asserted against him is granted, and his motion is otherwise denied; and it is further

ORDERED that the branch of the defendant Stephen Carolan’s motion which is for summary judgment dismissing so much of the first cause of action as seeks to recover damages for medical malpractice occurring during the plaintiff’s post-operative care is granted, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff’s cross motion is denied as academic; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on May 29, 2014 at 9:30 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
April 3, 2014


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