

<b>Myhre v Richmond Univ. Med. Ctr.</b>
2018 NY Slip Op 31512(U)
June 5, 2018
Supreme Court, Richmond County
Docket Number: 151079/2015
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**MICHELLE MYHRE,**

DCM PART 21

*Plaintiff(s),*

HON. ORLANDO MARRAZZO, JR.

Index No.: 151079/2015

*-against-*

Motion No. 1

**RICHMOND UNIVERSITY MEDICAL CENTER  
And WALLEN CHAN, M.D.,**

*Defendant(s).*

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The following numbered 1 to 3 were fully submitted on 5<sup>th</sup> day of June 2018

Papers  
Numbered

Defendant Dr. Wallen Chan’s Notice of Motion for Summary Judgment, with Supporting Papers and Exhibits, dated, March 12, 2018 ..... 1

Plaintiff’s Affirmation in Opposition with Supporting Papers and Exhibits, dated, May 23, 2018 ..... 2

Defendant’s Reply, dated June 4, 2018 ..... 3

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Defendant Dr. Wallen Chan moves pursuant to CPLR 3212 for summary judgment and to dismiss the complaint because the claims made against him lack merit and that there are no triable issues of fact. As is set forth below, Dr. Chan’s motion is dismissed.

In this medical malpractice action there appears to be an issue of fact whether the medical care, diagnosis, treatment and services rendered to

plaintiff were rendered carelessly, unskillfully, negligently, and not in accordance with accepted standards of medical care, diagnosis, treatment and services in the medical community.

The further factual inquiry is whether there is a lack of care and treatment rendered to plaintiff by Dr. Chan deviated from accepted standards, procedures and treatment in accordance with the prevailing standards in the medical community and as a result thereby causing plaintiff to suffer severe and permanent injury.

At plaintiff's May 12, 2017 deposition plaintiff testified that in 2001 she was first treated by Dr. Chan for a routine colonoscopy. Plaintiff alleges that in April 2011 she began having pain and that Dr. Chan monitored her condition and was concerned that it may be pancreatic cancer or a blockage. Thereafter, Dr. Chan recommended that she needed to have an ERCP (Endoscopic Retrograde Cholanigo-Pancreatography) performed. This procedure allowed you to observe, with dye, if there was a blockage in the bile duct. This procedure was followed up with an endoscopy and ultrasound which plaintiff underwent in 2012.

Plaintiff and Dr. Chan both agree that they discussed the procedure as well as the risks associated with the procedure. Dr. Chan advised plaintiff that

there was a 3% chance of the dye seeping out and going into the pancreas. Plaintiff alleges that Dr. Chan failed to discuss with her any other risks that might be involved.

At issue are the disputing affidavits of Dr. Richard S. Blum, defendant's expert physician and Dr. Dwight P. Ligham, plaintiff's expert physician. These expert physicians quarrel whether there were deviations in the standard of medical care and treatment provided to the plaintiff by defendants have been inappropriate and that those deviations are causally related to the injuries sustained and which resulted in extensive additional medical treatment she had to undergo and her current physical complaints.

The key question surrounds the severity of the post procedure discomfort. Did Dr. Chan oversee that the Dilaudid administered to plaintiff was being properly administered? Was Dr. Chan aware of the required protocol when administering the Dilaudid, the recommended dosage and over what period was it to be administered?

On July 10, 2013 plaintiff a 61-year-old woman, accompanied with her husband went to Richmond University Medical Center (RUMC) for an ERCP under sedation of Dr. Chan.

The procedure was complicated by post procedure pancreatitis from the radiographic dye injected into the biliary tree during the procedure.

Due to the alleged severity of the post procedure discomfort, plaintiff had to be admitted into the hospital for hydration and pain control. She was admitted to a standard care floor and prescribed Dilaudid 4 milligrams for pain control.

The record indicates that there was a standing order for Dilaudid 4 milligrams IV push to be administered "0.5 milligrams given over 2 minutes" for pain to a maximum dose of 4 milligrams every 4 hours as needed.

It appears as a factual matter in dispute whether Dr. Chan was aware of the difference in the administration of doses of Dilaudid over one milligram versus under one milligram.

Other issues appear to surround the issue whether was the notion of time that it took to administer the full 4 milligrams.

In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*Stukas v. Streiter*, 83 A.D.3d 18, 23, 918 N.Y.S.2d 176; *see Donnelly v. Parikh*, 150 A.D.3d 820, 55 N.Y.S.3d 274;

*Leavy v. Merriam*, 133 A.D.3d 636, 637, 20 N.Y.S.3d 117; *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 A.D.3d 959, 959, 18 N.Y.S.3d 689; *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d 1053, 1054, 923 N.Y.S.2d 856).

Thus, in moving for summary judgment, a physician defendant must establish, prima facie, “either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries” *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 A.D.3d at 959, 18 N.Y.S.3d 689; see *Stukas v. Streiter*, 83 A.D.3d at 23, 918 N.Y.S.2d 176).

Once this showing has been made, the burden shifts to the plaintiff to rebut the defendant's prima facie showing with evidentiary facts or materials “to demonstrate the existence of a triable issue of fact (*Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, 923 N.Y.S.2d 856; see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Stukas v. Streiter*, 83 A.D.3d at 30, 918 N.Y.S.2d 176). A plaintiff need only demonstrate the existence of a triable issue of fact “as to those elements on which the defendant met the prima facie burden (*Harris v. Saint Joseph's Med. Ctr.*, 128 A.D.3d 1010, 1012, 9 N.Y.S.3d 667; see *Stukas v. Streiter*, 83 A.D.3d at 30, 918 N.Y.S.2d 176). “General allegations that are conclusory and

unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment” *Rauci v. Shinbrot*, 127 A.D.3d 839, 842–843, 5 N.Y.S.3d 314, quoting *Bhim v. Dourmashkin*, 123 A.D.3d 862, 864, 999 N.Y.S.2d 471).]; *quoted by, In Sook Choi v Doshi Diagnostic Imaging Servs., P.C.*, 152 A.D.3d 750-751, 61 N.Y.S.3d 31,33.)

Here, contrary to the defendant's contention, defendant failed to establish that Dr. Chan’s treatment of the plaintiff did not depart from the applicable standard of care. Summary judgment deprives the litigant of [its] day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. *Andre v Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.2d 131, 133 (1974).

It is well established that, “In moving for summary judgment dismissing a complaint alleging medical malpractice, the defendant must establish, prima facie, either there was no departure or that any departure was not a proximate cause of the plaintiff’s injuries. Only once the defendant has made such a showing will the burden shift to the plaintiff to demonstrate the existence of a triable issue of fact solely as to those elements on which the defendant met the prima facie burden” *Duncan v E. Woman’s Ctr., Inc.*, 121 AD3d 381, 832 (2d

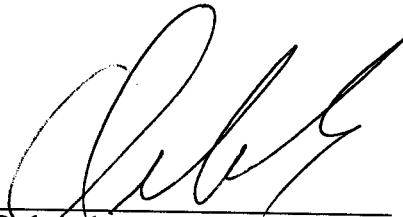
Dep't 2014); Fritz v Burman, 107 AD3d 936, 940 (2d Dep't 2013); Iulo v Staten Is. Univ. Hosp., 106 AD3d 969, 967 (2d Dep't 2013).

Additionally, plaintiff's physician has neither established that Dr. Chan departed from the appropriate medical standard of care. Both affidavits establish a triable issue of fact requiring this court to deny defendant's motion for summary judgment.

Accordingly, defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: June 5, 2018  
Staten Island, New York



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Orlando Marrazzo, Jr.,  
Justice, Supreme Court