DeJesus v Planned Parenthood Hudson Peconic, Inc.
2015 NY Slip Op 31195(U)
July 9, 2015
Supreme Court, New York County
Docket Number: 150347/11
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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SHARA DEJESUS,

Index No: 150347/11

Plaintiff,

Decision and Order

-against-

PLANNED PARENTHOOD HUDSON PECONIC, INC., MIRIAM CREMER, M.D., QUEENS LONG ISLAND MEDICAL GROUP, P.C., MICHAEL ALAN LEE, M.D., BHANUMATHY VINAYAGASUNDARAM, M.D., JOHN T. MATHER MEMORIAL HOSPITAL and THE MOUNT SINAI HOSPITAL,

Defendants.

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Hon. Martin Shulman, JSC:

On September 8, 2011 Plaintiff, Shara DeJesus ("DeJesus" or "plaintiff"), commenced this action against Dr. Vinayagasundaram ("Dr. Vinaya") and Queens Long Island Medical Group, P.C. ("QLIMG")[1] alleging two causes of action for: (1) medical malpractice; and (2) lack of informed consent. Defendants now move for summary judgment pursuant to CPLR 3212 dismissing the complaint. Plaintiff opposes the branch of the motion seeking dismissal of the first cause action but fails to address the portion thereof seeking dismissal of the second cause of action.

For the reasons discussed below, defendants have failed to make a prima facie showing of entitlement to judgment dismissing the first cause of action against them for medical malpractice as a matter of law. Moreover, in her opposition, plaintiff successfully raised triable, material issues of fact warranting a denial of summary judgment dismissing the first cause of action. However, the second cause of action

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[1] Dr. Vinaya and QLIMG are collectively referred to as "defendants."

alleging lack of informed consent must be dismissed since defendants successfully made a prima facie showing of entitlement to partial summary judgment as a matter of law, which DeJesus failed to refute.

FACTUAL BACKGROUND

This action arises from plaintiff's termination of pregnancy procedure ("ToPP") performed on February 27, 2010 at the offices of co-defendant Planned Parenthood Hudson Peconic, Inc. Plaintiff was discharged on the same day and a follow-up appointment was scheduled for two weeks later. However, plaintiff did not keep the appointment, preferring to see her own doctor at QLIMG. Coscia Opp Aff at ¶3 and ¶4. Nine days later, on March 8, 2010, plaintiff presented to QLIMG for an urgent care visit with Dr. Vinaya, who is board certified in family medicine. Poritz Aff in Support of Motion at ¶8 and ¶9. Plaintiff complained of back and groin pain. *Id.* at ¶10. After recording that the plaintiff was "obese with a BMI of 39" (Exh. B to Coscia Opp Aff), Dr. Vinaya palpated her abdomen and found same to be soft and non-tender as well as performed a straight leg raising test for back pain and reported a normal finding. *Id.* at ¶11. After completing her physical examination, Dr. Vinaya recommended that plaintiff exercise, follow-up with her primary care physician, and continue her medications (*id.* at ¶12), which included anti-inflammatory Aleve pills classified as "Category C" medication. Coscia Opp Aff at ¶32. When taking plaintiff's medical history, Dr. Vinaya indisputably never asked plaintiff about her menstrual cycle and whether she was ever/then pregnant, nor did she engage in a discussion to potentially allow plaintiff to reveal information about her ToPP performed nine days earlier. *Id.* at ¶5. It is also

undisputed that plaintiff never volunteered any information to Dr. Vinaya or anyone else at QLIMG about her then recent ToPP. Poritz Aff in Support of Motion at ¶9.

Four days later, on March 12, 2010, as instructed, plaintiff returned to see Dr. Vinaya with continued complaints of back and groin pain. *Id.* at ¶13. Plaintiff advised that her pain had improved from her last visit until she went to work and injured her back "picking up something heavy." *Id.* at ¶14. Dr. Vinaya conducted a similar clinical examination, repeated her same recommendations made on the March 8th visit and also provided plaintiff with a doctor's note to excuse her from work for a few days. *Id.* at ¶15. Again, Dr. Vinaya indisputably never asked plaintiff about her menstrual cycle and whether she was ever/then pregnant, nor did she engage in a discussion to potentially allow plaintiff to reveal information about her ToPP.

In fact, at her deposition, Dr. Vinaya testified that in 2010 it was not her custom and practice to ask a female patient of child-bearing age about whether she had abnormal, irregular or painful menstrual periods unless it was "related to the *present* complaint." (emphasis added)(Exh. D to Coscia Opp Aff at pp 73-74). Moreover, Dr. Vinaya testified that on plaintiff's two March 2010 visits, she never ruled out a pregnancy because she never even considered this possible condition when conducting a differential diagnosis. *Id.* at pp 74 and 77). Nor did Dr. Vinaya record any information indicating she considered a possible pregnancy for a full and complete differential diagnosis. See Exh. B to Coscia Opp Aff, Bates stamped pp. 190-192. In this vein, plaintiff testified at her deposition that she never informed Dr. Vinaya that she had been pregnant and recently underwent a ToPP, because "she [Dr. Vinaya] didn't ask . . . [a]nd the backaches and the pains that [she] was going through, [she] . . . didn't

attribute to being pregnant." (bracketed matter supplied)(Exh. C to Coscia Opp Aff at pp 116-117). Plaintiff never saw or had contact with Dr. Vinaya after March 12, 2010. Poritz Aff in Support of Motion at ¶17.

One month after seeing Dr. Vinaya, on April 13, 2010, plaintiff presented to the emergency department at John T. Mather Memorial Hospital ("Mather Hospital") for complaints of heart palpitations. *Id.* at ¶18. At this visit, the hospital staff elicited information about her recent ToPP (see, e.g., Exh. F to Coscia Opp Aff at NYSCEF Doc. No. 76, p 5 of 701), however, no diagnosis was made of plaintiff's continued pregnancy.

Two days later, on April 15, 2010, the plaintiff followed up with Dr. Lee, her primary care physician at QLIMG, for a heart monitor. Poritz Aff in Support of Motion at ¶19. Evidently, plaintiff was preoccupied with addressing the underlying causes of her palpitations, and Dr. Lee never documented any back or groin pain complaints as complaints of same were presumably not forthcoming. *Id.* at ¶20. Dr. Lee also never asked plaintiff about her menstrual cycle and whether she was then pregnant, and did not engage in a discussion to potentially allow plaintiff to reveal information about her ToPP. Coscia Opp Aff at ¶8. Nor did plaintiff volunteer any information to Dr. Lee or anyone else at QLIMG about her recent pregnancy and the February 2010 ToPP. Poritz Aff in Support of Motion at ¶20.

Twelve days later, on April 27, 2010, plaintiff returned to Dr. Lee to follow up for her palpitations. Again, Dr. Lee did not record any complaints of back or groin pain, but

did order blood laboratory studies including a pregnancy test.[2] *Id.* at ¶21. About 4 or 5 days later, Dr. Lee called plaintiff to inform her that based on the test results, she might be pregnant, yet plaintiff continued to withhold information about terminating her recent pregnancy (Exh. H to Poritz Aff in Support of Motion at pp 401-402). At that time, plaintiff thought she was newly pregnant because certain birth control measures she and her male partner utilized possibly failed (Exh. C to Coscia Opp Aff at pp 145-147). Finally, some time during the week of May 15, 2010,[3] plaintiff informed Dr. Lee about her February 2010 pregnancy, because she needed medical clearance for a second ToPP, and admitted this was the first time she notified anyone at QLIMG about her February pregnancy and the prior ToPP (Exh. H to Poritz Aff in Support of Motion at p 407; Exh. C to Coscia Opp Aff at p 178).

On June 4, 2010, defendant Miriam Cremer, MD, the surgeon who performed the first ToPP, again performed the same procedure at Mt. Sinai Hospital. Coscia Opp Aff at ¶19. Thereafter DeJesus was hospitalized at Mather Hospital's Intensive Care Unit due to complications and eventually required a total hysterectomy. Coscia Opp Aff at ¶¶ 21-23).

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[2] Plaintiff testified that she "asked him at that time to order a pregnancy test" as a "last resort thing." Exh. H to Poritz Aff in Support of Motion at pp 397-398.

[3] In their motion, defendants point out that plaintiff specifically testified that May 15, 2010 was the first time she told anyone at QLIMG about her prior pregnancy and having undergone a ToPP (Exhibit H to Motion at p 407). However, plaintiff claims in her opposition that it was on May 20, 2010 that she went back to Dr. Lee at QLIMG to advise him of all the recent events regarding her pregnancy. Coscia Opp Aff at ¶ 14, citing to plaintiff's January 4, 2013 EBT at p 178).

Defendants' Motion

In support of their motion defendants submit an expert affirmation from Robert Fuentes, M.D. ("Fuentes"), a physician board certified in internal medicine (Exh. A to Poritz Aff in Support of Motion). Relying on the Fuentes affirmation, defendants contend that they are entitled to judgment dismissing the complaint as a matter of law because:

- at all times Dr. Vinaya rendered appropriate treatment to DeJesus, within accepted standards of medical care, thus, when plaintiff presented to QLIMG with specific complaints of back and groin pain, Dr. Vinaya did not deviate from good practice when she neglected to: a) conduct a differential diagnosis and rule out pregnancy, b) inquire into plaintiff's menses before prescribing a "category C" medication, and c) take a more extensive medical history of the plaintiff including recent surgical procedures;

- Dr. Vinaya's actions or inactions during the two March 2010 visits were not a substantial factor in causing plaintiff's alleged injuries in June 2010 because: a) Dr. Vinaya did not cause any delay in diagnosis, and b) a delay, if any, had no impact on the outcome of the second ToPP; and

- There is no basis for plaintiff's lack of informed consent claim because: a) there was no procedure outside of standard medical office care that Dr. Vinaya or QLIMG performed that required informed consent, and b) there is no allegation in the pleadings that either Dr. Vinaya or QLIMG rendered any treatment to DeJesus that amounted to an affirmative invasion or disruption of her physical integrity that caused injury.

Plaintiff's Opposition

In opposition to defendants' summary judgment motion, plaintiff submits an expert affirmation of a physician who is board certified in internal medicine and infectious diseases ("plaintiff's expert"). Exh. A to Coscia Opp Aff. Plaintiff's expert *inter alia* opines that Dr. Vinaya deviated from the standard of care expected of family medicine practitioners by failing to do a more extensive differential diagnosis during

both March 2010 visits, especially when DeJesus, a female patient of child bearing age, presented at QLIMG with back and groin complaints[4] and such a deviation was a substantial factor in causing plaintiff's injuries. This expert witness further opines that Dr. Vinaya was medically negligent in failing to either inquire about plaintiff's menses before prescribing "class C" medication or about her history of surgical procedures and, therefore, Dr. Vinaya's actions or inactions during the two March 2010 visits delayed a confirmed pregnancy diagnosis which exposed plaintiff to a riskier ToPP performed in June 2010. DeJesus argues that, at the very least, the dueling medical expert affirmations present triable, material issues of fact warranting denial of defendants' summary judgment motion.

Defendants' Reply

In reply, defendants describe plaintiff's affirmation in opposition as conclusory, speculative and loaded with mischaracterizations and red herrings. Defendants reiterate their entitlement to summary judgment particularly when plaintiff failed to not only raise any triable issue of fact on her malpractice claim, but also to even address her cause of action alleging lack of informed consent.

ANALYSIS

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for

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[4] Plaintiff's expert highlights the fact that these complaint symptoms are consistent with "pregnancy, ectopic pregnancy, pelvic inflammatory disease and sexually transmitted diseases, among other diseases of the reproductive organs . . ." (see Exh. A to Coscia Opp Aff at ¶ 24).

summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives her the benefit of all reasonable inferences that can be drawn from the evidence. *See Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court must draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad*, *supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party 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, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc.*, *supra*. "To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) . . . that such departure was a proximate cause of plaintiff's injury." *Foster-Sturrup v Long*, 95 AD3d 726, 727 (1st Dept 2012) (citation omitted). On the

other hand, "a defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby." *Stukas v Streiter*, 83 AD3d 18, 24 (2d Dept 2011). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact." *Id.*

First Cause of Action: Medical Malpractice

Defendants failed to demonstrate their prima facie entitlement to summary judgment dismissing plaintiff's medical malpractice cause of action as a matter of law. As stated in *Roques v Noble*, 73 AD3d 204 (1st Dept 2010):

> With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence. Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations fails to establish prima facie entitlement to summary judgment. (Citations omitted).

See also, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) ("bare conclusory assertions echoed by all three defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment . . .").

Here, defendants' expert's affirmation is conclusory. On this record, Fuentes offers no medical evidence or literature to support his bare conclusions that a family practitioner need not: (1) perform a differential diagnosis when a female patient of child bearing age presents with specific complaints of back and groin pain; (2) inquire about the patient's menses or rule out a pregnancy before prescribing "category C"

medication; and (3) take an extensive medical history of the patient's recent surgical procedures that do not "relate to the present complaint." Furthermore, in his retrospective analysis, Fuentes offers no explanation to demonstrate it was not medically possible for the February 2010 ToPP to "relate to the [plaintiff's] present complaint[s]" of back and groin pain.

Despite defendants' expert's categorical conclusions that Dr. Vinaya did not deviate from good and accepted practice, in viewing defendants' motion in the light most favorable to DeJesus and drawing all reasonable inferences in her favor (*Negri v Stop & Shop, Inc.*, *supra*), this court must conclude that triable issues of fact exist. Illustratively, Fuentes opines that Aleve, a "category C" medication, can be safely taken during the first trimester of pregnancy. That being said, since Dr. Vinaya admittedly never asked any questions to learn about DeJesus' most recent menstrual cycle, her absence of menses, her prior pregnancy and her February 2010 ToPP, Dr. Vinaya was incapable of evaluating whether prescribing Aleve was medically sound.

Another triable issue surfaces from Fuentes' opinion that it is good practice for a physician to only ask about a patient's history of surgical procedures that could relate to a patient's then present complaints. On this record, it is uncertain what information in plaintiff's medical history related to her then complaints of back and groin pain. A standard inquiry about plaintiff's prior surgical history when working up a differential diagnosis could have created an opening for DeJesus to disclose her recent ToPP and reveal a plausible basis for her March 8th complaints.

Finally, accepting the notion that on average, a healthy pregnancy is estimated to last 280 days (usually calculated after the date of the last menstrual period), plaintiff's

two March 2010 visits with Dr. Vinaya were respectively 47 and 51 days prior to when plaintiff finally learned she was still pregnant. Since the function of summary judgment is issue finding rather than issue determination (*see Assaf v Ropog Cab Corp.*, *supra*), another material issue of fact to resolve at trial is whether the claimed delay in plaintiff's pregnancy diagnosis which occurred at the end of April significantly amplified DeJesus' health risks associated with a late term ToPP ultimately performed in June 2010.

To round out this discussion, even assuming *arguendo* defendants met their initial burden for entitlement to summary judgment, plaintiff's opposition still raises triable issues of fact as to both negligence and causation. On this record thus far, it is of no moment that defendants seek to blame plaintiff for the resultant complications of her second ToPP due to the latter's reticence in not disclosing information about her prior pregnancy and the ToPP she underwent. At this juncture, this undisputed fact alone seemingly does not exculpate Dr. Vinaya from her professional duty to explore *all* plausible causes of plaintiff's then complaints and work up a more extensive differential diagnosis. In any event, DeJesus' withholding of information about her medical history could be evidence a jury may consider when assessing comparative negligence. *Finnigan v Lasher*, 90 AD3d 1286, 1287 (3d Dept 2011). Finally, dueling expert affidavits present a question of fact for the jury. *Feinberg v Feit*, 23 AD3d 517, 519 (2d Dept 2005) (summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions; such credibility issues can only be resolved by a jury).

As defendants have failed to demonstrate their entitlement to judgment as a matter of law and plaintiff has successfully established the existence of a genuine

issues of fact requiring trial, summary judgment dismissing the first cause of action must be denied.

Second Cause of Action: Lack of Informed Consent

On this record, defendants successfully demonstrated their prima facie entitlement to summary judgment dismissing the second cause of action alleging lack of informed consent. As stated in *Colarusso v Lo*, 42 Misc3d 1210(A), 2013 WL 6985388, [*5] (Sup Ct, NY County, Schlesinger, J.S.C.):

> 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 ultimately prevail on a lack of informed consent claim, a claimant must prove 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 prove that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. *Id.* § 2805–d(3).

DeJesus' complaint fails to even allege the second element "which is 'an essential element' of a cause of action for medical malpractice based on lack of informed consent . . ." (*Senatore v Epstein*,128 AD3d 794, [*3] [2d Dept 2015]). Here, as against the moving defendants, plaintiff's complaint does not extend beyond the scope of Dr. Vinaya's failure to elicit certain information when taking plaintiff's history. This simply does not constitute an affirmative invasion or disruption of the integrity of the body. Public Health Law §2805-d(2); *Janeczko v Russell,* 46 AD3d 324, 325 (1st Dept 2007) ("A failure to diagnose cannot be the basis of a cause of action for lack of

informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body' [citations omitted]"); see also, *Campea v Mitra*, 267 AD2d 190,191 (2d Dept 1999) (physician's failure to recommend surgery at a time when more beneficial results could have been obtained fails to state a cause of action based on lack of informed consent).

Finally,"[f]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." *SportsChannel Assocs. v Sterling Mets, L.P.*, 25 AD3d 314, 316 (1st Dept 2006), citing *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 (1975). Since plaintiff never factually or legally challenged the basis for defendants seeking dismissal of the second cause of action, she is deemed to have conceded that branch of defendants' summary judgment motion. Accordingly, defendants are entitled to partial summary judgment dismissing plaintiff's second cause of action as a matter of law.

For all of the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is granted in part to the extent that the second cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment dismissing the second cause of action as against defendants Queens Long Island Medical Group, P.C. and Bhanumathy Vinayagasundaram, MD.

Counsel for the parties are directed to appear for a status conference on August 12, 2015, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
July 9, 2015

HON. MARTIN SHULMAN, J.S.C.