Perretti v Samara
2015 NY Slip Op 31726(U)
September 4, 2015
Supreme Court, Suffolk County
Docket Number: 10-12258
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 10-12258
CAL. No. 14-00403MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 8-6-14
ADJ. DATE 11-19-10
Mot. Seq. # 004 - MG; CASEDISP

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VINCENT PERRETTI,

Plaintiff,

- against -

GHASSAN JOSEPH SAMARA, M.D., STONY BROOK UNIVERSITY PHYSICIANS, UNIVERSITY FACULTY PRACTICE CORPORATION, and STONY BROOK SURGICAL ASSOCIATES, UNIVERSITY FACULTY PRACTICE CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 4 - 7; Replying Affidavits and supporting papers __; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

This medical malpractice and lack of informed consent action arises as a result of treatment rendered and surgery performed by defendant Ghassan Joseph Samara, M.D. to correct nose injuries plaintiff sustained on May 28, 2007 in a motor vehicle accident. In his complaint, as amplified by his bill of particulars, plaintiff alleges that from August 2008 to January 2009, Dr. Samara and his agents and employees at defendants Stony Brook University Physicians, University Faculty Practice Corporation ("SBUP") and Stony Brook Surgical Associates, University Faculty Practice Corporation ("SBSA") failed to properly treat his nasal fracture with a deviated septum and deviated dorsum. Plaintiff also alleges that Dr. Samara failed to properly perform the surgery, a septoplasty, which was

supposed to correct the deviations but, instead, aggravated and exacerbated his nasal injuries. Plaintiff further alleges that Dr. Samara failed to properly address his post-operative complaints and follow-up with him regarding his recovery. He alleges that Dr. Samara, his agents and employees, failed to discuss the option of a septorhinoplasty and options to improve his external nasal deformity, and after surgery, failed to provide alternative options to address his continuing internal nasal problems. It is also alleged that SBUP and SBSA were each negligent in the hiring and supervising of its medical personnel who were careless, unskilled, negligent, and did not possess the requisite knowledge and skill of medical professionals in the community.

Plaintiff alleges that as a result of Dr. Samara's malpractice, he had to undergo additional surgery, including another septoplasty which was performed on March 30, 2012 by Grigorty Mashkevich, M.D. Plaintiff also alleges that he needs a rhinoplasty or other cosmetic surgery for his external nose injury and suffers from, among other affects, persistent deviated nasal dorsum, nose bleeds, dysphasia, frequent episodes of feeling light headed and dizzy, breathing difficulties, pressure on the right side of his face, sinus pressure and facial pain.

Dr. Samara and each of the co-defendants have interposed an answer generally denying the allegations in the complaint. However, it is admitted that Dr. Samara is employed by SBSA and performed plaintiff's septoplasty. The defendants now collectively move for summary judgment dismissing the complaint.

Plaintiff became a patient of Dr. Samara on August 22, 2008 pursuant to a referral from Arnold Katz, M.D. Dr. Katz examined plaintiff after the car accident and found that he had a nasal fracture. On June 14, 2007 Dr. Katz performed a closed reduction of the nasal fracture with stabilization. According to the certified medical records submitted by the defendants, in February 2008, Dr. Katz noted that plaintiff had a persistent deviation of his septum and advised him to have a septorhinoplasty to improve his breathing after the healing of his fracture became more stable in about six months.

In his own expert affidavit submitted in support of the motion, Dr. Samara sets forth that he has worked at Stony Brook University Hospital since 1998, has been board certified in Otolaryngology-Head and Neck Surgery since 1999, and is currently an Associate Professor of Surgery, and a member of the American Academy of Otolaryngology and the Long Island Society of Otolaryngology. Dr. Samara asserts that at the initial visit plaintiff presented with trouble breathing and an external nose deformity. According to Dr. Samara, he discussed surgical options with the plaintiff which included a septoplasty to correct the deviated septum on the interior of his nose, a rhinoplasty to correct the external deformity, and a septorhinoplasty wherein the two aforementioned procedures are performed at the same time. Dr. Samara asserts he explained the risks associated with each procedure, informing plaintiff that with the septoplasty he could experience bleeding, infection, an inability to smell, pain, scarring in the nose and septo perforation. If plaintiff decided to pursue a septorhinoplasty, in addition to the aforementioned risks, there was a potential for increased bleeding, complications and pain, black eyes and bruising on the face. Dr. Samara states he explained that a rhinoplasty may be more complicated if not performed at the same time as the septoplasty. Dr. Samara informed the plaintiff with each procedure there could be a failure to achieve desired results and no guarantee that the outside appearance would be pleasing. Dr. Samara further states he also explained that a septorhinoplasty takes longer to get approval from the

insurance company and that it costs more. Dr. Samara admits, however, that he did not discuss dysphagia and neuropathy with the plaintiff, as generally they are not considered material risks and complications.

Plaintiff chose to proceed with the septoplasty and the procedure was scheduled for October 28, 2008. Dr. Samara asserts that on the day of the surgery, he informed the plaintiff that the procedure could be rescheduled for a septorhinoplasty. Plaintiff chose to go forward with the septoplasty. In his operative notes, Dr. Samara explained how he performed the septoplasty and that there were no complications during the procedure.

On November 7, 2008, the first postoperative visit, plaintiff had some swelling and complained of a left side obstruction, but he did not have any pain. The interior surgical bandages were removed. The next visit on November 14, 2008, plaintiff complained of nasal obstruction on the right side. Upon evaluation, Dr. Samara removed crust on the right side, which he explained was not usual after surgery, and plaintiff's breathing improved.

November 21, 2008, plaintiff presented with complaints of a right nasal obstruction, pain on the bridge of his nose, occasional nose bleeds on the right and a pulling sensation on the left. Dr. Samara advised plaintiff not to smoke and to stop using Afrin which had never been recommended. Plaintiff was told to continue using saline spray as much as possible to keep his nose moist and to prevent crusting.

Plaintiff did not appear for his December appointment and returned to the office on January 5, 2009 with complaints of a stuffy nose, lightheadedness and shortness of breath at night. He had stopped smoking and using Afrin and was instructed to continue irrigating his nose with saline every three hours. During the January 30, 2009 visit, plaintiff complained of sinus pressure, headaches, shortness of breath when sleeping and pain and pressure on the right side. He had started smoking again. Dr. Samara states that he placed a topical anesthetic in plaintiff's nose which improved his headaches, thereby suggesting that he was suffering from migraines. Dr. Samara explained that headaches are not typical after a septoplasty and recommended that plaintiff see a neurologist and then schedule a follow-up appointment with him. Plaintiff did not return to Dr. Samara's office.

Dr. Samara opines, within a reasonable degree of medical certainty, that the surgery performed and the care and treatment he rendered to plaintiff met the applicable standard of care. Dr. Samara asserts he performed the septoplasty in accordance with his training and in a manner he felt was best to treat plaintiff's deviated septum. Dr. Samara further asserts that he used his best judgment and skill when correcting the patient's internal nasal deformity to improve his breathing. Dr. Samara states that it is his professional opinion, within a reasonable degree of medical certainty, that he properly discussed and counseled plaintiff on his options regarding a septoplasty versus septorhinoplasty, properly informed him of all the alternatives to the surgery, and provided an option to improve his external nasal deformity, which plaintiff did not choose, thereby obtaining his informed consent to move forward with the septoplasty. He further opines, within a reasonable degree of medical certainty, that the allegations of negligence made against him and the co-defendants did not cause any of the injuries or damages alleged.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such deviation or departure was a proximate cause of injury or damage (see Castro v New York City Health & Hosp. Corp., 74 AD3d 1005 [2d Dept 2010]; Deutsch v Chaglassian, 71 AD3d 718 [2d Dept 2010]; Geffner v North Shore Univ. Hosp., 57 AD3d 839 [2d Dept 2008]). On a motion for summary judgment, a defendant physician has the burden of establishing the absence of any deviation or departure or that the patient was not injured thereby (see Castro v New York City Health & Hosp. Corp., supra; Deutsch v Chaglassian, supra; Rebozo v Wilen, 41 AD3d 457 [2d Dept 2007]). Importantly, not every instance of failed treatment may be attributed to a physician's failure to exercise due care (see Nestorowich v Ricotta, 97 NY2d 393 [2002]; Schrempf v State of New York, 66 NY2d 289 [1985]). In opposition, a plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, and that such departure was a competent producing cause of the injury (see Lowhar v Stern, 70 AD3d 654 [2d Dept 2010]; Flanagan v Catskill Regional Med. Center, 65 AD3d 563 [2d Dept 2009] Rebozo v Wilen, supra).

Contrary to the plaintiff's contention, Dr. Samara's submission of his own affidavit to support the motion is sufficient and established that he exercised due care in treating the plaintiff (see Videnovic v Goodman, 54 AD3d 937, 864 NYS2d 496 [2d Dept 2008]; Wager v Hainline, 29 AD3d 569, 815 NYS2d 121 [2d Dept 2006]). As Dr. Samara's affidavit provided detailed, specific, factual information, an affidavit of an independent medical expert was not required (see Thomas v Richie, 8 A3d 363 [2d Dept 2004]; see also Toomey v Adironack Surgical Assocs., P.C., 280 AD2d 754 [3d Dept 2001]). Dr. Samara, therefore, established his entitlement to summary judgment as a matter of law. Thus, the burden shifts to plaintiff to raise a triable issue of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting physician's opinion that Dr. Samara's omissions or departures were a competent producing cause of the injury (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Mosezhnik v Berenstein, 33 AD3d 895 [2d Dept 2006]).

Here, plaintiff has failed to provide an affidavit from a physician. Instead, plaintiff has submitted the affirmation of his counsel, to which is attached the transcript of plaintiff's deposition testimony and the uncertified medical records of Dr. Mashkevich who performed the subsequent surgery.

Dr. Mashkevich's records are not a substitute for a medical expert's affidavit (Mosberg v Eklahi, 176 AD22d 710 [2d Dept 1991], aff'd 80 NY2d 941 [1992]). Plaintiff does not point to any statement contained in the medical records that Dr. Samara's treatment constituted a departure from accepted medical standards or were a competent producing cause of the plaintiff's injuries (id.). Moreover, the allegations of malpractice are not the type within the common knowledge and experience of a lay person, and thus require the submission of expert medical evidence (see e.g. id.; see also Fiore v Galang, 64 NY2d 999 [1985]). Therefore, plaintiff's testimony is also insufficient to raise an issue of fact.

Hence, summary judgment is warranted dismissing the first cause of action for medical malpractice as Dr. Samara addressed all of the factual allegations set forth in the plaintiff's bill of particulars and the facts contained in the medical records (see Gagnon v St. Joseph's Hosp, 90 AD3d 1605 [4th Dept 2011]; Larsen v Banwar, 70 AD3d 1337 [4th Dept 2010]]. In opposition, the plaintiff failed to submit any affidavits of medical experts to support the claims of malpractice and to refute Dr.

Samara's and his co-defendants' submissions (see Savage v Quinn, 91 AD3d 748 [2 Dept 2012]; Thomas v Richie, supra).

Dr. Samara also established that plaintiff has no basis for a lack of informed consent claim. "To establish a prima facie entitlement to judgment as a matter of law on the issue of liability on a cause of action alleging lack of informed consent, a plaintiff is required to demonstrate (1) that defendant failed to disclose alternatives to the subject treatment and failed to inform the injured plaintiff of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent was a proximate cause of the injury" (Romano v Persky, 117 AD3d 814, 816, 985 NYS2d 633 [2d Dept 2014]; Zapata v Buitriago, 107 AD3d 977, 979 [2d Dept 2013]). "To state it in other terms, the causal connection between a doctor's failure to perform his [or her] duty to inform and a patient's right to recover exists only when it can be shown objectively that a reasonably prudent person would have decided against the procedures actually performed" (Trabal v Queens Surgi-Center, 8 AD3d 555, 557 [2d Dept 2004]). "The claim will be dismissed where plaintiff fails to establish through an expert that "the information disclosed to the patient about the risks inherent in the procedure [was] qualitatively insufficient" (Rodriguez v New York City Health & Hosps. Corp., 50 AD3d 464, 465 [1st Dep 2008]; see Johnson v Jacobowitz, 65 AD3d 610 [2d Dept 2009]).

Dr. Samara has demonstrated that he informed the plaintiff of the alternatives to the septoplasty and the reasonably foreseeable risks associated with such procedure, and proffered the written consent form signed by the plaintiff (see Khosrova v Westermann, 109 AD3d 965 [2d Dept 2013]; Zapata v Buitriago, supra). In opposition, the plaintiff failed to tender an expert's opinion to prove the insufficiency of the information disclosed to the plaintiff. Moreover, the evidence proffered by plaintiff did not establish that a fully informed reasonable person would have declined the procedure. Indeed, the evidence establishes that the plaintiff underwent a second septoplasty to correct the nose injuries he sustained in the motor vehicle accident. Therefore, plaintiff's opposition to the motion failed to demonstrate a triable issue of fact (see Orphan v Pilnik, 15 NY3d 907 [2010]). Hence, summary judgment is warranted as a matter of law dismissing the third cause of action to recover damages for medical malpractice based on lack of informed consent.

In light of the determination herein, there is no viable cause of action against Dr. Samara to serve as a predicate for imposing vicarious liability on SBSA or SBUP under the theory of respondeat superior or ostensible agency. Therefore, the second cause of action must also be summarily dismissed.

Accordingly, the motion is granted and the complaint is dismissed in its entirety.

Dated: September 4, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION