Henry v Duncan
2018 NY Slip Op 30219(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 805239-2015
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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MARLENE HENRY,

Plaintiffs,

-against-

KAREN DUNCAN and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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Index No. 805239-2015

DECISION/ORDER

Motion Sequence 001

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Attorney's Affirmation & Collective Exhibits Annexed	1, 2, 3
Affirmation In Opposition	4, 5
Reply Affirmation	6

In this action for medical malpractice and lack of informed consent, defendants New York City Health and Hospitals Corporation and Karen Duncan, M.D. s/h/a Karen Duncan (Duncan) (defendants) move by notice of motion dated May 1, 2017 for an order granting them summary judgment dismissing the complaint of plaintiff Marlene Henry (plaintiff). Plaintiff opposes the motion.

Plaintiff's verified bills of particulars allege that on December 3, 2014 defendants negligently performed surgical procedures resulting in iatrogenic injuries to plaintiff, including perforation of plaintiff's ureter, severe abdominal pain, leakage of urine, ureter-vaginal fistula and urinary dysfunction. In support of the motion, defendants submit an affirmation of Dr. Arnold J. Friedman, a physician board certified in obstetrics and gynecology. Friedman opines that defendants did not depart from accepted standards of medical care in the performance of the December 3, 2014 surgery and that the eventual development of the fistula and urinoma cannot be linked to any departure allegedly committed by defendant. More specifically, Friedman opines that defendants performed a thorough inspection of the ureters prior to and after tissue dissection and confirmed that both were intact and injury-free at the conclusion of the surgery.

Friedman contends that during the procedure, the ureters were visualized and the left ureter was identified prior to ligation and division of the round ligament, the infundibulo pelvic ligament, the utero-ovarian artery, transection or removal of the fallopian tube, creation of the bladder flap and posterior dissection. Friedman opines that since both ureters were closely identified and moved away from the site of the dissection, it is unlikely that the injury to plaintiff was due to direct damage to the ureter caused by direct contact between the jaws of the Ligasure impact device. Rather, because plaintiff's ureteral fistula did not become evident until several weeks after the surgery, the injury was most likely caused by invisible thermal weakening to the left ureter from the undetectable energy spread from the Ligasure device. According to Friedman, one of the most common types of ureteral injury is thermal damage that occurs as a result of the use of an energy-producing surgical device. Friedman claims that thermal injury can occur during the use of the Ligasure instrument, even when the device is properly used, when energy or heat spreads from the instrument and causes microscopic damage to the wall of ureter which does not reveal itself until long after the surgery is over. Even when the instrument is used at low power for a short duration and with great care, as Friedman claims it was used here, adjacent structures such as bowel, ureters and nerves can be damaged through lateral spread of and such damage is an inherent risk of pelvic surgery. Friedman further opines that defendants properly obtained plaintiff's informed consent.

In opposition, plaintiff submits the redacted affirmation of a physician, also board certified in obstetrics and gynecology. Plaintiff's expert contends that Friedman failed to state that lateral spread of heat or energy from a Ligasure device is limited to only 2-3 millimeters from the instrument and, therefore, when a thermal instrument is properly used, it is kept greater than 3 millimeters away from critical structures such as ureters. Plaintiff's expert then concludes that the only possible explanation for the lateral thermal injury to plaintiff's left ureter is that defendants unknowingly came within 2-to-3 millimeters of the left ureter with the Ligasure device. According to plaintiff's expert, defendants lack of perception and failure to employ risk reduction and alternative methods resulted in exposing the ureter to an unjustified and unreasonable risk of injury.

In an action premised upon medical malpractice, a defendant doctor establishes *prima facie* entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]).

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 (*Cassano v Hagstrom*, 5 NY2d 643, 646, 159 NE2d 348, 187 NYS2d 1 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical

expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108; *Wasserman* 307 AD2d at 226).

Once the defendant meets her burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept 2008]; (*Koeppel v Park*, 228 AD2d 288, 289 [1st Dept 1996]). In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* 66 AD3d at 1001; *Myers* 56 AD3d at 84; *Rebozo* 41 AD3d at 458).

Generally, "'the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants'" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002], quoting *Murphy v Conner*, 84 NY2d 969, 972, 646 NE2d 796, 622 NYS2d 494 [1994]). To suffice, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307, 833 NYS2d 89 [1st Dept 2007], *quoting Ferrara v South Shore Orthopedic Assoc.*, 178 AD2d 364, 366 [1st Dept 1991]). However, where "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz*, 99 NY2d at 544).

In response to defendants' prima facie showing that they did not deviate from accepted standards of medical practice in the performance of the December 3, 2014 procedure and that plaintiff's alleged injuries were not proximately caused by a departure from accepted standards, plaintiff fails to raise a triable issue of fact. Duncan testified at her examination before trial that she was never within 2-to-3 millimeters of the left ureter with the Ligasure device. Duncan testified that

the left ureter was several centimeters away from the round ligament where the transection took place, that the uterine arteries that were being clamped were many millimeters to a few centimeters away from the left ureter and that the descending bites taken by clamps were a half centimeter to a centimeter away from the ureter. Moreover, Duncan testified that the left ureter was always identified and visualized and that the cervical deviation did not obstruct full visualization of the left ureter. Therefore, even when viewing the evidence in the light most favorable to plaintiff, plaintiff's expert's opinion that defendant unknowingly lost perception of the ureter and came within 2-to-3 millimeters of it with the Ligasure device is speculative and unsupported by the record (*see Ortiz v Vernenkar*, 101 AD3d 637 [1st Dept 2012]). Where, as here, an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative value and is insufficient to withstand summary judgment (*Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]; *see also Castore v*

Tutto Bene Rest. Inc., 77 AD3d 599 [1st Dept 2010]). Plaintiff has also establish, via expert medical evidence, that defendants failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]), as plaintiff's expert is silent on the issue of informed consent. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint against them is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants are to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

George J. Silver, J.S.C.

Dated: 1/16/18
New York County

GEORGE J. SILVER